

LATE OTTOMAN MODERNIZATION IN JURISPRUDENCE:  
REASSESSING THE APPROACH TO THE ISLAMIC TRADITION OF FIQH  
(1908-1915)

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REASSESSING THE APPROACH TO THE ISLAMIC TRADITION OF  
FIQH (1908-1915)**

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## ABSTRACT

### LATE OTTOMAN MODERNIZATION IN JURISPRUDENCE: REASSESSING THE APPROACH TO THE ISLAMIC TRADITION OF FIQH (1908-1915)

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This thesis aims to comprehend late Ottoman Modernization by focusing on the analysis of the approaches and discourses, argued by the limited circle of the *ulema*, on the Islamic tradition of *fiqh* between the years 1908 and 1915. The scope of this study is bounded by how the *ulema* problematized the Islamic tradition of *fiqh*, and how they reinterpreted its concepts, such as *örf*, *maslahat*, *istislah*, *istihsan*, during the Second Constitutional Era, in which the idea of law began to be transformed.

Within the context of the Islamic tradition of *fiqh*, the transformation in the way *fiqh* was approached and how it impacted the intellectual climate will be the main focus of attention throughout the thesis to make sense of the wisdom of the Ottoman legal experience of post-Second Constitutional Revolution. The new conception of *fiqh* of the *ulema* also resulted in the reassessment of the capacity of making law, the capacity of interpreting law, and of those that were entitled to the right of having a say in legal and religious matters, as well as the determination of the boundaries of this authority. This study will also dwell upon

to discuss the comprehensiveness of *fiqh* in contrast to the modern sense of law. Accordingly, discourses of the *ulema* analyzed throughout the thesis, tell us that the modern sense of law brought a new perception of *fiqh* without disregarding it. Hence, what the *ulema* intended was to prove the adequacy of *fiqh*.

**Keywords:** *Fiqh*, Islamic Jurisprudence, Change, Second Constitutional Era, *Ulema*,

## ÖZ

### GEÇ DÖNEM OSMANLIDA HUKUK MODERNLEŞMESİ: FIKHA YAKLAŞIMLARIN YENİDEN DEĞERLENDİRİLMESİ (1908-1915)

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Bu çalışmanın amacı Geç Dönem Osmanlı Modernleşmesini 1908 ve 1915 yılları arasında sınırlı sayıdaki ulemanın fıkıh algısındaki değişimler üzerinden algılamaktır. Dolayısıyla bu tez temel olarak II. Meşrutiyet sonrasında değişen hukuk algısını, bunu doğuran sebepleri ve bu algısal değişime paralel olarak değişen fıkıh algısının ulema tarafından nasıl bir çerçevede ve hangi kavramlar kullanılarak yorumlandığını tartışacaktır. Konu ve içerik olarak sınırlı olan bu çalışma, iki boyutlu bir yaklaşımı benimseyerek ilk olarak İkinci Meşrutiyet Döneminde yaşayan sınırlı sayıda incelenen ulemanın kullandığı *örf*, *maslahat*, *istihsan*, *istislah*, gibi fıkıhın temelini oluşturan kavramları değişim argümanı içerisinde nasıl bir okumaya tabi tuttıklarını göstermeye çalışacaktır. İkinci olarak, bu tez ulemanın yürüttüğü fıkıh tartışmaları ışığında aynı zamanda fıkıh ve hukuk olarak algılanan iki alanda kimin salahiyyeti haiz olduğunu dair dile getirilen fikirleri de tartışacaktır. Bu ekseninde yürütülen tartışmaların bir boyutu da modern hukuk algısıyla birlikte fıkıhın modern hukuka göre kapsayıcılığının da tartışılmasıdır. Tez çerçevesince ele alınan ulemanın tartışmalarında fıkıhın muhteviyat olarak kapsayıcılığı da içtihad tartışmaları içerisinde vurgulanmıştır.

Çalıřma boyunca incelemeye tabii tutulan ulemanın söylemleri ışığında, modern anlamda hukukun fıkıh algısı üzerinde getirdiđi deđiřim, fıkıhı tamamen göz ardı etmekten ziyade onu yeniden yorumlamıřtır. Bir bařka ifadeyle, ulema fıkıhın yeterliliđini kanıtlama çabası içerisinde olmuřtur.

**Anahtar Kelimeler:** Fıkıh, İřlam Hukuku, Deđiřim, II. Meřrutiyet Dönemi, Ulema.

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## GLOSSARY

The following are legal concepts and their definitions as used in this thesis.

***Ahl al- ra'y***: Name for those who promoted established practice (sunan) as the ground of law; name for those articulating their personal view as the base of law.

***Fatwa, pl. fatawa***: legal opinion given by mufti.

***Fiqh***: technical term employed to define the science of religious law; deep understanding

***Hadith, pl. ahadith***: refers to tradition of Prophet Mohammad

***Hukm, pl. ahkam***: opinion, verdict.

***Ijma***: Consensus reached over something among community (Muslims)

***Ijtihad***: Effort of formulating new legal opinions by mujtahids

***Ikhtilaf***: *differences of opinion among scholars*

***Ilm***: Knowledge, Science.

***Istishab***: Refers to continuation of the established principle in the same way, if there is no evidence to change this principle.

***Istislah***: Taking the common good as the base to produce rule

***Madhhab, pl. madhahib:*** referred to the body of authoritative legal doctrine existed alongside individual, method, and school of law.

***Maslahat:*** refers to common good

***Majalla: Mecelle***

***Muamelat:*** Transactions; refers to rules covered relationship between human and social word rather than relationship between man and God.

***Mufti:*** a person who gives opinion, fatwa,

***Mujtahid:*** a person who carried out the activity of *ijtihad*

***Nass, pl. nusuz:*** refers to the clear premises inferred from the *Quran* and the sound *hadith*

***Qiyas:*** analogy; refers to the act of inferring opinion from a case and to implement it to a similar case

***Qadi, pl. qudat:*** judge

***Quran:*** Holy book of the religion of Islam

***Shayk al islam:*** the chief *mufti*, religious authority possessed highest religious authority.

***Shari'a:*** Refers to Islamic law possessing divine essence; revealed law of God; categorizing actions of human divinely as obligatory, forbidden and permitted.

*Sunna*: refers to action of Mohammad did.

*Takhayyur*: free choice, preference

*Usul al-fiqh*: refers to methodology followed to formulate law; science of law

## CHAPTER 1

### INTRODUCTION

The primary objective of this thesis is to examine the late Ottoman modernization in jurisprudence by giving special emphasis to the reassessment of the Islamic tradition of *fiqh* between the years 1908 and 1915 by late Ottoman *ulema*. As is known, the late Ottoman era had witnessed the transformation and reform attempts made in different spheres, ranging from administration and education to economy and law. It must be kept in mind that the period which started with the Tanzimat had witnessed the articulation of various discourses on the realm of justice, law, equality and security.<sup>1</sup>

In addition, the nineteenth century was a period in which the state was shaken in terms of many spheres from economy and military to secessionist movements, as well as law. The state, as much as it could do, attempted to cope with what we can call the challenge of modernity, by developing new discourses and engaging in reform attempts in many realms to keep the empire together. Corresponding to the aim of this thesis, examining how the idea of modern “law” had revealed itself during the late Ottoman Empire is one of the most significant dimensions that requires attention, due to the fact that the transformation of the Ottoman legal thought not only changed the economic, cultural and political ideologies, but also created circles such as Ottomanism, Islamism, and Turkism around them.

Accordingly, this thesis aims to contribute to the literature by giving wide coverage to the paths the late Ottoman *ulema* followed. In this sense, how the

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<sup>1</sup> Eldem Ethem, “Osmanlı İmparatorluğu’ndan Günümüze Adalet, Eşitlik, Hukuk ve Siyaset”, 2017, t.y.

Islamic tradition of *fiqh*, containing numerous *ijtihad*s of *mujtahids*, was reflected in the intellectual environment of the period by the *ulema*, and how the *ulema* grounded their arguments will be elaborated. We see that, during the Second Constitutional Era, *fiqh* began to be discussed under the influence of the modern sense of law by bringing the social, cultural and changeable aspects of “law” to the fore. These aspects were extended to the realm of *fiqh* without excluding it completely, but by the *ulema*’s reinterpreting it. Therefore, the Islamic tradition of *fiqh* was subject to reassessment by the *ulema* following the Young Turk Revolution and revived as a source of new laws, by emphasizing its flexible aspects. Since the scope of *fiqh* remained inadequate to cover the spheres of the modern age, finding ways to expand this scope or new grounds on which new laws would shape was inevitable. This concern found an intellectual basis and caused the emergence of the *ulema*’s different discourses on *fiqh*.

Another concern of this thesis is to examine this process by incorporating the discussions and discourses of the circle of the *ulema* on *fiqh*. Discussions of the *ulema* concentrated on proving the capacity of *fiqh* to adapt itself to change. In order to clarify how the *ulema* problematized the Islamic tradition of *fiqh*, some notions like *örf*, *maslahat*, *istislah*, *istihsan*, were given priority to strengthen their discussions around the issue of *fiqh*, in terms of providing solutions to new problems during the Second Constitutional Era. Given the fact that the nineteenth century legitimization and justification became a significant concern for the rulers, how the meanings of law and *fiqh* were redefined in line with the new concern of the modern state and the new sense of law constituted a significant aspect of legal transformation, and contributed to the emergence of new approaches to *fiqh*.

Taking the aforementioned view into consideration, this thesis also aims to observe the relationship of the late Ottoman *ulema* with *fiqh* by focusing on this process in terms of state rights and discussing the legislative and interpretive capacity of the state in the legal field. In other words, the way *fiqh* was perceived

resulted in re-problematizing the capacity of making law, the capacity of interpreting law, and of those that were entitled to the right of having a say in legal and religious matters, as well as the determination of the boundaries of this authority. Accordingly, the notions of legislation, *teşri*, execution, *icra*, *salahiyyet*, authority, *vaaz*, and making law were redefined by the *ulema* during the aforementioned period.

From a methodological point of view, I have come up with carrying out a discourse analysis rather than merely translating texts, which I will mention below. I will also dwell upon the contextual debates around the Islamic tradition of *fiqh*, corresponding to the Second Constitutional Era. Thus, answers to the following questions will be sought throughout the thesis: How did the state perceive the Islamic tradition of *fiqh* in the late Ottoman Empire, what can we state when it comes to the transformation of legal thought about this perception, and why was it necessary to develop new approaches to *fiqh*.

When I consider aforesaid questions, I come up with three dynamics to contextualize the stance of the Late Ottoman *ulema* towards the idea of change in the realm of Islamic tradition of *fiqh*. First of all, *ulema* prioritized some concepts of *fiqh*, like *örf* and *ijtihad* to prove the fact that Islamic tradition of *fiqh* possessed flexible mechanism. Secondly, it was also perceived that *fiqh* must be evaluated by taking into consideration the historical and social dimension. In that sense, applicability of *fiqh* to the modern age was questioned. Finally, relationship between modern law and Islamic tradition of *fiqh* was redefined. Here, the spheres both modern law and *fiqh* was separated. Accordingly, responsibility in religious matters was associated with *fiqh*. Non-religious realm, then, was defined as sphere modern law had to cover. While doing that, the primary concern is to come up with clearer understanding of the late ottoman intellectual environment by refraining from putting clear-cut dichotomies, like modernity and tradition excluded each other, at the center of my argument.

Therefore, throughout writing this thesis, examination of the work of prominent men of the *ulema*, İzmirli İsmail Hakkı, Halim Sabit, Elmalılı Hamdi Yazır, Manastırlı İsmail Hakkı,<sup>2</sup> Mehmet Kamil Bey, Mehmed Seyyid Bey, Ziya Gökalp, was valuable in terms of enlightening how the echoes of modernization and its impact on the understanding of *fiqh* made itself evident in their discourse. The reason why I have chosen these figures derives from the fact that the intellectual world of these people, except for Gökalp, enjoyed a madrasa background, and they engaged in studying *fiqh* comprehensively. They wrote various articles on *fiqh* in the periodicals of the era and actively participated in the discussions around the Islamic tradition of *fiqh*. Paying attention to their discourses on *fiqh* in the atmosphere of the Second Constitutional Era not only provides us with a broader reinterpretation of the Islamic tradition of *fiqh*, but also a more nuanced narrative of the transformation of the late Ottoman legal thought during the Second Constitutional Era.

In the literature, the Islamic tradition of *fiqh*, Islamic law and Islamic legal theory were studied from many perspectives in both the Western literature and the Turkish academia. Both the faculty of law, and the faculty of divinity, as well as the department of history showed interest in studying the Islamic tradition of *fiqh*.<sup>3</sup> Some studies within the literature, like the studies of Hıfzı Veldet Velidedeoğlu<sup>4</sup>, Hıfzı Timur<sup>5</sup>, Gülnihal Bozkurt<sup>6</sup>, Mehmet Akif Aydın<sup>7</sup>, are worth

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<sup>3</sup> Mehmet Gayretli, “Tanzimat Sonrasından Cumhuriyet’e Kadar olan Dönemde Kanunlaştırma Çalışmaları” (PhD Thesis, İstanbul, Marmara Üniversitesi Sosyal Bilimler Enstitüsü İlahiyat Anabilim Dalı İslam Hukuku Bilim Dalı, 2008). Also, Samy Ayoub, “We’re not in Kufa Anymore: The Construction of Late Hanafism in the Early Modern Ottoman Empire, 16th-19th Centuries CE” (PhD Thesis, University of Arizona: School of Middle Eastern and North African Studies, 2014).

<sup>4</sup> Hıfzı Veldet Velidedeoğlu, “Kanunlaştırma Hareketleri ve Tanzimat”, içinde *Tanzimat I* (İstanbul, 1940).

<sup>5</sup> Hıfzı Timur, “Views on the Transition in Turkey From Islamic Law to A Western Legal Set Up” 5, sy 6 (1956): 75-80.; Hıfzı Timur, “The Place of Islamic Law in Turkish Law Reform”, *Annales de la Faculté de Droit d’Istanbul*, sy 5 (2011): 63-74.

mentioning. These authors discussed the transformation of the legal system and the key issue that has been examined in detail, especially in studies looking into the development of the idea of law, is the adaptation of European laws. The PhD thesis of Sami Erdem<sup>8</sup>, for instance, can be regarded as one of the prominent studies carried out in an attempt to unearth the development in the legal field in the aftermath of the Tanzimat on an intellectual basis. In his thesis, Erdem attempts to observe the process of how the aftermath of the Tanzimat brought a new perception to the meaning attributed to law, and he places *fiqh* at the center of his analysis. He deems the way *fiqh* was perceived from a historical point of view of utmost significance. The concern of the Western literature was shaped to some extent by the perception of attributing the Islamic law static or dynamic. A detailed analysis of the discourses will be provided in the second chapter of this study, by referring to prominent scholars.

Bearing in mind the main concern of this study, it will begin by presenting the constitutive concepts of Islamic legal thought in order to shed light on the nature of early Islamic law. First of all, in this sense, the following questions have been respectively taken into consideration in the second section: How did the idea of law emerge among the Muslim community? Who was able to formulate law? And by which methodology did legal experts come up with legal provisions? Pertaining to forming legal opinions, some concepts such as the *Qur'an*, *Sünnet*, *Kıyas* and *İcma* which are regarded as an indispensable part of the legal consciousness possessed by the Islamic community, are analyzed and the methodology of legal theory, *usul al fiqh*, is touched briefly. Finally, “the

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<sup>6</sup> Gülnihâl Bozkurt, *Batı hukukunun Türkiye’de benimsenmesi: Osmanlı Devleti’nden Türkiye Cumhuriyeti’ne resepsiyon süreci, 1839-1939*, Türk Tarih Kurumu yayınları. VII. dizi, sa. 164 (Ankara: Türk Tarih Kurumu Basımevi, 1996).

<sup>7</sup> Mehmet Akif Aydın, *Türk Hukuk Tarihi* (İstanbul: Beta Basım Yayım, 2017).

<sup>8</sup> Sami Erdem, “Tanzimat Sonrası Osmanlı Hukuk Düşüncesinde Fıkıh Usulü Kavramları ve Modern Yaklaşımlar” (PhD Thesis, İstanbul, Marmara Üniversitesi Sosyal Bilimler Enstitüsü, İlahiyat Anabilim Dalı İslam Hukuku Bilim Dalı, 2003).

Closing of the Gate of *Ijtihad*’, one of the famous discussions within the sphere of the Islamic legal thought is touched upon at the end of this section.

The third chapter of this thesis is concerned with the relationship between modernity and law, and clarifying how the idea of law was transformed with modernity. In this context, the codification movement and its impact on producing a new sense of law will be discussed. In the second section of the third chapter, a sort of conceptual analysis that briefly touches upon *Shari’a*, *Qanun*, *Örf*, and *fiqh* as the essence of the Ottoman legal system, will be carried out. In the final section of the third chapter, the transformation of the legal field in the Tanzimat Era will be contextually analyzed by taking into consideration how the idea of codification in the field of law revealed itself. Accordingly, it will be attempted to explain the nature of the relationship between the state and the Islamic tradition of *fiqh*, especially in the light of the codification act, *Mecelle-i Ahkam-ı Adliyye*.

The final chapter of this study is devoted to elaboration on how the Young Ottomans and the Young Turks used the Islamic tradition of *fiqh* and what sort of value they attached it. Finally, in this chapter, the discourses of the circle of the *ulema* on law and *fiqh* will be examined. In this sense, this section problematizes the three following questions: How were the concepts of *örf*, *istihsan*, *istislah*, *ijtihad* and *maslahat* used while reevaluating the Islamic tradition of *fiqh*? What was the underlying reason of the discussions on *ictimai usul al fiqh*? And how did the *ulema* dwell upon the nature of the relationship between *fiqh* and law on an intellectual basis?

In my thesis, I have benefited from tracking primary sources to support my arguments. Firstly, the periodicals of the period, *Sırat-ı Müstakim*, *Beyan’ül-Hak Mecmuası* which were published starting from 5 October 1908 until November 1912, *Sebilü’r-Reşad*, and *İslam Mecmuası* will be used. In these periodicals, the articles related to *fiqh* and discussions on *ijtihad* have been

chosen to detect the discourses of the *ulema* on *fiqh*. In addition to these periodicals, I have also employed lecture books written on *usul al fiqh* as a supplementary source. Among these books are Süleyman Sırrı İçelli: *Medhal-i Fıkıh*<sup>9</sup>, Mehmet Kamil: *Tarih-i İlm-i Fıkıh*<sup>10</sup>, Mehmet Seyyid Bey *Usul-i Fıkıh: Cüz-i Evvel*, and *Medhal*.<sup>11</sup>

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<sup>9</sup> Süleyman Sırrı İçelli, *Medhal-i Fıkıh* (Konstantiniyye: Matbaa-yı Ebuzziya, 1329), [www.hathitrust.org](http://www.hathitrust.org).

<sup>10</sup> Mehmet Kamil, *Tarih-i İlm-i Fıkıh; Medreset ül- mütehassısında takrir edilen dersleri havidir* (İstanbul: Matbaa-ı Amire, 1331), [www.hathitrust.org](http://www.hathitrust.org).

<sup>11</sup> Mehmed Seyyid Bey, “Usûl-i Fıkh. Cüz’-i Evvel, Medhal” (İstanbul: Matbaa-ı Amire, 1333).

## CHAPTER 2

### COMPONENTS OF ISLAMIC LEGAL THOUGHT

The Muslim jurist cannot even begin to think about the law except in the context of a worldwide predicated upon the existence of God. Given that God exists, it follows by inexorable monotheistic logic that he is the one whom mankind must first turn as a source of law, for he alone is the ultimate sovereign, the possessor of all original rights.<sup>12</sup>

Any study attempting to examine modernization within the legal field in the late Ottoman Empire must, first of all, understand how the earlier modern era legal thought developed within the Islamic community, since most of the constitutive elements of legal thought within the Ottoman context must be explored in the early days of Islam. Taking into consideration that the scope of this thesis is limited, this chapter aims to inform the reader on the following points by specifically focusing on the classical ages of Islam: The key concepts in the Islamic legal theory, existing trends within the literature in the field of Islamic law, the context in which the Islamic legal thought evolved, the methodology of legal reasoning employed by the legal scholars of the early ages, the source of legal knowledge and finally, people who were engaged in the study of “law” and their position vis-a-vis the political authority. To summarize, this chapter investigates whether we can talk about an independent or a dependent class of legal experts by examining the work conducted by the scholars of Islamic law or, as Hallaq suggests, what was at stake at the intersection of the spheres or different realms of authority among *mufti*, *jurists* and *judge*.<sup>13</sup>

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<sup>12</sup> Bernard G. Weiss, *The Spirit of Islamic Law*, The Spirit of the Laws (Athens, Ga.: The Univ. of Georgia Press, 2006). pp. 23

<sup>13</sup> Wael B. Hallaq, *An introduction to Islamic Law* (Cambridge; New York: Cambridge University Press, 2009). p. 13

## 2.1. Conceptual Enquiry: *Fiqh* and *Shari'a*

Before briefly engaging in a historical overview and the transformation of the Islamic legal thought, it is appropriate to make a short enquiry into the concepts of *fiqh* and *Shari'a* that will be frequently used throughout the thesis. Although at first glance they appear to be synonymous with each other, these notions are different in terms of the meanings attached to them. To begin with, *Shari'a* is depicted within the context of the law of God possessing divine origin. Hamilton Gibb's engagement in a definition arguing that from Muslims' point of view, the legal and religious are not considered as separate realms can be given as an example. Accordingly, *Shari'a* signifies the religious duties of Muslims' and in this sense, law is also perceived as divine essence.<sup>14</sup>

In the final analysis, the will of God transmitted by the Prophet is considered within the category of law, and as far as the concept of law is concerned, it has not been attributed an autonomous aspect, but is rather associated with duty or religious duty. He further grounds his argument by evaluating *Shari'a* in the scope of the duties Muslims are obliged to fulfill and the violation of these duties, which are regarded as sin and disobedience to religion.<sup>15</sup> This latter aspect, which pays regard to the essence of *Shari'a*, will be discussed in the third chapter, which aims to shed light on the modern approach to the notion of law. The main argument is that the divine essence of *Shari'a* was thought to cause a lack of reasoning in a sense that human judgment was no longer allowed to

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<sup>14</sup> H.A.R. GIBB, *Mohammadanism: An Historical Survey* (New York: Oxford University Press, 1962). pp. 93

<sup>15</sup> *Ibid*, pp. 99-100 H.A.R. GIBB. The views of Weber on Islamic law is the point as far as the the essence and the origin of law taken into account. This aspect will be discussed in the third chapter.

intervene with the sphere of law, because it was considered that this sphere belonged to God and the Prophet.<sup>16</sup>

Continuing with definitions, *fiqh* can be explained as the technical term employed to define jurisprudence, the science of religious law in Islam, the scope of which covers the following subjects: ritual matters, family law, inheritance, property and contracts, obligations (*muaamelat*) referring to legal issues appearing in social life, as well as administrative matters found in it.<sup>17</sup> It is difficult to come up with a conclusion, since the scholars of Islamic law differed in their definitions of “*fiqh*”. For instance, Baber Johansen designates it as a system of method and principles in which experts interpret revelation and *Shari’a* in a normative way and evaluate people’s actions in the light of these interpretations. To put it another way, *fiqh* classifies people’s actions and adjudicates on them, as well as making suggestions to the Muslim community on legal and moral matters.<sup>18</sup> The aim of those who devoted themselves to the science of *fiqh* was to derive ideas about solutions. For this purpose, those who were experts in *fiqh* used four revealed texts, the *Qur’an*, *Sunnan*, *Qiyas* and *İjma*, which constituted the basis of *fiqh* and which will be discussed in the following section.

## 2.2. Literature Review on Islamic Law

There are some preliminary works in the literature on Islamic law and an increasing number of them come up with different views. This section will be

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<sup>16</sup> C. Snouck Hurgronje, *Mohammedanism: Lectures on Its Origin, Its Religious and Political Growth, and Its Present State* (INDY PUB, 2006). pp. 109

<sup>17</sup> Bernard Lewis, Charles Pellat, ve Joseph Schacht, ed., *C - G*, New edition, 4. impression, *The Encyclopaedia of Islam 2* (Leiden: Brill [u.a.], 1991). pp. 886

<sup>18</sup> İrfan İnce, “Baber Johansen: Çalışmalarına Dair Tasviri Bir Sunuş”, *İslam Hukuku Araştırmaları Dergisi*, sy 4 (2004): 231-65. pp. 235

devoted to looking at these views and aims in order to see how the approaches to Islamic law within the scholarly field had changed, especially the Orientalist<sup>19</sup> approach, as well as the modern ones. One of the attempts to study Islamic law is the work of Wael Hallaq. According to him, the emergence of legal schools and the growth of legal theory are key for us to enlighten the development of the Islamic legal thought.<sup>20</sup> Moreover, he underlines the significance of the symbiotic relationship between law and politics, law and legal profession.<sup>21</sup>

Schacht, who is another scholar attempting to study Islamic law like Hallaq, emphasizes that studying or thinking about Islam is not independent of Islamic law itself. In other words, according to Schacht, Islam constitutes the essence of Islamic law.<sup>22</sup> What Hallaq suggests in his studies is to rectify misconceptions about Islamic law by paying attention to individuals or experts who contributed to the evolution of Islamic law, like muftis, author jurists, judges and the law professors.<sup>23</sup>

Studies on Islamic law also discusses two notable issues, whether Islamic law has a stable or dynamic nature, and whether there is a gap between ideal doctrine and actual practice. Coulson, for example, considers Islamic law or *Shari'a* as immutable and static as it did not care for the changes of time, but rather came up with an eternally valid ideal which the society could desire. He underlines,

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<sup>19</sup> C. Snouck Hurgronje, *Mohammedanism: Lectures on Its Origin, Its Religious and Political Growth, and Its Present State*.

<sup>20</sup> Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Themes in Islamic Law 1 (Cambridge, UK; New York: Cambridge University Press, 2005). p. 3

<sup>21</sup> Ibid, p. 6

<sup>22</sup> Joseph Schacht, *An Introduction to Islamic law* (Oxford [Oxfordshire]; New York: Clarendon Press, 1982). p. 1

<sup>23</sup> Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge; New York: Cambridge University Press, 2009). p.1

however, that presenting Islamic law as such an idealistic image did not mean that *Shari'a* overlooked the practical concerns related to the needs of the society, and the ideals it presented did not find a place to be implemented in Muslim courts.<sup>24</sup> What rather underlined is the fact that scholars studied *fiqh* within the context of legal and religious doctrine, rather than that of practical concern. In other words, such engagement with *fiqh* led it to be perceived as if it is merely ideal legal construct. This discussion transformed into another one, suggesting that the gate of independent reasoning, *ijtihad*, was closed and therefore, Islamic law ceased to develop. This issue will be outlined in the sections on “*ijtihad*” below.

Another significant controversy argued by Coulson suggests that what was inherent in Islamic law was the gap between ideal doctrine and actual practice, between *Shari'a* laws laid down by jurists and positive law implemented within courts.<sup>25</sup> Coulson concludes that it is difficult to talk about the existence of the notion of historical process in law in classical Muslim jurisprudence. However, Schacht advocates the opposite, stating that Islamic law, or *Shari'a*, is the result of a complex historical process by underlining its dynamic aspect.<sup>26</sup> Therefore, this chapter, intends to gather these different views and reveal the diversity of opinions expressed by scholars.

To begin with, Vikor summarizes some of the tendencies found within the Western scholarship. Accordingly, the main questions occupying their minds are: “Has *Shari'a* ever been really used? Should it be regarded as law or a set of moral orderings? Can we find any historical facts in Muslim sources to ground our knowledge? And finally, can we talk about any historical developments after

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<sup>24</sup> Noel J. Coulson, *A History of Islamic Law*, paperback ed., reprinted, Islamic Surveys 2 (Edinburgh: Edinburgh Univ. Press, 2006). p. 2

<sup>25</sup> Ibid, p. 3

<sup>26</sup> Schacht, *An introduction to Islamic Law*. p. 2

the formative period?”<sup>27</sup> As far as the reliability of Muslim sources is concerned, the legal methodology section will provide detailed information on how legal experts chose their sources and what sort of methodology they followed. In this section, the notion “the closing of the gate of *ijtihad*” will be discussed.

The approach of legal modernism to *Shari'a* in the modern sense acknowledged that on one hand, law remains a form of expressing divine command, and on the other hand, it was evaluated in terms of meeting the demands of society. Thus, legal modernism expresses that God’s will can be interpreted in various ways, in accordance with the circumstances and conditions of time. Unlike classical jurisprudence, which regards law as imposed from above as eternal standards, and also as the rules that the state and society has to obey, modern jurisprudence evaluates law as providing solutions to the problems of society, and historically places emphasis on the interpretation of revelation rather than placing it on the basis of law.<sup>28</sup>

Contrary to the view of legal modernism, which sees the application of the principles expressed by divine will within the framework of the social conditions of the current age, Schacht regards Islamic law as an ethical norm rather than a coherent body of law, underlining the religious aspect of *Shari'a*.<sup>29</sup> Therefore, according to Schacht, religious and moral principles were not a separate part of Islamic law, rather they formed its essence.<sup>30</sup> Vikor argues that traces of Weber can be found in Schacht’s view.

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<sup>27</sup> Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (London: Hurst, 2005). p. 12

<sup>28</sup> Coulson, *A History of Islamic Law*. pp. 6-7

<sup>29</sup> Vikør, *Between God and the Sultan*. pp. 13

<sup>30</sup> Schacht, *An Introduction to Islamic Law*. pp. 203

From Weber's point of view, *Shari'a* remained inadequate to formulate solutions to the problems of the ever-changing society, and the preservation of the legal tradition by scholars had nothing to do with the practical needs of the society. To meet these needs, it was necessary to resort to rules outside *Shari'a*, other than its divine essence.<sup>31</sup> Hallaq, however, considers *Shari'a* as a judicial system and legal doctrine, which aims to regulate social relations, as well as to resolve disputes. For Hallaq, *Shari'a* also refers to the "lifestyle" and the perception of world as a body of belief and intellectual play.<sup>32</sup> In other words, *Shari'a* is perceived as a cultural knowledge which includes local customs, ethics, and economic and cultural practices.<sup>33</sup>

Another significant discussion in the literature concerns the validity of the sources in which the essence of Islamic law is formulated. When it comes to the validity of the information found in these sources, Vikor mentions revisionist scholars. Some traditionalist scholars focused on the founders of the four schools of law, Hanafi, Maliki, Shafi'i and Zahiri. Some revisionists, on the other hand, cast doubt on sources like John Wansbrough, who suspected the history of the *Qur'an* by claiming that it must have been edited after Muhammad's lifetime.<sup>34</sup> These revisionist scholars also reduce the significance of the early schools of law in the history of Islamic law, and state that such a development was a later phenomenon.<sup>35</sup>

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<sup>31</sup> Vikor, *Between God and the Sultan*. pp. 14

<sup>32</sup> Hallaq, *An Introduction to Islamic Law*. pp.163

<sup>33</sup> Ibid, pp. 164

<sup>34</sup> See, John E. Wansbrough ve Andrew Rippin, *Quranic Studies: Sources and Methods of Scriptural Interpretation* (Amherst, N.Y: Prometheus Books, 2004).

<sup>35</sup> Vikor, *Between God and the Sultan*. pp.14

However, contrary to this revisionist view, Hallaq underlines the significance of the formative period and comes up with his own definition. Accordingly, he elaborates his view of the formative period as the historical period in which the major components of Islamic law emerged from rudimentary beginnings, and transformed into the stage where the basic traits gained an “identifiable shape”. Four essential features of Islamic law are specified by Hallaq: the development of a complete court and judiciary system, the formulation of a positive legal doctrine, the evolution of the science of legal methodology encompassing hermeneutic, intellectual consciousness, and the formation of doctrinal legal schools. All of these four developments were attributed to the fourth/tenth century.<sup>36</sup>

The rest of this chapter will focus on the following points respectively: the emergence of legal ethics and those who contributed to its creation, the legal methodology followed by legal experts, and the emergence of study circles and the growth of legal education as an intellectual activity.

### **2.3. The Essence of Legal Methodology: *Usul al fiqh* in the Formative Period of Islam**

In the previous section, the literature focusing on *fiqh* was reviewed, referring to key discussion topics within. This section will be an introduction to the theory of *usul al fiqh* in which legal experts formulate laws or opinions about certain cases. Before going into detail, it will be useful to explore how “legal ethics” emerged among the Muslim community. We must first state what meaning was attached to the notion of “law” before discussing the role of those who contributed to this process. From Calder’s and Schacht’s point of view, Islam was not concerned with the law of anything, instead customary law exists in

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<sup>36</sup> Hallaq, *The Origins and Evolution of Islamic Law*. p. 3

various centers, in Kufa, Damascus, and Madina. According to Gerber, the sacred quality of Islamic law was attained with Muhammad.<sup>37</sup>

According to Coulson, the commandment of the *Qur'an* “obey God and His Prophet” brought novelty to the social structure of Arabia. This novelty is therefore called the foundation of political authority that includes legislative power.<sup>38</sup> The significance of Muhammad’s position stems from his being evaluated within the context of “supreme judge”, whose main duty was to interpret divine revelation.<sup>39</sup> However, as can be seen from Hallaq’s view, it is difficult to imagine the monopoly of political authority over the legislative sphere. Rather, what Hallaq suggests is the domination of this sphere by legislative experts independent from the state. In this sense, Hallaq suggests looking into the duties of the early *qadis* (judges) and examining the sources they used in order to see what sort of legal consciousness existed among them, or whether they had any legal consciousness. At the same time, we have to clarify what we mean by legal ethics and consciousness.

First of all, it is difficult to draw the boundaries of the jurisdiction of *qadis* as they performed multiple tasks such as financial, military, and policing. It can be seen towards 50/670 that the jurisdiction of *qadis* expanded towards the financial sphere, such as collecting taxes.<sup>40</sup> In addition, the position of *qadi* (judgeship) was evaluated within the context of a quasi-legal nature, in a sense that most of the men holding this position did not have a comprehensive legal knowledge.

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<sup>37</sup> Haim Gerber, *Islamic law and culture, 1600-1840*, Studies in Islamic law and society, v. 9 (Leiden: Boston : Brill, 1999). pp. 25

<sup>38</sup> Coulson, *A History of Islamic Law*. p. 9

<sup>39</sup> Ibid, pp. 22

<sup>40</sup> Hallaq, *The Origins and Evolution of Islamic Law*. pp. 37

Rather, the status of *qadi* was described as arbitrators in their relationship with law.<sup>41</sup> Thus, due to the little knowledge they possessed about law, it is difficult to talk about the existence of a sophisticated legal reasoning.<sup>42</sup> Ninety years after the Hijra, we can talk about considerable developments when it comes to the evolution of legal ethics and systematic legal reasoning, with the specialization of the duties of *qadis* by making them responsible for conflict resolution and legal administration.<sup>43</sup>

Consequently, the nature of judicial appointment also undergone change from c. A.D. 715-20 onwards; *qadis* began to be appointed as legal experts who were considered pious.<sup>44</sup> According to Schacht, these specialists that were chosen to fill the position of judgeship incorporated the field of law into that of religious and ethical ideas. In other words, what was at stake was the process in which law was subject to Islamic norms and the law body of duties were made binding on every Muslim.<sup>45</sup> This process is mostly associated with the period of the Umayyads (A.D. 661-750), whose primary objective was to establish a new framework based on an organized and centralized bureaucratic administration for the Arab Muslim Society.<sup>46</sup> In order to make sense of the development of Islamic legal thought, there is an important issue regarding the office of *qadi* worth mentioning. In the first centuries of Islam, appointment to the office of *qadi* was rejected by most of the specialists of law since they evaluated this office within

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<sup>41</sup> Ibid, p. 35

<sup>42</sup> Ibid, pp. 34

<sup>43</sup> Ibid, pp. 57

<sup>44</sup> Schacht, *An Introduction to Islamic Law*. pp. 262.

<sup>45</sup> Ibid, pp. 27

<sup>46</sup> Ibid, pp. 23

the context of “contempt”, rather than evaluating it with eagerness. Coulson invites the reader to examine the nature of this office so as to understand why such a negative attitude was adopted towards it. From the point of view of some pious people, accepting the office of *qadi* might lead to physical and moral dangers. It would not be wrong to argue that their negative attitude was most probably shaped by their negative perception of political authority. For instance, it was argued that “accepting the office of *qadi* meant exposing oneself to all kinds of temptation”.<sup>47</sup>

Hallaq expresses two factors that contributed to the conception of specialist against government, and argues his view within the context of the relationship between law and government. According to him, the split between the emerging legal class and the ruling elite was derived from, first of all, the dissemination of the new religious ethics among the legal specialists by the end and at the beginning of the second century. The second development was the institutionalization of the ruling elite, dissociating themselves from the egalitarian principles with little access to the people they ruled. These two factors led the emerging legal class to designate the ruling elite and the position of *qadi*, who were engaged with the ruling elite, as vice and corrupted.<sup>48</sup> A significant development which is difficult to overlook according to Coulson also showed itself during the early decades of the second century. This development corresponded to what Hallaq underlined as far as the attitude towards political authority is concerned.

The idea of elaborating an ideal law for Islam began to spread among the pious, who directed their loyalty towards religious law, rather than serving the governor’s interest. Given this fact, gaining independence from the political authority was one of the aims of *qadis*.<sup>49</sup> They conceptualized their desire

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<sup>47</sup> Coulson, N. J., “Doctrine and Practice in Islamic Law”, *Bulletin of the School of Oriental and African Studies* 18, (2) (1956): pp. 213

<sup>48</sup> Hallaq, *An Introduction to Islamic Law*. pp. 41

<sup>49</sup> Coulson, N. J., “Doctrine and Practice in Islamic Law”, pp. 215-216

through the ideal relationship expressing the independent relationship between *Shari'a* and political authority.<sup>50</sup> This latter aspect will be examined in detail within the late Ottoman context. For now, it suffices to say that the relationship between the two sides either followed a reconciliatory or sometimes an uncompromising pattern.

In the end, however, if we attempt to discuss who made considerable contribution to the development of Islamic law, as well as legal ethics, jurists with their widespread knowledge of law undoubtedly played the most important role. As Gerber puts it: “The evolution of Islamic law has been made possible by the work and efforts of individual experts who relied on the *Qur'an* and the hadith texts to carry out the process of formulating law.” Gerber raises three main questions of paramount importance when examining the relation of law to political authority. These questions are: What is law, who decides and controls it? How does the ruler gain legitimacy in the eyes of the community and the *ulema* (men of religion)? And can we talk about any limitations on the authority of the state in its relation to the individual?<sup>51</sup> Gerber’s conclusion underlines that law took precedence over the state. Explicitly, the state was regarded as a tool to implement law.<sup>52</sup>

Within this context, it is necessary to take a look at how the knowledge of law was acquired by the jurists. To be able to answer this question, we have to examine what sort of educational background the experts of law possessed. According to Gerber, the specialists’ education and their ability of formulating law were the key factors which led them to form a group that was not dependent

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<sup>50</sup> Ibid, pp. 218

<sup>51</sup> Haim Gerber, *Islamic Law and Culture, 1600-1840*, Studies in Islamic Law and Society, v. 9 (Leiden: Boston: Brill, 1999), pp. 23-24

<sup>52</sup> Ibid, pp. 43

on the government.<sup>53</sup> Early attempts towards law and legal studies took place in study circles, where men who had knowledge of the *Qur'an* and were also informed of the general principles of Islam gathered and discussed among themselves. No defined methodology of law or legal reasoning could be seen in these circles. Thus, the circles differed from each other in terms of topic, methodology, and doctrine taught by teachers.

Towards the first half of eighth century, however, jurists began to formulate their own legal methodology. This led to the formation of doctrinal schools known as *madhhabs*. Some, for instance, taught law of inheritances while others inculcated ritual law.<sup>54</sup> It was the attempts of jurists that led Islamic law to be designated as their law, in a sense that the state did not prefer to intervene in the basic intellectual structure of them, or display any tendency to determine what Islamic law was or not.<sup>55</sup> Rather, legal authority resided in the hands of people with knowledge of law and religion. Holding a military or political office did not guarantee having legal authority.

As Hallaq enunciates, what was at stake here was to have epistemic legal authority, which forms the essence of Islamic law.<sup>56</sup> In the late tenth century, the picture changed with the emergence of law colleges called “Madrasas”. These colleges, as educational institutions, were not free from political authority as they were politically and financially patronized.<sup>57</sup> The ruler could use them to

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<sup>53</sup> Ibid, pp. 44

<sup>54</sup> Hallaq, *An Introduction to Islamic Law*. pp. 32

<sup>55</sup> Gerber, *Islamic Law and Culture, 1600-1840*. pp. 46

<sup>56</sup> Hallaq, *An Introduction to Islamic Law*. pp. 35

<sup>57</sup> Ibid, pp. 38

penetrate into the society in the absence of an effective mechanism. In this sense, the madrasas, as a field of legal education, formed a fertile ground to be used by the ruler as a source of legitimacy to obtain the loyalty of significant jurists living in larger cities.<sup>58</sup> In other words, the field of politics extended itself to the sphere of law by considerably subordinating legal specialists. This was a relationship relying on mutual interest as rulers gained not only the cooperation and loyalty of the scholars, but also the legitimacy they provided. In return, scholars were paid salary and granted patronage.<sup>59</sup>

In addition to judge, another important figure that must be mentioned is the author jurist called “mufti”. Mufti is defined as follows: The mufti or jurisconsult stands between man and God, and issues legal opinions (*fatwa*, pl. *fatawa* or *fatwas*) to a petitioner known as *mustafti*, either with regard to the law of God or the deeds of man”. In other words, mufti can be defined as a person who has legal knowledge and is entitled to give legal opinions, who has the capacity to use reasoning in order to deal with problems.<sup>60</sup> In early Islam, *mufti* was free from the control of the state. Mufti differs from a judge in many aspects. The authority of jurisconsults is delegated by his peers contrary to *qadis*, whose authority is delegated by the state. Finally, the judge’s ruling is considered final, whereas the ruling of mufti is the decision of many competing juridical opinions. In addition, mufti rules on questions of law, whereas *qadi* rules on fact.<sup>61</sup>

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<sup>58</sup> Ibid, pp. 45

<sup>59</sup> Ibid, pp. 53

<sup>60</sup> Gordon D. Newby, *A Concise Encyclopedia of Islam*, Repr, A Concise Encyclopedia Of (Oxford: Oneworld, 2004). pp.153

<sup>61</sup> Muneer Goolam Fareed “Mufti” in Vol.2, Richard C. Martin, ed., *Encyclopedia of Islam and the Muslim World* (New York: Macmillan Reference USA: Thomson/Gale, 2004). pp. 478; See also: Muhammad Khalid Masud, Brinkley Morris Messick, and David Stephan Powers, ed., *Islamic legal interpretation: Muftis and their Fatwas*, Harvard studies in Islamic Law (Cambridge, Mass: Harvard University Press, 1996). Here, the role of mufti attributed significance in a sense that mufti contributed to the development of the doctrine of the Sunni

Vikør divides muftis into three categories: individual muftis, muftis as advisors in court, and muftis appointed by state. Individual muftis were not recognized officially, but by the knowledge they had, so no formal exam was required to confirm their authority. Basically, anyone who considered himself learned could give legal opinions (fatwa). Muftis could also act as an outside advisor in court if the judge sought their authority in complex and important cases, such as the death penalty. Sometimes muftis could also be attached to court in a regular manner and attend proceedings. Finally, muftis were appointed to a particular court by the state as a consequence of territorial expansion. Here, Vikør argues that the process of establishing domination over the muftis had initiated. This could be seen especially in the pre-Ottoman period and the Mamluk period. The sultan could also gather around himself the muftis acting as advisors, whose main duty was to legitimize his rule.<sup>62</sup> The process where muftis gave their fatwa, their legal opinion, was known as “*ifta*”. With the institution and practice of *ifta*, muftis constitute the essential part of the legal theory. Within the context of the institution of *ifta*, we have to underline it was related to “*ijtihad*”.<sup>63</sup>

In other words, having the capacity to give opinions requires, above all else, having the capacity to perform *ijtihad*. Thus, this relationship between *ifta* and *ijtihad* will be clarified in the remainder of the chapter. Firstly, if it is attempted to define *ijtihad*, it can be defined as follows: If the situation to which a jurist seeks a solution is not determined as *nass (pl. nusūs)*, clear premises,<sup>64</sup> within the

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School of law due to their exercise of independent reasoning to formulate new rules. Mufti was also expected to guide judges by giving legal opinion to them on request

<sup>62</sup> Vikør, *Between God and the Sultan*. pp. 144-45

<sup>63</sup> Gerber, *Islamic law and culture, 1600-1840*. pp. 33

<sup>64</sup> Wael B. Hallaq, *A history of Islamic legal theories: an introduction to Sunnī uṣūl al-fiqh* (Cambridge; New York: Cambridge University Press, 1997). pp. 96

*Qur'an*, *Hadith* and *sunan*, the jurist resorts to the option of *ijtihad*. That is to say, *ijtihad* is the process of reasoning of the jurist. *Ijtihad* also refers to the situation in which independent judgment is exercised by those who possess adequate knowledge to carry it out.<sup>65</sup> Except for the unambiguous statements of the *Qur'an* and the Prophet, the rest of the law could be regarded as the product of *ijtihad*.<sup>66</sup> In early Islam, this term was used along with terms like *al-ra'y* and *qiyas*, which referred to sound and balanced personal reasoning in the sphere of *usul al fiqh*.<sup>67</sup>

Hallaq, on the other hand, dwells upon how the term *qiyas* emerged as a distinct term from *ra'y*<sup>68</sup>, and also attempts to question how *ijtihad*, legal reasoning, continued operate universally, embraced by all jurists and theologians, in contrast to *qiyas*' being reduced by the jurists of all schools, which is another point deserving attention. Thus, if we attempt to look at how the process of legal reasoning worked, we must emphasize some points. Accordingly, *'Ilm* corresponded to the knowledge of the *Qur'an* and *Sunna* (exemplary behavior of the Prophet Muhammad), whereas *ra'y* was regarded as considered opinion.<sup>69</sup> A

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<sup>65</sup> Newby, *A Concise Encyclopedia of Islam*. pp. 97

<sup>66</sup> Hallaq, *An Introduction to Islamic Law*. pp. 27

<sup>67</sup> "Ijtihad", Martin, *Encyclopedia of Islam and the Muslim World*. pp. 344

<sup>68</sup> Hallaq, *The Origins and Evolution of Islamic Law*. pp. 114. According to Hallaq, *ra'y* refers to articulation of opinion without bounding by authoritative text and in this sense evaluated within the context of "free human reasoning". After Shafi' the nature of reasoning gave way to the more strict form called "qiyas" and "ijtihad" the kernel of these reasonings shaped by two authoritative texts Quran and Sunan.

<sup>69</sup> In older theological language the word did not have this comprehensive meaning; it was rather used in opposition to *'Ilm*. While the latter signifies, beside the Kuran and its interpretation, the accurate knowledge of the legal decisions handed down from the Prophet and his Companions the term *fiqh* is corresponded to the independent exercise of the intelligence, legal points is grounded and decided via one's own judgment in the absence or ignorance of a traditional ruling bearing on the case in question. The Encyclopaedia of Islam 2 (Leiden: Brill [u.a.], 1991). pp. 886

formulated or reached opinion through *'ilm* was called *ijtihad*, or *ijtihad al-ra'y*.<sup>70</sup>

By the beginning of the third/ninth century, the novel method of reasoning called *qiyas* and *ijtihad* had come to the fore, and *ra'y* began to lose its domination in legal discourse.<sup>71</sup> In this context, Hallaq speaks of *Shafi'i* and how he determined the scope of this method, and argues that it was after *Shafi'i* that *qiyas* and *ijtihad* were evaluated in separate contexts, in a sense that *qiyas*, analogical reasoning,<sup>72</sup> was evaluated as the strict and systematic argument of *ray'* predicated upon revealed texts.<sup>73</sup> He argued that if the Book, the *Qur'an*, and *Sunna* provided solutions to the case at hand, then there was no need to perform *ijtihad*. It seems that the exercise of *ijtihad* had to be legitimized on account of the fact that the sources at hand remained inadequate to formulate new rules. And if these sources remained inadequate to provide solutions to the new case, exercising *ijtihad* became obligatory.<sup>74</sup>

Given this fact, the *Qur'an*, *Sunna*, *qiyas* and consensus, *ijma*, were regarded as the main legal sources within *usul-al fiqh*, legal theory.<sup>75</sup> Hierarchically, the *Qur'an* and *Sunna* took the first place. Alternative methods of legal reasoning were also mentioned by Hallaq. *Istihsan* relied on juristic preferences and *istislah* took public welfare into consideration, and they both referred to a

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<sup>70</sup> Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh* (Cambridge; New York: Cambridge University Press, 1997). pp. 15

<sup>71</sup> *Ibid*, pp. 19

<sup>72</sup> Hallaq gives the following example to make the understanding of *qiyas* easy. Accordingly, if grape-wine is prohibited textually due to its intoxicating essence, then, by analogy grape-wine is also regarded as prohibited.

<sup>73</sup> Hallaq, *The Origins and Evolution of Islamic Law*. pp. 115

<sup>74</sup> Hallaq, *A History of Islamic Legal Theories*. pp. 23

<sup>75</sup> Coulson, *A History of Islamic Law*. pp. 76

situation where *qiyas* was abandoned.<sup>76</sup> Schacht summarizes this point, stating that “Individual reasoning is called *ra’y*.”<sup>77</sup>, opinion or considered opinion. When it is directed towards achieving systematic consistency and guided by an existing parallel institution or decision, it is called *qiyas*, analogy. When it reflects the personal choice and discretionary opinion of the lawyer, it is called as *istihsan* or *istihbab*, meaning, approval and preference. Hereby, the term *istislah* corresponded to the violation of strict analogy, *qiyas*, due to public interests, convenience or any other reasons, while *istishab* referred to the continuation of the established practice in the same manner, if there was no evidence which would violate or eliminate this established practice.<sup>78</sup>

After touching upon significant components of the Islamic legal thought, another point worth paying attention to is the discussion on the closing of the gate of *ijtihad*. Some modern scholars argue that the activity of *ijtihad* ceased to be exercised after the end of third/ninth century, and this process is called the closing of the gate of *ijtihad*. This closing meant that what was done after the aforementioned century was nothing but a *taqlid* of the established authority. The reason why I would like to elaborate this issue derives from the fact that the acceptance of such a view led to the emergence of misinterpretations regarding the history of Islamic law. According to Hallaq, one of the scholars who supported the discussion on the closing of the gate of *ijtihad* is Joseph Schacht. Hallaq, however, does not accept the closing of the gate *ijtihad* as the existence of *mujtahids* who were capable of performing *ijtihad* was almost always witnessed. It can be stated that the activity of *ijtihad* was regarded as a religious

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<sup>76</sup> Hallaq, *A History of Islamic Legal Theories*. pp. 108

<sup>77</sup> *Ahl al-ray*, proponents of opinion, refers to the jurists interpreting the message of Mohammad under the light of their opinion and by putting akl at the base. Whereas the *Ahl-al – Hadith*, proponents of tradition, rather than questioning the the validity of *hadith* and making interpretation but rather showed loyalty to texts when the attempt was taken to formulate new legal rules or opinions.

<sup>78</sup> Schacht, *An introduction to Islamic law*. pp. 37

duty, “*fard kifaya*”, due to the fact that *ijtihad* gained its legitimacy from revealed sources. So, should a new case arise, qualified jurists were expected to practice their *ijtihad* and give a judgment pertaining to the case.

In this context, Hallaq poses a question. If legal theory attributed the activity of *ijtihad* to a significant place within Islamic theory, what caused the closing of this gate?<sup>79</sup> This controversy about the closing of the gate of *ijtihad* is also based on the assumption that the absence of any mujtahids led to its closing. However, this argument was by rejected by the Hanbali jurist Ibn Aqil (513-1119), on the grounds that it was impossible for any age to be deprived of *mujtahids*, who were capable of formulating rules or law in order to deal with new cases.<sup>80</sup> Thus, closing the gate of *ijtihad* meant for Muslims a partial and flawed master of ‘*ilm*’<sup>81</sup>, whose bearer were “*mujtahids*”.<sup>82</sup> Another underlying reason for this discussion, according to Coulson, was the perception that earlier scholars had contributed to *Shari’a* in reaching its final form through their discussions. In accordance with this perception, it was accepted that the later scholars did nothing but imitate the earlier ones.<sup>83</sup> In the final analyses, Hallaq highlights a theological concern underlying the discussion on the closing of the gate of

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<sup>79</sup> Hallaq, Wael. “Was the Gate of Ijtihad Closed?”. *International Journal of Middle East Studies*, vol.16, no.1 (March, 1984). (pp.3-41): pp. 4-5

<sup>80</sup> Hallaq, Wael B. "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad." *Studia Islamica*, no. 63 (1986): 129-41. Accessed April 21, 2020. doi:10.2307/1595569. pp. 129

<sup>81</sup> Franz Rosenthal, *Knowledge Triumphant: The Concept of Knowledge in Medieval Islam*, Brill classics in Islam, v. 2 (Boston; Leiden: Brill, 2007). Rosenthal in this study put emphasize on the notion of ‘*ilm*’ by arguing that this notion of ‘*ilm*’ operative and determinant of the Muslim civilization. Here ‘*ilm*’ is also designated as knowledge which brought humans closer to God.

<sup>82</sup> Hallaq, “On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad”, pp. 132

<sup>83</sup> Coulson, *A History of Islamic Law*. pp. 81

*ijtihad*. At the same time, however, he emphasizes that such theological controversies had an impact on legal theory.<sup>84</sup>

## 2.4. Evaluation

In an attempt to evaluate this chapter, when the evolution of Islamic legal thought is examined, it can be argued that legal consciousness emerged among the Muslim community through the contributions of legal experts, rather than the efforts of the state in the sphere of law.<sup>85</sup> What was at stake was the *Qur'anic* and largely customary sphere of law.<sup>86</sup> In other words, as far as legal authority is concerned, the source of this authority was based on the epistemic quality of the person, rather than political or any other authority that was not based on that of the epistemic. The reason why legal experts were so important in Islamic legal theory was that they formulated solutions to deal with new cases or to meet the needs of the society in line with the changing conditions and time within the boundaries of *fiqh*, thanks to their *ijtihad*. While doing so, the *Qur'an*, *Sunnah*, *Qiyas* and consensus, *ijma*, were regarded as the main sources of law on which jurists based their solutions and views.

According to Weiss, since law is not given to humans based on formulas, these sources are given to derive rules of law.<sup>87</sup> *Mujtahids* who performed *ijtihad*,

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<sup>84</sup> Hallaq, "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of *Ijtihad*", pp. 140. In the article, Hallaq underlines the theological aspect of discussion the extinction of mujtahids that he regards as the bearers of *'ilm*, and this discussion taken place under the light of day of Judgment as well as that of end of religion

<sup>85</sup> Patronage activity of rulers however must not be overlooked.

<sup>86</sup> Maria F. Curtis. *Fiqh*, "The Science of Islamic Jurisprudence" Clinton Bennett, ed., *The Bloomsbury Companion to Islamic Studies*, Bloomsbury Companions (London; New York [N.Y.]: Bloomsbury, 2013). pp. 209

<sup>87</sup> Bernard G. Weiss, "The "Madhhab" in Islamic Legal Theory" P. J. Bearman, Rudolph Peters, and Frank E. Vogel, ed., *The Islamic School of Law: Evolution, Devolution, and Progress*,

however, put forward different views on particular cases arising from the use of different types of legal reasoning, changing in accordance with the madhhab *mujtahids* attached themselves to, as well as arising from the different social settings they lived in.<sup>88</sup> Another crucial development as far as the development of Islamic legal thought is concerned was the emergence of the classical Sunni schools of law in the late ninth and early twelfth centuries. From Weiss' point of view, where madhhab revealed itself was based on the level of doctrine, rather than that of people in the schools. Stating this view, Weiss suffices to simply define the meaning of madhhab as "schools".

In the final analyses, madhhab was described as the doctrinal legacy which unified the members of the schools together.<sup>89</sup> According to Hallaq, by the middle of the second and eighth century, scholarly circles showed an interest in methodology and accordingly, jurists embarked upon working out their own methodology to formulate laws that reflected their own perception.<sup>90</sup> Consequently, each jurist started to gather followers around himself, to whom he had taught his jurisprudence. Thus, from Hallaq's point of view, following the doctrine of a certain jurist did not mean limiting loyalty to one doctrine exclusively; it was quite common to follow more than one simultaneously.

In view of this fact, Hallaq opposed the 80/700-250/865 period to be seen as the emergence of personal schools, as the leading jurist did not expect his followers

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Harvard series in Islamic law 2 (Cambridge, Mass: Islamic Legal Studies Program, Harvard Law School : Distributed by Harvard University Press, 2005). p. 3

<sup>88</sup> Eyyup Said Kaya, "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of 10th century, Bearman, Peters, ve Vogel. pp.31; pp. 34

<sup>89</sup> Weiss, "The "Madhhab" in Islamic Legal Theory" Bearman, Peters, ve Vogel. p.2

<sup>90</sup> Hallaq, *The Origins and Evolution of Islamic Law*. pp.153

to show loyalty to his doctrine in a strict sense. To summarize, it can be suggested that the doctrinal school, madhhab, referred to the establishment of an authority and the formation of methodology around it. Within the doctrinal school, the figure of leading jurist was regarded as the founder. Furthermore, madhhab, doctrinal schools, also referred to the body of authoritative legal doctrine which was built around individuals; Hallaq names this process the axis of authority construction. Therefore, the figure of the leading jurist was called absolute *mujtahid*, whose knowledge was regarded as the master of *usul al fiqh*, legal theory.<sup>91</sup>

As a result, by the late tenth and early eleventh centuries, the legal opinions of scholars were defined as the “followers” (*ashab*) of people such as Malik b. Anas, Abu Hanifa, and al- Shafi’i, who represented the perspectives of the five main schools: Maliki, Hanafi, Shafi’i, Hanbali (following Ahmad b. Hanbal), and the Zahiri (following Da’ud b. Khalaf).<sup>92</sup> In summary, rather than focusing on the doctrine produced by a single jurist, doctrinal madhhabs as a collective and authoritative entity following consolidated boundaries were regarded as a source of formulating law.<sup>93</sup> Touching briefly upon what the legal doctrines of the aforementioned schools disagreed on, Weiss emphasizes two points: legal argumentation and legal authority. As far as legal argumentation is concerned, the method of analogy, *qiyas*, evaluated it as the source which could guarantee the consistency of law and contribute to the emergence of a more generalized and systematic statement of it, by extending it to new cases through the analogical sort of reasoning, *qiyas*.<sup>94</sup> Corresponding with what Hallaq suggested

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<sup>91</sup> Ibid, pp. 157

<sup>92</sup> Brannon M. Wheeler, Madhhab” in Vol.2, Martin, *Encyclopedia of Islam and the Muslim World*. pp. 417

<sup>93</sup> Hallaq, *The Origins and Evolution of Islamic Law*. pp. 167

<sup>94</sup> Weiss, *The Spirit of Islamic Law*. p. 9

as the authority of construction, mentioned in the previous paragraph, Weiss too deemed the scholarly circles and their contribution to the movement of legal knowledge, the learning among generations, and the development of prominent masters, whose knowledge was believed to create an authoritative expression within the doctrine of other schools, significant.<sup>95</sup>

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<sup>95</sup> Weiss. pp.10

## CHAPTER 3

### MODERNIZATION IN THE LEGAL FIELD DURING THE LATE OTTOMAN ERA

Let us end all this confusion by adopting a code.  
Let us once and for all by statute enact a carefully prepared body of rules  
sufficiently complete to settle all future controversies.<sup>96</sup>

The main objective of this chapter is to question what sort of relationship existed between law, modernity and the act of codification. Throughout this chapter I will cover, firstly, the main theoretical approaches towards the notion of law by examining how the perception of law changed with modernity, and how the codification phenomenon evolved throughout the world. In the second section of this chapter, constitutive notions of the Ottoman legal thought will be explained. Subsequently, how the act of codification took place within the Ottoman Empire during the Tanzimat Era, especially *Mecelle Cemiyeti* and Ahmet Cevdet Pasha's opinions concerning "codification" will be dealt with comprehensively. In addition, attention will be paid to the modernization in the legal sphere so as to understand the nature of codification attempts and the dimensions of legal transformation within the late Ottoman context.

#### **3.1. Modernity, Law and Codification: What Sort of Connection**

Making sense of law and its relationship with modernity requires, above all, to understand and perceive modernity itself. Attempting to ask how the meaning attributed to the notion of law after modernity changed, it is difficult to come up with a certain answer. In this section, I will present some of these answers by

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<sup>96</sup> Jerome Frank, *Law and the Modern Mind*, (Coward-McCann, 1949), pp. 186

examining the relationship between law and modernity. To begin with, according to Douglas, attempting to define or theorize law during the modern era tended to focus on the following points: First of all, it was believed that law gained an autonomous existence after modernity. Secondly, law was now seen as a systematic and an orderly being. Thirdly, modern law began to be associated with the nation state, or it was perceived that it put emphasis on state law by overlooking the pluralistic aspect of law on the global, regional, and sub-national level.<sup>97</sup> With this in mind, it is argued that modernity brought about a novel conception of law in a sense that it is regarded as something autonomous that has nothing to do with other aspects of life, morality, culture and politics. Although this constitutes the key aspect of modern legal theory, there is also a counter argument. The main concern of this argument is to place law within the political, historical, cultural and social contexts.<sup>98</sup>

When we look Fitzpatrick's stance on law, on the other hand, we can argue that he regards it as occurring within the imperatives of "action", "time" and "space". As far as the conception of law as a stable or a uniform sense is concerned, Fitzpatrick underlines that it is not enough for law to provide stability and predictability, and has to guarantee and confirm that it is responsive to change, because otherwise, it will cease to function during the changing situation. Thus, if law is exposed to change, it is difficult to draw its boundaries. Therefore, its determinants cannot be clear, specific, and conclusive.<sup>99</sup> Another discussion Fitzpatrick mentions is whether law is autonomous or dependent. According to

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<sup>97</sup> Sionaidh Douglas-Scott, *Law After Modernity*, Legal Theory Today (Oxford; Portland, Or: Hart Pub, 2013). pp. 23

<sup>98</sup> Ibid, pp. 25

<sup>99</sup> Peter Fitzpatrick, *Modernism and the Grounds of Law*, Cambridge Studies in Law and Society (Cambridge, UK ; New York: Cambridge University Press, 2001). pp. 70-71

Derrida, supporting the former, law has to deploy itself away from the demands of the society and of history.<sup>100</sup>

Therefore, “The autonomous binding force of law cannot be included by what it is or what it has been, but it extends to all it will be. Law is regarded as eternally present.” Both sides come up with the following view in conclusion pertaining to this discussion: Law is discretely autonomous and dependent. In accordance with that, law and any part of law will be secure on one hand, but will be uncertain and subject to change on the other.<sup>101</sup> The critics of legal autonomy, on the other hand, evaluate law within a broader context in relation to other normative elements found in society. It seems that rather than positivist views, which exclusively associated law with the state authority, the critics of legal autonomy underlined human interaction including religion, custom, morality, which was regarded as a significant factor of the determinant of law.<sup>102</sup>

As far as the discussion on the relationship between modernity and law is concerned, Max Weber’s legal thought, undoubtedly, requires underscoring. His discussion of law will be presented briefly to provide a theoretical approach of how modernity and law are connected. Weber attributes an important role to law as it forms the basis of political authority. In his approach, the notions of “rationalization” and “predictability” are frequently emphasized.

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<sup>100</sup> For further information look at, Derrida, Jacques. 1992. Force of law: The ‘Mystical Foundations of Authority’. In Drucilla Cornell vd., ed., *Deconstruction and the possibility of justice* (New York: Routledge, 1992). pp. 15. The main concern of him is to discuss relationship between law and justice. From view point of Derrida first of all. there is a history of laws. Second, that the history of laws relates a history of power. Third, that might is not right. Furthermore, it can be articulated that fourthly, that law is constructed and can therefore be deconstructed. Fifth, that justice is undeconstructible. And, finally, sixth, that this work of deconstruction belongs to a movement of progress in the history of law. Also, Simon Glendinning, “Derrida and the Philosophy of Law and Justice. Law Critique”, *Law Critique*, sy 27 (2016): 187-203.

<sup>101</sup> Ibid, pp.72

<sup>102</sup> Douglas-Scott, *Law After Modernity*, Legal Theory Today, pp. 60

According to Deflem, Weber's view of law is shaped by his approach to the rationalization of politics. To be clear, there were three types of power which were distinguished on the basis of their legitimacy. These are traditional authority legitimized by belief, charismatic authority legitimized by the qualities of the political leader, and the final and most significant one for our task, rational legal domination legitimized by the systems of law. This source of legitimation is regarded as the essential characteristics of the modern state.<sup>103</sup> The significance of this authority derived from the fact that under legal authority:

...Submission based upon an impersonal bond to the generally defined and functional 'duty of office.' The official duty—like the corresponding right to exercise authority: the 'jurisdictional competency'—is fixed by rationally established norms, by enactments, decrees, and regulations, in such a manner that the legitimacy of the authority becomes the legality of the general rule, which is purposely thought out, enacted, and announced with formal correctness.<sup>104</sup>

From Weber's point of view, consequently, the state as a political community contains within itself the monopoly of the legitimate exercise of physical force through which the modern state establishes domination. This domination established by modern state is justified through legality. The state also uses political authority through the military, administering justice and enacting law, as well as by ensuring personal safety and public order through the police. In this sense, the implementation and the administration of state functions now began to be carried out by bureaucracy, whose main duty was to put the policies of the state into practice. It seems that Weber deems bureaucracy a significant part of the modern rationalized societies, since bureaucracies contribute to the world's calculability, and the traditionalistic ethical life, which Weber sees as mystical, was replaced by rational calculus thanks to them. The legality of rational

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<sup>103</sup> Mathieu Deflem, *Sociology of law: visions of a scholarly tradition* (Cambridge, UK; New York: Cambridge University Press, 2008). pp. 41-42

<sup>104</sup> Max Weber, "The Social Psychology of the World Religions, in the *From Max Weber: Essays in Sociology*, ed. H.H. Gerth and C. Wright Mills, (New York Oxford University Press, 1946), pp. 299

domination embodied itself, in the purest form, in the bureaucracy which acted in accordance with the formal procedures and systems of law.<sup>105</sup>

If we attempt to elaborate on what Weber means by saying rational law, we can touch upon another aspect of his sociology of law, where he attributes law-making, legislation, and law finding, adjudication, as two important aspects of law. Furthermore, he distinguishes law-making and law finding from the substantive rationality, which based its legitimacy on certain value and customs, and evaluated them within the category of formal rationality based upon general rules and procedures as in his conceptualization.<sup>106</sup> In that case, irrationality of law is seen when legal decisions are grounded on means consisting of concrete factors, such as ethical or conventional, or when sources of law are grounded on divine and sacred authority, as legal decisions formulated by such sources lack general standards, and are not systematic or predictable.

Thus, irrational law is regarded as unpredictable, and in order for law to be regarded as rational it has to be predictable, impartial and codified.<sup>107</sup> To make sense of the nature of the Ottoman legal experience and modernization in the sphere of law, firstly, we have to understand the relationship between law and the modern state. From this point forth, Bourdieu's legal thought is significant in

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<sup>105</sup> Deflem, *Sociology of Law: Visions of a Scholarly Tradition* pp. 43. Cited from Weber, Max. (1922a) 1980. *Wirtschaft und Gesellschaft: Grundriss der Verstehenden soziologie*. Tubingen, Germany: J.C.B Mohr.

<sup>106</sup> See: Max Weber, *Economy and Law (Sociology of Law)*, in *Economy and Society: An Outline of Interpretive Sociology*, R. Guenther, W. Claus, (Berkeley: University of California Press, 1978), pp. 644. Here, Weber make elaborate explanation pertaining to legal rationality. In addition to limiting it by legal norms and vested rights, government also must have legitimate basis for its own jurisdiction due to fact that modern government utilize its function as legitimate jurisdiction in a sense that it is legally accepted as based on authorization via the constitutional norms of the state. This is positive aspect which must be emphasized. Negative aspect is that law and vested rights limits the power of the state lead limitations on the freedom of action of the state to which the state must played along with. Government also have other political, ethical, utilitarian objectives rather than accepting and enforcing law.

<sup>107</sup> Deflem, *Sociology of Law: Visions of a Scholarly Tradition* pp. 45-46

terms of the concepts he presented to observe this relationship. It should be emphasized that his approach to law is related to his approach to sociology of law, rather than aiming at constructing a legal theory.<sup>108</sup> The notion of field employed by Bourdieu has a central position in his legal thought. He employs notions such as the field of power, field of law and symbolic systems, the essence of which is determined by a specific logic.<sup>109</sup> According to him, thinking in terms of “field” corresponded to thinking relationally. Furthermore, concepts can only fully acquire their meaning within a system of relations.<sup>110</sup>

According to Bourdieu, symbolic systems are regarded both as a means of knowledge and a tool of domination. Here, domination signifies more than physical violence in Bourdieu’s conceptualization as “symbolic violence”, in a sense that domination is practiced through symbolic violence. In this sense, Bourdieu evaluates law as a symbolic system and a tool of symbolic violence. That is to say, the existence of legal authority is considered as a privileged form of power. In other words, this authority is associated with the legitimate symbolic violence monopolized by the state, and<sup>111</sup> the significance of law lies in the fact that it sanctifies the order established and held by the state.<sup>112</sup> From his

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<sup>108</sup> Mauricio Garcia Villegas, “On Pierre Bourdieu’s Legal Thought” pp. 63

<sup>109</sup> Pierre Bourdieu and Loic J.D. Wacquant, *An Invitation to Reflexive Sociology*, (Polity Press, 1992) pp. 97

<sup>110</sup> Ibid, pp. 96

<sup>111</sup> Villegas, “On Pierre Bourdieu’s Legal Thought” pp. 60. See also, Pierre Bourdieu, Loic J.D. Wacquant, and Samar Farage, “Rethinking the State: Genesis and Structure of the Bureaucratic Field,” *Sociological Theory* 12, no. 1 (March 1994): 4-5. Bourdieu argues that construction of state signifies the construction field of power defined as space of play within this space holders of capital participate in struggle to gain power over the state. Bourdieu also draw attention to the fact that to make sense of symbolic dimension of the effect of the state requires understanding of how microcosm of bureaucracy functioned.

<sup>112</sup> Pierre Bourdieu, «The Force of Law: Toward a Sociology of the Juridical Field », *Hastings Law Journal*, 38 (5), 1986, pp. 838. French original: “La force du droit. Éléments pour une sociologie du champ juridique “, *Actes de la recherche en sciences sociales*, 64, 1986.

point of view, consequently, law is a social and juridical field within which various actors' campaign for the appropriation of the symbolic power is included in legal texts:

The juridical field is the site of a competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world.<sup>113</sup>

With this in mind, the examination of legal experience requires focusing on comprehending the relational field among the state and the other actors. Within the scope of this thesis, the relation between the state and the *ulema* within the legal field will be the focus of attention. In addition, another concern of this study is to shed light on the nature of the codification movements within the late Ottoman context. First of all, the essence of this act must be understood in a global sense to unearth the Ottoman experience, and how the ground of change in the terms of law and legality was justified carries significance, both on the state's and the *ulema*'s side, concentrating on how the capacity or the boundaries of law-making was defined by looking at the change in the perception of *fiqh*.

From Rubin's point of view, codification is regarded as a modern activity in a sense that notions like systematization, simplification, social engineering, unity of practice and rationality are considered to form the essence. He argues that what is emphasized under the codification act is the logic of modern state aiming to establish regularity and social engineering over society. Rubin also suggests that contrary to compilations, the underlying reason for the enactment of codes was to reveal the "new law" or to create a new framework that either includes or

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<sup>113</sup> Ibid, pp. 817. Bourdieu also argues that the social practices of the law are in fact the product of the functioning of a "field" specific logic of which is conditioned by two factors, the first one via the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and also, by means of the internal logic of juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions.

excludes the older law.<sup>114</sup> Taking his view into consideration, the Ottoman experience of codification will be enlightened in the next chapter.

It can be argued that the completion of the first modern codification in the age of codification, a period from the enactment of the Bavarian Civil Code (1756) to the enactment of the Austrian General Civil Code (1811), brought novelty in terms of conceptions of law, legal methodology and legal knowledge. Canale's questioning of what sort of change was brought by codification in terms of our imagination and perception of law is worth examining to better contextualize its reflections within the Ottoman context. First of all, it can be stated that codes signify the trilateral conception of law. One suggests that law consists of sets of general prescriptive sentences that form a part of the legal system.

The second argues that these prescriptive sentences acquire the status of law due to their source, meaning, they based which means the authority of law is associated with the authority of the state's legislative power. And the final expresses that the main concern of law is ensuring equality and liberty. With the creation of the first modern codes in the second half of the nineteenth century, the new conception disseminated across Europe, and undoubtedly legal methodology and the officials' conception of law changed the way they perceived their duty and function within the state.<sup>115</sup>

The most important dimension is that codes are regarded as the primary and subsidiary forces of law, and they can contain the law of land or the law expressed by legal experts when no clear solution is provided by the existing law. Basically, these are created to present different legal texts and to facilitate

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<sup>114</sup> Rubin, Avi, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification", pp. 830-31

<sup>115</sup> Domiano Canale, "The Many Faces of Codification of Law in Modern Continental Europe", Patrick Riley, ed. Pattaro, Enrico, "The Philosopher's Philosophy of Law from seventeenth century to Our Days", (Dordrecht Heidelberg: London New York, Springer, 2009, pp. 135

their use. To put it another way, “Codes were created to systemize legal materials which were in force before them. In this way, all legal prescriptions are employed to establish a new legal system on the basis of a fundamental political decision to support the system’s normative authority and state’s cohesion.”<sup>116</sup>

According to Canale, modern civil codes can fulfill all of these aims. Basically, legal codification became a source of controversy among legal scholars regarding how the notion of code makes sense in modern legal history. The search for this question is discussed under three dimensions which are legislative technique, legal theory and legal philosophy. We can touch briefly upon each of them to better perceive how codification modified the conception of law. Given the legislative technique, what is suggested is that law must be simple, coherent, meaning that it has to exclude legal contradictions, and complete in a sense that no source outside law is sought. However, attempts towards reaching legal certainty by means of code or codification failed. In other words, codification could not exclude or overlook judicial innovation or ensure complete predictability in the sphere of law.<sup>117</sup>

According to Canale, the focus of attention in terms of codification is on the problem of the sources of law. Simply put, the existence of various sources of law, local customs, imperial law, royal edicts and advises of legal experts constitutes an obstacle in terms of adjudicating on cases or providing solutions to them. Moreover, another aspect of the codification movement is the situation of natural law theory in a sense that codification was accepted as the essence of the new legal thought which developed in Europe.<sup>118</sup> In other words, it was argued

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<sup>116</sup> Ibid, pp.136

<sup>117</sup> Frank, *Law and the Modern Mind*”, (Coward-McCann, 1949), pp. 189

<sup>118</sup>Paolo Becchi, German Legal Science: *The Crisis of Natural Law Theory, Historicisms, and Conceptual Jurisprudence*. In, Patrick Riley ve Patrick Riley, *The Philosophers’ Philosophy of Law from the Seventeenth Century to Our Days*, ed. Enrico Pattaro, A Treatise of Legal

whether the codification act pointed to the way towards legal positivism, where the human element lay in the basis of law. As far as the codification of law is concerned, Giddens has a remarkable view which is considered to be the summary of what the modern state aimed with codified law. From his point of view:

Laws had long been in some part written but in the preceding scribal culture their influence was necessarily limited and diffuse. Printed codes of law, within an increasingly literate culture, made for the increasing integration of 'interpreted' law within the practice of state administration and for a much more consistent and direct application of standardized juridical procedures to the activities of the mass of the population. But the sphere of the law is only one area in which such changes can be observed. Records, reports and routine data collection become part of the day-to-day operation of the state, although of course not limited to it.<sup>119</sup>

Thus, the decision taken by the judiciary in the absence of unified procedural rules was regarded as arbitrary.<sup>120</sup> It was believed that the codified legal system, in this context, would solve this problem by providing a novelty in the organization of legislative provisions and bring regularity in terms of judicial reasoning.<sup>121</sup> As far as legal theory is concerned, the modern code idea signifies that codified legal prescriptions are considered in the context of a valid source of law within the territory of the state; it signifies the intention of increasing the political control over the judiciary by integrating it into the state mechanism and by making the state determine the legal standard which has to be obliged. In the

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Philosophy and General Jurisprudence, ed.-in-chief Enrico Pattaro ; Volume 10 (Dordrecht Heidelberg London New York: Springer, 2009). pp. 185

<sup>119</sup> Anthony Giddens, *A Contemporary Critique of Historical Materialism. Vol. 2: The Nation-State and Violence*, Reprint (Cambridge: Polity Press, 2002). pp. 413

<sup>120</sup> Weber's concept of *kadijustice* constitute example to this view. However, Haim Gerber's thesis opposed to view of Weber who saw Islamic law lacked of unified procedural and also is evaluated the judge named *qadi* as possessing the discretionary power.

<sup>121</sup> Canale, "The Many Faces of Codification of Law in Modern Continental Europe", pp. 138

light of modern codes, therefore, the will of the sovereign is required for the previous materials of law, natural law, customary law, precedent, Roman Law, to be regarded as a valid source. Also, under particular circumstances, previous sources of law were regarded as a binding force by the sovereign.<sup>122</sup>

Canale clarifies this process by expressing that “In codified legal systems, all laws are seen as a system of command promulgated by the sovereign.” Here, then, it is not wrong to argue that the sovereign had a say in the control of legal content and it also created the possibility of limiting judicial discretion as to which source of law jurists had to look at. Law now began to be perceived as consisting of normative entities and was regarded as a structured legal system in which the sovereign’s control was felt. Finally, it can be suggested that codes displayed different roles in the modern age.

Contrary to the traditional approach, which is mostly associated with the Weberian legal thought, he evaluates the codification attempts of the eighteenth and nineteenth centuries as a transformation from ancient law to modern law in continental Europe, and Weber interprets this period in terms of the emergence of the need for the unification, generalization and systematization of law in society. The suggestion of Canale, however, seems more satisfactory. He suggests three alternative models that we can take into consideration when interpreting the meaning of code in the modern age, which are the methodological, revolutionary and reform models.

The main aim of the methodological model is to identify prescriptive sentences from natural law which can guide the behavior of individuals within the state. The second model focuses on using the legal code to turn back to the pure natural order. In this sense, the legal code is evaluated as a tool that will bring a radical change in the sphere of law. Finally, the reform model refers to the

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<sup>122</sup> Ibid, pp. 139-40

situation in which the sovereign, or the ruler is entitled to enact legal provisions and accept them as the sole source of law within the state. In the final analyses, these models underline the various roles modern legal codes played in a sense that they could either be employed to regulate the behavior of not only citizens, but also officials.

Furthermore, as we touched on the reform model, modern legal codes can be put into practice as a part of the society reform process.<sup>123</sup> In particular, this study focuses on the last model (reform model) within the late Ottoman context. When we examine the late Ottoman codification acts, we can see that their experience had different mentalities, the essence of which depended on the exclusive authority of law that the central government regarded as “legislation”. Moreover, the main desire was to ensure the implementation of legal provisions across the territories of the empire in the same manner.<sup>124</sup> The aim of this study is to focus on determining the place and role of *fiqh* within the context of codification attempts during the late Ottoman era. In addition, analyzing the discussions on the notion of *fiqh* and *usul al fiqh* regarding who were entitled to possess authority in the realm of law during the Second Constitutional Era will constitute another concern of this study.

### **3.2. Relationship Between *Shari’a*, *Fiqh*, Sultanic (*Qanun*) and *Örfi* (Customary) Law Within the Ottoman Context**

Before discussing the context of how the modernization in the field of law was shaped in the Ottoman Empire, first, a conceptual enquiry is required. In this sense, the relationship between *Shari’a*, *fiqh*, Sultani law (*qanun*) and *örfi*, customary law, will be enlightened within the Ottoman context in the following

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<sup>123</sup> Ibid, pp. 142-143

<sup>124</sup> Rubin, Avi, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification, pp. 840

section. In view of that, this section aims to draw attention to some of the discussions in the literature of Ottoman studies. In the light of conceptual enquiry, another aim of this section is to give the reader brief information about the basis of the Ottoman classical legal system, especially the Hanafi school of law and its functioning within the state mechanism. It will be a good starting point to make an entrance into seeing where legal authority resided in the classical age of the Ottoman Empire. With the latter point in mind, some prominent actors who contributed to the shape of the legal system, like the institution of mufti as an implementer, interpreter and observer of *Shari'a*, will also be a matter of discussion.

*Shari'a*, *Qanun* and *örf* formed the main components of the Ottoman legal thought. In this section, I will engage in the conceptual enquiry of these terms. To begin with, the distinction between "*fiqh*" and "*Shari'a*" has to be clarified. In accordance with the definition found in the Encyclopedia of Islam compiled by the Religious Affairs Administration, the word *Shari'a* derived from "*şer*" (pl. *şerai*), which means to clarify. Along with that, *Shari'a* signifies to move towards a certain road or direction.<sup>125</sup> For the sake of a clarified definition, the word *Shari'a* means "clearly-defined way", highway, situated on a main road. Within the Muslim discourse, it refers to the rules and regulations which governed the lives of Muslims, and the origin of these regulations, on the other hand, predicated upon the *Qur'an* and *Hadith*.<sup>126</sup> In addition, *Shari'a* (pl. *shara'i*) pertains to a rule of law, or a system of law, or is regarded as the totality of the message of a particular prophet.<sup>127</sup>

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<sup>125</sup> Talip Türcan, "Şeriat", TDV İslâm Ansiklopedisi, <https://islamansiklopedisi.org.tr/seriat#1>

<sup>126</sup> Clifford Edmund Bosworth vd., ed., *San - Sze*, New edition, The Encyclopaedia of Islam 9 (Leiden: Brill [u.a.], 1997). pp. 321

<sup>127</sup> Ibid, pp. 322. For detailed information, how *Shari'a* is studied and approached in the literature of Islamic law please look at the second chapter.

Another notion which has to be dwelled upon is “*urf*” (*örf*)<sup>128</sup>, usually translated as custom in English. According to İnalçık, ‘*örf* is defined as the sultan’s authority of enacting laws outside the area of *Shari’a*’. İnalçık argues that the Ottoman State developed a law system beyond *Shari’a* and that it was the principle of *örf* which enabled the development of such a system, outside the sphere of *Shari’a*, called *örf-i sultani*.<sup>129</sup> *Örf-i sultani* is not evaluated as independent from *örf-i adat*. It would become a *qanun* through the incorporation of the sultan’s will into *örf-i adat*, where justification was grounded on the sultan’s will.

The essence of İnalçık’s argument also underlines that the principle of *istislah*, which takes into consideration the welfare of the Muslim community and advocates growth, became an important tool used by the *ulema* to expand the scope of *Shari’a*. Furthermore, according to İnalçık, the problems which *Shari’a* could not find solutions were an indication of the fact that the institution of fetva was inadequate.<sup>130</sup> It also refers to the need for other sources of tools to produce legal opinions. The justification of “*örf*” was predicated upon the welfare of the community and the principle of justice.<sup>131</sup> *Usul al fiqh*, on the other hand, as emphasized in the second chapter, means knowing and understanding something

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<sup>128</sup> There are two Arabic terms associated with the word custom: *urf* (pl. a ‘raf) and *ada* (pl. *ada’t*). According to Shabana, the difference between them derives from the rational justification of them. While the development of an ‘*urf*-based custom includes an element of “human volition” such as the prevalence of particular types of transactions due to their utility or convenience, an ‘*ada*-based custom regarded as a natural phenomenon that do not contain within itself human volition. See, Ayman Shabana, “Custom in the Islamic Legal Tradition”, ed. Anver Emon and Rumea Ahmed, The Oxford Handbook of Islamic Law, 2015

<sup>129</sup> Halil İnalçık, “Osmanlı Hukukuna Giriş: Örfi - Sultani Hukuk ve Fatih” in Kanunları”.”, *Ankara Üniversitesi SBF Dergisi*, sy 13 (1958). pp. 103

<sup>130</sup> Halil İnalçık, *Osmanlı’da Devlet, Hukuk ve Adâlet*, 2016. pp. 51-52

<sup>131</sup> İnalçık, “Osmanlı Hukukuna Giriş: Örfi - Sultani Hukuk ve Fatih” in Kanunları”. pp. 104

comprehensively, and is seen as the science of jurisprudence or religious law.<sup>132</sup> This term is also used to describe the knowledge the essence of which are the *Qur'an* and *hadith*.<sup>133</sup>

When we turn our attention to the legal mechanism of the Ottoman Empire, the predominance of the Hanafi school of law, as a *fiqh* madhhab, is beyond dispute as it was embraced and followed as the official school of law. Taking this into consideration, it is worth examining how the Hanafi school came into prominence and what can be stated about the legal culture of the Ottoman Empire during the classical age, as far as this dominance is concerned. According to Guy, the Ottoman Dynasty had embarked upon developing a distinctive branch within the Sunni Hanafi school of law since the early fifteenth century.<sup>134</sup> From his point of view, the establishment of the chief imperial juriconsult (*Shayk al Islam*) led to the compilation of the imperial canon to put the desired legal change into practice, as well as contributed to legal change.<sup>135</sup>

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<sup>132</sup> Lewis, Pellat, ve Schacht, C - G. pp. 886

<sup>133</sup> Hayreddin Karaman, "Fıkıh", YDC İslam Ansiklopedisi, <https://islamansiklopedisi.org.tr/fikih#1>

<sup>134</sup> Burak Guy, *The Second Formation of Islamic Law: the Hanafi School in the Early Modern Ottoman Empire*, Cambridge Studies in Islamic Civilization (New York, NY: Cambridge University Press, 2015). p. 3

<sup>135</sup> Samy Ayoub, "'The Sultān Says': State Authority in the Late Hanafi Tradition", *Islamic Law and Society*, sy 23 (2016): 239-78. pp. 247. See: *The second formation of Islamic law: the Hanafi school in the early modern Ottoman empire*, pp. 136. Guy in his study has the intention of drawing attention to at the imperial level the how conquest and incorporation of Arab lands into empire lead to articulation of the boundaries of learned hierarchy and that of the branch within Hanafi School whose members expected to follow. He especially focuses on Damascus at the provincial level. p. 4

Guy does not read the process of the adoption of the Hanafi school of law<sup>136</sup> in a narrow sense, like the act of state patronage, but places this adoption to a much broader context, emphasizing the fact that the Ottoman Dynasty engaged in the act of controlling the structures, doctrines and authorities of the school of law.<sup>137</sup> Furthermore, according to Guy, this development is also related to the emergence of the concept of dynastic law and he attempts to approach the institutional aspects of the relationship between ruling dynasties, dynastic laws and the pre-Mongol ideal of Islamic law, and how dynasties, within the scope of this thesis Ottoman Dynasty, in eastern Islamic lands dealt with conflicts between dynastic laws and their pre-Mongol perception of Islamic law as jurist law. Justification of these tensions, then, grounded on dynastic law.<sup>138</sup> By the same token, the study of Peters is also significant in terms of enlightening how the Hanafi madhhab revealed itself within the Ottoman context. Two main dimensions merit attention in his work.

The first one is how the Hanafi doctrine between the twelfth and sixteenth centuries transformed into an unequivocal body of rulings implemented by *qadis*. And the second one is how the Ottomans organized their relationship between the Hanafi madhhab and other madhhabs, especially after the conquest of non-Hanafi, mostly Arab regions, corresponding to the sixteenth century. According to his conclusion, the policy of the Ottomans gave rise to the emergence of the distinctive Ottoman Hanafism.

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<sup>136</sup> About why Hanafi School of law gained upper hand within Ottoman state mechanism See, Ahmet Yaşar Ocak, *Türkler, Türkiye ve İslam* (İstanbul: İletişim Yayınları, 2013). pp. 43-47

<sup>137</sup>Burak Guy “The Second Formation of Islamic Law: The Post-Mongol Context of the Ottoman Adoption of a School of Law”, *Comparative Studies in Society and History* 3, sy 55 (2013): 579-602. pp. 580

<sup>138</sup> Ibid, pp. 581. His use of the notion of dynastic law to state that dynasty and its ancestors regarded as the significant source of legitimacy.

In other words, the Ottoman Hanafism is regarded as an appropriate form which fulfilled the requirements of the bureaucratic essence of the Ottoman state, bringing a uniform and predictable legal doctrine. Moreover, what Peters suggests is that the state and the Hanafî jurists contributed to the development of a body of law limiting the discretionary power of the judge by attributing the Hanafî madhhab superiority over other madhhabs when cases were tried.<sup>139</sup> It is the latter aspect which constituted one of the essences of the Ottoman Hanafism.<sup>140</sup>

Another key point to mention at the end of this section is “*qanun*”. Heyd’s classification, at that point, comes to our rescue. According to him, four different meanings of *qanun* can be found within the Ottoman sources. Firstly, legal rules which contained prescriptions and rules of the religious law of Islam, named as *kânûn-i şer’*, *kavânin-i şer’iye*. Secondly, statute and regulation enacted by the sultan. Thirdly, collections of regulations related to certain matters, named as *qanunname*. And finally, whole body or institution of the secular state law contrary to *Shari’a*, *şer’a ve kânûna muhalif*.<sup>141</sup> Within the state mechanism, the promulgation of *qanun* was justified through *Shari’a*. To clarify, according to Barkan, when the sultan attempted to enact a *qanun*, it was argued that this novelty did not oppose *Shari’a* and was in line with it.<sup>142</sup>

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<sup>139</sup> Rudolph Peters, “What Does it mean to be official madhhab? Hanafism and the Ottoman Empire?” in Bearman, Peters, ve Vogel, *The Islamic school of law*. pp. 154. See also Uriel Heyd, “Some Aspect of the Ottoman Fetva”, *Cambridge University Press* 32, sy 2 (1969): 35-56. In Ottoman towns which had non-Hanafî population, non-official muftis belong to other schools of law were allowed to degree issue fatwa in accordance with their traditions. pp. 56

<sup>140</sup> Peters, “What Does it mean to be official madhhab? Hanafism and the Ottoman Empire?” pp. 147.

<sup>141</sup> Uriel Heyd ve ed. by V.L. Menage, *Studies in Old Ottoman Criminal Law* (London: Oxford University Press, 1973). pp. 167-68

<sup>142</sup> Ömer Lütfi Barkan, “Osmanlı İmparatorluğu Teşkilat ve Müesseselerinin Şer’iliği Meselesi”, *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* X, sy 3-4 (1945). pp. 211. “...Padişahların

Unlike some scholars who evaluate the Ottoman legal system with an extensive emphasis on *Shari'a*<sup>143</sup>, Barkan recognizes the existence of örf-i hukuk separate from *Shari'a*.<sup>144</sup> It must be highlighted that the notion of *qanun* was in circulation before the Ottomans. For instance, in the writings of Al-Ghazali, according to Sariyannis, it was stated that the faqih knew *qanun al siyasa* (political and administrative norms). By the same token, Ibn Taymiyya underlined *siyasal al-shariyya*. However, what made the Ottoman *qanun* different was due to its connection to the eponymous dynasty that was the main characteristic of Ottoman statesmen.<sup>145</sup>

All things considered, in an attempt to evaluate what is explained throughout this section, it seems reasonable to express, by following the conclusion of Koç, örf-i sultani hukuk (custom and sultan's will) used religious law (*fiqh*) as the source of legitimization, and religious law provided customary sultanic law with a base on which the sultan could ground his law, but this does not mean that the relationship between *qanun* and religious law always followed a compromising pattern.<sup>146</sup>

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*iradelerinin kayıtsız ve şartsız bir kanun haline geçmekte olduğu zamanlarda bile. Osmanlı İmparatorluğunda her yenilik «şer'i şerife uygun» kaydıyla icra edilmiştir “*

<sup>143</sup> Like Ahmet Akgündüz.

<sup>144</sup> Also see, Coşkun Üçok, “Tanzimat’tan Önce Osmanlı Devleti’nde Hukuk”, içinde *Tanzimattan Cumhuriyete Türkiye Ansiklopedisi* (İletişim Yayınları, 1985). Köprülüoğlu evaluated within this context. Also, Aydın supports this view. See: Mehmet Akif Aydın, “Kanunnameler ve Osmanlı Hukuku’nun İşleyişindeki Yeri”, *The Journal of Ottoman Studies*, sy XXIV (2004). pp. 40; Also Ahmet Mumcu, *Osmanlı Devleti’nde Siyaseten Katl*, Ankara 1985 2bs. Birey ve Toplum yay. pp. 40-42

<sup>145</sup> Marinos Sariyannis ve Ekin Tuşalp Atıyas, *A History of Ottoman Political Thought up to the Early Nineteenth Century*, Handbook of Oriental studies = Handbuch der Orientalistik. Section One, The Near and Middle East, Volume 125 (Leiden ; Boston: Brill, 2019). pp. 441

<sup>146</sup> Yunus Koç, “Erken Dönem Osmanlı Hukuku: Yaklaşımlar, Temel Sorunlar”, *Hacettepe Üniversitesi Edebiyat Fakültesi Dergisi* 16, sy Özel (1999): 115-26. pp. 124. See: Ömer Lütfi Barkan, “Osmanlı İmparatorluğu Teşkilat ve Müesseselerinin Şer’iliği Meselesi”. pp. 213

Scholars like Ahmet Akgündüz, on the other hand, argue that the Ottoman legal system developed within the sphere of *Shari'a* and did not act outside of it, and that the Ottoman law did not contradict with *Shari'a*. Furthermore, it is underlined that the Ottoman legal system was predominated by *Shari'a*.<sup>147</sup> Contrary to this view, İnalçık and Hassan came up with different views. As stressed above, İnalçık emphasizes that the reign of Mehmet II was the turning point in terms of the growth of *örf-i law* to attain superiority with the absolute authority of the sultan.<sup>148</sup>

Hassan's view is shaped in opposition to İnalçık and Akgündüz to a considerable degree, but seems closer to İnalçık in terms of emphasizing *örf*. A closer look at his evaluation of *örf* is reasonable and worthy. The main concern of Hassan is to reveal that *örf-i sultan* was based on *tore* and *yasag*. To clarify, the process of *tore* and *yasag* constituted the precondition of ideology and law, which were embodied in *qanun* and *qanunname*. What the state did was transform, modify and change this composition and supplement it with *Shari'a*.<sup>149</sup> According to the conceptualization of Hassan, *tore* and *yasag* were incorporated into the state mechanism where *Shari'a* played the role of syringe.<sup>150</sup>

Consequently, it can be argued that within the state mechanism and the mentality of the Ottoman Empire, *Shari'a* constituted a significant place in terms of

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<sup>147</sup> Ümit Hassan, *Osmanlı: Örgüt, İnanç, Davranış'tan Hukuk, İdeoloji'ye*, 1. baskı, Araştırma-inceleme dizisi 111 (Cağaloğlu, İstanbul: İletişim, 2001). pp. 47

<sup>148</sup> İnalçık, *Osmanlı'da Devlet, Hukuk ve Adâlet*. pp. 41

<sup>149</sup> Hassan here emphasized the changing aspect of “yasa” in contrast to Zeki Velidi ToganTogan who regards “Türe” stable throughout the years and who directly regards türe as *örf-i law*.

<sup>150</sup> Hassan, *Osmanlı: Örgüt, İnanç, Davranış'tan Hukuk, İdeoloji'ye*, pp.11. Hassan makes classification in his study. By distinguishing scholars of Islamic law who embraced approach which put emphasize on *örf* and those who concern themselves with showing that ottoman law and especially the acts of sultan as his regulations did not contradict with *Shari'a*. According to supporter of this view, Ottoman law and *shari'a* always followed compromising pattern.

enlightening and discovering the main ground of the Ottoman legal system, as well as the philosophy of legal thought within the Ottoman context. Despite the difficulty, discussions surrounding *Shari'a*, *fiqh*, *qanun* and customary law must be comprehended to put an end to these controversies. It was the legal aspect we concerned ourselves in this section. In the final analyses, it is difficult to reject the existence of a separate system outside *Shari'a*, but that does not mean that this sphere totally excluded or dissociated itself from the sphere of *Shari'a*, or that it reflected it completely.

To put it another way, *Qanun*,<sup>151</sup> which consists of regulations, decrees and edicts, was seen different from *Shari'a*, according to Imber.<sup>152</sup> However, the legitimacy of such regulations as well as the underlying public interest grounded on *Shari'a*. In addition to what is claimed, another dimension as far as the essence of the Ottoman legal system is concerned is the significance of the notion of "*fiqh*". The essence of the Ottoman legal system, to a considerable degree, was associated with the implementation of a part of the *Hanefi fiqh*.

### **3.3 Codification Acts during the Late Ottoman Era: Ahmet Cevdet Pasha and the Preparation of Mecelle**

The promulgation of the Edict of Gülhane on 3 November 1839 constituted one of the points signifying change in state mentality in terms of emphasizing the importance of making new laws, as well as the dominance of Islamic law and its

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<sup>151</sup> See, view of Gerber on *qanun*: Haim Gerber, *State, Society, and Law in Islam: Ottoman law in comparative perspective* (Albany, N.Y: State Univ. of New York Press, 1994). As a cultural document the *kanun* is, therefore, a complex document to interpret. The fact that it enacts the *hudud* as state law poses in itself an almost insoluble puzzle. It is a confirmation of the *shari'a* but also, in a sense, a violation of it, inasmuch as the *shari'a* is God-given. pp. 63

<sup>152</sup> Colin Imber ve Murteza Bedir, *Şeriatın Kanuna: Ebussuud ve Osmanlı'da İslami Hukuk* (İstanbul: Tarih Vakfı Yurt Yayınları, 2004). pp. 30. "*Dini bir topluluğun hukuku olan şeriatın farklı olarak kanun, imparatorluğun hukukuydu*".

precepts.<sup>153</sup> As İnalçık argues, the Tanzimat marked the attempts of the Ottoman State to reestablish itself with new principles.<sup>154</sup> Furthermore, this edict contributed to the development of the idea of Ottomanism, the essence of which was the equality of both Muslim and non-Muslim Ottoman subjects in the sphere of law.<sup>155</sup> In addition, The Reform Edict of 1856 was also pivotal in terms of contributing to the transformation in the legal and philosophical ground of the Ottoman State by giving equality to Christians living in the empire.<sup>156</sup>

The codification of *Shari'a* in the middle of the nineteenth century, which is another phenomenon of the age worth mentioning, led to its transformation from jurist law into statutory law.<sup>157</sup> Hereby, it seems that new sense of law was began to be associated with the idea of codification, providing state with a tool to determine legal standards which was one of the main concerns of the state as part of its centralization policies. Such attempt taken in the realm of law can be read as the process of putting codified law of the state forward. The following section will focus on the context in which this codification act took place.

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<sup>153</sup> ... bundan böyle Devlet-i Aliye ve Memalik-i mahrusemiz'in hüsn-i idaresi zımında bazı kavanin-i cedide vaz' ve te'sisi lazım u mühim görünerek...; kavanin-i şer'iyeye mücerred din ü devlet ve mülk ü milleti ihya için vaz olunacak olduğundan canib-i hümayunumuzdan hilafına hareket vuku bulmayacağına ah u misak olunub; cümleye ma'lum olduğu üzere Devlet-i Aliyemizin bidayet-i zuhurundan beri ahkam-ı celile-i Kur'aniyye ve kavanin-i şer'iyeye kemaliyle riayet olduğundan. From the Edict of Tanzimat.

<sup>154</sup> Halil İnalçık, "Tanzimat Nedir?", In Mehmet Seyitdanlıoğlu ve Halil İnalçık, *Tanzimat: değişim sürecinde Osmanlı İmparatorluğu*, 1. baskı, Phoenix Türkiye Tarih dizisi (Kızılay, Ankara: Phoenix, 2006). pp. 14; Zafer Toprak, From Plurality to Unity Anna Frangoudaki, ed., *Ways to Modernity in Greece and Turkey: Encounters with Europe; 1850 - 1950*, Library of European Studies 1 (London: Tauris, 2007). pp. 32

<sup>155</sup> Seyitdanlıoğlu ve İnalçık, *Tanzimat*. pp. 29

<sup>156</sup> Kemal H. Karpat, *The politicization of Islam: Reconstructing Identity, State, Faith, and Community in the Late Ottoman State*, Studies in Middle Eastern history (New York: Oxford University Press, 2001). pp. 76

<sup>157</sup> Aharon Layish, "The Transformation of the Shari'a From Jurist's Law to Statutory Law in the Contemporary Muslim World", *Die Welt des Islams, New Series, Brill* 44, sy 1 (2004). pp. 96

Within this context, particular attention will be paid to the activities of Mecelle Cemiyeti and Ahmet Cevdet Pasha. Before making sense of the discussions that took place in the sphere of *fiqh*, firstly, this section aims to enlighten what sort of legal discourse was developed by the Ottoman State on the verge of modernity, and what the main rationale lying in the minds of the Ottoman statesmen was, as far as the transformation of the legal field is concerned. The following section will be a kind of bridge to the next chapter by examining the place of *fiqh*, which constituted the source and essence of Islamic law, in the modernization of the legal field and it will be elucidated in two dimensions: the state and the *ulema*, men of religion.

According to Toprak, from the French Revolution onwards, the idea of a direct contact with the emerging citizen prepared the ground on which the modern state based its administration by embracing and promoting the rule of law, the essence of which was constituted through predictability in the realm of law. Therefore, the mentality of the modern state was shaped by the intention of administering through “consent” and “cooperation”. In doing so, according to Toprak, the state aimed to remove the identity based on community and emphasize the notion of individual instead.<sup>158</sup> To put it another way, given that one of the main concerns of the Tanzimat men was to save the empire by incorporating the non-Muslim population into the new Ottoman identity and ideology, rather than supporting the independence movements, such as the Greek and the Balkan Uprisings, that non-Muslims pursued under the impact of nationalist movements, the nineteenth century Ottoman State took steps to put this idea into practice by aiming to bring unification in the sphere of law.<sup>159</sup>

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<sup>158</sup> Toprak From Plurality to Unity Frangoudaki, *Ways to Modernity in Greece and Turkey*. p. 28

<sup>159</sup> İlber Ortaylı, *Osmanlı'ya Bakmak: Osmanlı Çağdaşlaşması*, 1.baskı (İstanbul: İnkılâp, 2016). pp. 225

Especially, what must be underlined and is worth searching is that the Civil Code, the Napoleonic Code, which is the product of lawyers who lived under and respected Louis XV and Louis XVI, had an enormous influence throughout Europe. The Ottoman Empire was among the ones that remained under the influence of this code.<sup>160</sup> Thus, the Tanzimat period had witnessed the reception of the European law to a considerable degree, and as a result, making sense of how the laws originating from Europe were adopted by the Ottomans is a precondition to understand the Ottoman experience of reform in the legal field. Unearthing the traces of the Ottoman experiences of law is not an easy task since the modern perception of religion and Islam as a sectarian force constituted an impediment in terms of making sense of how the imperial nature and the Ottoman legal culture were based on Islam. Akarlı criticizes that the communitarian notion of religion is inadequate to understand the Ottoman legal experience and legal culture. What Akarlı proposes is worth mentioning as far as the aim of this thesis is concerned. He considers “law” to be extremely important not only because of the role it played in maintaining order, but also corroborating the fluid social and political networks it encompassed.

His main concern is to shed light on how law worked in different contexts as a means of creating order, legitimacy and continuity in the pre-modern empires.<sup>161</sup> By the same token, how the justification of law was established in modern empires is a significant question to be considered without reducing the legitimacy of the source law exclusively to the abstract power of the ruler, but with an emphasis on the changing aspect of the legislative process.

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<sup>160</sup> Toprak From Plurality to Unity In Frangoudaki, *Ways to Modernity in Greece and Turkey*. pp. 27

<sup>161</sup> Engin Deniz Akarlı, “The Ruler and Law Making in the Ottoman Empire,” In Jeroen Frans Jozef Duindam vd., ed., *Law and empire: ideas, practices, actors, Rulers & elites*, volume 3 (Leiden: Brill, 2013). Duindam vd. pp. 87-88

This thesis, by taking this argument into consideration, aims to discover the different meanings attached to *fiqh* by the *ulema*. The early nineteenth century had witnessed a challenge to the legal system as a consequence of the new conditions. This brought a new perception of law, so that it was evaluated within the context of a means of shaping society, rather than just a tool to draw the legitimacy of the regime and to balance different interests, and Akarlı conceptualizes it as the “reification of the state” symbolized by the ruler.<sup>162</sup> This process of change was called the rise of the interactive modern state.<sup>163</sup> From Toprak’s point of view, the uniform Civil Code which provides integration and national or imperial cohesion, is paramount of importance for the interactive modern state, as without such a code it would be difficult for the state to maintain its strength vis-a-vis its citizens. Therefore, while the significance of the Tanzimat Edict lied in expressing the absence of written laws as an official tool accessible to the public, the necessity to enact new written laws also underlined that loyalty to *Shari’a* would be observed.<sup>164</sup> It can be rightly argued, then, that the nineteenth century was an important turning point in a sense that many spheres of life were legally redefined by bringing them into the orbit of state law than religion.<sup>165</sup>

Studies engaged in exploring how the Ottoman government used the legal framework on the verge of modernization to identify the roles and the breadth of the government in order to seek a more nuanced view of the transformation the

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<sup>162</sup> Ibid pp. 89

<sup>163</sup> Ottoman Empire on the eve modernity had made recourse to various legitimation means, for detailed study took these means into consideration. See, Selim Deringil, *The Well-Protected Domains: Ideology and the Legitimation of Power in the Ottoman Empire 1876-1909*, Paperback ed (London: Tauris, 1999).

<sup>164</sup> Toprak, Z., “From Plurality to Unity: Codification and Jurisprudence in the Late Ottoman Empire Frangoudaki, *Ways to Modernity in Greece and Turkey*. pp. 32- 33

<sup>165</sup> Ibid, pp. 37

empire experienced.<sup>166</sup> While doing so, it is not reasonable to assume a total rupture from *fiqh* as far as the transformation of the legal sphere or the reduction in the number of *Shari'a* courts is concerned. Rather, the main concern was to achieve standardization, centralization and rationalization in the realm of law.<sup>167</sup> In the following enquiry, a modest attempt will be taken to enlighten the process of standardization, centralization and rationalization within the late Ottoman context.

If we attempt to continue with the underlying reasons for the legal reform during the late Ottoman era, it will be appropriate to heed the context in which the Ottoman Empire maintained its rule. Then, the status of the religious establishment that occupied a considerable place within the sphere of legal system and was responsible for giving legal opinions, which made contributions and took important decisions as well, should be mentioned. To summarize briefly, as we have mentioned, the men of religion remained inadequate and unable to advise on current affairs since their traditional religious education was not sufficient for them to understand and interpret the new kinds of problems the empire had to deal with in the nineteenth century.<sup>168</sup> As a place where the education of Islamic jurisprudence had been given, madrasas constituted the essence of the knowledge the *ulema* had received,<sup>169</sup> and the deterioration<sup>170</sup> of

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<sup>166</sup> See, Kent F. Schull, M. Safa Saracoglu, ve Robert W. Zens, ed., *Law and Legality in the Ottoman Empire and Republic of Turkey* (Bloomington, Indiana: Indiana University Press, 2016). p. 3

<sup>167</sup> Schull, Saracoglu, ve Zens. Ibid, p. 5

<sup>168</sup> Carter V. Findley, *Turkey, Islam, Nationalism, and Modernity: a History, 1789-2007* (New Heaven ; London: Yale University Press, 2010). pp. 62

<sup>169</sup> Ekmeleddin İhsanoğlu, "The Madrasas of the Ottoman Empire", *Foundation for Science and Technology and Civilization*, Nisan 2004, <https://muslimheritage.com/uploads/madrasas.pdf>. p. 2

<sup>170</sup> Ibid, pp. 15; Also see: Yılmaz Kurt, *Koçi Bey Risalesi*, 4. bs (Ankara: Akçağ, 1998). pp.153. the decline in the quality of the madrasa was not a new phenomenon. It was already towards the

this institution undoubtedly had a direct impact on the *ulema* and their approach and interpretation of new cases and problems.

Given the fact that *muftis* and *qadis*, men of religious knowledge, *ehl-i ilm*, whose opinions were respected and regarded as a significant branch of the Ottoman bureaucracy,<sup>171</sup> graduated from these institutions, their qualifications declined and their ability to make any interpretation pertaining to new cases constituted a problem in terms of formulating solutions. Regarding the latter, another problem faced during this century was the absence of clear law texts which could help the judges.<sup>172</sup> It is reasonable, then, to assume that the absence of uniform law texts made it difficult for the legal experts to adjudicate on cases, along with their inadequate education in madrasas. It seems that it was necessary to rescue Islamic law from this complexity and ambiguity arising from various views found within *fiqh* texts.

Hence, it was felt on the side of the state that it was necessary to rationalize and naturalize Islamic practice by standardizing and regulating the *şer'i* rulings.<sup>173</sup> Despite the degeneration of the *ulema*, their influence did not completely disappear. The domination of *Shari'a* as well as the *ulema* could still be observed and felt in this century. In other words, legislative authority in

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end of sixteenth century that deterioration of them was articulated. *İmdi ma'lum-ı hümayun ola ki şer'i şerifin bekası ilimledir. Ve ilmin bekası ulema iledir ... İntizam-ı hal-I ulema, mühimmat-ı din ü devlettir. Bu esnada gayet muhtell ve müşevveş olub halleri diger-gun olmuştur*

<sup>171</sup> Michael M. Pixley, "The Development and Role of the Şeyhülislam in Early Ottoman History", *Journal of the American Oriental Society*, 9, sy 1 (1976): 89-96. pp. 90

<sup>172</sup> Ahmet Şimşirgil, Ekrem Buğra Ekinci, ve Turkey, *Ahmed Cevdet Paşa ve Mecelle* (İstanbul: KTB Yayınları, 2008), [http://books.google.com/books?id=o\\_xNAQAIAAJ](http://books.google.com/books?id=o_xNAQAIAAJ). pp. 50

<sup>173</sup> Deringil, *The Well-Protected Domains*. pp. 50; it is worth also to mention that during the reign of Abdülhamid II Shari'a courts was evaluated within the context of civilizing mission in the Ottoman provinces in terms of legal standardizing legal practice. With Deringil's words: "Civilizing" influence of religious courts under the Ottoman administration "

particular lay in *Shari'a* which was expected to regulate everything.<sup>174</sup> Legal experts, in this sense, acted as a sort of legal advisor to the ruler. Akarlı's summary is worth quoting to better explain their position within the apparatus of the government:

Being part of a distinct and distinguished branch of the government provided them with an esprit de corps that bound them closer together—despite their intellectual differences, professional rivalries and jealousies. Compared to other government officials, legal experts (whether judges, jurists or teachers) enjoyed certain privileges in deference to the traditional esteem in which their profession was held and the autonomy associated with it. Nevertheless, their career shaped them as loyal bureaucrats committed to the causes of the state. They influenced Ottoman elite culture and were also influenced by it.<sup>175</sup>

Furthermore, the circle of *ulema* also had to deal with rivalries within themselves. Most of the men within this circle had a monopoly over the Muslim tradition and Muslim learning, and some were an obstacle to reform. This probably derived from the negative meaning some circles of the *ulema* associated with the notion of change and innovation. For example, adaptation from non-Muslim laws and codification constituted two dimensions of legal reform in the nineteenth century, but this was also a matter of opposition on the side of the *ulema*.<sup>176</sup> In order to better clarify the point of codification, we can give an ear to Ahmet Cevdet Pasha, who was appointed as the chairman of the draft commission responsible for preparing Mecelle. According to him, adopting laws from other nations is disastrous for all the community. Following this path is not appropriate and the circle of *ulema* criticize those who follow foreign (*alafranga*) ideas.

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<sup>174</sup> M. A. Ubicini, *Letters on Turkey: An Account of the Religious, Political, Social, and Commercial Condition of the Ottoman Empire; The Reformed Institutions, Army, Navy, andc. andc.*, trans. by Lady Easthope (London: John Murray, 1856). pp. 126: “The *örf* can maintain or abolish, at will, the regulations of the *Kanoun*, but it cannot under any circumstances take the place of the *Cher'iat*, which enjoys an authority paramount to every other. The Turks have an admirable phrase to express this idea; they say, “*Kheriatin kesdegui parmak adjitmaz; the finger cut by the Cher'iat feels no pain.*”

<sup>175</sup> Akarlı, “The Ruler and Law Making in the Ottoman Empire,” Duindam vd., *Law and empire*. pp. 98

<sup>176</sup> Findley, *Turkey, Islam, Nationalism, and Modernity: A History, 1789-2007* pp. 97

French expect us to inform about what our law is...<sup>177</sup> In terms of the internal reasons that prepared the ground for the Mecelle<sup>178</sup> modernization of the legal field with the codification of *Shari'a*, examining *Esbab-ı Mucibe Mazbatası*, which was prepared by Mecelle Cemiyeti on 29 March 1869 and presented to Meclis-i Vükela, gives us clues. The point underlined in this *mazbata* is that *ilm-i fıkıh* contained many opinions<sup>179</sup> and it was difficult to find solutions to cases in courts in the face of diversity of opinions.<sup>180</sup> This difficulty was due to the fact that it was no longer possible to give legal opinions solely on the basis of general

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<sup>177</sup> Ahmet Cevdet Paşa, *Tezâkir 1-12*, c. 2, 22 (Ankara: Türk Tarih Kurumu Basımevi, 1953). pp. 63. *Halbuki bir milletin kavanin-i esasiyesini böyle kalb-ü tahvil etmek ol milleti imha hükmünde olacağından bu yola gitmek caiz olamayıp ulema güruhu ise o makule alafranga efkara sapanları tekfir ederderdi. Frenkler dahi " Kanununu ne ise meydana koyunuz. Biz de görelir; ve teba'amıza bildirelim" derler idi.*

<sup>178</sup> Mecelle-i Ahkam-ı Adliye, consist of sixteen civil code books. It was came into force between 1868 and 1876. During the compilation of it, Hanafi *fiqh* was benefitted, but other madhhabs also given place. In the preperation of it, the method of *tahayyur*, preference, was followed. It was also translated into French by Demetrius Nicolaidis; translated into Greek by Kontantinos Photiadis and Ionnis Vithynos.

<sup>179</sup> Şimşirgil, Ekinci, ve Turkey, *Ahmed Cevdet Paşa ve Mecelle*. pp. 76. Three fields covered by *ilm-i fiqh*. *Münakehat* (family), *mu'amelat* (transaction), and *ukubat* (crime and punishment). *Madde 1: İlm-i Fıkıh mesail-i şer'iyeyi amelıyeyi bilmektir: Mesâil-i fikhiyye ya emr-i âhirete teallük eder ki ahkâm-ı ibâdât- dur veyâhud emr-i dünyâya teallük eder ki münâkehat ve muamelât ve ukûbât kısımlarına taksim olunur ..... Elhâsıl inşân medeniyyü't-tab' olduğundan, sair hayvanât gibi münferiden yaşamayıb, bast-ı bisât-ı medeniyyet ile yekdiğere mu'âvenet ve müşarekete muhtâcdır. Hâlbuki her şahs, kendüye mülayim olan şeyi taleb ve müzâhim olan şeye gazâb eder olduğundan, beynlerinde adi ü nizâmın halelden mahfuz kalması için, gerek izdivaç ve gerek mâ-bihi't-temeddün olan te'âvün ve iştirak hususların da bir takım kavânîn-i müeyyide-i şer'ıyyeye muhtâc olur ki evvelkisi fikhın münâkehat kısmı ve ikincisi muamelât kısmıdır ve emr-i temeddünün bu minval üzere payidar olması için ahkâm-ı ceza tertibi lâzım gelib, bu dahi fikhın ukûbât kısmıdır.*

<sup>180</sup> Şimşirgil, Ekinci ve Turkey. pp. 71 It was difficult to give legal opinion by relying exclusively on *küllî kadeler* which were *Quran*, *Sunna*, *icma* and *qıyas*. In addition to these sources, there were also evidences called as "*fer'i delil*", within it *custom (örf)*, *istihsan* and *maslahat* can be counted. The science of *usul al fiqh* depicted as the way or methodoolgy followed by people known as *müctehid* the main task of whom is to formulate legal rules, called as *fıru-i fıkıh*, from these sources. This led Islamic legal system to gain casuistic character. For the detailed explanation of these notions, please see: Chapter II of this thesis.

principles (*külli kaideler*)<sup>181</sup> (*Quran, Sunan, ijma* and *qiyas*), unless there was a clear opinion or view on certain cases in *fiqh* books. These were not sources of opinion, but evidences that had to support the opinion given by those who performed legal reasoning, *ijtihad*.<sup>182</sup> So much so that there was deprivation in terms of finding qualified people in the field of Islamic science.<sup>183</sup> Another dimension which the commission members took into consideration was their belief regarding the need for *fiqhi* cases to update themselves as the time changed.<sup>184</sup> Although at first glance it seems there was a negative attitude towards *fiqh*, when we pay attention, we can see that the source of the problem was not *fiqh* itself, but the task of choosing from *fiqh* which contained various opinions.

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<sup>181</sup>See, Osman Kaşıkçı, *İslam ve Osmanlı Hukukunda Mecelle* (İstanbul: Osmanlı Araştırmaları Vakfı (OSAV), 1997). Külli kaideler by themselves not enough to give opinion, so they had to be supported by benefitting from the books of *fiqh* with divine evidence. But it is difficult to talk about presence of consensus among lawyers pertaining to this issue some advocated the adequacy of külli kaideler alone to draw opinion.

<sup>182</sup> Şimşirgil, Ekinci ve Turkey, *Ahmed Cevdet Paşa ve Mecelle*. pp. 73 In this regard, külli kaideler (general principles) evaluated within the context of evidence, *edille-i erbaa*, the meaning of which fourth evidence (*Quran, Sunan, İcma* and *Qiyas*). Accordingly, the opinion of an act must be predicated upon one of the evidences, such as *Quran, Sunan, İcma* and *Qiyas*. These evidences by themselves not enough to give opinion.

<sup>183</sup> Ahmet Akgündüz, *Karşılaştırmalı Mecelle-i Ahkam-ı Adliye (Mecelle Ta'dilleri ve Gereçekleriyle Birlikte)* (İstanbul: Osmanlı Araştırmaları Vakfı, 2013). pp. 48. During preparation of Mecelle's provisions, which found in the introduction part of it. Ibn Nüceym's work named *el-Eşbâh ve'n-Nezâir* was benefitted. The rationale underlying such action might be derived from the concern of presenting Mecelle as if it did not contradicted with the Islamic law. The legal maxism of Nüjaym's was utilized because it was believed that his make positive contribution in terms of faciliating the knowledge of particular cases within the Hanafi School. See, especially Samy Ayoub, "We're not in Kufa Anymore: The Construction of Late Hanafism in the Early Modern Ottoman Empire, 16th-19th Centuries CE". pp. 95

<sup>184</sup> Ibid pp. 42 *İlm-i fıkıh ise, bir bahr-i bi-payan olub bundan dürer-i mesail-i lazımeyi ıstınbat ile hall-i mes'eşe edebilmek hayliden hayli maharet ve melekeye mevkuftu. Alel husus mezheb-i Hanefî üzere tabakat-ı mütefavitede pek çok müctehidler gelüb ihtilafat-ı kesire vuku' bulmuş ve fikh-ı Hanefî fikh-ı Şafî gibi, tenkih edilemeyüb pek müteşaib ve müteşettit olmuştur. Kaldı ki tebedüil-i a'sar ile örf ü adete mübtteni olan mesa'il-i fikhîye dahi tebeddül eder.*

Cevdet Pasha, arguing that new laws to be implemented in the *nizamiye* courts and courts of cassation should be enacted, also underlined the necessity of enacting a new civil code in his Maruzat. He also problematized the issue of law by drawing attention to the fact that non-Muslims within the Ottoman Empire no longer supported the trial of their cases in *Shari'a* courts. What non-Muslims desired was the translation of French laws into Turkish and the trial of their cases with these translated laws in *nizamiye* courts.<sup>185</sup> It seems that the problem encountered had two dimensions, one of which was the problem faced by non-Muslims living within the Ottoman realm, and the other was the concern of the state and the *ulema* to cope with the difficulty represented by *fiqh*, Islamic law. Also, what Cevdet Pasha underlined was that these regulations and laws had to be predicated upon Islamic (*şer'i*) base, since that was the essence of the state.<sup>186</sup> However, opposing opinions were also expressed in a sense that some advocated the adaptation of French laws.<sup>187</sup>

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<sup>185</sup> Ahmet Cevdet Paşa, *Tezâkir 1-12*. pp. 62-63. *Günden güne Avrupalıların Memalik-i mahruse'ye tevarüdü ziyadeleşip al'el-husus Kırım muharebesi münasebetiyle fevk ade çoğaldı ve bu cihetle daire-i ahz ve ita vüs'at buldu. Dersaadet'te ruz-merre zuhura gelen de'avay-i ticareti bir mahkeme-i ticaret idare etmez oldu. Ecnebler mahakim-ı şer'iyyeye girmek istemez. Müslim aleyhinde gayr-i müslimin ve zimmi aleyhine mi. istemenin şهادeti şer'an isti'ma' olunmamak mes'elesi ise Avru pahlıların nazarına pek ziyade çarpar olduğundan hıristiyanların mahakim-i şer'iyyede muhakemelerine itiraz eder oldular. Bundan dolayı bazı zevat Fransa kanunları türkçeye tercüme olunup da mahakim-i nizamiyyede anlar ile hükm olunmak fikrine zahib oldular.*

<sup>186</sup> Ahmet Cevdet Paşa, *Maruzat* (İstanbul: Çağrı Yayınları, 1980). Maruzat 200, pp. 199-200 *Gerek Divan-ı Ahkam-ı Adliyye'de, gerek teşkili musammem olan İstinaf ve Bidayet mehakim-i nizamiyyesinde ve Ticaret mahkemelerinde ma'mulu'n- bih olacak kavanin ü nizamata yapılmak lazım gelüp, halbuki her devletde kavanin ü nizamatin esası "kot sivil" (=Code Civile), ya'ni hukuk kanunnamesi olup, Devlet-i Aliyye şer'i şerif üzre müesses olduğundan kavanin ü nizamatina kavanin-i şer'iyye esas olmak fikri öteden berü efkar-ı sahiha erbabı indinde arzu olunmakta idi. Sırf alafranga efkara tabi' olan mütefernicin ise "Code Napoléon" (un) tercümesiyle, aynen hakim-i Devlet-i Aliyye'de mer'iyyü'l icra olması fikrinde idiler.*

<sup>187</sup> Ibid, pp. 200-201. *Diğer bir kısmı ise Fransa Kanunnamesi'ni tercüme ile mehakim-i nizamiyyede düstur'ul-amel tutulması fikrinde idi...Fransız politikasına hadim olanlar hep bu fikr-i sakimde idiler.*

In terms of searching for the underlying reasons of the codification act, instead of focusing solely on the problems or barriers created by *fiqh*, impact of external factors can also be mentioned. It is appropriate to discuss these factors in the light of the challenge of modernity and the struggles of the Ottomans to cope with it. Considering the importance of the nineteenth century as the supremacy of the West began to be felt significantly in the fields of economy, military and politics, the legal field also entered the orbit of the West<sup>188</sup> and especially the French Model was taken as an example in terms of reforming the sphere of law, like the Penal Code of 1858 and the Commercial Code of 1850.<sup>189</sup> The rivalry between Western powers on Ottoman lands was another challenge the empire had to deal with it.<sup>190</sup> Most of the states, such as France and Britain, pressured the Ottoman government to put an end to duality and ensure stability within the sphere of law<sup>191</sup>, and the French Ambassador Monsieur Bourée pressured the

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<sup>188</sup> Imber, Bedir, *Şeriatın Kanuna: Ebussuud ve Osmanlı'da İslami Hukuk*, pp. 48

<sup>189</sup> Roderic H. Davison, *Reform in The Ottoman Empire 1856-1876* (Princeton, N.J: Princeton University Press, 1963). pp. 98

<sup>190</sup> Ahmet Cevdet Paşa, *Tezâkir 1-12*. pp. 26 *Ol esnada umur-ı Devlet'i müşkilata düşüren başlıca bir sebep dahi İngiliz ve Fransız sefaretlerinin Dersaadet'te nüfuz yarışına çıkışmaları hususu idi. Şöyle ki İngiliz Elçisi Canning' ötedenberi Babiali'nin icraatına müdahale eylerdi. Fransızlar ise bu muharebede hayli şan kazanıp bu cihetle Fransa sefaretini nüfuzca ana tefevvuk daiyesine düşmüş idi. Reşid Paşa öteden beri İngiltere politikasına mail olup amın mekteb-i terbiyesinden çıkıp da sonra ana rakıyb olan Ali Paşa ile Fuad Paşa ise bütün bütün Fransa politikasına bağlandılar.*

<sup>191</sup> Şimşirgil, Ekinçi, ve Turkey, *Ahmed Cevdet Paşa ve Mecelle*. pp. 50; The narrative which focus on the fact that reform attempts of Ottomans towards rationalization of law was exclusively result of foreign pressure. Rubin criticizes this misconception and came up with novel model which emphasized the eclectic nature of the reform attempts in the legal sphere. Avi Rubin, *British Perceptions of Ottoman Judicial Reform in the Late Nineteenth Century: Some Preliminary Insights*, c. 37, 4 c. (Journal of the American Bar Foundation: Law & Social Inquiry, 2012). pp. 1009.

state to adopt French laws to be implemented in the courts of the Ottoman Empire.<sup>192</sup>

Ahmet Cevdet Pasha presented his concern in his petition, stating that in order to be freed from adopting French laws, the idea of composing books from *ilm-i fikh* was expressed during the reign of Abdülmecid and the commission, named *Cemiyet-i İlmiyye*, was established in relation to this suggestion.<sup>193</sup> This process of codification within the Ottoman context is important in terms of revealing the significance of the relationship between the state and jurists. Furthermore, taking the phenomenon of codification into consideration is one of the useful keys to discover how the challenge of modernity revealed itself in the realm of law and how the perception of *fiqh* was shaped. Also, the examination of such a relationship signifies whether there can be a relationship between modernity and the idea of codification.

As Peters<sup>194</sup> and Layish stated, the general tendency in the literature is that the intervention of the state in the sphere of law led to the loss of the independence of Islamic law, which was mostly regarded as jurist law. This means that, contrary to jurist law, where law was promulgated through jurists and legal experts independent of the shadow of the state, law was declared by the state or

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<sup>192</sup> Ahmet Cevdet Paşa, *Maruzat*. Maruzat 200, pp. 200: *O zaman elçilerin Dersaadetde en nüfuzlusu Fransa Elçisi Mösyö Bouréee olduğundan, Fransa Kanunlarının mehakim-i Devleti- Aliyyede ma'mülü'n-bih olması emelinde bulunmağla*

<sup>193</sup> “Fransa kanunlarına müracaat mecburi yetinden halâs için ilm- i fikihtan bir kitap yapıp ta üss-ü esası kavanin-i devlet olmak üzere meydana koymak eškâra cennet\* mekân Sultan Abdülmecit Han hazretlerinin ahd- i saltanatla rında meydana konu ve bir cemiyet-i ilmiye teşki olundu cited by Ebül’ula Mardin, *Journal of Istanbul University Law Faculty*, sy 13 (2011): 911-40. pp. 926;

<sup>194</sup> Rudolph Peters, “From Jurists’ Law to Statute Law or What Happens When the Shari’a is Codified?” 7, sy 3 (26 Eylül 2007): 82-95. pp. 90. Peters define *Shari’a* under three categories: sharia as religious law, *shari’a* as jurist law and as codified *Shari’a*. He does not hesitate to talk about total domination of the state in the realm of Shari’a, but rather advocating the middle way between *Shari’a* and the state as far as the relationship among them concerned. For example, the sultan was obliged to determine which text the qadi must follow while *qadi* adjudicating the case. pp. 87

the national-territorial legislature. Consequently, Layish argued that the legislative authority possessed by *fuqaha*, experts of law, had diminished as a result of the codification of *Shari'a*, because now the state came to the fore.<sup>195</sup> At that point, it seems that codification provided the state with the possibility or authority of controlling legal actors besides itself, and through the tool of codification the modern state attempted to construct its own legal attitude, the essence of which was determined with the aim of creating a clear and unified legal discourse.<sup>196</sup>

However, the important point to be considered is that within the Ottoman context, the class of jurists and the *ulema* were not excluded from the codification attempts. Quite the contrary, their inclusion in this process was deemed important as a source of legitimation. Furthermore, the implementation of the code was not limited to judges who received their education as *fuqaha*, judges outside this group could also put it into practice.<sup>197</sup> By following the view expressed by Guy, it can be assumed that the Islamic meaning attributed to Islamic law did not follow a strict pattern since Muslim rulers showed an attitude by which many of their subjects and citizens understood the nature of Islamic law.<sup>198</sup>

While some discussed codification within the context of “foreignness”, some deemed it purely Islamic. Rubin’s view seems more appropriate and moderate

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<sup>195</sup> Aharon Layish, “The Transformation of the Shari’a From Jurist’s Law to Statutory Law in the Contemporary Muslim World”. pp. 86

<sup>196</sup> See Chapter 3 on Modernity, Law and Codification.

<sup>197</sup> Burak Guy, Codification, Legal Borrowing and the ‘Localization of Islamic Law’ In Khaled Abou El Fadl, Ahmad Atif Ahmad, ve Said Fares Hassan, *Routledge Handbook of Islamic Law*, 2019, <https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=1935184>. pp. 393

<sup>198</sup> *Ibid*, pp. 395

since he evaluates *Mecelle* as a syncretic artifact. Furthermore, Rubin also underlines the inherent meaning of *Mecelle* by arguing that its implementation as a legal standard in both *Shari'a* and *Nizamiye* courts constituted a significant aspect of it.<sup>199</sup> Neumann, for instance, thinks that *Mecelle* contradicted the perception of *fiqh* because it made the precepts of *Shari'a* valid for non-Muslims as well.<sup>200</sup> Onar, additionally, does not evaluate *Mecelle* within the context of *qanun*, but that of scholarly work produced by the scholarly commission, and the precepts of *Mecelle* were made compulsory by the will of the sultan.<sup>201</sup>

From Ayoub's point of view, the justification of the codification of Islamic law in the nineteenth century was grounded on its dependence on the existing legal genres within the Hanafi school. Furthermore, *Mecelle* did not signify any dissociation from the pre-modern Islamic legal reasoning.<sup>202</sup> According to Ayoub, instead of considering the codification act as an intention to imitate European codes, *Mecelle* must be seen within the context of a response to Western hegemony, the legitimation of which was provided from Islamic legal tradition.<sup>203</sup> Consequently, it seems difficult to regard *Mecelle* as an act of

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<sup>199</sup> Avi Rubin, "Legal borrowing and its impact on Ottoman legal culture in the late nineteenth century", *Continuity and Change*, Cambridge University Press 2, sy 22 (2007): 279-303. pp. 282- 283

<sup>200</sup> Christoph K. Neumann, "Tanzimat Bağlamında Ahmet Cevdet Paşa'nın Siyasi Düşünceleri", içinde *Modern Türkiye'de Siyasi Düşünce 1-2: Tanzimat ve Meşrutiyet'in Birikimi*, ed. Tanıl Bora ve Murat Gültekinil (İstanbul: İletişim Yayınları, 2009). pp. 84

<sup>201</sup> Sıddık Sami Onar, "İslam Hukuku ve Mecelle", içinde *Tanzimattan Cumhuriyete Türkiye Ansiklopedisi* (İletişim Yayınları, t.y.). pp. 583

<sup>202</sup> Schull, Saracoglu, ve Zens, *Law and Legality in the Ottoman Empire and Republic of Turkey*. p. 8

<sup>203</sup> Kent F. Schull, M. Safa Saracoglu, ve Robert W. Zens, ed., "Samy Ayoub, "The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic law in the Nineteenth and Twentieth Centuries", içinde *Law and Legality in the Ottoman Empire and Republic of Turkey* (Bloomington, Indiana: Indiana University Press, 2016). pp. 149

diminishing the Islamic essence of law. Considering the view of Cevdet Pasha, it can be seen that he deemed *Mecelle* of utmost importance when compared with Roman law.<sup>204</sup> Finally, in an attempt to define the essence of the codification act, which concentrates on *Mecelle* within the scope of this section, Guy puts forward the view that *Mecelle* did not provide any considerable solution to unravel the complexity of the pre-nineteenth century legal texts. Contrary to the common view expressed by the aforementioned scholars, what Guy argues is that jurists were able to determine which opinion they would implement while adjudicating on cases before the nineteenth century. In this sense, he offered to approach the issue of Islamic law from a genealogical perspective, rather than placing “early and late modernity” at the center of the narrative that explains Islamic law. Thus, he evaluates *Mecelle* in the light of this view.<sup>205</sup>

### 3.4. Evaluation

It is reasonable to examine *Mecelle* in terms of the continuation and transformation of the existing legal genre and within the framework of the Hanafi legal discourse. The opinions of the Hanafi school were still respected

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<sup>204</sup> Ahmet Cevdet Paşa, *Tezâkir 1-12*. pp.64 *Avrupa kıt'asında enibtida tedvin olunan kanun-name Roma kanun-namesi'dir ki şehir-i Kostantiniyye'de bir cem'iyyet-i ilmiyye ma'rifetiyle tertib ve tedvin olunmuş idi. Avrupa kanunlarının esasıdır ve her tarafta meşhur ve mu'teberdir. Fakat Mecelle-i ahkam-ı adliyyeye benzemez. Beyinlerinde çok fark vardır. Çünkü o beş altı kanun-şinas zatın ma'rifetiyle yapılmıştır. Bu ise beş altı fakih zatın ma'rifetiyle vaz'-ı ilahi olan şeriat-i garradan alız -ü iltikat edilmiştir. Avrupa kanun-şinaslarından olup bu kerre Mecelle'yi mütala'a ve Roma kanun-namesi'yle mukayese eden ve ikisine dahi mücerred eser-i beşer nazariyle bakan bir zat dedi ki "Alemdede cem' yet-i ilm ye vasıtası ile re'sen iki def'a kanun yapıldı. İkisi de Kostantiniye'de vuku' buldu. İkincisi tertib ve intizamı ve me sailinin hüsn-i tensik ve irtibatı haseb le evvelkiye çok müreccah ve fa iktir. Bey'inlerindeki fark dahi insanın ol asırdan bu asra kadar dlem-i medenivette kaç adım atmış olduğuna bir güzel mik)ıastır, intiha.*

<sup>205</sup> Burak Guy, “Ottoman Islamic Law and ‘Early Modernity’”, *Journal of Ottoman and Turkish Studies Association* 7, sy 1 (Cambridge, UK: Cambridge University Press 2015). pp. 17-18. Guy underlines that, thinking in terms of geneology provides one with understanding of how geneologies connect past to present as well as to futures while also they contianed within itself “historical contingency”. From there, he emphasize dthe muldirectional view geneological thinking offered.

and care was taken to comply with them.<sup>206</sup> However, in the following years, the men responsible for codifying *Mecelle* would be criticized in terms of its narrowness. For now, it is sufficient to state that their act was regarded as far from bringing any considerable attempt due to their rigid attitude relying solely on the provisions of *fiqh* based on the Hanafi school of law.

Towards the end of this chapter, we can argue that the Tanzimat period is significant in terms of introducing new attempts towards reforming the structure of the state. According to Mardin, the main rationale underlying this edict, as well as modern constitutional acts, was to have a mechanism which ensured the implementation of laws and rescued them from disappearing, as the will of the sultan was one of the fields undergoing renovation and redefinition in the context of the transformation of the legal sphere.<sup>207</sup> Our concern within the scope of this thesis is that it was understood by the state that the precepts of Islamic law, the essence of which was determined through the *ijtihad* (legal reasoning) of *fuqaha*, legal experts, remained inadequate to cope with the new problems of the empire in terms of proposing satisfactory solutions.

Thus, from the state's point of view, reform was necessary and the class of *ulema* was included in this process, as we saw in the preparation of *Mecelle-i Ahkam-ı Adliyye*. Their inclusion made it possible for knowledgeable jurists to have an official capacity to directly influence the legal system.<sup>208</sup> However, the *ulema* was far from uniform in terms of their view towards adopting European

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<sup>206</sup> Murteza Bedir, "Fıkıh to Law: Secularization Through Curriculum", *Islamic Law and Society, Brill* 11, sy 3 (2004): 378-401. pp. 388

<sup>207</sup> Şerif Mardin, Tanzimat Fermanı'nın Manası Yeni Bir İzah Denemesi, in, Seyitdanlıoğlu ve İnalçık, *Tanzimat*. pp. 97

<sup>208</sup> Akarlı, "The Ruler and Law Making in the Ottoman Empire" Duindam vd., *Law and empire*. pp. 96

laws during this process.<sup>209</sup> The different opinions they held began to crystallize towards the end of the century. Especially in the Second Constitutional Era and its aftermath, discussions surrounding the sphere of law transformed into another realm, in a sense that during the process of *Mecelle*, the essence of legal reform was predicated upon the difficulty of trying cases, and choosing from various opinions prevented judges from solving disputes in courts.

Therefore, in the middle of the nineteenth century, the Ottoman Empire engaged in a process of codifying Islamic law with the *ulema*. Here, *fiqh* was approached with a concern different than the one expressed in the Second Constitutional Era.

According to Ayoub, especially what makes *Mecelle* so significant is the intention of its compilers to find solutions in terms of judicial reasoning. In this sense, what is discussed here is the complexity and comprehensiveness of *fiqh*, rather than a questioning of the very essence of *usul al fiqh* in depth.<sup>210</sup> However, this does not mean that *Mecelle* did not make any contribution to the discussions that took place in the Second Constitutional Era. Detailed analysis of these discussions is the concern of the following chapter.

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<sup>209</sup> Amit Bein, “The Ulema, Their Institutions and Politics in the Late Ottoman Empire, (1876-1924)” (PhD Thesis, Princeton University, 2006). p. 4

<sup>210</sup> Samy Ayoub, “The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries”, *Journal of Ottoman and Turkish Studies Association* 2, sy 1 (2015): 121-46. pp. 131

## CHAPTER 4

### REASSESSING THE APPROACH TO THE ISLAMIC TRADITION OF FIQH DURING THE SECOND CONSTITUTIONAL ERA (1908-1915)

#### 4.1. New Approaches to the Islamic Tradition of Fiqh During the Late Ottoman Era

Throughout this study, until this part, general information about the Ottoman legal experience and information concerning the framework within which the Ottoman legal system developed has been given. In this sense, first of all, it is attempted to elucidate the types of approaches in the secondary literature, mainly in the Orientalist circle. Before approaching the Ottoman context in terms of legal transformation, the question of the relationship between the modernity of law and codification has been explained in the third chapter. Furthermore, in line with the aim of this study, special attention is paid to the Ottoman context in terms of the legal culture it had. In this sense, the constitutive notions of the Ottoman legal system have been discussed. As far as the Ottoman Empire is concerned, it is argued that *Shari'a* and custom, as well as *fiqh*, are among the main components of the Ottoman law.

Especially the middle of the nineteenth century marked the beginning of change not only in the rationale of the state, but also in the legal discourse used by the late Ottoman Empire. In this sense, especially the Tanzimat and Islahat edicts were approached as the kernel of this change. However, neither the Ottoman legal thought nor discourse dissociated itself completely from *Shari'a* on the verge of modernity; contact was maintained with the existing legal culture shaped by *Shari'a* and *fiqh* to a certain extent. As it can be seen in the Edict of

Gülhane and the Edict of 1856, the dominance of *Shari'a* as well as the traces of conservative and traditional stance or language could still be felt,<sup>211</sup> however, the vitality of these documents as the initiator of the process towards the state of law cannot be overlooked.<sup>212</sup>

As a result of this change, various fields were legally redefined. Provisions of *fiqh* to drive legal opinions were also attempted to be transformed within the context of modernization in the realm of law. It is the latter aspect which forms the main attention of this thesis. The main argument to be elucidated in this sense is that the methodological and contextual aspect of *fiqh* had been questioned in the Second Constitutional Era and attempts were taken to enable change within the sphere of *fiqh* as well as that of law. More precisely, the questioning of and suspicion against sources with divine content in terms of their applicability or ability to adapt to the new conditions brought about by modernity, in a sense, became the main source of problem.

Before touching upon the aforementioned developments, in addition to the Edict of 1839 and the Edict of 1856, two developments the Ottoman Empire experienced, constitutions of 1876 and 1908 have to be unearthed. It is known that the opposition of the Young Ottomans and the Young Turks is a matter of hot discussion in the Ottoman literature due to the fact that during these periods, the ideology the state was based upon had been shaken by the opposing groups, and the circulation of new ideas they pursued contributed to the transformation of the state mechanism. By keeping this fact in mind, this chapter will attempt to introduce the *Zeitgeist* and the predominant ideology of the period that had witnessed the emergence of various ideas around which arose various circles,

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<sup>211</sup> Selçuk Akşin Somel, “Çok Yüzlü Bir Belge: Gülhane Hatt-ı Hümayunu”, *Toplumsal Tarih*, sy 311 (2019): 72-79. pp. 77

<sup>212</sup> *Ibid*, Selçuk Akşin Somel. pp. 79

Ottomanism, Westernism and Islamism<sup>213</sup>, to be able to clarify how the issue of *fiqh* was problematized in terms of its place in the mechanism of law.

#### **4.1.1 Approaches to *Fiqh* (Islamic Law): The Case of the Young Ottomans and the Young Turks**

As far as the challenge of modernity is concerned, one of the groups that needs to be examined is the *ulema*, as it had also undergone a transformation both institutionally and ideologically as a result of the state-driven reform throughout the nineteenth century. Given that this thesis aims to focus on the intellectual point of the *ulema* by looking at their perception of “*fiqh*”, Islamic law, it is appropriate to examine their situation. Within the context of the late Ottoman era, the Ottoman *ulema* attracts attention not only as an opponent of reforms, but also as a supporter with their own ways or suggestions.

It can be argued that the role of the *ulema* in the field of law, education, religious endowments and new institutions began to decline in the late Ottoman era, although it did not completely disappear. Now, the religious institutions maintained their relations within the mechanism of an extended bureaucracy.<sup>214</sup>

What concerned the *ulema* was the fear of the marginalization of the religious institutions along with Islamic law, norms and practices. The political atmosphere as well as the dominant ideology of change affected the late Ottoman *ulema* in different ways. This difference resulted in the emergence of three groups whose ideas differed from each other. The first group, *İttihad-ı Muhammedi Cemiyet*, was established by *Derviş Vahdedi* and its main organ was

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<sup>213</sup> Tarık Zafer Tunaya, *Türkiye’de Siyasal Partiler: II. Meşrutiyet Dönemi*, c. 1 (İstanbul: Hürriyet Vakfı Yayınları, 1988). pp. 9-10

<sup>214</sup> Amit Bein, “The Ulema, Their Institutions and Politics in the Late Ottoman Empire, (1876-1924)”. pp. 8-9

*Volkan*. The second group was *Cemiyet-i İlmiye-i İslamiye*, the main organ of which was *Beyan'ül Hak*. And the final one was the groups led by Mehmet Akif that published in *Sebil ur Reşad* and *Sırat-ı Müstakim*. The reform process especially in the realm of madrasas, was perceived by the *ulema* as a direct threat to their position.<sup>215</sup> In addition, their stance in the sphere of law was also subject to redefinition.

#### 4.1.2. The Case of the Young Ottomans

The Young Ottomans and their rationale deserve examination when it comes to the political atmosphere of the late Ottoman era. The open letter written by Mustafa Fazıl Pasha to Sultan Abdülaziz gives us clues about the ideas pursued by the Young Ottomans, who were critical of the present situation and bad governance. Pertaining to the latter, especially the corruption in the circle of civil servants was regarded as the signifier of ethical corruption.<sup>216</sup> As a remedy to this corruption, implementation of solid laws guaranteed freedom, and security was needed.<sup>217</sup>

In this sense, they were concerned with promulgating the constitution that the Young Ottomans associated with modernity and progress, and introducing an administration based on parliament. It was believed that the arbitrary powers of

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<sup>215</sup> Amit Bein. *Ibid*, pp. 33

<sup>216</sup> Ebuzziya Tevfik, *Yeni Osmanlılar Tarihi*, çev. Şemsettin Kutlu, 1973. bs (İstanbul, t.y.). pp. 27; pp. 30. The letter of Fazıl Pasha was translated from French into Turkish by Sadullah Pasha and with the contribution of Namık Kemal

<sup>217</sup> *Ibid* pp. 35 Ebuzziya Tevfik. *Şevketlü padişahım; şimdiki idare tarzını değiştirmek suretiyle devleti kurtarınız. Daha özgür kanunlar ve düzenler ile saltanatınızı süsleyerek, onu bulunduğu kötü durumdan selâmete çıkarınız. Lâkin öyle özgür kanunlar ve düzenler olsun ki, gerçek, yaygın ve güvenli bir nitelik ta ısın. Gerek uygulanması sırasında, gerekse zedelenmeden ve değiştirilmeden devam ettirilmesi konusunda, tam bir garanti ile pekiştirilmiş bulunsun.*

the sultan and bureaucrats would be controlled under a parliamentary regime.<sup>218</sup> As far as the ideology shaping their movement is concerned, they displayed a negative attitude towards the ideology of the Tanzimat, and from their point of view, the Tanzimat was associated with bureaucratic tyranny.

In this context, from their point of view, the opening of the parliament and the promulgation of the constitution meant a return to *Shari'a* principles.<sup>219</sup> According to Mardin, the Islamic political theory occupied an important place in the minds of the Young Ottomans, and it was possible to see they had knowledge of the political philosophy of Islamic thinkers. It can be argued that the main rationale behind the Islamic modernist act was to return to the original source of Islam, and in this context, to make use of the *Qur'an* and its interpreters.<sup>220</sup>

In addition to what is claimed, the matter is that re-institutionalizing the Ottoman practices on the ground of religious law was necessary since the loss of this base by the Tanzimat men created an “ideological gap”.<sup>221</sup> The Young Ottoman Movement, then, not only directed its criticism towards the absolute power held by the Sublime Porte, but also, in a similar way, was not satisfied with the autocratic power held by the sultan, Abdülaziz.<sup>222</sup> During the opposition to the

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<sup>218</sup> M. Şükrü Hanioglu, *A brief history of the late Ottoman empire* (Princeton: Princeton University Press, 2008). pp. 112-113,

<sup>219</sup> Zürcher Erick J., *Modernleşen Türkiye'nin tarihi* (İstanbul: İletişim, 2010). pp. 109

<sup>220</sup> Şerif Mardin, *Bütün Eserleri 5: Yeni Osmanlı Düşüncesinin Doğuşu*, çev. Mümtazer Türköne, Fahri Unan, ve İrfan Erdoğan (İstanbul: İletişim, 2017). pp. 95-96; M. A. Ubcini, *Letters on Turkey: An Account of the Religious, Political, Social, and Commercial Condition of the Ottoman Empire*; pp. 133. To introduce improvements not as innovations barrowed from Europe but as a return to the principles of Quran and truer application them

<sup>221</sup> Mardin. Ibid, pp. 134-35

<sup>222</sup> Erdem Sönmez, “From kanun-ı kadim (ancient law) to umumun kuvveti (force of people): historical context of the Ottoman constitutionalism”, *Middle Eastern Studies* 1, sy 52 (2016): 116-34. pp. 122

regime, the Young Ottomans used “*fiqh*” in order to threaten the legitimacy of the central government and bureaucracy of the Sublime Porte, Bab-ı Ali. The essence of their argument pertaining to *fiqh* was shaped by their view that it had a binding impact, which constituted an obstacle to carrying out reforms, on expanding bureaucracy. Related to that, asking the opinion of the office of *Shaikhulislam* was also a matter of dissatisfaction for the Young Ottomans. However, it must be noted that *fiqh* also provided them with the source of social mobilization and cultural reconstruction by using the language of Islam based on *fiqh*, and making adaptations from European institutions and concepts.<sup>223</sup> What they suggested was to bring *fiqh* to the fore as the essence of political, social and legal thought.<sup>224</sup>

It seems that the Young Ottomans relied on “*fiqh*” both intellectually and in the context of the policies they followed. In their opposition to the government, the Young Ottomans also used Islam as a useful tool of opposition and as a base to establish a constitutional regime. For example, according to Namık Kemal, the constitutional regime was neither alien to Islam nor considered as “*bid’at*” (novelty). On the contrary, its roots could be found in our past.<sup>225</sup> It will be seen, then, that in the period leading up to the 1908 Revolution, the issue of *fiqh* and *Shari’a* as the main component of Islamic legal framework began to be defined in different ways.<sup>226</sup> Within this circle, it can be seen that the views expressed

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<sup>223</sup> Recep Şentürk, “Intellectual Dependency: Late Ottoman Intellectuals Between Fiqh and Social Science”, *Die Welt des Islams* 3, sy 47 (2007): 283-318. pp. 290-291

<sup>224</sup> Ibid, Recep Şentürk. pp. 300

<sup>225</sup> Niyazi Berkes, *Türkiye’de Çağdaşlaşma*, 26. bs (İstanbul: Yapı Kredi Yayınları, 2018). pp. 293. See also Hüseyin Yılmaz, “Containing Sultanic Authority: Constitutionalism in the Ottoman Empire before Modernity / Sultan Otoritesini Sınırlandırmak: Osmanlı İmparatorluğu’nda Modernite Öncesi Anayasacılık”, *The Journal of Ottoman Studies*, sy 45 (2015).

<sup>226</sup> Susan Gunasti, “The Late Ottoman Ulema’s Constitutionalism”, *Islamic Law and Society, Brill*, sy 23 (2016): 89-119. pp. 98-99. Gunasti underlined the fact that *fiqh* was perceived as the

by Ali Suavi (1839-1878) and Namık Kemal (1840-1888) came into prominence in terms of the perception of *fiqh* in the late Ottoman era.<sup>227</sup>

Accordingly, it was emphasized that the provisions of Islamic law did not constitute an impediment to progress. On the contrary, *fiqh* had a mechanism which could develop solutions to the problems of the changing age. This view was legitimized in the tract named “*Arabi İbare Usulül fikh Nam Risale*” written by Suavi, which discussed the issue of adapting codes from the West.<sup>228</sup> In addition, Namık Kemal argued that the provisions of *Shari’a* regarding politics should be enacted in the form of *qanun* and refused the implementation of two types of law in one country.<sup>229</sup> Kemal also complained about the present situation of Islamic law as they had no science of law, *fenn-i hukuk*, and the terms *istilah* of *Düstur*, code of laws, were not decided.<sup>230</sup> Consequently, Namık

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legal tradition. *Shari’a*, on the other hand, evaluated within the context of legal code. To support *Shari’a* mean to justify constitution. The impact of *fiqh* regarded as significant in the process of law-making.

<sup>227</sup> Mümtaz’er Türköne, “Siyasi İdeoloji Olarak İslamcılığın Doğuşu (1867-1873)” (PhD Thesis, Ankara Üniversitesi Sosyal Bilimler Enstitüsü: Kamu Yönetimi ve Siyaset Bilimi AnaBilim Dalı, 1990). pp. 49-50

<sup>228</sup> Ali Suavi, “Ali Suavi’nin usûl-i fikh’a dair bir risalesi: ‘Arabî İbare Usûlü’l-Fıkh Nâm Risalenin Tercümesi””, çev. Sami Erdem, *Divan: Disiplinlerarası Çalışmalar Dergisi*, 1998, 283-96. pp. 283. According to Erdem, in his tract Suavi put emphasize on the notion of ‘*örf*’ as a mechanism which make it possible to prduce flexible hukms within fiqh; *İşte vech-i meşrûh üzere bulunan usûl-i fikh hangi hâdiseyi hükümsüz bırakır? Nasıl ki deniz ve kara va- purları müddet-i sefer mesâilini ve telgraf muhâbere ahkâmını değiştirmiştir, elbette her hâdisi iktizâsınca hüküm vardır; Malum ola ki âdet ve örfe itibar kaide- sine fıkhıta pek çok mesele râci olur.* Cited by Erdem. pp. 291-92

<sup>229</sup> Namık Kemal, *Sürgünde Muhalefet: Namık Kemal’in Hürriyet Gazetesi 1 (1868-1869)* (Vakıfbank Kültür Yayınları, 2019). pp.704; Namık Kemal “*Nutk-ı Hümayun*”, *Hürriyet* no:50, 7 June 1869 pp. 704. *Kavaid-i şeriate tatbikan belki Avrupa’dan daha muntazam kanunlar tanzim olunabilir ve bu davamızı bil cümle ulema tasdik eder. Hal böyle iken niçin yalnız muamelat-ı nassa dair bir Mecelle ile iktifa olunsun da bir kanun’üş-şer’ tanzimine bakılmasın?*

<sup>230</sup> Ibid, pp. 692. Namık Kemal. Namık Kemal “*Şura-yı Devlet Mazbatası Üzerine Mülâhazat*”, *Hürriyet* no: 49, 31 May 1869. *Biz de hala müdevven fenn-i hukuk yok. Düstur’un istilahları kararlaştırmamış. İbareleri ne anlaşılacak surette yazılmış ne de şerh olunmuş. Bu halde birtakım adamların usul-ı muhakemat öğrenmesiyle icra-yı adaletçe ne faide mutasavver olabilir.*

Kemal paid regard to making laws by relying on *Shari'a*, emphasizing its applicability to the necessities of time.<sup>231</sup> The basis of his argument on law was his negative attitude towards the Tanzimat policy of importing Western laws. This controversy would come to the fore in the Second Constitutional Era in a sense that the suitability of *fiqh* was problematized. This questioning would result in the reinterpretation of the legislative and interpretative capacity of the state in the sphere of law. This issue will elaborately be clarified in the fifth chapter of this study.

Although it does not directly concern this thesis, another aspect that is worth paying attention to about how the conception of Islamic law had been transformed, is the curriculum of madrasas and the establishment of new schools of law. These were regarded as the places where the education and knowledge of law were given. From Ortaylı's point of view, the Ottoman law began to be Romanized in the nineteenth century due to the fact that the adaptation of Western-style institutions inevitably required the importation of the European legal system along with the institutions.<sup>232</sup> Keeping this fact in mind, it was the intention of the state to establish new schools, *Mekteb-i Hukuk*, which can be considered as an indicator of this phenomenon, to train bureaucrats, legal experts

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<sup>231</sup> Ibid, pp. 295, Namık Kemal. “*Lond Stanley’in Nutku Üzerine Mülâhazat*”, no: 23, 30 November 1868. .. *Hakikat biz Düstur’a bedel bir kanunü’ş- şer yapmak talebindeyiz. Çünkü Düstur, sarf ve nahivden başka bir şey okumayan bazı ricalin ya Fransızcadan tercüme ettirerek veyahut karihadan ilave ederek tertip ettiği birçoğu cahilane ve zalimane birtakım müteferrik bendlerden ibarettir. Şeriat ise usul-ı ayat ve ehadiste mevcut olan hukuk-ı tabiiden bi’l-istinbat, iki yüz milyon nüfuslu bir millette bin iki yüz elli seneden beri zuhur eden kaffe-i ulemanın yalnız taharri-i hakikat ve arz-ı marifet değil, ecr-i ahiret için ikdamat-ı fevkalaede sarf ederek tevsi ve tefri ettikleri bir derya-yı marifettir. Ondan iltikat olunanacak kanun, adalaetçe ve icab-ı vakt ü hale mutabakatça belki düvel-i mütemeddinede mevcut olan kavanin hepsine muraccah olacağında şüphe edilir mi?*

<sup>232</sup> İlber Ortaylı, *Hukuk ve İdare Adamı Olarak Osmanlı Devletinde Kadı*, 2016. pp. 92. Also see, İlber Ortaylı, “Osmanlı Devletinde Lâiklik ve Hukukun Romanizasyonu”, *Erdem*, sy 9 (1997): 1201-8. Adaptation of administrative reform inevitable entailed the adaptation of legal system of Western Europe. pp. 1205; (see, Shamsy – Canonization of Islamic law p. 7

as well as judges for the nizamiye courts.<sup>233</sup> Graduates of the *ilmiye class* from these schools contributed to the emergence of different approaches and methods in some matters, especially to the issue of law. The views of Munif Pasha (1830-1910), who gave lectures in *Mekteb-i Hukuk* on the philosophy of law, *Hikmet-i Hukuk*, carried the traces of this new sense of law that emerged in the pre-Second Constitutional Era.

To mention briefly, Münif Pasha underlined that laws were obliged to change as time changed.<sup>234</sup> Furthermore, he also underlined that the laws of Prussia, Frederick I, and France, Napoleon, had a philosophical ground. According to Münif Pasha, it is not reasonable to assume that people did not progress because these laws had not been changed. If people progress then laws progress too, and if it is necessary to make changes in laws, then having a philosophy of law is also indispensable.<sup>235</sup> It is possible to see the traces of such a conception in the minds of the *ulema* in their articles published in various journals, on which will be touched in the last chapter of this thesis. However, in the Second Constitutional Era, a more *fiqh*-sided approach was seen on the side of the *ulema*. Especially, the notions of *fiqh* was underlined to emphasize its flexibility to adapt to changing circumstances without submitting to European laws.

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<sup>233</sup> Stanford J. Shaw, Ezel Kural Shaw, ve Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey. Vol. 2: Reform, Revolution, and Republic: The Rise of Modern Turkey; 1808 - 1975*, Reprinted (Cambridge: Cambridge Univ. Press, 1997). pp. 248

<sup>234</sup> Münif Paşa, *Hikmet-i Hukuk (Hukuk Felsefesi)*, çev. Gökhan Doğan (Konya: İletişim Yayınları, 2016). pp. 21. “Kavanin la-yetegayyer değıldir; bir mukteza-yı beşeriyyet ve medeniyyet ya’atikleri ıslah ve tebdil ve yahud yeniden vaz’ olunur; çünkü zaman ve ahval-i nas daima bir halde durmayıb tebeddül eder ve bunlar tebeddül ettikçe bunlara müstenid olan ahkam dahi tebeddül ve tegayyür eder”.

<sup>235</sup> Münif Paşa. Ibid, pp. 32.... *Mesela Prusya’da Büyük Frederick ve Fransa’da Birinci Napolyon’un ve Avusturya Devletinin kavanini gibi ezmine-i ahirede vaz’ edilmiş birtakım kanunlar vardır ki, hep eşkar ve kava’id-i hikemiyyeye müsteniddir. Ma’ahaza bunların ‘alahaliha kalıp da ta’dil ve tebdil olunmamalarını mülahaza ve arzu etmek ‘adeta insanları terakki etmiyor ve hal-i vukufta bulunuyor iddi’asında bulunmaktadır; madamki insanlar tarik-i terakkide ilerliyor kanunlar da ta’dil ve tebdil olunmalıdır, madamki kanunların ta’dil ve tebdil olunması zaruridir hikmet-i hukuka da ihtiyac zaruridir.*

Before mentioning 1908 and its aftermath, the First Constitutional Era corresponding to 1876 is briefly elucidated within the scope of this section. The advantage of such an examination is to see the differences between these periods in terms of approaching *fiqh* on the eve of the development of the modern sense of law and science. To clarify, the main question addressed is whether the provisions of *fiqh* were adequate for the matters that were not answered in these provisions and how law, “*hukuk*”, was perceived in this sense. Whether they could be synonymous, conflicting or complementary to each other was among the hot topics of the age. It seems that most of the discussions took place on this ground and the redefinition of the notions of *fiqh* to produce a legitimate ground for change was at stake. The latter point will be enlightened in the final chapter of this thesis.

For now, firstly, I will briefly mention the views of Namik Kemal and Ali Suavi on *fiqh* within the context of the Young Ottomans, in order to better contextualize the discussions that took place in the aftermath of the Second Constitutional Era. When we look at the backgrounds of these men, although they cannot be counted within the circle of *ulema*, both Namik Kemal and Ali Suavi came into prominence with their journalist identities, as well as their opposing stances. The view they expressed brings us to the issue of how the conflict between *hukuk* and *fiqh* was expressed in their discourse, what sort of solution was suggested and also, how the perception of *fiqh* was shaped. In the discussions surrounding these questions, some notions such as natural law, the association of *akl* (*wisdom*) with revelation entered the field of these intellectuals’ discourse. Especially the aftermath of the Second Constitutional Era would witness the circulation of numerous notions, but for now, we can look at what Kemal and Suavi argued to contextualize their views on *fiqh*.

The Young Ottomans’ main concern was to implement the provisions of *fiqh* not only to the sphere of Islamic law, but also to those that did not fall within its scope. In their argument, the Young Ottomans used the notions of “*akl*”

(*wisdom*) and *nakl* (revelation). This view also caused discussions regarding the nature of law. From their point of view, wisdom was included in the limits of revelation. Namık Kemal, for instance, argued that the laws in Europe emerged as a result of wisdom, “*akl*”, and the laws of *Shari’a* were similar to them in terms of their essence. Also, Kemal deemed the law of *Shari’a* to have a pivotal place since it was based on divine authority.<sup>236</sup>

Likewise, Suavi’s views are similar to those of Kemal as he also emphasized that the underlying cause of Europe’s progress was the essence of its law based on *akli*. Within this context, what Suavi suggested was the incorporation of the European method and that of Islam. According to him, in order to do this, it was necessary to take into consideration *hüsn kubh* of Islam based on wisdom, outside the sphere of *Shari’a* based upon revelation.<sup>237</sup> Another dimension related to the change in the perception of *fiqh* is the inclusion of the notion of *tabii hukuk*, natural law, in the discourse of the Young Ottomans. The concern of this doctrine was based upon questioning whether law was binding due to its divine essence or its binding force resulted from its being rational (*akli*).<sup>238</sup> However, the doctrine of natural law contradicted the Sunni doctrine. In the

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<sup>236</sup> Khayr al-Dīn Tūnīsī, *Ülkelerin durumunu öğrenmek için en doğru yol: akvemu’l-mesalik fi marifeti ahvalu’l-memalik*, 2017. this work can be regarded as the epistle of reform made use by the Young Ottomans. The main theme of this epistle developed around the searching for the reasons which contributed to the superiority of the West. “*İtikadımızca hukuk hakimi kudretin tabiatı külliyyede hak ettiği hüsn ve kubuhtan ibarettir*. Cited by Fındıkoğlu, Ziyaeddin Fahri Fındıkoğlu, *Türk Hukuk Tarihinde Namık Kemal* (İstanbul Üniversitesi Hukuk Fakültesi, 1941). pp. 199

<sup>237</sup> See, İlyas Çelebi, “Hüsn ve Kubuh, TDV İslam Ansiklopedisi. This notion used in *usul al fiqh* about rationality of good and evil. See also Youcef Soufi, “The Historiography of Sunni Usul al-Fıqh in, Anver M. Emon ve Rume Ahmed, ed., *The Oxford handbook of Islamic law*, First edition, Oxford handbooks (Oxford: Oxford University Press, 2018). pp. 264

<sup>238</sup> Mardin, *Bütün Eserleri 5: Yeni Osmanlı Düşüncesinin Doğuşu*. pp. 103- 104 According to Mardin, Islamic Law was perceived as the phenomenon which reveal the law of God. Order in nature was evaluated as the sign of God’s existence. The law of universe which also law of God could not be understood via wisdom only. Mümtaz’er Türköne, “Siyasi İdeoloji Olarak İslamcılığın Doğuşu (1867-1873)”. pp. 97.

Sunni doctrine, the *Qur'an* and *Shari'a* were regarded as the main component of natural law, rather than being imagined independently of it.<sup>239</sup>

Until this part, we have briefly taken a look at the political atmosphere as well as the dominant ideology of the late Ottoman era, with a special emphasis on the two oppositional movements of the Young Ottomans and the Young Turks. The importance of these movements lies in the fact that the circulation of various ideas among them contributed to the transformation in the intellectual climate of the period by creating three dominant ideologies, Ottomanism, Islamism and Turkism, around which circles emerged.<sup>240</sup> The following chapter will focus on the political atmosphere of the Second Constitutional Era. Therefore, the center of attention will be the discussions of the *ulema* around the Islamic tradition of *fiqh*.

#### 4.1.3 The Case of Young Turks

In this sense, it seems appropriate to look at the context which corresponded to the reign of Abdülhamid II and culminated in the promulgation of *Kanun-i Esasi* and in the Revolution of 1908, also known as the Second Constitutional Era. These oppositional attempts shaped the sphere of law and also led to a redefinition of the *ulema*'s position and their perspective on Islamic law. Especially what is significant is that there was a challenge directed towards the sultan's authority during the reign of Abdülhamid II. As Karpat emphasized, the authority of Abdülhamid II was threatened by the modernist bureaucracy and the Constitution of 1876.<sup>241</sup>

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<sup>239</sup> Türköne, "Siyasi İdeoloji Olarak İslamcılığın Doğuşu(1867-1873)". pp. 98

<sup>240</sup> Yusuf Akçura, *Üç Tarz-ı Siyaset* (Ankara: Türk Tarih Kurumu Yayınları, 1976).

<sup>241</sup> Karpat, *The politicization of Islam*. pp. 157

The mentality that shaped the minds of the Young Turks was to attack a system that was only loyal to the sultan.<sup>242</sup> Accordingly, the idea of a regime based on constitution was in their minds, but according to Hanioglu, their idea of constitution differed from that of Europe in a sense that the Young Turks had recourse to it in order to reduce the power of the sovereign, as well as to pave the way for new reforms.<sup>243</sup> Therefore, what was at stake was not the demand expressed by the people, but the political elite whose main desire was to save the empire, so they used the constitution as a tool.<sup>244</sup>

The atmosphere of the Late Ottoman Era contributed to the emergence of a sort of intelligentsia whose main concern was to show loyalty to the Islamic character of the state and society. Also, some did not turn their backs on the need to reform Islamic institutions so as to be able to deal with the challenge of modernity and save the empire. The word of Mehmet Arif Bey, for instance, is significant in terms of the attitude shared by some circles of the *ulema*. According to that, what was required was that the *ulema* studied modern sciences.<sup>245</sup> However, as mentioned above, the circle of *ulema* contained disagreements within itself, and not all members of this group shared the same opinion on the reformation of religious institutions.

For instance, Mustafa Sabri Efendi did not advocate the view of the reform-minded *ulema* on the degeneration of religious institutions, but rather argued that

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<sup>242</sup> M. Şükrü Hanioglu, *The Young Turks in Opposition*, Studies in Middle Eastern History (New York: Oxford University Press, 1995). pp. 26

<sup>243</sup> Hanioglu. Ibid, pp. 29

<sup>244</sup> Cemil Koçak, “Yeni Osmanlılar ve Birinci Meşrutiyet”, içinde *Modern Türkiye’de Siyasi Düşünce 1-2: Tanzimat ve Meşrutiyet’in Birikimi* (İstanbul: İletişim Yayınları, 2009). pp. 80-81

<sup>245</sup> Amit Bein, *Ottoman Ulema, Turkish Republic: Agents of Change and Guardians of Tradition* (Stanford, Calif: Stanford Univ. Press, 2011). pp. 25-26

such criticism had nothing to do with reality and was expressed to diminish Islam.<sup>246</sup> As much as there were disagreements within the *ulema*, there also was an opposition which took a stand against Abdülhamid II, although he stated that his power was divinely sanctioned.<sup>247</sup> The indifference of Abdülhamid II towards the reform of religious institutions such as madrasas might have contributed to the emergence of the dissatisfaction of the *ilmiye class*.<sup>248</sup> Such a policy could be read as a destabilization policy towards the *ulema*.<sup>249</sup> Here, it is reasonable to argue that there was mutual opposition and suspicion not only on the side of the *ulema* but also the sultan. The triumph of the Young Turks came about with the promulgation of *Kanun-i Esasi* in 1908. However, the aftermath of this process witnessed various controversies in terms of determining the base of the new political order with the enthronement of Abdülhamid II. The scope of this section will content itself with examining the amendment process of *Kanun-i Esasi* in order to detect the position of *fiqh*. However, a broad scope of discussion will be devoted to how the state and the *ulema* interpreted the notions of *fiqh* and subsequently used them to form the basis of change in the realm of law, which was usually regarded as having a static nature due to strict notions encompassed by *fiqh*, during the Second Constitutional Era through lecture books and periodicals written by some circles of the *ulema*.

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<sup>246</sup> Amit Bein “Ulama and Political Activism in the Late Ottoman Empire: The Political Career of Mustafa Sabri Efendi(1869-1954)”, In, Meir Hatina, ed., *Guardians of faith in modern times: ‘ulama’ in the Middle East*, Social, economic and political studies of the Middle East and Asia, v. 105 (Leiden ; Boston: Brill, 2009). pp. 74

<sup>247</sup> Karpas, *The politicization of Islam*. pp. 158

<sup>248</sup> Şerif Mardin, *Bütün eserleri dizisi. 1: Jön Türklerin Siyasî fikirleri: 1895 - 1908*, 5. baskı, İletişim yayınları 13 (Cağaloğlu, İstanbul: İletişim Yayınları, 1994). pp. 70

<sup>249</sup> Mardin. *Ibid*, pp. 73

#### 4.1.4. Aftermath of the Revolution: Amendment of Constitution

The consequences of the Young Turk opposition resulted in the promulgation of the Constitution of 1908 on 23 July 1908 and the Second Constitutional Era began. This was a significant period in terms of shaping the legal discourses of the late Ottoman era. After the revolution some of its provisions were amended and the constitution gained a different character. The aim of this section is to bring the provisions which shaped the Constitution of 1908 and transformed it into a more religious character to the fore. In other words, not only the deputies but also the *ulema* made their presence felt in the parliament with their views on law, governance, *Shari'a* and *fiqh* (Islamic law) during the parliamentary discussions. While examining these provisions, what we should concern ourselves with is how the perception of *fiqh* was used to be able to make it one of the legitimate sources of the constitution.

In addition, it also has to be understood how such an incorporation contributed to strengthening the position of the *ulema*. In order to answer this question in a nuanced way, we firstly have to clarify again what we mean by "*fiqh*". It can be argued that *Shari'a* was associated with the constitution while *fiqh* was regarded as a component of *Shari'a* and evaluated within the context of the Islamic legal tradition.<sup>250</sup> By taking the purpose of this thesis into consideration, which is to enlighten the perception of *fiqh* of the state and the *ulema* within the context of the Islamic legal thought in the late Ottoman era, the articles 3, 7,10, and 118 deserve attention.

These articles of *Kanun-i Esasi* shed light on the essence of the new legal discourses used by the new administration. Accordingly, when it comes to the perception of *fiqh*, attention will be drawn to the institutional status of the caliphate, the sultan caliph, the position of *Shari'a* courts and nizamiye courts,

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<sup>250</sup> Susan Gunasti, "The Late Ottoman Ulema's Constitutionalism". pp.98

and the institution of Meşihat. The original and amended versions of these articles will be touched on briefly throughout the section. In accordance with article 3, “Ottoman sovereignty resides in the exalted person of the sultan, who is also the Muslim caliph, [and] who is the eldest [male] member of the House of Osman, according to the rules established *ab antiquo*.”<sup>251</sup> Its amended version underlined the role the sultan-caliph had to implement.

Given that the protection of *Shari'a* and the constitution was an indispensable duty he had to fulfill, he swore to realize that duty in the amended version of article 3.<sup>252</sup> It is also possible to read such an amendment as the signifier of the limitation imposed on the position of the sultanate by *Shari'a* and the constitution. Similarly, article 7 of the constitution emphasized that the sultan, as the *hukuk-ı mukaddisiye*, was charged with safeguarding *şer'i* provisions and regulations.<sup>253</sup> According to article 10, it was not possible to punish anyone unless a justification supported by *şer'i* grounds was expressed.<sup>254</sup> Finally, article 118 of the constitution stated that new regulations and laws must be derived from the provisions of *fiqh*, taking the changing time and the arising of new needs into consideration.<sup>255</sup>

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<sup>251</sup> “The Constitution of 1876”, article 3 § (t.y.), <http://www.anayasa.gen.tr/1876constitution.htm>.

<sup>252</sup> Düstür, Tertib-i Sanil, Cüz-i Evvel (Düstür II/I) p. 640; *On his accession the Sultan shall swear before Parliament, or if Parliament is not sitting, at its first meeting, to respect the visions of the Şariat (canon law) and the Constitution, and to be loyal to the country and the nation.;*

<sup>253</sup> Ibid, p. 640 *Devair-i hükümetin muamelatına ve kavanin-i sur-ı icrasına müteallık nizamnameler tanzimi, her nev'i kavanin teklifi ahkam-ı şer'iyye ve kavaniniyenin muhafaza ve icrası... akd-i mukaddese-i padişahındır.*

<sup>254</sup> Ibid, p. 640. Article 10: *Hiç kimse şer'i kanunun tayin ettiği sebep ve suretten mua'ada bir bahane ile tevkif ve mücazat olunamaz.*

<sup>255</sup> Ibid, pp. 643. Article 110: *Elyevm düstur'ul amel bulunan nizamat ve adat ilerüde vazi' olunacak kavanin ve nizamat ile ta'dil veya ilga bulunmadıkça mer'el icra olacaktır. Kavanin ve nizamatın tanziminde mu'amelat nassa avefk ihtiyacat-ı zamana avefk ahkam-ı fikhiye ve hukukiye ile adab ve muamelat-i esas ittihaz kılınacaktır.*

In addition to the amendments in question, the promulgation of another decision on 31 March 1913, *Hükkam-ı Şer'i ve Memurin-i Şer'iyye Hakkında Kanun-ı Muvakkat*,<sup>256</sup> reflected the mentality of the state in determining the boundaries of *fiqh* and law. Here, a significant part of this regulation was shaped by the mufti's capacity of giving fatwa, legal opinion, and the role attributed to him within the state mechanism. According to this view, their authority of giving fatwa, *ifta*, was reconsidered by the state as how this authority could become advantageous for itself. To put it another way, the question of fatwa authority actually led to the questioning of who should be authorized in religious and legal affairs.

In terms of law, this thesis prefers to focus on the capacity of making and interpreting law, as emphasized in the introduction part. Accordingly, subjecting *fiqh* to rereading led it to be perceived differently in a sense that the separation of its religious, *itikad*, and non-religious matters constituted the core of the argument. On account of this, it was argued that the fatwa of the *mufti* and the opinion of the judge differed. Such a separation brought along a new perception of *fiqh* both by the *ulema* and the state. By some members of the *ulema*, however, it was not advocated that these authorities be given to separate individuals, but rather that the authority of one person was appropriate for having a say in both religious and legal matters.<sup>257</sup> However, the course of events resulted in the *ulema* to have a limited say in legal matters, particularly in those related to jurisdiction.

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<sup>256</sup> Düstur, Tertib-i Sani, C. 5, Dersaadet, 1328 pp. 359-360

<sup>257</sup> For Instance, İzmirli İsmail Hakkı. Despite that he accdpted the difference between fatwa and kaza, he suggested the unification of these authorites on one person. See, İzmirli İsmail Hakkı, "İfta Ve Kaza", *Sebilürreşad* 14, sy 358 (12 Ekim 1916). İzmirli İsmail Hakkı, Müftü ve Kadı, *Sebilürreşad* 14, sy. 359 (19 Ekim 1916); İzmirli İsmail Hakkı, Kadının İftası, *Sebilürreşad* 14, sy 360 (26 Ekim 1916); İzmirli İsmail Hakkı, Diyanet ve Kaza, *Sebilürreşad*, 15, sy 373, (9 Ekim 1918)

## 4.2. Reassessing the Approach to the Islamic Tradition of Fiqh in the Second Constitutional Era (1908-1915)

One of the hot topics which dominated the Second Constitutional Era was to question the validity and applicability of the sources of law, and especially in this sense, *Mecelle* and law which was based upon *fiqh* were the center of attention.<sup>258</sup> Accordingly, it was argued that new problems required new solutions and in line with this perception, it was asserted that to be able to produce new solutions, a new ground in the realm of law was necessary in order to facilitate this process. My objective is to unveil this process by concentrating on the symbiotic relationship between *fiqh* and law in the light of the discussions expressed by the circle of *ulema* which were published in the periodicals of the age.

The main question that may be asked is how this influence of the state affected the position or the monopoly of the *ulema* in the realm of knowledge and law. Furthermore, especially in the process of amending or modifying the constitutions of 1876 and 1908, controversies over changing the provisions of these constitutions were important in terms of how the provisions of *fiqh* and *Shari'a* found their place in the new political order. In particular, the new position of the *ulema* in politics will be taken into consideration here to see how they acted to pursue their goals and strengthen their position, as well as make contributions to the legal reform. This will help us see how the mentality of the *ulema* was shaped by the political atmosphere of the age and their own involvement in politics.<sup>259</sup>

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<sup>258</sup> Sami Erdem, "Tanzimat Sonrası Osmanlı Hukuk Düşüncesinde Fıkıh Usulü Kavramları ve Modern Yaklaşımlar". pp. 73

<sup>259</sup> Elisabeth Özdalga, *Late Ottoman Society The Intellectual Legacy*, 2013. p. 9

What was at stake in the realm of the *ulema* was to reinterpret the notions of *fiqh* and thus, construct a new methodology of *fiqh* and *ijtihad*, without putting *fiqh* aside or excluding it from the realm of law. On the contrary, they revived *fiqh* as the source of new laws. The following section of my thesis will firstly concentrate on the circle of *ulema* and their perception of *fiqh* during the process of modernity in the Second Constitutional Era. In this section, corresponding to the aim of this thesis, the view of the *ulema* on *fiqh* will be explained by referring to the key figures from the circle of *ulema*, discussing how and through which tools they expressed their desire of change between 1908 and 1915. Given that it is difficult to speak of a unified sense of opinions as far as the change in the realm of law is concerned, special attention will be paid to the various opinions held by the following figures throughout the section: İzmirli İsmail Hakkı<sup>260</sup>, Halim Sabit<sup>261</sup>, Elmalılı Hamdi Yazır<sup>262</sup>, Manastırlı İsmail Hakkı,<sup>263</sup>

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<sup>260</sup> İzmirli İsmail Hakkı (1869-1946) was a scholarly person whose origin belongs to madrasa education. This thesis, in this sense, prefers to evaluate his intellectual background by evaluating him within the circle of *ulema*. He is graduated from *Darülmüallimin-i Aliye* on 13 January 1890. He took active position in the educational institutions as teacher, *mudarris*. He also give lectures on *usul-ı fiqh* in civil school, Mülkiye Mektebi. He also took participation in reform programs the main concern of which was to update curriculum of institutions where education of religion given, *madrasas*. In *Süleymaniye Madrasas*, he gave lectures in 1915 on the philosophy of Islam as well as on theology, *kelam*. He published in periodicals, *Sebilür Reşad* and *İslam Mecmuası* on *fiqh*.

<sup>261</sup> Halim Sabit (1883-1946) was another scholarly person who lived during the late Ottoman Era. His educational background was shaped by Madrasa. He gave lectures in, *Dârülfünun Ulûm-ı Şer'iyye Şubesi in 1914* on the religion of Islam. It is not wrong to evaluate him as the person who actively participate in scholarly activities. Accordingly, he also wrote on the issue of *fiqh* and its place in the sphere of law, *hukuk*.

<sup>262</sup> Elmalılı Hamdi Yazır (1878-1942) also known as Küçük Hamdi, was Islamic legal scholar living during the late Ottoman Era. His real name known as Muhammed Hamdi Yazır. Like the other scholars abovementioned, Elmallı also completed his education in madras, Bayazid and finally graduated from Mekteb-i Nüvvb in 1904. He gave lectures in Madrasas, Suleyman Madrasa and *Mekteb-i Mülkiye* on *fiqh* and logic. He also took part in the parliament as the deputy from Antalya. In addition to that, he participated in the amendment process of Kanun-i esasi in 1909 and advocated the constitutional monarchy, *meşrutiyet*, not conflicted with *Shari'a*.

<sup>263</sup> Manastırlı İsmail Hakkı (1846-1912) was scholarly person who concentrates itself on writings related to *usul-ı fiqh*. He gave lectures in Mekteb-i Hukuk pertaining to *usul-ı fiqh* as well as he also acted as the *mudarris* in exegesis in the same institution.

Mehmed Seyyid Bey<sup>264</sup>, Mehmed Kamil Bey<sup>265</sup> and Ziya Gökalp<sup>266</sup>. These are the key figures that form the main concern of this thesis. However, examples from other authors will also be mentioned to detail how approaches to the Islamic tradition of *fiqh* was shaped. The consequences of the two the oppositional movements, the Young Ottomans and the Young Turks, led to the emergence of an administration based upon a constitution, known as *Kanun-i Esasi*. Within this framework, one of the problems faced by the new administration in the aftermath of 1908, the Second Constitutional Era, was how the provisions of *fiqh*, which regulated matters, and *Shari'a* were interpreted. As for the ground on which they were redefined, the dichotomy between secular law and *Shari'a* came into prominence. It was known that in both the First and the Second Constitutional Periods, religious law, *Shari'a*, was linked to the constitution and this link contributed to its legitimacy. However, after the Second Constitutional Era, a controversy which was difficult to overcome arose.

Accordingly, the source of concern was shaped by the view that the provisions of *fiqh* which constituted *Shari'a* were not adequate to deal with the problems of the modern age. In addition, Westernization in almost every field, in that of law

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<sup>264</sup> Mehmed Seyyid Bey (1873-1925) was lawyer living in during the Late Ottoman Era. He completed his education in the faculty of law in 1904. He also took education in madrasa. He took part as the mudarris on *usul-ı fiqh* in the Darülfünun. Aftermath of Second Constitutional Revolution can be seen as the beginning of his activity as the deputy from İzmir in the parliament during the 1908 elections. His background on Islamic law led him to participate in the amendment processes. He also published book about *usul-ı fıkıh* named “*Usul-ı fıkıh, Cüz-i Evvel* (İstanbul, 1333) These books concentrate on the definition, scope and the purpose of *usul al fiqh*.

<sup>265</sup> Mehmed Kamil Bey (1875-1957), also known as Kamil Miras, was another scholarly person of the late ottoman Era. He took education Darülfünun-I Şahana from department of Divinity in 1903. In addition to that, he gave lecture on history of science of *fiqh* in Darülfünun-I Şahane until 1914. Also, he gave lesson on *fiqh*, in Dârü'l-hilâfeti'l-aliyye Medresesi. He also took part in CUP.

<sup>266</sup> Ziya Gökalp (1876-1924) was scholarly persons of the late Ottoman Era. He engaged in intellectual discussions on various realms. Especially his theory of “*içtimai usul-ı fıkıh*” was widely discussed. He was also member of the Committee of Union and Progress. he was known mostly with his writings on culture, religion and civilization.

as well, made it difficult to maintain the status quo.<sup>267</sup> As it has been mentioned in the third chapter, there was a similar concern in the 1860s and as a solution, the provisions of *fiqh* were codified based on the Hanafī madhhab, as *Mecelle-i Ahkam- Adliye*. However, now *Mecelle* was also criticized in terms of its narrowness.

This called for subjecting the provisions of *fiqh* to either an update or a rereading or formulating new laws through a new method. Thus, how this conflict between law in the modern sense and *fiqh* was perceived and overcome is one of the aims of this thesis. Especially, in this context, it focuses on what the separation of these two realms resulted in by problematizing the issue of the capacity of law-making and who were entitled to have a say in legal and religious matters, as well as determining the boundaries of this authority. The following section will dwell upon the main notions detected in the articles published by the *ulema* so as to draw attention to the flexible and changeable nature of *fiqh*.

#### **4.2.1 Change in the Perception of *Fiqh* of the *Ulema* during the Process of Modernization:**

To begin with, discussions around “*fiqh*” put emphasis on some points in order to enable change in the formulation of new provisions without adopting Western laws, and to make change from the inside rather than the outside. Contrary to the modern sense of law, the perception of law within the Ottoman context was shaped to a certain extent by the two significant components of Islamic law, *fiqh* and *Shari’a*. As we have touched on in the third chapter, modernity brought along new challenges to which the Ottoman Empire had to respond.

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<sup>267</sup> Murteza Bedir, “Fīkh to Law: Secularization Through Curriculum”. pp. 390

Accordingly, the Ottoman Empire's attempting to use the Islamic framework in many spheres marked its modernization process as a special one, and in terms of legal modernization, it is possible to see the traces of this Islamic outlook.

First of all, it is necessary to pay attention to the matters covered by *fiqh* in order to see whether its scope was insufficient before modern law, which dealt with the spheres of human life or earthly matters brought about by modernity.<sup>268</sup> Accordingly, one of the points that formed the source of the discussions was “*ijtihad*”. What was questioned was that whether the gate of independent legal reasoning within the realm of *fiqh* was open to making new laws.

It was argued to what extent *fiqh* could provide a flexible mechanism for change, and this constituted the essence of the discussions of the *ulema*. In this sense, some concepts of *fiqh* such as the notion of ‘*urf*, which was usually translated as custom, was brought to the fore by some circles of the *ulema*. Moreover, a distinction between the provisions of *fiqh* was made, categorizing them as changeable and unchangeable to make way for change. As far as changeable provisions are concerned, the concept of “*içtima*” was expressed by Gökalp, giving it a social shape as a ground of legitimizing change in the realm of *fiqh*.

This aspect was particularly associated with the realm of law and was different from that of *fiqh*, which was usually regarded as the concern of religion. However, some argued that the change in the realm of *fiqh* could be realized within *fiqh* itself without seeking external tools. In this section, attention will be drawn to how this change began in the sphere of *fiqh* through ‘*örf* and expanded to the realm of law as well. In this sense, it is appropriate to take a closer look at

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<sup>268</sup> Sava Paşa, *İslam Hukuku Nazariyatı Hakkında Bir Etüd*, çev. Baha Arkan, Yeni Matbaa, c. 1 (Ankara, 1955). Pp. 128. Sava Pasha described science of *fiqh* as following: in addition to matters, like praying and fasting, the science of law also contain issues related to matters concerning to relationship with state, and the relationship of people with society as well as with the state. He evaluated the science of law within the category of science, *ulum-ı şer'iyye*, the source of which was divine inspiration, *vahiy*, and *sunman of prophet*.

the views of İzmirli İsmail Hakkı and Halim Sabit. Also, Gökalp's theory of *usul al fiqh*, (*içtimai usul-ı fıkıh*), will be touched upon in the second section within the scope of the discussion on "örf". The views of these figures will be examined by looking at the basis they suggested to enable change.

#### 4.2.2. Tool for Legitimizing Change: Örf and İctihad (İjtihad):

In this section, by following the views presented by the circle of *ulema*, I will concentrate on the notions they used to justify change in the realm of *fiqh*, discussing the reasons which made such a change necessary and inevitable. To begin with, the concepts of "örf/urf" and "ijtihad" were not alien to the Islamic legal system and their use dates back to the early days of Islam; we see the traces of the conception of 'örf in the writings of the *ulema* and in the textbooks about *usul al fiqh*. 'Örf and *ijtihad* deserve attention because the meaning attributed to them in the Second Constitutional Era reveals the essence and transformation of the legal thought of this era.

The basis of the new arguments was the idea of coming up with a new way without overlooking religious law. More precisely, the provisions of *fiqh* and the tools it provided attracted attention.<sup>269</sup> Accordingly, there were extensive references to *örf* and *ijtihad* in the periodicals published by the *ulema*. The significance of this notion in the matters belonging to the sphere of *muamelat* was further underlined in the textbook which included lessons Mehmed Kamil Bey, the deputy of Karahisar, gave in madrasas on the history of *usul al fiqh*.<sup>270</sup>

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<sup>269</sup> Sami Erdem, "Tanzimat Sonrası Osmanlı Hukuk Düşüncesinde Fıkıh Usulü Kavramları ve Modern Yaklaşımlar". pp. 74

<sup>270</sup> For instance, Mehmet Kamil, *Tarih-i İlm-i Fıkıh; Medreset ül- mütehasısında takrir edilen dersleri havidir*. p. 6 *Fıkıhın kısım-ı muamelatına dair mesailde örf ve adata da ehemmiyet veriliyordu. ; Nusus-ı şeriye nazar-ı dikkate alınarak muamelat-ı nassa aid olub da gayr-i mensus bulunan mesailde örf ve adet nassa müracaat olunması beyn'el-tabı'yyün kavaid-i fikhıyeden bir kaide-i esasiye oldu.*

The main idea this circle sought was to draw attention to the fact that *fiqh* could be used and made flexible to meet the demands of the modern age, and also that it could be used as a basis for new legal regulations that were not covered by *fiqh*. In textbooks, the science of *fiqh* was described as: In terms of legislation, *teşri*, God was incorporated into the realm of *fiqh* and the use of *şer'i* evidences<sup>271</sup> and the *Qur'an (Book)*, *Sünnet*, *İcma-ı ümmet* and *qiyas* to drive opinions constituted the essence of the science of *fiqh*.<sup>272</sup> According to İzmirli, the science of *usul al fiqh* classified people's actions in line with the criteria of beneficial-harmful, and it was wrong to exclude the *amel* belonging to these criteria from *fiqh*.<sup>273</sup> While *fiqh* was described as such, according to İzmirli, law (*hukuk*) was depicted as following: Law consists of four sections, that are the law of God (*hukuk-ı mahza-yı allah*), law of worship (*mahza-ı hukuk-ı 'ibad.*), *hakk-ı Allah* and *hakk-ı 'ibad ictima'* respectively. This definition is far from the meaning attributed to law by the modern state.<sup>274</sup>

From his point of view, the division of provisions on religious matters (*ibadat*) and worldly matters (*muamelat*) began to be emphasized, but it should be underlined that there was no total division of *fiqh* as Islamic law and praying, at least on İzmirli's side.<sup>275</sup> In order to make a *şer'i* judgment on a case, first of all,

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<sup>271</sup> Süleyman Sırrı İçelli, *Medhal-i Fıkıh*. p. 3-4 *İfade ve istifadesinde bulunduğumuz ilmin ismi fıkıh olub teşri' itibariyle va'az-i cenab-ı allah be tebliğ itibariyle va'az-i Hoca-ı kainat-ı aliyye... edille-i şeriyeden müstefad olan kavaid-i usuliyenin vaz' ve tesisiyle ahkam-ı fûru'asını bi'l-i istinbat cem' ve tedvinle üslub-u ma'ruf üzere*

<sup>272</sup> Ibid, Süleyman Sırrı İçelli. pp. 16

<sup>273</sup> İzmirli İsmail Hakkı, "Sebilürreşad Ceride-i İslamiyyesi heyet-i Muhterem-i İlmiyyesine", 16 Nisan 1914. pp.94 *Bizim 'ilm-i fikhımız nefsi insaniye dünyeviye ve ahrevi nef' ve zararı mucib olan umurun ahkamını bildirir. İnsanların 'amellerini nef' ve zarar nokta-yı zararından tedkik eder; Nef' ve zarara müteallik olan 'amel, fikhiden ayırmak islam fikhınca doğru değildir.*

<sup>274</sup> See Chapter 3.

<sup>275</sup> Ibid, pp. 94 İzmirli İsmail Hakkı, "Sebilürreşad Ceride-i İslamiyyesi heyet-i Muhterem-i İlmiyyesine". *Hukuk dört kısımdır: hukuk-ı mahza (yalnız)- allah, mahza-ı hukuk-ı 'ibad, hakk-ı*

it was necessary to look at books of *fiqh* to see if there was a clear judgment on that case.<sup>276</sup> If a clear judgment could not be found, then, the issue of performing legal reasoning called *ijtihad* came into play.<sup>277</sup> However, if a judgment was available in *nass* and *ijma*, it was not acceptable to carry out *ijtihad*.

Thus, it can be argued that there were some obligations to be able to carry out *ijtihad* in the domain of *fiqh*.<sup>278</sup> First of all, İzmirli criticized that *ijtihad* could not be equal to *qiyas*.<sup>279</sup> For him, *ijtihad* meant coping with difficulties. While doing so, making an effort could be translated as “*bezl*” (effort) and *makdur*. These two concepts underline the effort of the *mujtahid* who performed *ijtihad* in the context of giving *şer’i* provisions of *fiqh*. *Qiyas*, on the other hand, referred

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*Allah ile hakk-ı ‘ibad ictima’ edib hakk-ı Allahın galib olduğu hukuk hukuk-ı Allah. Hukuk-ı allah hukuk-ı ‘umumiye demektir. Hukuk-ı Allah. Hukuk-ı Allah hukuk-ı ‘umumiye demektir; ibadata ahkam uhreviye mu’amelata ahkam-ı dünyeviye te’alluk etmek asıldır.*

<sup>276</sup> İzmirli İsmail Hakkı, “Her Mesele-i Fıkhiyye için Nakil Lazım mıdır?” 12, sy 290 (02 Nisan 1914). pp. 58 *Bir hadise hakkında hüküm-i şeriyeyi beyan etmek için o hüküm Şeriyenin herhalde kitab-ı fıkhiyyede sarahaten beyan olunması lazım mıdır? Hüküm-i şeriyeye sarahaten beyan olunmadığı halde kavaid-i fıkhiyye sayesinde hüküm-i Şeriyeyi beyan edemez miyiz? Hüküm-i şeriyeyi beyan edebilirsek müctehid olmaklığımız lazım gelmez mi? Müctehidin başkası hüküm-i şeriyeyi beyan edebilir mi?*

<sup>277</sup> İzmirli İsmail Hakkı, “İctihadın Bais-i Tevellüdü” 12, sy 297 (21 Mayıs 1914). pp. 190. *İctihad iki halde fer ayn olur: Müctehid ‘amele muhtaç olur, kendi hakkında farz-ı ‘ayn olur, Çünkü müctehidin ne kendi hakkında, ne başkası hakkında birine takliya etmesi caiz değildir. Bir hadise hüdüd eder, sa’il o hadise hakkındaki hüküm-i şer’iyi Başkasına sormağa kadir olamaz. Artık hadisenin fevtinden korkarak ‘alel fevr içtihad vacib olur.*

<sup>278</sup> Ibid, İzmirli İsmail Hakkı. pp. 190, *sa’il-i hadise hakkındaki hüküm-i şer’iyi başka bir müctehid de sa’il edebilir, müctehitlerden biri cevap verir ise farz-ı sakıt(hükümsüz) olur. Müctehid cevab-ı zahir iken imsak ederlerse günahkar olurlar. Bilakis cevab-ı zahir değil ise imsaklarından naşi ma’zur olurlar.*

<sup>279</sup> Ibid, pp. 190 İzmirli İsmail Hakkı. *En ziyade dilimizde dolaştırdığımız “içtihad” kelimesinin ma’na-yı fıkhiyesi layıkıyla anlaşılmamıştır: Kimi ictihad ile kıyası bir ‘ad ediyor kimi “içtihad örf’e intibak ihtiyacından mütevellüd diyor... İctihad müşkülâtı olan bir şeyi ele geçirmek mahsusunda takatini sarf etmektir ki bezl-i makdur ile tercüme olunur.*

to the expression of special opinions mujtahid made on a case.<sup>280</sup> In addition, *qiyas* was regarded as an act of giving opinions on a case by taking similar cases as an example, based on the *hadith* and *Qur'an*. However, if an opinion could be found in the *Qur'an* and the *sunnan*, it was not acceptable to choose the way of *qiyas*.<sup>281</sup> It seems that even if the option of *ijtihad* was offered within the sphere of *fiqh*, the use of this opportunity was limited, but as we will see, it would be attempted to make this limitation flexible by stressing some concepts.

Within the scope of this section, I will dwell upon the notion of *örf*, since this conceptual enquiry will contribute to how the notions presented by the *ulema* were used to strengthen the argument of change not only in the sphere of *fiqh*, but also in that of law by benefitting from the tools *fiqh* provided. The latter point will be better clarified in the following sections and within the scope this one, the point of attention will be the concept of '*örf*'. At the basis of the argument predicated upon "*örf*" lay the view that if provisions (*ahkam*) belonged to *örf* (*ahkam-ı cüziyye*) and '*adat*', they could be regarded as open to change.<sup>282</sup> We will elaborate on this in the following sections, but for now it is appropriate to make a brief introduction to the relationship between *örf* and the idea of change. First of all, in the periodicals scanned, it is seen that a distinction was made between *örf* and *adat*. Giving an ear to the article and the classifications of İzmirli will clarify this point.

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<sup>280</sup> İzmirli İsmail Hakkı, "İcma, Kıyas ve İstihsanın Esasları", *Sebilürreşad* 12, sy 295 (07 Mayıs 1914). pp.152 *Kıyas: Bir hadisenin hükm-i şerisini beyan etmek hususunda bir fakihin rey-i mahsusudur*. The definition of the following terms: *İcma*, *Qiyas*, *istihsan* and *maslahat* was made in the second chapter of this thesis.

<sup>281</sup> Şimşirgil, Ekinci, ve Turkey, *Ahmed Cevdet Paşa ve Mecelle*. pp. 100. Mecelle, md.14 *mevrid-i nassta içtihad müsağ yoktur*. was underlined that opinion or action determined via nass (*nakl*) could not be choose the *qiyas* (*akl*). See also example in footnote 59.

<sup>282</sup> İzmirli İsmail Hakkı, "Örfün Nazar-ı Şerdeki Mevkii", *Sebilürreşad*, sy 12 (23 Nisan 1914): 293. pp. 130 *Zikr olunduğu üzere birçok ahkam ancak 'örf ve 'adete binaen kılınmış idi. Böyle 'örf ve 'adete mübteni olan ahkam ancak 'örf ve 'adetin tegayyüriyle tegayyür eder. Bu surette nassa mebni olmayub 'örfe mübteni olan ahkam-ı cüziyye tegayyür eder. Yoksa ahkamı külliye asla tegayyür etmez*

According to him, if there was no existing clear opinion, *hüküm*, on an issue, it was reasonable and acceptable to validate *örf* and *adat* as *hüküm*.<sup>283</sup> Also, he underlined that numerous opinions had been given by using ‘*örf* and ‘*adat* as the source of opinion, *hüküm*, in addition to the *Qu’ran*, *İcma* and *Qiyas*, which were evaluated as the basic evidence of *hüküm* in Islamic law, *fiqh*.<sup>284</sup> It seems that İzmirli’s approach to the notion of ‘*örf* and *adat* can give us an idea, if not entirely, of how the *ulema* defined the legitimacy of the Islamic legal system, *fiqh*. In this context, *fiqh* can be considered not only a science that studied and classified human action, ‘*amal*, but also in a category of science that gave *şer’i hukm* on ‘*amal*. Nevertheless, it was difficult for *fiqh* to cover the sphere of worldly matters entirely<sup>285</sup>, as its scope included the issues of *ibadat*, *muamelat* (transactions), *ukubat* (criminal punishments) and *kefare*.<sup>286</sup> The meaning of *muamelat* is ensuring felicity both in the realm of worldly and religious matters.<sup>287</sup> Although *ijtihad*, performing legal reasoning, came to help, it was difficult to find the appropriate opinion as there were various opinions by

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<sup>283</sup>Ibid, İzmirli İsmail Hakkı. pp. 129 *Ya’ni hakkında nass-ı varid olmayan bir hüküm-i şer’iyi İsbat etmek için ‘örf ve ‘adet hüküm kılınır... Herhangi hadise ki hakkında nass-ı şari’ olmaz ise o hadisenin hükmi bilinmek için ‘örf ve ‘adete müracaât olunur*

<sup>284</sup>Ibid, pp. 129 İzmirli İsmail Hakkı. *Birçok mesailde ‘örf ve ‘adete müraca’aat olunur. ‘adet bir asıldır.*

<sup>285</sup> Manastırlı İsmail Hakkı, “*Ahkam-ı İslamiye ve İctihad*”, *Sırat-ı Müstakim* 2, sy 29 (11 Mart 1909). pp.33 *Muamelat-ı dünyeviye ve intizam-ı ahval – i umumiyyeye dair olan kısım ... şeriat-ı amme daima olarak cüziyatını tahdid etmek mümkün değildir*

<sup>286</sup> Süleyman Sırrı İçelli, *Medhal-i Fıkah*. pp. 21. During the process of preparing Mecelle, the categories of munakahat, muamelat, and uqubat was given attention. As much as that these three categories were also evaluated and paid regard as the main constituents of “Civil Law”. Report which explained the process codification, *Mecelle*, put emphasize on the Islamic jurisprudence’s suitability and availability to solve disputes occurred in commercial courts which was one of the problems paving way towards changing the legal tradition in the Ottoman Empire and paving path towards Mecelle.

<sup>287</sup> Ibid, pp. 24 Süleyman Sırrı İçelli. *Muamelatın usul-ı icmalıyesi emr-i maişet ve hüsn-i maişetin teminiyle heyet-i ictimaiye ve mukteza-yı medeniyeyi muhafaza ederek saadet-i diniye ve dünyeviye istihsal için meşru’ buyurulan muavezat-ı maliye ve beka-yı nesl ile ibka-ı nev’i için muhafaza-ı hukuk için mühasamat ve muhakemat emsali birçok efail-i mükellifdir ki...*

different *mujtahids* on the same matter. If we attempt to better understand what we mean by the word *muamelat*, it can be stated that the intention of the matters related to it aims to bring order to life.<sup>288</sup> Therefore, it was argued and underlined that people's progress also meant that the matters belonging to *muamelat* were also exposed to change.<sup>289</sup>

Consequently, by following the conclusion of Sabit, *örf* constituted the basis of the argument of change, and *muamelat* and *örf* were brought to the fore as the main element of change.<sup>290</sup> It must be underlined that the argument of *örf* was not a phenomenon which emerged in the Second Constitutional Era. On the contrary, it goes back to the early days of the Ottoman Empire, as it has been explained in the third chapter. In *Mecelle*, the value of *örf* as the source of law and the mechanism of change had also been emphasized.<sup>291</sup> The main concern here was the reinterpretation of the notion of *örf*, and one of its consequences was the emergence of the theory shaped around *ictimai usul-i fıkıh*. The most prominent supporter of this argument was Ziya Gökalp. In the second section of this chapter, the approach of Gökalp, who was a bureaucrat outside the circle of *ulema*, to *fiqh* will be analyzed.

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<sup>288</sup> Kazanlı Halim Sabit, "İlm-i Fıkıh Tarihinden Bir Parça: İctihada Dair", *Sırat-ı Müstakim* 3, sy 64 (24 Kasım 1909). *Muamelatda maksad, sarf-ı tanzim-i hayat, umur-ı maiyeti ıslah, hülasa-i mmühemma imkan-ı saadet-i dünyeviyeyi ihzardan 'ibarettir.*

<sup>289</sup> Ibid, Kazanlı Halim Sabit. pp. 181. *Muamelat böyle değil: Yani beşer tefekkür etmeğe başladığı günden beri zamanımıza kadar hadisat üzerinde pek çok tahlilat icra edilmiş; Her noktasında senelerce tefekkürat yaratılmıştır.*

<sup>290</sup> Kazanlı Halim Sabit, "İctimai Usul-ı Fıkıh", *İslam Mecmuası* 1, sy 5 (09 Nisan 1914). pp. 146. *Zaten 'örf Müslümanların hayat ve maişetlerinde, ahlak be suretlerinde tecelli eden ictimai vicdandan 'ibaret, olub sıyaneti de (muhafaza) bütün efrad-ı ümmetin 'uhdesine mevdu'dur. Şeriat nassa ne kadar ehemmiyet verirse örf'e de o kadar ehemmiyet verir.*

<sup>291</sup> Recep Şentürk, "Intellectual Dependency: Late Ottoman Intellectuals Between Fıkh and Social Science". pp. 297

One of the main discussions in the aftermath of the revolution was to modernize the legal system. While approaching the issue of Islamic law, *fiqh*, within the circle of *ulema*, it is seen that the two aspects of *fiqh*, law and religion, had been broadly discussed especially in the writings of Halim Sabi, Ziya Gökalp and Ahmed Şirani. Particularly in terms of law, the circle of *ulema* criticized the importation of Western laws and justified their argument by conducting an extensive research on the history of Islamic law, stressing the suitability and adaptability of *fiqh* to modern needs. The main concern in the emergence of such a defensive argument in the circle of *ulema* was to prevent *fiqh* from being completely overlooked in the modern legal order, otherwise this exclusionary act would be detrimental to it. Their view can be depicted as compromising.

Although it was accepted that *fiqh* could not give *şer'i* opinions covering all spheres of human life, it does not mean that the gate of *ijtihad*, giving opinion about new cases, had been closed. On the contrary, the gate of *ijtihad* was regarded as open to making new laws since as time progressed, people progressed as well and their needs underwent change. In the light of this perception, it was believed that *fiqh* and the opinion of *ijtihad* occupied a central place in terms of underlining the flexible aspect of *fiqh*. If we attempt to elaborate on what we have stated, as we have previously emphasized by taking this aspect of *fiqh* into consideration, some circles of the *ulema* criticized the attempts to import foreign laws and advocated the legibility of *fiqh* to derive opinions rather than subordinating to foreign laws. In this context, the views of Halim Sabit and Elmalılı Hamdi Yazır are worth mentioning.

What these men dwelled upon was to come up with a moderate way of reform in the realm of law, and to criticize the deteriorated situation of Islam at the same time. Sabit, for instance, firmly rejected the argument that the gate of *ijtihad* was closed, and linked the defense of such an argument with the misery of minds

focusing on strict opinions.<sup>292</sup> He also underlined that the false perception of *fiqh* as consisting of only a few narrow principles, *destur*,<sup>293</sup> led some to claim that the gate of *ijtihad* was closed, and this perception led to the misconception that the boundaries of *fiqh* were strict to enable the change the modern state required.<sup>294</sup> From Sabit's point of view, the evolvement of the science of *ijtihad* was a turning point in a sense that *ijtihad* found a place to develop within the Islamic legal thought.<sup>295</sup> The discussion on *ijtihad* brings us directly to the issue of classifying changeable and unchangeable opinions, in a sense that no *ijtihad* was allowed in terms of unchangeability. It is necessary to clarify what unchangeable means. According to Manastırlı, for example, in the field of religious obligation, it was no longer allowed to perform *ijtihad*<sup>296</sup> and he conceptualized this situation as *ahkam-ı asliye* and *itikadiye*. In addition, Manastırlı expressed two more provisions, *muamelat-ı dünyeviye* and *intizam-ı*

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<sup>292</sup> Kazanlı Halim Sabit, "İlm-i Fıkıh Tarihinden Bir Parça: İctihada Dair". pp. 181. *Yine utanmıyor, kafalarımız esfel sefaletle doğru meyl ettirerek kasvetli, kararımış kalıblara kuvvet verdiğiinden sonra "Bab-ı İctihad Mesduddur! Diyebilecek kadar kendimizi de bir cesaret buluyoruz*

<sup>293</sup>Ibid, pp. 260 Kazanlı Halim Sabit, "İctihada Dair", *Sırat-ı Müstakim* 3, sy 69 (30 Aralık 1909). *Hala da öyleyiz. Bu ta'rif anlaşılmamış ola idi...bizim ilm-i fıkhı böyle mahdud birkaç Desturdan ibaret zanneder miydik?... Biz bu tarifi hakkıyla anlamış olaydık Bab-ı ictihad mesduddur demeye cür'et yab olur muyduk?*

<sup>294</sup> Ibid, pp. 260 Kazanlı Halim Sabit. pp. 260- 261

<sup>295</sup> Ibid, pp. 260 Kazanlı Halim Sabit. *ilm-i fıkh: nefsin kendisi için faideli ve zararlı olan şeyleri bilmesidir. İşte ilm-i fıkh böylece, hakikiyetle tehaddüd olunduktan sonra İctihad, bütün müşkülât-ı 'arziyeden kurtularak bir kolaylık kesb etmiş bulunuyordu. Buna kadar ise ictihad için bir mevzu'-ı muayyen malum değildi: sahada bir vüs'at (genişlik), bir umumiyet, binaen aleyh mahal-i ictihadda Müphemiyet (belirsizlik) mevcut idi. İşte 'ilm-i fıkhın tehaddüdüyle ictihad için manafi' İnsaniye ile muzıratı arasınca geniş fakat ma'lum bir meydan açıldı. Bu meydanda her mütefekkir, her müctehid istediği kadar at oynatabilecekti.*

<sup>296</sup> Manastırlı İsmail Hakkı, "Ahkam-ı İslamiye ve İctihad" 2, sy 28 (04 Mart 1909). pp. 17- 18 *Elhasıl nefasil-i ahkam-ı şer'ıye itikadat, ibadat, melakat, muamelat, unvanlarıyla mütamayiz bulunan umur-ı ahval-i ibada dair şu dört kısım ahkam-ı celileye münhasırdır.*

*ahval-i umumiye*.<sup>297</sup> It was the latter aspect that was evaluated within the context of changeable provisions since these provisions were exposed to changes in time and place.

The source of concern was how the matters related to *muamelat-ı dünüveviye* and *intizam-ı ahval-i umumiye* would be satisfied only within the scope of *fiqh* or by enacting and importing new laws. Manastırlı emphasized the relationship between law, ‘*örf* and *şer*’ and advocated that it was possible to depict them within the category of “law”.<sup>298</sup> From his point of view, if laws were produced by employing *örf* and *şer*’i provisions as an accumulated source from the past to the present, the cases related to *muamelat-ı dünüveviye* could be solved within the boundaries of *fiqh* provisions. The opinion suggested by Manastırlı seems charier. If we attempt to summarize the main idea, we can argue that the matters belonging to the sphere of *muamelat* could be turned into “law”, but the conditions for realizing this differed.

For Manastırlı, as we have mentioned, ‘*örf* and the cumulative provisions of *fiqh*<sup>299</sup>, *külli kaideler*, acted as the main tool in the formulation of new laws<sup>300</sup>, but other tools, such as *maslahat* and *istihsan*,<sup>301</sup> could also be used. How the door of change opened and who had the authority to make regulations

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<sup>297</sup> Manastırlı İsmail Hakkı, “Ahkam-ı İslamiye ve İctihad”, 11 Mart 1909. pp. 33

<sup>298</sup> Ibid, pp. 34 Manastırlı İsmail Hakkı. *Örf ile muradımız kavaid-i şeriate muvaffakatı ile beraber beyne’l- nas mukarrer olan şeylerdir ki bazı ulema buna kanun tesmiye ederler” buyurulmuştur.*

<sup>299</sup> It is a notion of *fiqh* which refers to the general principles of law and also covers the matters of different realms, totally or to certain degree. General principles utilized to formulate opinion.

<sup>300</sup> Mansurizade Said (1864-1923), who was another scholarly person who taught in Darülfunun and known as his identity as *mudarris*. *His writings mainly focused on uslamic tradition of fiqh and ijti had.*

<sup>301</sup> Definition of these notions, *maslahat and istihsan*, is made in the second chapter.

constituted the main attention as far as the perception of *fiqh* is concerned, not only by the circle of *ulema* but also the state. From Gökalp's point of view, the door of change could be opened by infusing *fiqh* with a "social" dimension and leaving its other aspects to the state's concern. The aim of the next section is to explore and unveil how Gökalp read *fiqh* and which aspect of it formed the essence of his argument.

#### 4.2.3. Ziya Gökalp: *İctimai Usul al fiqh*

According to Bedir, the intention of Gökalp can be viewed as an attempt to establish a bridge between Durkheimian sociology and *usul al fiqh*.<sup>302</sup> In order to make sense of this bridge, the opinions of Gökalp and the notions of *fiqh* he used and ascribed meaning to with sociological connotations will be explored throughout this section. Gökalp's discussion on *fiqh* in *İslam Mecmuası* got reactions from the Islamist circle, criticizing his discussion of the notion of 'örf within the category of change. As we have mentioned in the section above, there was no possibility for *külli* provisions of *fiqh* to change, but *cüzi* provisions of *fiqh* based on 'örf and 'adat could.

In his articles published in *İslam Mecmuası*, Gökalp came up with a new theory of *usul al fiqh*, the essence of which was based upon the idea that people's actions were determined in accordance with *hüsn and kubh*. Gökalp categorized these actions in two as attached to religion and belonging to legal affairs.<sup>303</sup> Again, he underlined that *menasik-ı islamiye* and *hukuk-ı islamiye* were two

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<sup>302</sup> Murteza Bedir, "Fıkıh to Law: Secularization Through Curriculum". pp. 391

<sup>303</sup> Ziya Gökalp, "Fıkıh ve İctimaiyyat", *İslam Mecmuası* 2, sy 2 (26 Şubat 1914): 40-44. pp. 40. *İnsanların amellerini hüsn u kubh nokta-yı nazarından tedkik ve takdir eden amele- islam aleminde "fıkıh" namı verilir. Hüsn yahud kubh haiz olan amelleri "dini ibadetler ve hukuki muameleler diye ikiye ayırabiliriz*

components of Islamic law, *fiqh*.<sup>304</sup> Gökalp interpreted *fiqh* with a sociological concern by arguing that it did not only rely on revelation but it also had a social aspect. The essence of this aspect was determined by ‘*örf*, which he regarded as the conscience of society.<sup>305</sup> Moreover, ‘*örf* constituted the main source of community. The community of Islam resorted to the *Qur’an* to solve and satisfy its legal needs, but it also made progress in its social (*ictimai*) life. This progress led to a change in its ‘*örf*, depicted as the essence of the society.<sup>306</sup>

Gökalp treated the notion of ‘*örf* within a broad context in a sense that it contained various dimensions such as public opinion, *te’amul*, *adat*, *anane* (tradition), *istimal* (usage), *icma* of the *fakih*s, which were also evaluated as its manifestation. What he asserted was that *nass* was related to worldly matters resulting from ‘*örf*.<sup>307</sup> As it has been mentioned, the Second Constitutional Era had witnessed discussions on the essence of law. In this sense, the theory of *ictimai usul al fiqh* expressed by Gökalp represents some clues about the issue of the relationship between *fiqh* and law.

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<sup>304</sup> Ziya Gökalp. Ibid, pp. 41 *O halde fıkıh-ı islam menasik-i islam ve hukuk-ı islamiye namlarıyla iki mebhas-ı müstakili müştemildir.*

<sup>305</sup> Ibid, pp. 41 Ziya Gökalp. *Örf ise cemaatin ilmi maişetinde tecelli eden ictima’i vicdandır; Şu halde fıkıh bir taraftan vahiy diğer cihetten ictimaiyyat a istinad eder. Yani islam-ı şeriati hem ilahi hem de ictimaidir.*

<sup>306</sup> Ziya Gökalp, “İctimai Usul-ı Fıkıh”, *İslam Mecmuası* 1, sy 3 (12 Mart 1914): 84-87. pp. 84-85. *Her cemaatin canlı hukuki, hakiki kanunı hayatının mahsulesi olan örfünden ibarettir. Kitaplarda yazılı olan düsturları tefsir ve hayata tatbik eden vicdanlarda yaşayan kaidelerdir; İslam cemaati hukuki ihtiyaçlarını tatmin için ol emrde kuran-ı kerime müracaat ediyordu. Bir taraftan da bu cemaat günden güne gayet seri bir surette tevsi’ etmekte olduğundan ictima’i hayatında ve dolayısıyla örf ve adetinde amik tehavviller geliyordu*

<sup>307</sup> Ibid, pp. 87 Ziya Gökalp. *Madem ki kavimler ve ümmetlerin ictima’i vicdanları ahlak-ı adetleri, hukuki teamülleri, siyasi efkâr-ı umumiyeleri ferdi idarelerden müstakil ve onlara hakim olan tabii kanunlara tab’idir bu sünnetleri İcaben dünyevi işlere ve ictimai hayata tealluk eden nasların hemen kaffesi örfden mütevelliddir denilemez mi?*

Gökalp brought this discussion to the fore by rereading the constituent notions of Islamic law, *fiqh*. Until now, we touched on Gökalp's notion of 'örf' as the source of law. In addition, he also dwelled upon the *husn* and *kubh* discussion in his article named "*Diyanet ve Kaza*", in which he once more drew attention to the distinction between religious matters and legal matters, and the division of authority between *muftiate* and the judge (*qadı*). This separation of him can tell us something about the relationship between *fiqh* and law. The same separation can also be seen in Sabit's writings emphasizing the executive and legislative aspect of the *ulema* and the role attributed to Islamic law.

Before clarifying this point, Gökalp's argument on *husn* and *kubh* merits attention. Given that this discussion occupied a significant place in the realm of *fiqh*<sup>308</sup>, three categories of *hüsn* and *kubh* were evaluated within the category of 'akl, wisdom, by İzmirli, in a sense that it determined what *hüsn* and *kubh* were. In the first category, *hüsn* was associated with fullness while *kubh* was associated with incompleteness. In the second category, it was argued that *hüsn* was compatible with "purpose", *garez*, and *kubh* was against it. Finally, *hüsn* did not oppose people (*tebaaya muhalif*) as *kubh* did.<sup>309</sup> What lay in his discussion was that *husn* and *kubh* must not be interpreted under the category of benefit and harm (*nef'* and *zarar*), but rather that attention must be paid to the good and bad aspects, as we have emphasized in his definition *fiqh*.<sup>310</sup> This raised the question of what basis was taken as a tool for evaluating people's actions. It can rightly be claimed that 'örf' constituted the framework of Gökalp's argument not only as the source of law, but also as a criterion for classifying people's 'amel.

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<sup>308</sup> İzmirli İsmail Hakkı, *Usul-ı Fıkıh Dersleri* (Dersaadet (İstanbul): Ahmet Ta'lat, Hacı Mehmet Tahir, 1329), www.hahthitrust.org. p. 2;

<sup>309</sup> İzmirli İsmail Hakkı. Ibid, p. 6. *Düşmanlarımızın ikbali kubh, askerimizin muzafferiyeti hüsn, ammece meşhu olan hüsn ve kub bu manya gelenidir; Bu üç manada kullanılan hüsn ve kubh aklidir. Şer' varid olsa bile 'akl onların hüsn ve kubh olduğuna hüküm eder.*

<sup>310</sup> Ziya Gökalp, "Hüsn ve Kubh: İctimai Usul-ı Fıkıh Münasebetiyle", *İslam Mecmuası* 1, sy 8 (21 Mayıs 1914). pp. 228

In the light of this view, he stressed the changing and relative aspect of what was good and bad among congregations just as the ‘*örf*’ of each congregation differed from each other.<sup>311</sup> Such an attitude probably stemmed from his evaluation of law in the category of ‘*örf*’. In fact, his aim was to emphasize that law as well had the dynamic of ‘*örfi*’ change.<sup>312</sup> Consequently, when his emphasis on ‘*örf*’ is considered, it seems that ‘*örf*’, having changed dimension, was pursued as a matter of expanding the sphere of *fiqh* by making it meet the needs of the modern age. Furthermore, since he depicted *fiqh* by stressing on its “social” dimension in addition to its divine aspect, he did not exclude ‘*örf*’ from the realm of *hukuk* and broadly incorporated it in this realm. For him, law was in a state of progress in time and space, and it was a result of the social, *içtimai*, life.<sup>313</sup>

Another point within the context of Gökalp’s *içtimai usul al fiqh* was his discussion on the institutions of *Diyanet* and *Kaza*. His discussion on these institutions was shaped by his perception of religion to a certain degree, and the social mission expected from them suggested that the legal and legislative sphere should be separated from that of religion, and in connection with this, the new conception of *fiqh* should be elaborated.<sup>314</sup> The rest of this section will be devoted to how Gökalp shaped his argument.

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<sup>311</sup> Ibid pp. 230 Ziya Gökalp.

<sup>312</sup> Ziya Gökalp, “İçtimai Usul-ı Fıkıh”. pp. 86. *Saniyen örfün ahlaki, hukuki, siyasi, kısımları vardır ki aralarındaki farklar tayin edilmek iktiza eder.*

<sup>313</sup> Ziya Gökalp, “Fıkıh ve İçtimaiyyat”. *Mesela devletlerin kanunları biri birine uymakla beraber her devletin kanunu kendi memleketinde mutlak bir mutaiyeti (boyun eğme) haizdir. Nasıl ki milletler için ahlak böyledir. Fiilerin hayır yahud şer olması içinde cereyan ettikleri ictimai enmuzeclere nisbetledir. Buna binaen yalnız zamanların tegayyürüyle değil, nisbet olundukları cemaatlerin tahlifiyle de ahkâmın değişmesi lazım gelir.*

<sup>314</sup> Ziya Gökalp, “Dinin İçtimai Hizmetleri”, *İslam Mecmuası* 3, sy 36 (23 Eylül 1915): 772-76. pp. 772. *Dinin içtimai hizmetleri siyasi, hukuki, lisani iktisadi, ilmi müesseseleri kendi dairesi dahiline alması*

To begin with, according to Gökalp, the *hukm* of action given by *mufti* and *qadı*, judge, were different in a sense that *mufti* was responsible for giving information about the *şer'i* aspect of an action, whereas *qadı* was responsible for presenting *kazai hüküm* named *i'lam*. In the light of such a division, what he suggested was the separation of authorities in the realm of religion.<sup>315</sup> Based on this point of view, Gökalp expressed that the provisions of *kaza* remained inadequate contrary to the *şer'i* aspect, and attributed this to the fact that *diyanet* and *kaza* were intermingled with each other.<sup>316</sup> As far as this purpose is concerned, in the discourses of some people, which we will dwell upon, this separation constituted a significant aspect in terms of perceiving *fiqh*.

Concordantly, he suggested the separation of the institutions of Muftiate and Judgeship. Furthermore, the expression of a new theory of *usul al fiqh* predicated upon the notion of '*örf*' and its separation from *fiqh* which was shaped by strict *hukm*, called *nass*, draw attention to the fact that the source of law based on divine and *örfi* grounds that had been exposed to change had precipitated the separation of religion from the legal sphere by stressing the social benefits of religion. However, it should be kept in mind that for Gökalp, the notion of *örf* was not a concept alien to *usul al fiqh*. On the contrary, this concept was reinterpreted on a *şer'i* base.<sup>317</sup> The opinions of Sabit, Elmalılı and Ahmed Şirani

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<sup>315</sup> Ziya Gökalp, "Diyanet ve Kaza", *İslam Mecmuası* 3, sy 35 (09 Eylül 1915). 759-760

<sup>316</sup> Ibid, pp. 760 Ziya Gökalp. *Bir işin kazai ciheti ise iktisadi, feni birçok dünyevi icabata tab' olmak mecburiyetindedir. Bizim mübalat-ı diniyye hususunda sair milletlerden geri olmamızın müsbebi şu dur ki diyanetimizin esasları son derece 'ali olduğu halde kazamızdaki kaideler ve usuller gayet nakısalıdır. Kaza ile diyanet birbirine karıştırıldığı içindir ki kaza işlerinden müşteki olan kimseler dine karşı da mübadalatsız oluyorlar. Diyanet ve kaza birbirine karıştığı zaman ikisi de birbirine muzır olur. Çünkü bunların esasları ayrı ayrı gayelere ma'tuftur. Fakat müftüler yalnız diyani hükümleri i'ta, kadılar yalnız kazai vazifeleri icra ettiği zaman ikisi de vazifelerinin safvet ve tammamiyetini muhafaza edebilir.*

<sup>317</sup> Sami Erdem, "Tanzimat Sonrası Osmanlı Hukuk Düşüncesinde Fıkıh Usulü Kavramları ve Modern Yaklaşımlar". pp. 132.

(1879-1942)<sup>318</sup> also touched on this issue by emphasizing the separation between the legislative and the executive by the *ulema* and in relation, the effect of *fiqh* on the legislative and the executive sphere.

#### 4.2.4. Halim Sabit and Islamic Tradition of Fiqh

Halim Sabit is one of the persons whose writings on the issue of *fiqh* merit attention as far as the aim of this thesis is concerned. This section will be devoted to concentrating on Sabit's analyses and discussion on the relationship between *fiqh* and *hukuk*, whether controlling these fields was the responsibility of the state or the *ulema*. Corresponding to Sabit's conceptualization, there were two types of authorities, *velayet-i amme*; one was *velayet-i diniye* and the other was *velayet-i hukukiye*. The first authority belonged to *mufti* and *shaikhülislam* and concerned itself with religious matters, *umur-ı diniye*.

The latter was represented by the parliament and concentrated on legal matters, *umur-ı hukukiye*. He also underlined that these two authorities of religious and legal issues, *salahiyet-i teşri*, were previously incorporated in the person of *mujtahid*.<sup>319</sup> However, Sabit complained about the fact that it was still difficult to claim that religion was separated from law in that current situation. In other words, he underlined that there was no distinction between *fiqhi* provisions and *qanun*, because *qanun*, which was the product of the sultan and the caliphate, was depicted as the manifestation of Islamic *örf*.<sup>320</sup>

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<sup>318</sup> Şirani enjoyed madrasa education and lived during the late Ottoman Era. The education he received made him depicted as the *ulema*. He wrote on the Islamic tradition of *fiqh*, especially on the issue of *ijtihad*. He also gave lecture in the Fatih Mosque. Few article of him on *ijtihad* had been benefitted in this study to ground controversies carried around the reassessment of islamic tradition of *fiqh* during the Seond Constituonal Era.

<sup>319</sup> Halim Sabit, "İcma", *İslam Mecmuası* 2, sy 18 (31 Aralık 1914). pp. 488

<sup>320</sup> Halim Sabit, "Osmanlılar ve Teşri-i Salahiyyeti", *İslam Mecmuası* 3, sy 27 (13 Mayıs 1915). pp. 628. *Bu nokta-yı nazardan şu kanunlar ile fikhi hükümler arasında zerre kadar fark yoktu.*

He especially deemed the Tanzimat unsuccessful in terms of ensuring the separation of religion from worldly matters, and accordingly, religious institutions maintained their interest towards matters outside religion. At the same time, although the desired distinction could not be achieved, the state also failed to protect its *şer'i* base as legislation was still in the hands of Fetvahane.<sup>321</sup> However, to be able to accept such a conclusion it is necessary to clarify our definition of legislation. This latter aspect will be enlightened in the following sections. For now, suffice it to state that from Sabit's point of view, the authority in legal matters should not be confused with the responsibility of religious matters, and taking responsibility for non-religious matters should belong to the state. Accordingly, the sultan was regarded as the representative of *velayet-i hukukiye*, *kuvve-i teşriye* and *kuvve-i icraiye*, and since he possessed the title of caliphate, he was also evaluated as the custodian of *velayet-i diniyye*.<sup>322</sup>

If we attempt to further penetrate into Sabit's thoughts to comprehend the relationship between *fıkh* and *hukuk*, we can dwell on upon each of these authorities, *velayet-i diniye* and *velayet-i hukukiye*. In terms of the latter, *hukuk* was discussed in terms of *teşri*, *salahiyyet*, *icra* and *vaaz*. To begin with, in terms of *velayet-i diniyye*, the institution of Meşihat, Fetvahane and the position of the caliphate and müftiate began to be redefined in relation to the sphere they were expected to pay regard to. As we have previously mentioned, it was beside the point that there was no considerable distinction between the realm of law and

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*Aynı zamanda fıkhî hükümler islam örfünün resmîyet kesb etmiş birer şekli ise, sultan ve halifeleri tarafından vaz' olunan kanunlarda bundan başka bir şey değildi.*

<sup>321</sup> Halim Sabit. pp. 630. *Aynı zamanda devlet de tamamıyla bir (devlet-i şeria) mahiyetini iktisab edemedi. Çünkü bi'-l nazariye hala hakk-ı teşri hakk-ı kaza fetvehaneye aiddi. Yeni bir usul-i fıkıh tesisıyla ulum-ı islamiyede bir inkılap yapılmadıkça hukuk dairesi din dairesinden ayrılmayacak ve hukuk dairesinde hakimiyet fetva yerine hakimiyet-i millet kaim (devam etmek) olmayacaktı.*

<sup>322</sup> Ibid, pp. 632 Halim Sabit. *İşte görülyor ki bugün zat-ı padişahi velayet-i hukukiyenin yani kuvve-i teşriye ile kuvve-i icraiyenin mümessilidir. Aynı zamanda saffet-i celile-i hilafeti haiz olmak cihetiyle velayet-i diniyenin de nigahbanıdır*

religion. The ground of Sabit's argument can be better understood by concentrating on his discussion on the notion of *icma*, which belonged to the theory of *usul al fiqh*, but he re-contextualized this notion. *İcma* refers to the consensus reached by those who had legislative authority at the same time and placed on legal and religious matters.<sup>323</sup> Accordingly, Sabit made a distinction between *icma* of *velayet-i hukukiye* and *diniye* and deemed *icma* of *teşri-i hukuk heyeti* the most comprehensive one contrary to *icma* of *mujtahids*.<sup>324</sup>

This separation can also be read and interpreted as an attempt to ground the argument between the sphere of religion and law. In this context, religion and law acted as the two components of *icma* rather than exclusively underlining its religious aspect among *mujtahids*. What Sabit did was bring law into the picture in the realm of *icma*. The framework of his new conceptualization on *icma* was based on the parliaments of *mebusan* and *ayan*'s reaching an agreement on memorandums, *layiha*, prepared by the Ministries authorized by the sultan.<sup>325</sup>

It seems that *fiqh* was obliged to concentrate on religious matters, and worldly matters was entrusted to the authority whose essence lay outside religion. Hence, legislative authority was transmitted to the realm of the state by diminishing the authority *fiqh* previously possessed, in a sense that it was considered to be a part of the religious affairs institutionally authorized by *Diyanet*, *Meşihat* and *Muftiate*. The Ministry of Justice, on the other hand, would be responsible for

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<sup>323</sup> Halim Sabit, "İcma". pp. 489

<sup>324</sup> Halim Sabit, "Velayet-i Hukukiye", *İslam Mecmuası* 3, sy 33 (11 Ağustos 1915). pp. 728. *Anlaşıyor ki teşri-i hukuk heyetinin icma'ı müteakib ve kuvvet-i cihetinden müctehidlerin icma'ından daha vuzuhludur çünkü müctehitlerin icma'ı ekseriyet itibariyle böyle iki katlı olmamakla beraber*

<sup>325</sup> Halim Sabit, "Velayet-i Hukukiye" 3, sy 31 (14 Haziran 1915): 696-99. pp. 699. *Binaen aleyh teşri-i hukuk salahiyetinin icma'ı şöyle tarif olunabilir: Mebusan, ayan heyetleriyle zat-ı padişahiyenin salahiyetdar nezaretler tarafından hazırlanan layihalar hakkında ittifak etmeleridir.*

ensuring the distribution of justice, *tevzi'i adalet*.<sup>326</sup> Those who would occupy this position would be regulated by the state. Sabit regarded such a separation as the era of evolution of law.<sup>327</sup> If the necessity of a separation between the realm of religion and law was expressed by religion itself, the separation turned into national truth, *hakikat-ı milliye*.<sup>328</sup>

In the light of this view, he further advocated the relationship between law and the state rather than religion and law, as the state which had lost its authority within the field of law could no longer survive. Especially, he deemed significance to the re-promulgation of the Constitution of 1876 in 1908 since the *velayet-i hukukiye* began to be carried out by the deputy of the nation.<sup>329</sup> At the same time, the *mufti*, Fetvahane, *shaikhülislam* were entitled to possess the authority of legislating on religious matters, *teşri'i din salahiyeti*. This authority was evaluated within an official category in a sense that people entrusted with the responsibility of this authority acted as a representative of people's customs, which gave them an official status.<sup>330</sup>

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<sup>326</sup> Halim Sabit, "Osmanlılar ve Teşri-i Salahiyeti". pp. 631. *Madem ki adliye teşkilatı yapıldı, artık tevzi'i adalet münhasıran oraya aid olacakdı bab-ı celil-i meşihat adliye ve maarif işlerini ait oldukları nezaretlere bırakarak umur-ı diniye ile terbiye-yi diniye cihetini vazife edinecekti.*

<sup>327</sup> Halim Sabit, "İcma".

<sup>328</sup> Halim Sabit, "Osmanlılar ve Teşri-i Salahiyeti". pp. 630

<sup>329</sup> Ibid, pp. 632 Halim Sabit.

<sup>330</sup> Halim Sabit, "Velayet-i Diniye", *İslam Mecmuası* 3, sy 28 (27 Mayıs 1915): 644-47. pp. 644. *Teşri-i diniye ile teşri-i hukukiyenin tekamül neticesi birbirinden ayrılmış olduğu söylendi. Şu halde meşihat-ı İslamiye tarafınfaki teşri', sarf dinidir. İşte bu teşri-i dini salahiyeti, başta hazret-i hilafa olduğu halde şeyhüllislam efendinin nazariyatı altında feteva emaneti ile müftilere aittir. Makalemizin mevzunu teşkil eden teşri-i dini heyetinin bu hususdaki salahiyeti örf-i resmidir. Örfidir. Çünkü bu heyete dahil olanların milli irfan ile dini örfleri ettiğine ale'l- usul inanıldığından ifta ve teşri hususunda salahiyetdar tanınılır. İman-ı ictima'ı bunlara kıymet verdiğiinden fetvalarına da inanılır şu halde bu salahiyet, adeten manevi bie intihabdan ileri gelir, demektir.*

According to Sabit, the constituents of *Velayet-i diniye* revolved around two sections, *terbiye-i diniye* and *teşri-i diniye*. The latter has been previously mentioned, as for the former, *terbiye-i diniye*, its main duty was to instill religious feelings.<sup>331</sup> The general framework of his argument, then, was to save Meşihat from non-religious matters and depict it as the embodiment of people, *ümme*. On account of that, the state was accepted as the nascent form of millet in institutional terms,<sup>332</sup> and at the same time, as the representative of *velayet-i hukukiye* through the will of *ümme*.<sup>333</sup> The definition of each of them, both the state and the *ulema*, was carried out in terms of the control over religious and legal matters by Sabit. The latter aspect can especially be defined as the realm in which the state expanded its position, and as for religious matters, the definition of the *ulema*'s position was re-determined in a way that it would remain in the orbit of the state while fulfilling its duty of dealing with matters relating to religion and prayer, and as previously emphasized, of acting as a guide to inform people of religious matters.<sup>334</sup>

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<sup>331</sup> Halim Sabit, "Velayet-i Diniye: Meşihat-ı İslamiye Teşkilatı", *İslam Mecmuası* 3, sy 29 (10 Haziran 1915): 662-64. pp. 664. *Şu halde bu heyet tabi'i olarak şu yolda teşkil eder: Halife Hazretleri, Şeyhülislam efendi, terbiye-yi diniye müdiriyeti, müftüler(livalarda), vaazler(kazalarda), hutbeler(nahiyelerde), imamlar (köylerde, mahallelerde) işte bunlar yukarıdan aşağı bir silsile olarak teşkilat-ı içtimaiyemizin derinliklerine kadar nüfuz ile irşad ve terbiye vazifesini ifa eyler. Ahalinin din hissiyatını ikaz eder. Efrad-ı millette ahlak, din hayatının kökleşmesine çalışılır*

<sup>332</sup> Halim Sabit, "Velayet-i Diniye: Meşihat-ı İslamiye Teşkilatı", *İslam Mecmuası* 3, sy 30 (01 Temmuz 1915). pp.684. *İşte bütün mülahazalar gösteriyor ki devlet, milletin teazu etmiş heyeti olduğu gibi meşihatde ümmetin teşkilat haline gelen suretidir.*

<sup>333</sup> Halim Sabit, "Osmanlılar ve Teşri-i Salahiyeti". *Velayet-i hukukiye resmen millete rücu' ederek onun vekilleri umur-ı hukukiye de teşri'ye başladılar. Bunların bu teşri' husundaki salahiyetler de millett ümmetçe kabul edildi.*

<sup>334</sup> Halim Sabit, "Dinşinas ve Fakihler", *İslam Mecmuası* 3, sy 35 (09 Eylül 1915): 760-67. pp. 761-763 *Halk diyanet hususunda daima rehberine muhtaçtır. Bunun için kendilerinin fevkinde diyanetçe kendilerinden yüksek bir sınıf görmek isterler. Çünkü dinle olmak için yalnız arzu kaft gelmiyor. Canlı bir misal lazım. Sarf kitab okuyarak yahud gönüldeki arzu ile din yolunda ilerlemek kabil değildir. Çünkü din mücerred bir şeydir. Bunun içindir ki ümmet arasında diyanetde rehber olacak bir sınıf bulunmak zaruridir. Ehl-i islam arasında Müslümanlara dinen rehber olacak, doğru yolu gösterip onları irşad edecek ma'ruf ve münekkeri tanıdacak bir sınıf bir ümmet yani cemaat lazımdır. Bunlara fakihler namı da verilebilir*

So far, this section has concentrated on how the course of relationship between *fiqh* and law transformed. In order to clarify this point, the views of İzmirli İsmail Hakkı, Ziya Gökalp and Halim Sabit have been reviewed. Gökalp's view, in this context, has been analyzed as an intellectual who was outside the circle of *ulema*. On the other hand, special attention has been paid to the views of Hakkı and Sabit, as they were people who engaged in religious matters as well as Islamic law. In their discourses on the issue of *fiqh*, it can be argued that *fiqh* and its notions were subject to reinterpretation, the essence of which gives us significant clues on who possessed the legislative and executive authorities.

Furthermore, their discussion can be perceived as an attempt to update the provisions of *fiqh* as opposed to Western law. In this sense, the intention to highlight the changing aspect and broad scope of *fiqh* was observed on the basis of their arguments. In the following section, the focus will be given to the issue of importation from Western laws. To put it another way, as we have emphasized in the introduction part of this thesis, the conflict between law in the Western sense and *fiqh*, Islamic law, will be addressed in the light of Elmalılı Hamdi Yazır, Mehmet Seyyid Bey, and Ahmed Şirani.

#### **4.2.5. Conflict or Symbiosis: *Fiqh* and Law**

In the introduction part of the thesis and as well as in the previous section, the notions of *fiqh* and *usul al fiqh* have been described. The previous section has attempted to reveal how the sphere of law and *fiqh* had been separated. In this part, the aim is to see whether there was a conflict between these two realms, even though they were at least institutionally separated from each other. In this context, by starting with a brief conceptual enquiry, the initial question this part aims to reveal is whether the *ulema* of the late Ottoman era regarded *fiqh* as inadequate, contrary to the science of law. Furthermore, in the context of the

value the *ulema* attached to *fiqh* as an Islamic tradition in their minds, another point worth mentioning is that there were also criticisms directed to the *ulema* themselves in their evaluation of *fiqh*.

The latter aspect showed itself especially in the writings of Elmalılı Hamdi Yazır, who was a deputy from Antalya in the Chamber of Mebusan in the Second Constitutional Era. His article titled “*Mehakim-ı Şer’iyye ve Hükkam-ı Şer’ Kanunu ve Esbab-ı Mucibe Mazbatası*”, written in 1912, contains clues about his perception of law, the authority of distributing justice, as well as its function and place within the state mechanism which was surrounded by *Shari’a*.<sup>335</sup>

From this point of view, he criticized the deteriorated state of the Ottoman judiciary system as well as the interest shown in the science of Islam, *ulum-ı islamiyye*. In the previous section, we have dwelled upon Sabit’s view on who should be given legislative and executive authority. In this sense, what I have aimed to underline is that separating religious matters from non-religious matters brought along the transformation of legislative powers to the state by removing institutions concerned with religious matters from the sphere of law.

Elmalı Hamdi also approached this issue from a different perspective. He precisely put emphasis on the notion of will, *irade*, and “*ilm*”, and argued that what constituted the essence of legislative power was will, while its interpretation implied *ilm*. In terms of the science of *fiqh*, then, *ilmiyet* and *nakliyat* were regarded as two of its vital and inseparable parts.<sup>336</sup> To begin with, at the risk of repetition, according to Elmalılı, the science of *fiqh* corresponded to

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<sup>335</sup> Mehmed Hamdi Yazır, A. Cüneyd Köksal, ve Murat Kaya, *Meşrutiyetten Cumhuriyete: Makaleler ; Din, Felsefe, Siyaset, Hukuk*, 1. basım, Klasik İslâm Medeniyeti araştırmaları, 72 4 (İstanbul: Klasik, 2011). pp. 21

<sup>336</sup> Yazır, Köksal, ve Kaya. Ibid, pp. 31

knowing completely what was beneficial and harmful or to the ability of knowing the general provisions, *kavaid-i külliye*, which contained three fields: matters related to science and praying called *fikh-ı ekber*, *ilm-i akaid*, *ilm-i tevhid*, *ilm-i kelam*; matters belonging to actions and acts, known as *am'al* and *ef'al* named *fiqh*; and issues such as ethics and consciousness, known as the science of mysticism, *tasavvuf*.<sup>337</sup>

From his point of view, what Islam did was subsume *ulum-ı alem* under the aspect of unity which was *fiqh*.<sup>338</sup> Starting from this point of view, Elmalılı questioned the essence and underlying causes of the indifference towards Islamic sciences and, within the scope of this thesis, especially towards *fiqh*. He particularly emphasized the fact that people occupying the position of the imamate, *mudarris*, *mujtahid* remained inadequate to carry out their task as they could not unveil and understand the wisdom of *fiqh*, which concerned itself with giving opinions on obligations, requirements, customs and interests.<sup>339</sup> With his positive perspective on *fiqh*, Elmalılı suggested to benefit from it and its provisions while preparing new laws. In other words, new laws were supposed to represent the philosophy of *fiqh* because he believed that unless this aspect was taken into consideration, it would be difficult to expect Muslims to obey laws which did not have the wisdom of *fiqh*.<sup>340</sup>

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<sup>337</sup> Elmalılı Hamdi Yazır, “Ulum-ı İslamiye”, *Beyan'ül Hak* 1, sy 9 (30 Kasım 1908): 178-82. pp. 179

<sup>338</sup> Ibid, pp. 179-180 Elmalılı Hamdi Yazır. *Din-i islam, ulum-ı aleml de fıkah ciheti-i vahdeti altında cem' eylemiş*

<sup>339</sup> Ibid, pp. 181-82 Elmalılı Hamdi Yazır. *Zaruret, umum-ı belva, örf, ihtiyaç-ı nas, celb-i menfaat, der'-i mefsedet gibi mebna-yı esasiyle hal-i ihtiyar ve hal-i ıztırara nazaran ef'al-i beşeriyeden herbirine hüküm vermek hikmet-i fikhı teşkil etmiyor mu?*

<sup>340</sup> Elmalılı Hamdi Yazır, “Makale-i Mühimme”, *Beyan'ül Hak* 1, sy 18 (31 Ocak 1909): 299-304. pp. 301

Elmalılı's intention can be read as a modest attempt by the circle of the late *ulema*, which is examined in this thesis, to prove *fiqh*'s capability of adapting itself to the changing circumstances. However, such an attempt did not completely exclude the fact that the sphere of *fiqh* subsumed that of law. It is necessary to elaborate on this issue to enlighten Yazır's opinion as far as the relationship between *fiqh* and law is concerned. His opinion on this matter was shaped by three questions which he presented in his article. At their base lay the concern of importing from European laws.

The first question he asked was that if we focused on our own way of formulating laws by benefitting from *ilm-i-fikih*, how Europe would interpret such an act. The second question was whether the protection of non-Muslims' equality in the sphere of law was ensured, or whether Muslims always put emphasis on their part. And the final question was whether *ilm-i celili fikih* could succeed in integrating itself into the numerous issues of the modern age, *medeniyet-i hazıra*, or whether it would bring bigotry to the country.<sup>341</sup>

Since our purpose here is to understand the capacity of *fiqh* to adapt itself to change, then, it is appropriate to focus on the third one. As we have seen in the previous sections, the provisions of *fiqh* were divided into two as changeable and unchangeable. Elmalılı also followed a similar approach that, from his point of view, there were two types of provisions within *Shari'a*. One of them was the provisions based on nass, *ahkam-ı mansus*, and they were excluded from the realm of change. The other was the provisions based on the numerous opinions presented by *mujtahids*, *ahkam-ı müctehid fiha*. It was these provisions that were evaluated within the realm of change and where the activity of *ijtihad* was accepted. For this part, Elmalılı underlined that the limits of change in the provisions should still be determined within the boundaries drawn by *fiqh*, rather

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<sup>341</sup> Ibid, pp. 302 Elmalılı Hamdi Yazır.

than being attached to outside boundaries.<sup>342</sup> He also regarded the existence of numerous *ijtihad* as natural, and in this context, underlined the value of *fiqh*, which included rich provisions from all maddhabs, as a source of new laws by searching the Hanafi maddhab, and advocated that rather than putting *fiqh* aside while enacting new laws, other maddhabs should be consulted if necessary, rather than seeking for foreign laws to solve the cases not covered by *fiqh*.<sup>343</sup>

If we try to summarize what we have attempted to put forward so far, it is seen that Elmalılı Hamdi Yazır's views reflected the mentality seen on the part of the reformist *ulema*, that the boundaries and ways of change in the legal field were expressed through the reinterpretation of *fiqh* and by putting emphasis on its flexible nature. To show this nature, the notions of 'örf and *icma* were expressed by İzmirli, Gökalp and Sabit. In particular, Sabit's discussions bring to mind that the ground for the state to expand its influence on the legal sphere was prepared by incorporating changeable ones, *muemalat-ı dünyeviye*, to the realm of the state rather than that of religion. It will be attempted to explain this influence through articles written on the issue of legislative and executive power of the state and the position of Meşihat. The significance of such an enquiry lies in the fact that how the perception of *fiqh* transformed their way of perceiving *kuvve-i teşriye*, the authority of legislation.

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<sup>342</sup> Elmalılı Hamdi Yazır. Ibid, pp. 303. *İcabınca zaman, mekan, ahval ve şehasin tefavütiyle mütevafit ve bunların tegayyürüyle mütegayyir bulunan ahkma-ı muallele ve ictihadiye örf ve adat ve hacatin ehemmiyeti tibiyle "Ezmanın tegayyürüyle ahkâmın tegayyürü inkâr olunamaz" kaide-i külliyesinin medar-ı tedvini olan sırr-ı şer'i üzere hikmet-i hukuk-ı İslamiye olan ilm-i usul-ı fıkhta muayyen tarz-ı amik ve amimde bir felsefe-i ciddiye-i hakikiyeye rabtolunmuştur ki ezmanın tegayyürüyle tegayyür edecek ahkâmı yine kendisi tayin etmeği deruhte ederek medine-i hazıramıza değil, bundan böyle rünumun olacak terakkیات-ı gına-gun neticesi olan medeniyetin muameleleri bile onun daire-i şümulundan çıkamaz ve çıkmak ihtimali yoktu.*

<sup>343</sup> Ibid, pp. 303-304 Elmalılı Hamdi Yazır. *Ve ol emrde fikh-ı hanefiden tedkik ve tatbik ve cem' u telife başlar. Ve ihtiyaç nassa erfak ve evfak olan mesaili herhangi mezhebden olursa olsun alır ve faraza bunlarda bulamyacağımız zaruriyyü'l- hall bir hadiseye tesadüf edersek halini aynen bulabileceğimiz Avrupa kavaninden değil, kavaid-i felsefe-i şer'iyemizle hall ü ta'yin eyler ve bu suretle öyle bir kanun-ı muhit meydana getiririz ki ilm-i medeniyet parmak ısırır.*

When we come to Elmalılı, another point deserving attention is that he regarded the attachment to foreign law as the loss of our own civil law. For example, he interpreted the act of replacing *Mecelle* with the provisions of the French Civil Code with a negative view that such an act would mean to lay aside the civil code of our country.<sup>344</sup> He occupied himself so extensively with this issue that he published nine articles on *Mecelle*. He evaluates *Mecelle* as including the spirit of nation, so it was not acceptable to search for different sources of law other than *fiqh*.<sup>345</sup> In these articles, the traces of his thought on law and modernity could be traced. Towards the end of this section, Elmalılı's article titled "*Hakk-ı Tefsir ve Hukuk-ı Padişahi*" will be examined. Later, attention will be paid to his other articles titled "*Muaddel Kanun-i Esasi*" and *Mehakim-i Şer'iyye ve Hükkam-ı Şer' Kanunu ve Esbab-ı Mucibe Mazbatası*.

To begin with, Elmalılı brought into the picture the notion of *hukuk-ı padişahi* by underlining its two constituent dimensions, *hukuk-ı mukayyede* and *hukuk-ı mutlaka*. The implementation of the first one was possible by *kuvve-i kanuniye*, meaning the capacity of making law. *Kuvve-i icraiye*, on the other hand, constituted another dimension of *hukuk-ı padişahi*.<sup>346</sup> As far as the capacity and authority to enact laws are concerned, the person of padişah was brought to the fore due to the fact that he was depicted as possessing the authority of *re'y* and at the same time, the legal executive power, *kuvve-i kanuniye*. His veto right was

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<sup>344</sup> Elmalılı Hamdi Yazır, "Mecelle-i Ahkam-ı Adliyemize Reva Görülen Muahezeyi Müdafaa", *Beyan'ül Hak* 1, sy 48 (t.y.): 22 February 1910. pp. 1024

<sup>345</sup> Elmalılı Hamdi Yazır, "Mecelle-i Ahkam-ı Adliyemize Reva Görülen Muahezeyi Müdafaa", *Beyan'ül Hak* 2, sy 49 (01 Mart 1910). Pp. 1036 *Mecellemizin başlıca bir kabahati varsa o da istinad ettiği 'ilmin, ilm-i hukukun yalnızca bizim maarif-i mevruse-i milliyemizden ibaret olması, bizim ruh-ı millimiz bulunmasıdır. Mamefih mecellemizde ihtiyacat-ı hazıra itibarıyla ufak tefek bazı şayan-ı tadil mevadda olabilir. Bundan da bizim Fransa kanun-ı medeniyete 'arzi ihtiyaç etmeliğimiz icab etmez, bahr-ı bi- keran fikhımız yine bizim ruh-ı terakkiyatımızı temin eylemeğe kafidir. Elverir ki biz o bida'a-ı ilmiyemizi kaybetmeyelim.*

<sup>346</sup> Elmalılı Hamdi Yazır, "Hakk-ı Tefsir ve Hukuk-ı Padişahi", t.y.

also accepted unquestioned. His veto authority was considered in the same category as that of imams authorized by *ijtihad*.<sup>347</sup>

When it comes to *kuvve-i icraiye*, in addition to the authority of the padişah, Elmalılı also dwelled upon the position of the *caliphate* and *shaikulislam* who assumed the task of executing religious provisions, *ahkam-ı şeriyye*.<sup>348</sup> It seems that in the writings of the *ulema* following the Young Turk Revolution, the positions of execution and legislation were reinterpreted. As we see in the writings of Sabit and Elmalılı, by opening up the issue of who would be held responsible for carrying out religious as well as non-religious matters, *muamelat-ı dünyeviye* was emphasized on these two aspects.

As previously dwelled upon, the separation of *fiqh*'s religious and non-religious provisions enabled the state to have a say in non-religious matters. However, this does not mean that religious matters were completely excluded from the realm of the state. It can be briefly noted that the state rather had a predominance both over the sphere of religion and that of law. For the purpose of giving a more nuanced view on this issue, it is appropriate to focus on the circle of *ulema*, and how they interpreted the positions of the Caliphate, Shaykh al- Islam, Mufti and the authority they were allowed to possess.

As far as the position of the Caliphate is concerned, it is appropriate to give an ear to Mehmed Seyyid Bey (1873-1925), who was a legal expert and also a

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<sup>347</sup> Elmalılı Hamdi Yazır. *Hukuk-ı esasiyeyi İslamiyeye nazaran imamın müçtehid olması ve binaenaleyh hakk-ı içtihadı malik bulunması ercah olup bu hususun itlak ve takayyüdü imamın ehliyet-i içtihadı ve alim bi'l maşlaha olmaktaki mevkiyle mütenasibi düğünden mamulünü bih olarak mesail-i kanuniye de icab-ı hale göre hakk-ı içtihadını istimal edebilmekten ibaret olan veto hakkına zat-ı padişahinin dahi malik olması enseb olmak itibariyle padişaha arz olunan kanunlarda tasdik ve iade huşunda sahib-i rey bulunduğu kabul edilmiş ve bu surette kuvve-i kanuniyede muhakkak bulunmuştur.*

<sup>348</sup> Elmalılı Hamdi Yazır, "İslamiyet ve Hilafet ve Meşihat-ı İslamiye", *Beyan'ül Hak* 1, sy 22 (01 Mart 1909). pp. 512-513. *İslamiyetteki hilafet kanun-ı şerin kuvve-i icraye riyasetinden başka bir şey olmaduğu cihetle... Hilafet bir hükümet-i meşruta-ı İslamiye reisi demektir.*

deputy from İzmir in the parliament,<sup>349</sup> in his book titled “*Usul-ı Fıkıh: Cüz-i Evvel*”. In the section he devoted to the caliphate, Seyyid Bey dwelled upon two categories under which the caliphate was depicted. One of these categories was attributing spirituality to his position. The other one was evaluating his position, *umur- ı amme-i temşiyet*, under the dimension of the execution of public matters. His definition of such an authority is significant in terms of revealing the boundary and scope of the power held by the caliphate, as well as giving us clues to make sense of how the position of the state was redefined vis-a-vis the other actors, *Caliphate, Mufti, Shayk-al İslam, Qadis*, who possessed the quality of having a say in legal and religious matters and the Islamic tradition of *fiqh*. In accordance with this definition, the caliphate was seen as the person possessing the authority or capacity to make law.<sup>350</sup> Seyyid Bey, however, did not follow this definition and preferred the core of the matter from the perspective on *fiqh* and law.<sup>351</sup> He especially dwelled upon the fact that the caliphate was the deputy of the peygamber, prophet, rather than a person who had the power of preaching law. His main duty was to ensure the maintenance of Islam and to carry out public matters.<sup>352</sup>

In terms of preaching law, the position of the caliphate was subject to reexamination in a sense that the person of sultanate was regarded as vital in

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<sup>349</sup> He was the first Ministry of Justice of Turkish Republic.

<sup>350</sup> Mehmed Seyyid Bey, “Usûl-i Fıkh. Cüz’-i Evvel, Medhal”. pp. 106 *Bir kısmı da umur-ı ammeye temşiyet hususunda makam-ı müşarüileyhi büsbütün tekayyüd ile mezahib-i marufa-ı fıkhiye haricinde, hati mezheb-i Hanefi hilafında vaz-i kavanine salahiyetdar olduğuna kail oluyor.*

<sup>351</sup> Ibid, Mehmed Seyyid Bey. pp. 106-107 *Halifenin sahip olduğu velayet-i ammenin mahiyetini, vaz’i kavanin salahiyetinin derece-i şumulunu beyan ve tafsil edeceğiz; Maksadımız ulema ehl-i sünnet ve fukahanın beyanatına göre meselenin mahiyetini fıkhiye ve hukukiyesini ve üzerine tertib eden ahkam-ı fıkhiyeyi bildirmektir.*

<sup>352</sup> Ibid, pp. 109. Mehmed Seyyid Bey. *Vazifesi din-i İslamı hıfz ve umur-ı ammede icra-ı hükümet ve siyasettir.*

terms of executing and determining which law and opinion of *mujtahid* were appropriate to be implemented in a given situation,<sup>353</sup> by paying regard to the interest of people, *maslahat* or *menafi-i umumiye-i millet*.<sup>354</sup> Furthermore, Seyyid also underlined that the *ijtihad*s of the previous *mujtahids* emerged as a result of the context in which they lived.<sup>355</sup> By taking this aspect into consideration, he argued that it was difficult to accept these *ijtihad*s corresponded to the present affairs of the current age.<sup>356</sup> It seems that the authority belonged to the person of sultanate and also, the necessity of new *ijtihad*s to meet the needs of the present age was stressed, rather than *ijtihad*s' being static by exclusively relying on old ones. In addition to what was expressed, the issue of the capacity of making law was also subject to reexamination in the circle of *ulema*.

The purpose of the state, as far as the provisions of *fiqh* are concerned, was to transform religious matters into the authority of people, *fuqaha*, who were authorized by the state. This would provide the state with a secure way to have

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<sup>353</sup> Ibid, pp. 147 Mehmed Seyyid Bey. *Makam-ı hilafet, va'az-ı kavanin hususunda muayyen bir müçtehidin rey ve içtihatlarıyla şer'an mukayyed değildir. Müçtehidlerin mücerred rey ve içtihadlarından mütevellid ahkam-ı fikhiye şeri'at değildir. Şeri'at ancak va'az-ı şer'iatın va'az ettiği ahkamdır kii ahkam-ı mensustan ibarettir. Bu cihetle zat-ı hazret-i padişahi, hangi müçtehidin ictihadatını zamanın ihtiyacına muvafık bulur ise onu tercih eder. Bu surette salahiyet-i kemali haizdir.*

<sup>354</sup> Ibid, Mehmed Seyyid Bey. pp. 147. *Devletçe tanzim-i kavanin hususunda gözetilecek esas ise menafi-i umumiye-i memleket, tabi'-i istilahası veçhile maslahat-ı amme-i millettir.*

<sup>355</sup> Ibid, Mehmed Seyyid Bey. pp. 148-149 *Zamanımızda hayat büsbütün değişmiş, başka bir şekle girmiştir. Şerait-i hazıra-ı hayatiye ile devr-i müçtehiddeki şerait-i hayatiye arasında bu iki zaman arasındaki fark kadar azim fark vardı. Her zamanın bir hayatı ve her hayatın kendine göre icabatı bulunmak kanun-i hayatı ya'ni sünnet-i ilahiye-i muktezasiyedir. Bunun içindir ki zamanımızda medeniyet-i hazıranın icabatından olarak cereyan etmekte bulunan mu'amelat-ı cismiye be muk'avelat-ı maneviyeyi, bir müçtehidin bundan bin sene evvel tehdüs eden hadisat-ı hukukiye için medar-ı tatbik olmak üzere vuku' bulan müçtehidatına tevfiik eylemek imkan haricindedir.*

<sup>356</sup> Ibid, Mehmed Seyyid Bey. pp. 148. *Bir müçtehidin ictihadat-ı vakı'ası, kendi zamanının ahval-i ictimaiye ve hadisat-ı hukukiyesine muvafıktır. Lakin onun bütün ictihadatının zamanımız ahval-i ictimaiye ve mu'amelat-ı hukukiyesine muvaffakiyetini tasvir etmek, hayatı takdir etmemek olur.*

control and make intervention on the religious matters of the society and hold responsibility over the legal matters of the society. In other words, what was defined as religious also entered the orbit of the state, which possessed the power of defining the legal sphere.

In addition, this process signified another important point where the realm of law was attempted to be defined from an earthly perspective. Such an authority, as far as the capacity of penetrating into the realm of law is concerned, can be associated with establishing control over the positions of legislation and diminishing other actors, such as men of religion, posing a threat to the state's preeminence. This process starting with the Tanzimat began to accelerate in the Second Constitutional Era.

The relationship between *fiqh* and the modern sense of law has been problematized in this section, and towards the end, it can be argued that there was a kind of symbiotic of relationship, while the provisions of *fiqh* possessing divine aspect were regarded as unchangeable, the state incorporated changeable provisions into the state mechanism as a part of legislation.<sup>357</sup> On the other hand, we have dwelled upon the discussion of *ijtihad* in the section above, in a sense that the *ulema* advocated that the door of change was open in the sphere of *fiqh*. When it comes to the relationship between *fiqh* and modern law, what was considered is that the framework for carrying out *ijtihad* was re-determined without putting *usul al fiqh* aside, by using the terms of *fiqh* as a source of formulating new provisions outside religion, iman, itikad and matters concerning praying.

At this point, we can give an ear to Elmalılı's discourse on the Islamic tradition of *fiqh*. Elmalılı, in this context, engaged in a discussion that although Islam was

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<sup>357</sup> Sami Erdem, "Tanzimat Sonrası Osmanlı Hukuk Düşüncesinde Fıkıh Usulü Kavramları ve Modern Yaklaşımlar". pp. 105

the sum of *amel* and *iman*, *iman* did not mean *amel* <sup>358</sup> since the provisions of the issues of *iman* could not be resolved but rather complemented, but in the realm of *amel*, resolution could be materialized.<sup>359</sup> In terms of the sources from which the opinion on actions derived, he deemed the *Qur'an* of utmost importance as a guide for people's, *ümmet*'s actions, which contained not only *Shari'a* belonging to Muhammad, but also *Shari'a* of others, whom he described as *ümmet*.<sup>360</sup>

Acting with this point of view, Elmalılı criticized those who submitted themselves to foreign laws instead of acting within the boundaries of *fiqh*, which provided solutions to legal matters.<sup>361</sup> By the same token, searching for solutions to cases in European laws was an affront to religion.<sup>362</sup> He evaluated those submitting themselves to laws of other nations as “ulum-taklidiye”. Hereby, without rejecting inevitability of change in the provisions of *fiqh*, especially

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<sup>358</sup> Elmalılı Hamdi Yazır, *Hak Dini Kuran Dili*, c. 1 (İstanbul: Umut Matbaası: Zehreveyn, t.y.), <https://archive.org/details/ElmaliliHakDiniKuranDili1/page/n1/mode/2up>. pp. 174 *İslam Dini yalnız bir iman meselesi değildir. İman ve amellerin toplamıdır. Amellerle ilgili tatbikatı atıp da dinin bütün feyzini beklemek tehlikelidir. Böyle olmakla beraber iman, amel demek değildir. Amelin farz oluşuna iman ile, o ameli yapmak birbirinden farklıdır. Müslüman amel ettiği için mü'min olacak değil, iman ettiği için amel edecektir.*

<sup>359</sup> Ibid, Elmalılı Hamdi Yazır. pp. 182. *Zira imana aid meselelerde nesih (iptal etme) yoktur, tamamlama vardır. Nesih, amele ait hükümler itibariyle cereyan eder. Bu ve benzeri Kur'an ayetleri ve Peygamber'in sünnetleri bize özellikle şunu gösterir ki, Müslümanlık dini geneldir.*

<sup>360</sup> Elmalılı Hamdi Yazır, *Hak Dini Kur'an Dili*, c. 3 (İstanbul: Umut Matbaası, t.y.), <https://archive.org/details/ElmaliliHakDiniKuranDili3/page/n1/mode/2up>. pp. 255

<sup>361</sup> Elmalılı Hamdi Yazır, “Makale-i Mühimme”. pp. 302 *İlm-i celil-i fıkhıtan istifade edilerek “Kendi eski hırkanı tamir etmek ariyet elbise istemekten yeğdir sırrına imtisal edilmiş olsun.*

<sup>362</sup> El Mağribi, “Müctehidler Yetiştirelim”, *Sırat-ı Müstakim* 3, sy 75 (11 Şubat 1910): 364-66. *Zaman-ı eslaftan tehaddüs etmemiş bir mesele hakkındaki hükm-i şer'i sürülecek olsa cevab bulunamıyor. Mucib bu tevakkuf ve aciziyle sanki şeriat ol babda bir hükm-i ihtiva edemeyecek bir derecede dar olduğunu söylüyor. Ve o Meselenin saillerinin arzularına veya Avrupa kanunlarına nazaran hal ve tesviye edilmesini vacib kılıyor. İşte islamiyette bundan büyük tahkîr, sahib-i şeriate karşı bundan büyük küfran olur mu? Din-i celilemiz dururken o mesail-i hal için başka bir dinin mehaif-i ahkâmını mı karıştıralım?*

muamelat section related to sphere of human's social life, the change must be carried out within the boundaries of fiqh. Unless to do that, it was not possible to regard changeable provisions within the category of *fiqh* and Shari'a.<sup>363</sup>

To put it other way, it was rather more appropriate to devote to discovering the mine of *fiqh*, the way of which was *ijtihad*.<sup>364</sup> Unless this was done, it was inevitable to succumb to European laws.<sup>365</sup> Mustafa Şeref's article on public law, on the other hand, clarifies this relationship to a certain extent. Especially what constituted the essence of his view was his emphasis on the issue of will, as far as the content of modern law is concerned. Furthermore, he associated the state with personal law, called *hukuk-ı şahsiye*, which had the power to have a say in the public,<sup>366</sup> but he underlined that at the base of this law lay the mission of the

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<sup>363</sup>Ibid, El Mağribi. *Muamelat-ı nassa tealluk eden bu vakiat ve hususat hadise-i ticariyede medar-ı amel ve ahkam olcak birtakım ahkam-ı şeriyeyi delail-i diniyemizden istibat etmezsek o vakit bu muamelat hakkında ne şeri şerife muvafık bir hükm verebiliriz ne de bu amelden hasıl olacak nameye kazanca pek vas'î semahatkar olan şeriata nazaran helal diyebiliriz.*

<sup>364</sup> Ahmet Şirani, "İçtihad Kapusundan Ne Şartla Girmelidir?", *Hayrül Kelam* 1, sy 3 (03 Aralık 1913). pp. 17-18 *İctihad-ı umumiye, İslamiyet ve ehl-i islama ne kadar tehlikeli görünüyorsa icthad-ı hususi. De o kadar hayırlıdır. Çünkü saye-i islamiyette gizli bulunan maden-i medeniyeden ancak bu suretle istifade edebileceğiz. Maaden arziyemiz (yeryüzü, dünya) gibi maden-i şer'iyemizin işletme imtiyazı ecnebilere vermememiz bunu kendimiz işletmek mecburiyetindeyiz. O da ancak içtihad ile olabilir.*

<sup>365</sup> Ahmet Şirani, "İçtihad Kapusundan Ne Şartla Girilmelidir?", *Hayrül Kelam* 1, sy 4 (10 Aralık 1913). pp. 26 *Biz vaktiyle böyle bir kanun-i fıkhi mevcuda getirmezsek her biri ayrı ayet ve hadise müstenid bulunan mesail-i fıkhiye islamiyemize bedel, Avrupa mevad-ı kanuniyesinden mürekkeb kanunlar karşusunda kalacağımızı artık anlayabilmeliyiz. Bunu gayetle zaruri görürüm. Mecelle cemiyet-i celilesinin islamiyete etmiş olduğu hizmet, bize bir numune-i intibah ve imtisal olmalıdı. 'Adliye nezareti teşkil olunduktan, mehakim-i nizamiye tesis edildikten sonra mecelle gibi bir kanun-ı hukuki vücuda getirmemek, saha-yı amel ve tatbiki Avrupa kanunlarına terk ve ferağ etmek demektir.*

<sup>366</sup> Mustafa Şeref, "Fukahaya Göre Hukuk-ı Amme", *İslam Mecmuası* 1, sy 3 (12 Mart 1914): 80-84. pp. 80 *Garblar hukuk zikr edilince daima irade hatıra gelir. Bu irade ya ferdidir, ya cema'itidir. Cemaati irade cemaati terki eden efradın umumuna 'amm ve şamil gayeler karşısında vücudunu hissettiler. Ve burada şu veya bu ferdin değil 'umumun iradesi olduğundan bir şahsa izafe edilmesi iktiza eder. O şahıs cemaatin manevi veya hukuki şahsıdır. Şu ferdi şahıs veya cemaati şahsi Avrupa hukukunda asıldır, esastır. Devlet de bir hukuki şahıstır, haiz-i iradedir amme üzerinde tasarrufatda bulunur ve şu tasarrufatın zey-i hakkıdır. Devletin amme üzerindeki tasarrufatına tatbik edilen hukuka garbiler hukuk-i amme diyordular.*

state over its citizens rather than the owner of law.<sup>367</sup> From this point of view, what he in fact drew attention to was the social, *ictimai*, force of law,<sup>368</sup> and he argued that legal provisions and law did not make sense without religious, political, economic and familial aspects.<sup>369</sup> According to him, the essence of law was determined by its social, *ictimai*, aspect which he called *örf-i ictimai*. From this point of view, the main duty of legal experts was to discover these social customs, *örf-i ictimai*.<sup>370</sup> Also, at the base of his discussion lay the controversy whether the source of law must be derived from *usul al fiqh* itself or from a novel *usul al fiqh*. Accordingly, the sociological aspect and dimension of law were emphasized by Şeref without showing much concern towards *usul al fiqh* itself. Given that most of the discussions around *usul al fiqh* derived from the changes in social life, the strict nature of the Islamic tradition of *fiqh*, especially the provisions and domains determined by *nass*, could not adapt themselves to the changing time and its living conditions. Here as well, Şeref's stance can be defined as a modest way of dealing with the challenge the modern sense of law brought. In a nutshell, he stressed the redefinition of the present theory of law, rather than searching for external tools outside *fiqh*.

As we have seen in the second chapter of this thesis, the issue of *ijtihad* was discussed by referring to the early days of Islam. The underlying reason for this

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<sup>367</sup> Ibid, pp. 84 Mustafa Şeref. *Bütün insanlar yek diğerine karşı vezaiyle mükelleflerdir. Kimse haiz-i hukuk değildir.*

<sup>368</sup> Mustafa Şeref, "İçtimai Usul-i Fıkıh Nasıl Te'sis Eder", *İslam Mecmuası* 1, sy 6 (23 Nisan 1914): 162-66. pp. 162. *Hukuk, devlet dahilinde yaşayan eşhasın yekdiğeriyle olan münasebetlerinde riayete mecbur oldukları kavaiddir. Şu tarife dikkat edildiği takdirde hukukun bir içtima'i kuvvet olduğu teslim olunur... Hukukun istinad ettiği asıl kuvvet 'amm-ı şamiş bir mana ile "örf-i içtima'idir"*

<sup>369</sup> Ibid, pp. 165 Mustafa Şeref. *Fakih düşünmelidir ki hukuk, kaideler kendi başına birer hiçtirler. Sebpten, manadan ayrılınca onlar bi manadır. Dini, iktisadi siyasi, ailevi rabtlardan mahrum ise birer boş zarf gibidirler.*

<sup>370</sup> Ibid, pp. 163 Mustafa Şeref. *Bunun için bir hukukçunun, yani fakihin vazifesi örf-i içtima'iyi müşahade ve tafâhhus ederek vicdanlarda yaşayan desturları meydana çıkarmaktır*

discussion in fact tells us something about the ground on which law was based, because the discussions on *ijtihad* also referred to controversies about the source of law, as well as its autonomy or independency.<sup>371</sup> The opponents of carrying out independent reasoning, *ijtihad*, within the realm of law in fact rejected the entrance of human judgment into law, whereas its supporters advocated the inclusion of humans in the realm of law, in addition to the will of God.

This discussion especially makes sense when the abovementioned discussions are taken into consideration, due to the fact that the perception of *fiqh* also raised questions about where law must derive its source from, *nass* or a source other than that of divine. Rather, a source that was open to change and development over time must be the ground of formulating laws. It is also quite possible to interpret this discussion as how the scope of *ijtihad*, or freedom of *ijtihad* without any limitations, would be determined around *usul al fiqh* itself or by approaching it with a novel concern. In other words, the methodology of *usul al fiqh* to be able to produce new laws was being questioned. Two options emerged on the side of the *ulema*, either the classical *usul al fiqh* would continue to be employed or its boundaries would be limited to religious matters, while non-religious ones would be grounded on a different base. To put it another way, the construction of a new *usul al fiqh*, the content of which was enriched through historical, sociological and legal consciousness, would provide the necessary ground for the formulation of new opinions.

The institutions of law based on *nusus-ı semavi*, which had divine essence as a source, were no longer evaluated in the context of the argument of change.<sup>372</sup> Given the fact that the institutions were predicated upon divine essence, they had

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<sup>371</sup> Please see Chapter 3

<sup>372</sup> Veliyüddin, “Hukuk-ı İslam”, *İslam Mecmuası* 1, sy 9 (04 Haziran 1914).pp. 258. *Bir kısım ulemanın kanaatlerine göre nusus-ı semaviyenin münasabat-ı hukukiyeye hakim bulunduğu cemiyetlerde ahkâmın ezmana göre tebdil ve tevsi’, kavaid-i hukukiyenin tekamülât-ı ictima’iye ile tevfiiki müteessir hati mahal olur.*

to base themselves outside religion to be able to adapt to the changing time and conditions.<sup>373</sup> Within the late Ottoman context, then, some circles of the *ulema*, which we can describe as not purely conservative but as supportive of change in a conditional manner, used *ijtihad* as a justification to claim that if the provisions of *fiqh* failed to provide solutions to cases, the option of *ijtihad* could not be set aside.<sup>374</sup> In this sense, *ijtihad* began to be interpreted as a selection of the provisions of *fiqh* without restricting which view of the madhhab would be followed. From this point of view, *ijtihad* was used as a framework in which change was justified.<sup>375</sup>

Also, it is possible to read this process as the inclusion of human judgment in the sphere of law, or more accurately, the expansion. Especially when we draw our attention to what Musa Carullah argued concerning the present situation of the science of *fiqh*, the aforementioned discussion will be better understood. His view on this matter carries the traces of criticism of the way *fakihs* approached *usul al fiqh* as they ignored the social aspect of *fiqh*.

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<sup>373</sup> Ibid, pp. 259. Veliyüddin. *nusus; hayatı boğmaya, hayat; nüusus zehirini kırmaga sa'yıdır. Bu müsadematin neticesi cemiyet için her halde fenadır. Ya nususun tazyiki muhakkak altında hayat-ı cemiyet boğulur.....İşte bunun içündür ki müessesat-ı hukukiyenin, menbaalarını nusus-ı semaviden almaksızın dogup büyümeleri, hiç olmazsa, vesayet-i diniyeden erkence kurtulmaları, cemiyetler hayat-ı hukukiyenin sıhhat ve selamet dairesinde cereyan edecilmesi için şarttır.*

<sup>374</sup> Ahmet Şirani, “İctihada Dair İctihadım”, *Hayrül Kelam* 1, sy 2 (27 Kasım 1913). *Kavaid-i fikhîyemizin sükut ettiği mesail -i hadiseyi bir esas-ı şeriyeye irca' için icthad kapusuna baş vermek mecburidir. İhtiyaç-ı tevlid eylediği bu mecburutiyeti nazar-ı ehemmiyete alarak ona göre hareket etmezsek hem din-i mübeyyin-i islâmın ulviyetini tenakkıs, ihatasını, tahdid, hem de efrad-ı islamiyeyi ahkam-ı islamiyeden uzaklaştırmış oluruz. Çünkü hiçbir kimse, ihtiyacına kafi gelemeyen bir dine ilelebet merbut kalamaz, bir gün olur ki isyan eder.*

<sup>375</sup> Ahmet Şirani, “İctihad Kapusundan Ne Şartla Girilmelidir?”. pp. 25- 26. *Hadisat-ı hukukiye aid birçok mesele-i fikhîye var ki bir mezhebce onlarla 'amel, meşru' sayıldığı halde, diğer mezhebce memnu' gösteriliyor. Muamelat-ı hukukiye ve ticaretimizin, vas'î bir mecrada cereyan edebilmesi için, kavanin-i hukukiye ve ticariyemiz, her mezhebin mevad-ı müsaadesinden müteşekkıl olmalıdır... mezheb ayrılığına bakmaksızın her müçtehidin kavliyle 'amel olunabileceği*

Within this context, what he suggested was to bring the notion of *maslahat*, human benefit, to the fore when *şer'i* opinions were given on cases.<sup>376</sup> This was one of the aspects worth underlining since in the early days of Islam, the practical use of this notion was not at stake until Shafi began to use it as a source and tool to derive rules.<sup>377</sup> Carullah's main concern was shaped by the fact that a wrong approach to *fiqh* led to the perception as if its scope remained narrow to cover the other aspect, the social aspect of life.

#### 4.2.6. Evaluation

In a nutshell, it is more accurate to define the relationship between the state and law, *fiqh* and *fukaha*, as well as *fukaha* and the state as symbiotic. These three spheres, at least as I can see in the discourses of the *ulema*, must not be evaluated as if each were independent of each other. Their relationships were rather redefined. By stating independence, what we mean is that those, *fukaha*, who were authorized to have a say in religious matters of *fiqh* did not have an authority of their own, the boundaries of the power they held were determined and defined by the state. Here, the position of the state as possessing legislative authority, in terms of the capacity of making and interpreting law became prominent.

It can also be argued that the circle of *ulema*, which has been examined throughout this chapter, discussed and presented their views on *ijtihad* and *usul al fiqh* by underlining the social, *ictimai*, aspect of *fiqh*. In terms of this attitude, the meaning attributed to law acquired a social character as well, in a sense that the notion of *maslahat* was used to emphasize this aspect. Furthermore, the

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<sup>376</sup> See, Musa Carullah, *Uzun Günlerde Oruç (İçtihat Kitabı)*, çev. Yusuf Uralgiray (Ankara, 1975). pp. 173 Musa Carullah, "Uzun Günlerde Rûze" (Kazan 1911).

<sup>377</sup> See, Ahmed El Shamsy, "The Wisdom of God's Law: Two Theories", içinde *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernad Weiss*, ed. A. Kevin Reinhart and Robert Gleave, Peter Sluglett (Leiden ; Boston: Brill, 2014). pp. 20

relative aspect of law was also stressed, arguing that each community had a unique type of law.<sup>378</sup> In line with the aim of this thesis, which is to analyze different approaches to *fiqh*, in order to understand *fiqh*'s relationship with other aspects of life in a nuanced way, the changeable and unchangeable aspects of *fiqh* have been emphasized.

Accordingly, within the scope of this thesis, the reinterpretation of legislative and executive powers, in terms of *hukuk*, has been underlined by referring to the changeable aspects of *fiqh* and putting them to the domain of the state. In the light of these views, it is reasonable to argue that the timeless aspect of *fiqh* and its validity over time were questioned corresponding to the mentality that the provisions of law had to be changed as time changed. Rather, this led to an emphasis on the historical aspect of *fiqh*, especially during the Second Constitutional Era. The focus was on the historical perception of *fiqh*, and in this context, the history of *fiqh* began to be viewed through the dichotomy between *ijtihad* and *taqlid*.

While the years of *ijtihad* were defined as productive in terms of the history of *fiqh* and legal transformation, the years when *ijtihad* stagnated or completely disappeared were interpreted negatively in this context under the name *taqlid*. In the final analyses, both the argument of change and approaching *fiqh* from a historical point of view resulted in controversies in the realm of modern law, legislation, change and the state. In other words, in those realms, the authorities of the state and the *ulema* were in fact redefined in a way that the state gained the upper hand. The examination of these redefinitions reflected the changes in those realms as a result of the conjunctures<sup>379</sup> conceptualized as the challenge of modernity.

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<sup>378</sup> Mahmud Esad, "Tarih-i İlm-i Hukuk", *Darülfünun Hukuk Fakültesi Mecmuası*, Eylül 1332. pp. 428 *Nerede bir cemiyet varsa orada bir hukuk vardır*.

<sup>379</sup> Abdülhamit Kırmızı, "19. Yüzyılı Laiksizleştirmek: Osmanlı-Türk Laikleşme Anlatısının Sorunları", *Cogito*, sy 94 (2019). pp. 17.

In terms of the *ulema*, on the other hand, another point meriting attention is that the institutions of *fatwa* and *kaza* and their realm of authority was exposed to transformation. The aftermath of the revolution, as a reflection of the state's ideological concern which was to consolidate its administration in numerous realms, witnessed the redefinition of the position of the circle of *ulema*, who devoted themselves to understanding the law of God, *Shari'a*, by the state. Consequently, the importance of the idea of law in a different sense suggested by *fiqh* began to be discussed, bringing to the fore its social and cultural aspects without completely excluding it, but rather attempting to determine the matters and the realms which concerned both spheres.

The main concern of the articles written by the *ulema* was to draw attention to *fiqh*'s flexibility and wide scope.<sup>380</sup> Emphasis on the human element involved in the realm of *fiqh* by underlining the variety of *ijtihad*s carried out by *mujtahids* of different madhhabs, constituted another aspect of the discussion revolving around the place and role of *fiqh* in the new political order, which covered the years 1908 and 1915. Subsequently, the new perception of law developed around the notions of *fiqh*. In addition to *fiqh*'s suitability, some criticized the way the notion of '*örf*' gained prominence among other sources of *fiqh*.

This tells us that the stance towards change was still defined within the boundaries of *fiqh*, with utmost emphasis on notions which allowed little possibility of change, like *nass*. In other words, even if '*örf*' was not completely disregarded, its use depended on its conformity with *nass*.<sup>381</sup> Rather than

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<sup>380</sup>Ibid, pp. 432 Mahmud Esad, "Tarih-i İlm-i Hukuk". *Nusus olan nice ahkam-ı şer'ide bile işbu nususun adeta müstenid olması ve örf ve adetin tebdil etmesi hasebiyle yerlerine ahkam-ı cedide ikame edilmiştir...* Ahkam-ı hukukiyeyi tatbikde memuroylanlar içinde dahi sahib-i malumat zat yetişüb izhar-ı hak için lazım gelen mesail kitab-ı fikhiyede bulundıkları suretde birtakım ahkam meydana getirirlerdi. Bu da ahkam-ı fikhiyeyi tevsi' eyledi.

<sup>381</sup> İzmirli İsmail Hakkı, "İçtimai Usul-ı Fıkha İhtiyaç Var mı?", *Sebilürreşad* 12, sy 298 (28 Mayıs 1914). ...edille-i ahkam-ı şeriat nass, ve örf'e irca olunmaz. pp. 211

equating *örf* with *nass*<sup>382</sup>, for example, İzmirli put the provisions, *ahkam*, belonging to '*örf*' within the category of change, as it has been previously stressed. However, the provisions determined as *nass* were excluded from the domain of change. Moreover, İzmirli was not contented with associating *fiqh* with the social, *ictimai*, aspect. What he attempted to do was to engage in a discussion on *fiqh* within the boundaries of its notions, rather than attributing them a different aspect as Gökalp did in his conceptualization of *ictimai usul-i fiqh* through the notion of '*örf*'. Here, İzmirli explained the necessity of a new *usul al fiqh* which would be grounded on change and making new laws differently in a sense that acting outside the boundaries of classical *fiqh* was not acceptable.<sup>383</sup>

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<sup>382</sup> İzmirli İsmail Hakkı, "Örfün Nazar-ı Şerdeki Mevkii". *Örf ve 'adetin şer'-i celil-i envere, nass-ı fukahaya muhalif olmaması şarttır*. pp. 130

<sup>383</sup> İzmirli İsmail Hakkı, "İctimai Usul-ı Fıkha İhtiyaç Var mı?", t.y. pp. 216. *Fakat burada edille-i ahkam-ı şeri'at ve kavaid-i usul tamamıyla, aynıyle mahfuz kalacak...Usul-i fıkıhtan başka bir şey olan, usul-i fıkıh ile münasebet-i asliyeleri bulunmayan, bir rey-i mahsustan ibaret olan, makasid-i şeriate muhalif olan içtima-i usul-i fıkıh velüd, vedüd ruhlu olamaz. Belki akim, kerih, bi- ruh olur*

## CHAPTER 5

### CONCLUSION

This thesis mainly argued that the late Ottoman ulema engaged in a reassessment of the Islamic tradition of *fiqh* during the late Ottoman era and analyzed this phenomenon from an intellectual point of view. However, it should be underlined that this reassessment did not happen in a void and this thesis does not ignore the context in which *fiqh* was reinterpreted. In other words, I also tried focusing on the driving force that triggered the reevaluation of *fiqh* since concepts and their perception are not independent from the chronological setting and the dynamics it produced at the time. Therefore, the context in which concepts and their meaning or function are embedded deserves consideration and is of paramount importance in terms of history of ideas.<sup>384</sup>

With regard to the subject of this work, already by the beginning of the nineteenth century, the promulgation of the Tanzimat and Islahat Edicts signaled the change in the way law was approached. The Second Constitutional Era, however, displayed a comparative maturation and a remarkably intensified activity in terms of conceptual analysis and evaluation of the existent notions related to Islamic tradition of *fiqh*. Thus, the perception of law, the Islamic tradition of *fiqh* and the shifts in their interpretation must be regarded as historical, dynamic, and social formations. In this sense, adaptations from Western law constituted one of the aspects that must be considered because such adaptations were at times inevitable within the Ottoman context. For example, the codifications in the realm of marine or commercial law provide explanatory

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<sup>384</sup> Reinhart Koselleck ve Todd Samuel Presner, *The Practice of Conceptual History: Timing History, Spacing Concepts*, Cultural Memory in the Present (Stanford, Calif: Stanford University Press, 2002).

instances. The adaptations were unavoidable for facilitating the conduct of commercial relations. Daily necessities and practicalities dictated the changes and their inevitability. Hence, this practical inevitability led the late Ottoman *ulema* to engaged in developing new discourses by reevaluating the existent notions within a new framework. This endeavor found resonance in the lively intellectual climate of the era.

The Second Constitutional Era can be evaluated as the peak of Ottoman intellectual life as various ideas and debates found place in the periodicals of the age. In addition, the same era also witnessed the transformation of the state not only from an institutional, but also an ideological and intellectual point of view. This process resulted in the emergence of ideological currents such as Ottomanism, Islamism and Turkism. Within this framework Ottoman jurisprudence also took its share from this atmosphere and underwent reinterpretations.

Considering the scope of this thesis, then, this study has attempted to focus on elaborating the approaches of the *ulema* to the Islamic tradition of *fiqh* between 1908 and 1915. The origin of this assessment in fact goes back to the codification attempts made in the nineteenth century. It is also possible to read this process in the sphere of law as the *ulema*'s response to the modern notion of law during the late Ottoman era. As I have briefly touched on in the third chapter, the meaning attributed to law began to change with modernity. In this context, codification attempts throughout the world were regarded as one of the indicators of the change in the idea of law.

The scope of this thesis rests on the late Ottoman context and the analysis concentrates on how the *ulema*, as people who devoted themselves to religious matters, *fiqh*, came up with new and different views and developed a new sense of approach to the Islamic tradition of *fiqh* during the process of modernization in the sphere of law. Especially, in this context, the codification of Islamic law,

*Mecelle-i Ahkam-ı Adliyye*, gives us significant clues pertaining to the nature of the discussions on the Islamic tradition of *fiqh* during the Second Constitutional Era. When we have briefly touched on these discussions which took place during the preparation of *Mecelle*, the following three points came to the fore. Firstly, modernity required a predictable and unified sense of law. In this context, the existence of various opinions in Hanafi *fiqh* made the trying of cases difficult in both *Shari'a* and nizamiye courts. Secondly, the mentality and premise based on the the idea that changing times required new laws began to prevail. And finally, the lack of qualified people who could not only cope with the new legal order, but also not understand *fiqh* well constituted a problem.

The aftermath of *Mecelle*, however, did not bring an end to the discussions in the sphere of law. On the contrary, corresponding to the main argument of this thesis, the Second Constitutional Era showed a more remarkable questioning of the Islamic tradition of *fiqh* in contrast to the context in which the *Mecelle* was prepared. To clarify, its fresh perspective on the nature of *fiqh* made the Second Constitutional Era special. First of all, the provisions of *fiqh* became subject to examination from a historical point of view. Secondly, the changeable and unchangeable concepts of *fiqh* were comprehensively reread by the circle of *ulema*, which has been analyzed throughout the thesis. The underlying reason for this discussion was the present state of the Ottoman law, based on *fiqh* and *Shari'a*, and its adequacy vis-a vis Western law. In other words, the prevailing preoccupation was uncovering the extent to which the Islamic tradition of *fiqh*, the essence of which was usually regarded as strict and static, could cope with the requirements of the modern age that were always prone to change.

Instead of taking a partial approach to the development of the Islamic legal thought within the late Ottoman context, it is reasonable to interpret how *fiqh* was transformed in terms of the perception the *ulema* attached to it. Clearly, searching for the transformation of the idea of law required a holistic approach, without disregarding the element of change in the realm of law and *fiqh* within

the late Ottoman context. Accordingly, contrary to the misconceptions evaluating the reformation in the field of law with negative views, such as the total dissolution of *fiqh*, or associating the Islamic tradition of *fiqh* with negative connotations as if it purely had a static nature, this thesis has mainly revolved around this latter aspect by underlining how *fiqh*, containing numerous *ijtihad*s of *mujtahids*, gained the upper hand following the Young Turk Revolution and found place as a suitable source of novel laws.

Thus, we can see that in the Second Constitutional Era, scholarly people used the notion of '*örf*' widely to prove *fiqh*'s flexibility to make new laws. Some, like Gökalp and Sabit, for instance, advocated the idea of creating a new theory of law focusing on its social, *ictimai*, aspect. This theory of law was conceptualized as *ictimai usul al fiqh*. On account of that, in addition to the argument of change, the concept of society and *maslahat* (public welfare) were also given prominence. In a nutshell, *fiqh* was reinterpreted under two dimensions as an indispensable tool for regulating both law and society. In this context, the aspect of *fiqh* covered the relationship of humans with the social world, *mu'amelat*, which was stressed in the Second Constitutional Era.

Under the influence of modern notions of law, the late Ottoman *ulema* also problematized the prevailing mentality that argued the present age needed new laws and *ijtihad*, previous *ijtihad*s did not provide any considerable solutions to the modern age. Most of them embraced a moderate way in terms of approaching the modern sense of law, without disregarding the Islamic tradition of *fiqh*. Given that the *Qur'an*, *Sunan*, *Qiyas* and *Ijma* were evaluated as the main components of Islamic legal thought, during Second Constitutional Era these constitutive tools were discussed comprehensively. Paying attention to essence of Islamic legal thought helps us better contextualize the new perceptions of the Islamic tradition of *fiqh* during the late Ottoman context. In this sense, one of the dimensions questioned as far as the transformation in the idea of law is concerned was the source and ground on which law was based or must be based.

In other words, the main questionable aspect was whether the divine essence of law constituted an impediment in terms of producing new laws. This view, throughout the thesis, has been questioned within the context of the argument of change, by giving an ear to the discourses of the *ulema* on the main constitutive concepts of *usul al fiqh*. Most of the discourses concentrated on reviving *fiqh*'s flexible and changeable aspect to act as a ground for new laws.

One of the hot topics, in addition to the abovementioned ones, was the discussion on the "Closing of the Gate of *Ijtihad*", which meant that the provisions of *fiqh* could no longer be produced, as the later implementers of *fiqh* had nothing but to imitate earlier generations. In this sense, earlier generations of *mujtahids* excelled at producing legal opinions when the *Qur'an*, *Sunan* or *hadith* did not provide any satisfactory and clear solutions to cases.

Related to the argument of change, during the Second Constitutional Era, the notion of *ijtihad* was also revived with a new concern to prove the capability of *fiqh* to act as a ground for new laws. Moreover, some circles of the *ulema* embarked upon the task of reading the history of *fiqh* from a historical point of view by bringing the issue of *ijtihad* to the fore. Their attempt resulted not only in the reassessment of the Islamic tradition of *fiqh*, but also in the acknowledgement of the inevitably changing aspect of time, and in relation, also that of laws. Rather than other discussions suggesting to put the classical theory of *fiqh* aside and create a new one, the classical Islamic tradition of *fiqh* was subject to reevaluation from a historical point of view. Rereading the history of *fiqh* by examining it under the dimension of *ijtihad* activities led to the emergence of different periodizations based on the dichotomy between *ijtihad* and *taqlid*. In other words, what was expressed was that the history of *fiqh* was in fact perceived as the history of *ijtihad*.

The modern sense of law affected the way *fiqh* and *usul al fiqh* were approached. The Islamic tradition of *fiqh* was not disregarded, even if its ability to make new

laws was questioned, and the place of the modern sense of law in the tradition of *fiqh* was a source of controversy among the *ulema*. To put it in a different way, the modern sense of law brought new approaches to the Islamic tradition of *fiqh* of the *ulema* by determining its scope and divine essence, and by specifying the extent of modern law which required certainty, predictability and flexibility. Accordingly, either a new *usul al fiqh*, the essence of which was determined by social concerns other than those of religious, would be utilized to produce new laws, or the classical *usul al fiqh*, which not only possessed divine essence, but also consisted of provisions based on *nass* and abstained from the idea of change in the realm of religion, would be rendered flexible.

Given that the promulgation of *Kanun-i Esasi* in 1876 and in 1908 signified a new political order based upon the parliament, this process in fact tells us how the place of law would be determined in this novel administration. The *ulema* focused on this process in terms of state rights in the sphere of law, discussing the legislative and interpretative capacity of the state in the domain of law, as well as the reevaluation of *fiqh*. As previously emphasized, *fiqh* was prioritized as a suitable ground to adapt to the needs of the modern age. However, it was still controversial whether the personal, political, moral, familial, economic and religious fields were all clearly covered and defined by *fiqh*, or whether its scope remained limited. This caused the controversy whether the intervention of another source outside *fiqh*, the state, was inevitable or not.

In accordance with this point of view, the Second Constitutional Era represents an important epoch in which the domain of state was extended not only to the realm of *fiqh* but also by placing public interest on the basis of the new understanding of law. This process was accompanied by determining the fields in which law was related to *fiqh*, like religious, *itakat*, *ibadat*, which were matters different from law. To put it another way, the domain of the private and the public was problematized in terms of whose authority was reflected in them.

As far as the scope and aim of this thesis is concerned, the role *fiqh* played was associated with religious and private domains, as well as domains that were outside *fiqh*, which were regarded as public. Therefore, the significance of the Second Constitutional Era lies behind the culmination of the process of how the relationship between the state, law and *fiqh*, which started in the Tanzimat, was defined to the benefit of the state in a sense that the public endeavored to penetrate into what was private<sup>385</sup> by bringing both the worldly and the religious under the grip of the state.

Regarding the discussions on the Islamic tradition of *fiqh* during the Second Constitutional Era, I have opted for conducting a modest analysis on the intention and the way the *ulema* presented their opinions, rather than depicting the *ulema*, which has been dwelled upon throughout the thesis, as conservative or modernist. It seems that it is rather more accurate to argue that the Second Constitutional Era reflected the existence of more than one view and answer to the requirements of the age in terms of the new meaning associated with the Islamic tradition of *fiqh*. In this sense, the circle of *ulema* did not completely oppose the idea of modernization in law, but rather developed their own discourse which would not conflict with Islam and its values. Thereby, the approach to the Islamic tradition of *fiqh* in the Second Constitutional Era neither put Islam nor *fiqh* aside; it rather engaged in a symbiotic sort of relationship with the modern sense of law. In this context, *fiqh* and its domain were redefined by evaluating its *muamelat* part with worldly matters and by preserving the *ibadat* part as responsible for religious matters.

On this basis, in this study, I have drawn the following conclusions pertaining to the perception on the Islamic tradition of *fiqh*:

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<sup>385</sup> Ferdan Ergut “Surveillance and the transformation of public sphere in the Ottoman Empire”, *METU Studies in Development*, sy 34 (2007): 173-93. pp. 181. “It seems that the story of the state formation in Turkey from empire to republic can be fruitfully told as the story of the extension of the public over the private sphere. The Tanzimat was the transitory phase of this history.

In the first place, if we attempt to return to the questions expressed in the introduction part, the context which caused a new questioning of the Islamic tradition of *fiqh*, which constituted an indispensable part of the Ottoman legal thought, has been examined by giving an ear to the *ulema* and their ways of coping with the challenge of modernity within the context of the codification movements. The influence of the Napoleonic Code was reflected in the act of *Mecelle* which was prepared by a commission headed by Ahmed Cevdet Pasha and evaluated as the act of codifying legal maxims contained in the Hanafi school. Here, the notion of *örf*, the necessities and requirements of time were prioritized as inevitable for making change in the sphere of law.

Secondly, in addition to *Mecelle*, the Second Constitutional Era was the context which widely shaped the discussions around the Islamic tradition of *fiqh*. Here, three dimensions were identified as the late Ottoman *ulema* attempted to redefine and revive the Islamic tradition of *fiqh*. They prioritized the social, legal and historical aspect of *fiqh*. These three dimensions were discussed within the context of the argument of change and under the influence of the modern sense of law. Accordingly, it was argued that the new age required new legal opinions, *ijtihads*, rather than finding solutions in old *ijtihads* which reflected the mentality of older times. Thus, new *ijtihads* required a new perception on *fiqh* or updating it with new frameworks to derive new laws reflecting the mentality of the modern state.

Finally, another question this thesis has revolved around is whether *fiqh* and the modern sense of law conflicted with each other. Instead of an exclusive relationship, what we see here, or at least in the discourses of the *ulema*, is an attempt to prove the adequacy of *fiqh* to deal with new *ijtihads* rather than succumbing to foreign laws. Therefore, what was at stake was reinterpreting *fiqh* and determining the domain of both spheres, modern law and the Islamic tradition of *fiqh*, instead of excluding *fiqh* completely. This act caused the reevaluation of the position the Caliphate, Muftiate, and Shayhk-al Islam in a

sense that they were given the responsibility of concentrating on the realm of religion. Thereby, these persons were restricted from entering the domain of legislation and judiciary.

The main duty of institution of religion then bounded to educate people about the essence of religion, conceptualized as *maslaha*. However, the establishment of Diyanet, Religious Affairs Administration, marked significant era in a sense that, in the mean time, this institution transformed into producer and guardian of the ideology Turkish Republic. It is quite significant to consider this aspect, when we evaluate and search for the transformation in the way *fiqh* was reassessed. Unless, these two sides are taken into consideration, it is not possible to make sense of the evolution institution of not only *ulema* but also that of *fiqh*.

This thesis is contented with particularly revealing the perceptual change of the late Ottoman *ulema* towards the Islamic tradition of *fiqh* and enlightening the reader on the essence of religious and legal education is beyond the aim and limits of this work. If the scope were to be broadened, institutions providing religious and legal education, namely the madrasas, would have to be evaluated as centers raising the *ulema*. It would be valuable to engage in such studies in order to even better see and contextualize the new meanings and reevaluations of *fiqh*.

In this thesis, another significant argument that must be emphasized is related to secularization in law. The reassessment of *fiqh* under the impact of a modern sense of law brings to mind issues related to secularization in the sphere of law or secularism in law. Such reassessment already started during the nineteenth century, as we see in the Edicts of Tanzimat and Islahat, and the discussions conducted by the *ulema* during the Second Constitutional Era point to a gradual process of secularization of law, which reflected itself in the gradually growing notion that the realms of religion and law are two different spheres.

Secularization in law reached its peak during the Republican Era and manifested itself as secularism in law in a way that the relationship between not only religion and law but also state and ulema began to be transformed. The relationship of two sides began to be reconstructed in a sense that especially the institution of Diyanet began to come into prominence not only as guardian of ideology of the state but also as the institution reassessing the definition of Islamic religion and determining the boundaries of social, political norms.<sup>386</sup> Secularism emerged as the compelling and inevitable context and impacted the dynamics of aforesaid relationships. Hence, the establishment of the Turkish Republic as a nation-state undoubtedly constituted another significant step in how the Islamic tradition of *fiqh* was evaluated. This era expressed the state's concern to put emphasis on Turkishness. Therefore, in connection with this intention, the Islamic past related to that of Islamic law was subject to reinterpretation. Considering how the state approached the Islamic tradition of *fiqh* in order to provide a more nuanced picture of the transformation of the legal thought is a matter of future research.

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<sup>386</sup> For detailed information please see, Muhammad Q Zaman, *The Ulama in Contemporary Islam: Custodians of Change*, (Princeton: Princeton University Press, 2002); İsmail Kara, 'Turban and Fez: Ulema as Opposition' in E. Özdalga (ed.), *Late Ottoman Society: The Intellectual Legacy* (London & New York: Taylor & Francis Group, 2013).

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## APPENDICES

### A. TURKISH SUMMARY/TÜRKÇE ÖZET

Bu tezde temel olarak İkinci Meşrutiyet Dönemi'nde modern hukuk ve fıkıh algısının geçirdiği dönüşüü ulemanın perspektifinden incelenmiştir. Bu bağlamda bu çalışma kapsamında ulemanın dönemin entellektüel ortamı içerisinde İslami bir gelenek olarak fıkıhı hangi kavramları kullanarak yeniden değerlendirdiği tartışılmıştır. 19. yüzyıl Osmanlı Devleti'nin muhtelif açılardan, siyasi, sosyal, ekonomik, hukuki, dönüşümler geçirdiği bir yüzyıl olmakla birlikte bu çalışmada da tartışıldığı gibi mevcut kavramların yeniden değerlendirilmesine de tanıklık etmiştir.

Bu tez ulemanın da aktif olarak katıldığı hukuk ve fıkıh eksenindeki tartışmaları daha ziyade kavramsal çerçeveye odaklanarak tartışmıştır. Dolayısıyla, bu tezde ana kaynak olarak ulemanın dönemin çeşitli mecmualarında fıkıh üzerine yazdıkları yazılar kullanılmıştır. İlavaten, medreselerde okutulan ve ilm-i fıkıh üzerine yazılan ders kitapları da bir diğer ana kaynak olarak kullanılmıştır. Bu kaynaklar çerçevesinde ikinci meşrutiyet dönemi kapsamında ulemanın kullandığı kavramlar daha ziyade fikhın esnek mekanizmasına vurgu yapmak kaygısıyla ön plana çıkartılmıştır. Bu bağlamda, özellikle örf, içtihad, istislah, istihsan gibi fikhın temel kavramları yeniden değerlendirmeye tabii tutulmuştur. Bu tez fıkıh kavramların geçirdiği dönüşümleri incelerken bu dönüşüme yol açan bağlamı göz ardı etmeden fikir tarihi kapsamında kavramların tarihselliğine de vurgu yaparak modern hukuk algısının fıkıh algısına olan etkisine odaklanmıştır. Daha açık bir ifadeyle, hukuk ve modernite ekseninde yürütülen çalışmalara baktığımızda modernitenin getirdiği hukuk algısı hukukun dinamik, sosyal ve

değişken yapısına yapılan vurgu olmuştur. Buna ek olarak, modern hukuk aynı zamanda devletin hukuk alanında gerek kanun yapma kapasitesi ve gerek ise hukuki alanda yorum yapma yetisi bağlamında ön plana çıkmıştır. Geç Osmanlı ve özellikle İkinci Meşrutiyet döneminin düşünsel ortamında fıkıhın dinamik, sosyal, ve esnek yapısına yapılan bir vurgu karşımıza çıkmaktadır. Şeriat olarak adlandırılan İslam hukuku ve fıkıh alanında yapılan çalışmalar bilhassa Batı literatürüne baktığımızda Şeriat ve fıkıhın dinamik ya da statik bir yapıya sahip olup olmadığı ekseninde gelişmiştir. Burada altı çizilmesi gereken bir nokta, yaygın olan kanının aksine Şeriat ve Fıkıh iki farklı kavram değildir. Şeriat genellikle ilahi ve değişmeyen olarak algılanırken, fıkıh bu ilahi otoriteyi anlama çabası olarak algılanır.

Fıkıh ilmiyle iştigal edenler Kuran, Kıyas, Sünnet ve İcma olarak dört delil çerçevesinde ilahi otoriteyi yorumlama çabasında bulunurlar. İslam hukukunun dini özüne yapılan vurgu onun değişim dinamiklerinden eksik olduğu gerekçesiyle statik olarak nitelendirilmesine sebep olmuştur. Bu görüşün benimsenmesi İslam hukukunun modern hukukun gerektirdiği tarihsel ve değişken yapıdan mahrummuş gibi algılanmasına yol açmıştır. Diğer taraftan, İslam hukukunun dinamik yapısına yapılan vurgu daha ziyade dini olarak ifade edilen özün ya da İslam hukukunun diğer bir önemli kavramı olan vahiy gibi kavramlarında tarihsel olarak yeniden yorumlanabilirliğine dikkat çekmiştir.

İslam hukukunun oluşumu aynı zamanda kendisini siyasi bir meşruiyetten ziyade hukuk alanında çalışmalar yürüten müçtahidler gibi bilgisel bir meşruiyete sahip olan kişilerin çalışmalarına borçludur. Bu kişiler bir araya geldikleri ortamlarda İslam hukukunun temellerini oluşturmuşlardır ve özellikle içtihad yapma kapasiteleriyle İslam hukukunun muhteviyatı olarak kapsayıcılığına da katkıda bulunmuşlardır. Erken dönem özelinde bakıldığında İslam hukuku dinden ve dini sorumlulardan bağımsız olarak algılanmamıştır. Dolayısıyla, İslamiyet ve özellikle Hz. Muhammed ve Kur'an ile birlikte hukuk ve hukuksal yetki Kur'an ve Hz. Muhammed ile ilişkilendirilmiştir.

Emeviler ve Abbasiler dönemine baktığımızda bu dönemde siyasi otorite İslam hukuku ve bu alanda çalışan kişiler üzerinde bir meşruiyete sahip olmaya başlamıştır. Bu bağlamda, bilhassa müftiler ve kadılar ön plana çıkmaya başlamıştır. Bilhassa müftilerin ilerleyen dönemlerde ve özellikle Osmanlı bağlamında devletin meşruiyet mekanizması içerisinde önemli kişiler olarak ön plana da çıktıklarını görmekteyiz. Buna ek olarak, müftilerin sahip oldukları bilgiler ve fetva verebilme kapasiteleri toplum içerisinde de bir meşruiyet edinebilmelerine katkıda bulunmuştur.

Modern hukuk algısı düşünsel düzlemde kendisini tarihsel, sosyal, ve dinamik bir yapı olarak nitelendirirken aynı zamanda hukuksal alanda devletin görünürlüğü de modern hukukun bir sonucu olarak okunmuştur. Bunlara ek olarak, aynı zamanda kodifikasyon hareketleri de hukuka yüklenen anlamın değişmesine yol açmıştır. Bu bağlamda, kanun metinlerinin muhteviyat olarak açık, belirgin, sistematik olması beklenmiştir. On sekiz ve on dokuzuncu yüzyıldaki kodifikasyon hareketleri bu bağlamda hukukun kaynağı ve biçimine ilişkin tartışmaları da beraberinde getirmiştir. Başka bir deyişle, kodifikasyon ve hukuka yüklenen misyon hukuki standartların devlet tarafından belirlenmesine giden bir yol olarak algılanmıştır.

Erken dönem Osmanlı Devleti özelinde Osmanlı hukuk sisteminin şeriat ve örfü de içeren eklektik bir yapıya sahip olduğu söylenebilir. Bilhassa örf kavramı osmanlı hukuku alanında çalışan kişilerce şeriatın ötesinde kanun yapma kapasitesi sağlaması bakımında ehemmiyet gösterilen bir kavramdır. Diğer taraftan, Geç Osmanlı özelinde özellikle Mecelle'nin kodifikasyonu bize İkinci Meşrutiyet döneminde fıkıh etrafında yürütülen tartışmaların dinamiği hakkında ipucu vermesi açısından önem taşımaktadır. Ahmet Cevdet Paşa ve heyetinin İslam hukukunun kodifiye edilmesi hususunda bildirdikleri görüşler bize modern hukuk algısının ve bu çalışma çerçevesinde fıkhıya yaklaşımın değişmesi hususunda önemli dinamikleri göstermektedir. Bu noktada da islam hukuku özelinde kodifikasyon hareketinin gerekliliği kendisini göstermiştir.

Ahmet Cevdet Paşa'nın bu gerekliliğe verdiği tepki ya da geliştirdiği söylem tamamen negatif olmamakla birlikte değişimin ya da mevcut geleneğin farklı şekilde algılanması olarak yorumlanabilir. İlgili dönem çerçevesinde hukuktaki algısal değişim ve hukuksal alanda kimin yetki sahibi olacağı gibi dinamikler bize on dokuz yüzyıl Osmanlı Devleti'nin modern devlet olarak görünürlüğünü yasama üzerinden de kurduğunu göstermektedir. Daha açık ifade edecek olursak, modern devlet tebaasıyla kurduğu ilişkisinin temelinde hukuksal alanda çelişiklere mahal vermeyecek ve öngörülebilirliği ön plana çıkaran bir söylem üzerinden ilerlemeyi yerleştirmiştir. Bu minvalde çeşitli alanlarda yapılan kodifikasyon aktiviteleri temelde devletin hukuksal alanda bu alanda görünür olan diğer aktörleri de kontrol altında tutarak görünürlüğünü artırmayı hedeflemiştir. Bu açıdan bakıldığında fıkıh algısı muhteviyat, kapsayıcılığı ve dayandığı kaynak itibariyle sorgulanmaya başlanmıştır.

Bu sorgulama nihai olarak bakıldığında fıkıhın tamamen göz ardı edilmesi anlamına gelmemekle birlikte özellikle Mecelle özelinde ele alındığında fıkıhın bir düzen içerisinde bir araya getirilmesinin temin edecek bir araç olarak kodifikasyon gerekli görülmüştür. Pratik sebeplerden dolayı kaçınılmaz olarak görülen batı hukukunda iktibas yapmak hariç tutulursa, İslam hukuku ve fıkıh özelinde iktibas Cevdet Paşa tarafından tercih edilen bir yol olmamıştır. Cevdet Paşa haricinde bazı kesimler Code Napoleon 'un direkt olarak iktibasını savunmuşlardır. Cevdet Paşa bu kesimleri sırf alafranga tabii olarak nitelendirmiştir ve Osmanlı Devleti'nin şer'i şerif üzerine müesses olması kavanin ve nizamının da şer'i temellere dayanması gerektiğini vurgulamıştır.

Genç Osmanlılar özelinde bakıldığında Namık Kemal'in fıkıh algısı doğal hukuk teorisi ve buna binaan akl ve nakl kavramları üzerinden ilerlemektedir. Daha açık ifade etmek gerekirse, İslam hukuku dayandığı kaynak itibariyle, Kemal'in söyleminde nakl, ayrıcalıklı bir yere sahiptir. Kemal fıkıhın esnek mekanizmasının değişen şartlara uyum sağlayabileceğinin altını çiziyor. Yeni yapılacak kanunlar şeriate tatbik olmalıdır. Namık Kemal'in ifade ettiği gibi: "Kavaid-i şeriate

tatbikan belki Avrupa'dan daha muntazam kanunlar tanzim olunabilir ve bu davamızı bil cümle ulema tasdik eder. Hal böyle iken niçin yalnız muamelat-ı nassa dair bir Mecelle ile iktifa olunsun da bir kanun'üş-şer' tanzimine bakılmasın?" Ali Suavi'nin söylemleri de Namık Kemal ile ortak noktada buluşuyor. Avrupalıların ilerlemesine katkıda bulunana temel dinamik hukukun akli dayanağı olmasıdır diyerek bu methodon İslam hukuku için de uygulanabilirliğini dile getiriyor.

Fıkıhtaki algısal değişim, kanunların zaman içerisinde değişimine de vurgu yaparak değişim argümanı içerisinde fıkıh ve fikhın kavramları yeni bir bakış açısıyla okunmuştur. Özellikle Mecelle özelinde örf kavramı değişime olanak sağlayan bir kavram olarak sık sık altı çizilmiştir. Örf ve adete dayanan fıkıh meselelerinin tebeddül ettiği vurgulanmıştır. 19. Yüzyılda dinamiklerini gördüğümüz bu algısal değişimler İkinci Meşrutiyet Döneminde bir üst noktaya taşınarak ulemanın fikhın özünü ve kavramlarına ehemmiyet vererek iktibas aktivitesinden ziyade fikhın dinamiklerinde faydalanmayı öngören bir söylemde entelektüel düzlemde kendisini göstermiştir.

Bu tez temel olarak İkinci Meşrutiyet Dönemini referans alarak fikhın kaynağını ön plana çıkaran tartışmaları merkeze almıştır. Bu bağlamda, dönemin entellektüel ortamındaki tartışmalarda ön plana çıkartılan söylemler ve kavramlar bize fikhın algısının geçirdiği dönüşümler hakkında ipuçları vermektedir. Tez çerevesinde bu söylemler üç temel ana dinamik içerisinde incelenmiştir. Bu doğrultuda fikhın tarihsel, değişken ve dinamik yapısına vurgu yapılmıştır.

Özellikle örf kavramı bu söylemlerin merkezinde sık sık ön plana çıkartılmıştır. Örf kavramı bilhassa Ziya Gökalp, Halim Sabit ve İzmirli İsmail Hakkı'nın söylemlerinde değişim argümanı içerisinde ele alınmıştır. Örf kavramı fıkıh içerisinde değişim dinamiğinin öncüsü olarak ele alınmasına ek olarak bu kavram aynı zamanda hukukun da örf gibi değişmeye açık olduğu gibi

söylemlerin ortaya çıkmasına da sebep olmuştur. Bu görüş “Örf ve adetin tegayyürüyle ahkâmın tegayyürü” şeklinde ifade edilmiştir. Bu babda, örf ve hukuk milletlere has olarak görülmüş ve taklid yerilmiştir. Başka bir deyişle, burada fıkıh kavramı üzerinden gelişen bir değişim algısı da kendini göstermiştir diyebiliriz. Ulema kanadından bakıldığında önerilen seçenek taklid yerine yeniden değerlendirme ön planda olmuştur. Daha önce de ifade edildiği gibi pratik sebepler iktibas hareketinin önüne geçememiştir ve ulemanın önerdiği yol söylemsel düzlemde kalmıştır.

Örf kavramına ek olarak sık sık dile getirilen bir diğer kavram da içtihad kavramıdır. İslam hukukunun erken dönemlerinde de müçtahidlerin içtihad aktivitesini yürüttüğü göz önüne alınırsa geç dönem Osmanlı özelinde de bu kavram Kur’an, Sünnet ve Hadisi göz önünde bulundurarak karşılaşılan yeni problemlere ya da bir eylemin şeri şerife uygun olup olmadığını belirlemek adına müçtahidin akıl yürütme sürecidir. Bu aktivite İslam hukukunun muhteviyat olarak kapsamlılığını artıran bir eylem olarak algılanmıştır. İkinci meşrutiyet döneminin düşünsel ortamında bu kavram içtihadın geçerli olduğu ve geçerli olmadığı alanlar olarak yeni bir yorumlamaya tabii tutulmuştur.

İçtihad aktivitesinin bilhassa dünyevi alan olarak ifade edilen muamelat alanında cari olduğu dile getirmiştir ve dönemin gerektirdiği yeni içtihadların fıkıhın ya da fıkıhın metodoojisi içerisinde yürütülmesi uygun görülmüştür. Burada temel kaygı yabancı kanun iktibasını engellemek olmuştur. Pratik sebeplerden dolayı gerekli ve kaçınılmaz olan iktibasları hariç tutacak olursak, ulemanın söylemleri bu noktada belirleyici olmaktan çok entellektüel düzlemde kendisine yer bulmuştur. Diğer bir taraftan dini alanlarla ilgili meseleleri içeren itikad ve ibadat kısmı da nass olarak belirlenmiş alanlar olarak değişimin dışında tutulmuştur. Burada ana tema muamelat ve dünyevi kısımlardaki değişimi klasik fıkıhın sınırları içerisinde mümkün kılmaktır. Diğer bir ifadeyle, fıkıh gerek dini ve gerek dünyevi alanlardaki ihtiyaçlar için çözüm sunabilecek bir mekanizma olarak yorumlanmıştır.

Diğer bir taraftan özellikle Halim Sabit ve Ziya Gökalp özelinde gördüğümüz üzere din alanının fıkıhla ilişkilendirilmesi ve dünyevi alanda devletin kanun yapma ve yorumlama kapasitesi olarak ilişkilendirildiğini görüyoruz. Burada İzmirli İsmail Hakkı Elmalılı Hamdi Yazır, ve Manastırlı İsmail Hakkı gibi klasik fıkıhın içerisinde değişimi savunan ulemanın aksine bir din ve hukuk olarak algılanan iki alan ortaya çıkmaktadır. Dolayısıyla, örf ve içtihad muamelat alanındaki değişimleri meşru ve mümkün kılmak için öne çıkarılan iki kavram olmuştur. Burada ulemanın hukuksal salahiyeti de yeniden yorumlanmıştır ve ulema diyanet yetkisinin dışında kaza yetkisinden mahrum bırakılmıştır.

Görüldüğü üzere, modern hukuk algısı dini alanı hukuki alanda referansı dini bir temelden ziyade din dışı temellere oturtmayı beraberinde getirmiştir. Bu iki alanın esasları ayrı ayrı gayeler çerçevesinden tanımlanmıştır. Müfti ve Şeyhülislam diyani meseleler hakkında hüküm verme kapasitesine sahip olarak görülmüşlerdir. Kazai meseleler onların yetki alanında ayrı olarak devletin salahiyetine bağlı olarak tasavvur edilmiştir. Nitekim İkinci Meşrutiyet döneminde dinamikleri oluşmaya başlayan bu sürecin nihai noktası Cumhuriyet döneminde sekülerlik anlatısında görülebilir.

Yukarıdaki din ve hukuk anlatısına Halim Sabit'in söylemleri üzerinden baktığımızda üç tip velayet ayrımı üzerinden bu ayrımı anlattığını görebiliriz. Bunlar, velayet-i amme, velayet-i diniye ve velayet-i hukukiye. Velayet-i hukukiye özelinde teşri, icra, salahiyet ve vaaz kavramları yeniden yorumlanıyor. Velayet-i diniyye özelinde ise Müftü, Meşihat, Halifelik ve Fetvahane dini meseleler hakkında yorum yapma kapasitesine sahip olarak tanımlanmıştır. Bu yetkiyi haiz olanlar yasama otoritesinden azad tutulmuşlardır. Yasama yetkisi daha öncede ifade ettiğimiz gibi modern hukuk algısıyla birlikte değişmeye başlayan fıkıh algısıyla yeniden yorumlanarak hukuksal alanda devletin kapasitesini ön plana çıkaran bir tanımlama üzerinden tanımlanmıştır.

Özet olarak fukaha sınıfının rolü kanun yapma kapasitesinen ziyade “rehber” olmak olarak tanımlanmıştır. Geç Osmanlı özelinde fıkıh ve hukuk üzerinde gelişen tartışmalar fıkıhın daha ziyade kavramsal çerçevesi üzerinden metodolojik olarak modern hukukun getirdiği değişimi sağlayan bir araç olarak tartışılmıştır. Pratik sebeplerin doğurduğu iktibas eylemi entelektüel ortamda değişimin fıkıh üzerinden de tanımlanabilirliği üzerinden söylemselleştirilmiştir. Nihai olarak iktibas kaçınılmaz bir eylem olarak tezahür etmiştir.

Bu tezde temelde odaklanılan nokta fıkıhın kavramsal çerçevesi üzerinden yürütülen tartışmaları modernite ve gelenek ikilemselliği içerisinde yorumlamaktansa ikisi arasındaki ilişkiyi sembiyotik olarak tanımlamaktır. Bunu yaparken fıkıh ve hukuk arasındaki ilişkisi de tamamıyla dışlayıcı olmamakla birlikte sembiyotik bir temelde yorumlanmıştır. Bu tez çerçevesinde altı çizilmesi gereken temel argüman hukuki alandaki reform mevcut olan geleneğin yani fıkıhın tamamen dışlayıcılığı anlamına gelmediğidir. Söz konusu olan fıkıhın ilgili olduğu alanların yeni bir değerlendirmesidir.

İkinci Meşrutiyet döneminin düşünsel düzleminde yürütülen fıkıh tartışmaları modern hukuk tartışmaları içerisinde ulema kanadında şu kaygı ışığında yorumlanmıştır: “muamelat-ı dünyeviye” sadece fıkıhın belirlediği sınırlar düzleminde düzenlenebilir mi? Yani burada fıkıh içerisinde önceden geçmiş zamanlarda verilen hükümler mevcut dünyevi ve modern düzen için bir kaynak niteliği sağlayabilir mi sorusu kilit bir nokta teşkil etmektedir. Burada geçmişin yeni bir okumaya tabii tutulması ve tarihsel bilinçle birlikte gelen değişim algısı kendisini göstermektedir. Fıkıh ve içerdiği hükümler yeni bir okumayla tarihselliğinin altı çiziliyor. Temel olarak, söylemsel düzlemde zamanı ve değişimi göz önüne alabilecek hukuki hüküm verecek mekanizma bulma arayışı kendini göstermektedir. Çünkü böyle bir mekanizmanın eksikliği hukuki alanda belirsizlikler ve karışıklık doğurmaktadır. Burada ulemanın yaptığı geçmiş fıkıhı külliyat tarihsel olarak yeniden yorumlayarak şuanki içtihadların dinamiğinin şimdiden ve klasik usulün sunduğu mekanizmalardan yararlanarak çizilmesi ön

görülmüştür. Bu açıdan bakıldığında modern hukukun gerektirdiği tarihsel ve değişken dinamik kendisini söylemsel olarak fıkıh üzerinde gösteriyor. Buna ek olarak, hem hukukun kaynağını hem de kanun yapma süreçlerinin sorgulandığını görüyoruz.

Bu tartışmalardan çıkarılacak bir diğer sonuç ise fıkıhın hukuksal kategoride değerlendirilmesinin zorluğu ve bu söylem Gökalp gibi ictimaiyyatçıların ortak söylem noktası. Bu söylem klasik fıkıh usulünün sınırları içerisinde değişimi savunan ulemanın dile getirdiğinin aksine bir söylem olarak karşımıza çıkıyor. İkinci Meşrutiyet döneminin fıkıh ve hukuk ekseninde gerçekleşen düşünsel tartışmalarında fıkıhın insanın sosyal dünyasıyla olan ilişkisi öne çıkarılmıştır ve değişim argümanının bir boyutu da örf ve içtihad kavramına ek olarak “maslahat” kavramıyla da fıkıhın içtimai boyutuna yapılan vurguyla öne çıkarılmıştır. Burada temel kaygı hukukun çerçevesinin içtimai boyutlarla çizmek ve örf-i içtimai boyutu esas almaktır.

Tez kapsamında incelenen ikinci el literatürün ana kaygısı fıkıh diğer taraftan Müslümanların uyması gereken görevler kapsamında, antropologların yaptığı gibi kültürel bir oluşum ya da pratiklikten yoksun bir ideal bir doktrine ama diğer taraftan bir yasal kod olarak da algılanabilir mi? Bu temel soru çerçevesinde bu çalışma geç Osmanlı ulemasının fıkıh geleneği üzerinde yürüttüğü tartışmaları incelemiştir. Bu bağlamda örfi ve ictimai boyut, özellikle Sabit ve Gökalp özelinde, yapılan vurgu fıkıhın hukuksal kategoriden ziyade ictimai kapasitede değerlendirilebileceğinin altını çizmektedir. Başka bir deyişle, hukuksal kategori ya da hukuki müesseseler kaynaklarını dini bir temelden, nusus-ı semavi, ziyade bu temel dışından alarak doğup gelişmelidir.

Son olarak, bu tez kapsamında vurgulanması gereken bir diğer argüman da hukukun sekülerleşmesidir. Fıkıhın yeniden değerlendirilmesi akıllara hukuksal alanın sekülerleşmesi yada hukukun sekülerleşmesi gibi süreçleri getiriyor. Daha açık ifade etmek gerekirse, on dokuzuncu yüzyılı bu recin nüvelerinin atıldığı bir

dönem olarak nitelemek mümkündür. İkinci Meşrutiyet Döneminin düşünel ortamı bu fikrin kavramsal olarak etellektüel ortamda yeniden dile getirilmesine olanak vermiştir. Bu süreç Cumhuriyet döneminde kendisini daha fazla göstermiştir.

Cumhuriyet dönemi bu çerçevede sadece din ve hukuk arasında değil aynı zamanda ulema ve devlet arasındaki ilişkinin dönüşümü açısından da hukukun sekülerleşmesi sürecinde önemli bir aşamayı oluşturmuştur. Dolayısıyla, sekularizm yukarıda bahsettiden ilişkiler açısından algılandığında kaçınılmaz ve itici bir bağlam olarak kendisini göstermiştir. Buna ek olarak, Cumhuriyet Dönemi İslami geçmişle bağlantılı olarak İslam hukukunun da yeniden yorumlandığı bir dönem olmuştur. Bu çerçevede, devletim İslam hukukuna ve İslami bir gelenek olarak fıkhı nasıl yaklaştığının incelenmesi bize hukuki düşüncenin dönüşümü hakkında daha kapsamlı bir anlatı sunacaktır. Bu çerçeveye fukahanın laikliği nasıl ağıladığı da eklenebilir. Bu tezde ana kaygı ulemanın fıkıh algısı üzerinden hukuki düşüncenin dinamiklerini okumaya tabii tutmaktır. Dolayısıyla, hukuk ve din eğitimlerinin verildiği medreseler bu çalışmanın haricinde tutulmuştur. Fıkıh algısının geçirdiği dönüşümleri medreseler gibi dinamiklerden incelemek kuşkusuz algısal olarak hukukun geçirdiği dönüşümlerin dinamikleri hakkında muhtelif perspektifler sunacaktır. Bu tez kapsamında İkinci Meşrutiyet Dönemi devletin hukuksal alana nüfuz edebilme kapasitesinin genişlediği dönem olarak ele alınmıştır. Burada devlet sadece nüfuz etme kapasitesini değil aynı zamanda “kamusallık”, kamusal yarar gibi kavramları da ön plana çıkararak hukuk algısının dinamiklerini bu noktadan ifade etmeye başlamıştır. Bu reç nihai olarak itikadi mesellerin dinin alanına hasredilmesini ve beraberinde kamusal alan ve özel alan ayrımını getirmiştir. Bu ayrım mutlak olmaktan ziyade bağlamsal olarak yeniden yorumlanmaya açık hale getirmiştir diyebiliriz. Tez çerçevesince odaklanılan nokta dinsel ve hukuksal alanda salahiyete kimin haiz olacağı olmuştur.

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