www.mruni.eu

Juozas Valčiukas

DOCTORAL DISSERTATION

ISLAMIC LAW: A QUESTION OF ADAPTABILITY

SOCIAL SCIENCES,
LAW (01 S)
VILNIUS, 2018

MYKOLAS ROMERIS
UNIVERSITY

MYKOLAS ROMERIS UNIVERSITY

Juozas Valčiukas

ISLAMIC LAW: A QUESTION OF ADAPTABILITY

Doctoral dissertation
Social Sciences, Law (01 S)

Vilnius, 2018

The Doctoral Dissertation was written from 2011 to 2017, defended at Mykolas Romeris University according to the right to carry out doctoral studies provided to Mykolas Romeris University and Vytautas Magnus University under the order of the Minister of Education and Science of the Republic of Lithuania, dated 8 June 2011, No. V-1019.

Scientific supervisor:

Prof. Dr. Justinas Žilinskas (Mykolas Romeris University, Social Sciences, Law, 01 S).

ISBN 978-9955-19-892-5 (online)
ISBN 978-9955-19-893-2 (print)

MYKOLO ROMERIO UNIVERSITETAS

Juozas Valčiukas

ISLAMO TEISĖ: ADAPTYVUMO KLAUSIMAS

Daktaro disertacija
Socialiniai mokslai, teisė (01 S)

Vilnius, 2018

Daktaro disertacija rengta 2011-2017 metais, ginama Mykolo Romerio universitete pagal Mykolo Romerio universitetui su Vytauto Didžiojo universitetu Lietuvos Respublikos švietimo ir mokslo ministro 2011 m. birželio 8 d. įsakymu Nr. V-1019 suteiktą doktorantūros teisę.

Mokslinis vadovas:
Prof. dr. Justinas Žilinskas (Mykolo Romerio universitetas, socialiniai mokslai, teisė, 01 S)

In the memory of prof. Leonidas Donskis

To my grandmother Vanda Borodkiniene for lessons of patience and everlasting optimism

To all the students who devote their life to execute a last will of Stasys Lozoraitis Jr., Lithuanian President of Hope

GLOSSARY OF ISLAMIC TERMS

Darrura, pl. daruriyyat – necessity; basic necessities of human beings that the law must fulfil.

Fatwa – non-binding religious-legal opinion issued by a mufti in response to a question.

Fiqh – understanding of law written in the sources; the science of law.

Hadith, pl. ahadith – normative statement about what the Prophet said or did; the body of reports attributed to the Prophet.

Ijma – consensus, agreement.

Ijtihad – reasoning and interpretation of the sources of law; the process of exerting one's utmost in an effort to derive laws from sources.

Istihsan – juristic preference, equity; the juristic method that considers equity in applying the law.

Madhab – school of thought, juristic school, orientation or view.

Majalla – Ottoman Islamic law written in the form of Civil Code.

Maqasid al-Sharia – the methodology of law based on the purposes or goals of the Sharia.

Maslaha – public interest; the juristic assumption that considers public interest and general welfare in applying the law.

Mufti – scholar who is qualified to issue a non-binding legal response.

Mujtahid – a person who applies original analysis and independent judgment to legal issues.

Naskh – abrogation or replacement of an earlier Quranic verse or Sunna by a later one.

Qadi – judge in a Sharia court.

Qanun – secular positive law.

Qiyas – deduction by analogy; juristic methodology that relies on the use of analogy for unprecedented cases in which the source texts do not provide a legal decision.

Ray'a – personal opinion, judgment.

Sharia – the path given by God to human beings, the path by which human beings search God's will; All categories of rules written in the Quran and Sunna.

Sunna – the example of the Prophet embodied in his statements, actions, and those matters that he silently approved or disapproved as reported in hadith literature.

Taqlid – imitation; the imitation of more knowledgeable scholars, usually within a particular school. Taqlid is often considered the opposite of ijtihad.

Ulama – the members of the scholarly community, jurists.

Umma – the community of Muslims.

Urf – custom, customary practice.

Usul al-fiqh – the methodology of law; the theory of sources of Islamic law.

CONTENTS

Remember that the answers that are so cutting and decisive are not the answers that Islam is giving, but the answers that a "knowledgeable" person with a background in the written material is giving.
Omar Saif Ghobash[1]

INTRODUCTION

Research problem. To paraphrase Wael B. Hallaq[2], to write a dissertation on the Sharia as the very core of Islam already does not mean to represent the other but, rather, to strive at attaining more knowledge about Muslims living in non-Muslim countries or even about Western law itself which, as shows, for instance, the case of Greek law, encompasses a number of Islamic legal rules. In the Quranic sense, the key concept to understand Muslim identity lies in the Sharia which, although continues to be identified with or as the law, symbolizes a normative path to be followed by Muslims.[3] However, European Court of Human Rights (ECHR) regarding the issue of the prohibition of Turkish political party which besides else invited to incorporate the Sharia into the Turkish law affirmed that the Sharia as a set of dogmas and divine rules is fixed and invariable, thus, it cannot be reconciled with European Convention's values.[4] It signifies that social relations in the secular state cannot be regulated by the Sharia rules. The question necessary to be posed here is how to explain the thesis of the ECHR in the light of factual circumstances of the contemporary time when approximately one fifth of the worldly Muslim population lives outside the Muslim-majority countries[5], when both Islamic institutions legally providing

1 Omar Saif Ghobash, *Letters to a Young Muslim* (New York: Picador, 2017), 67.

2 Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 1.

3 The Quranic verse 5:48: "And we have sent down unto thee the Book in truth, confirming the Book that came before it, and as a protector over it. So judge between them in accordance with what God has sent down, and follow not their caprices away from the truth that has come unto thee. For each among you we have appointed a law and a path. And had God willed, He would have made you one community, but (He willed otherwise), that He might try you in that which He has given you."

4 "The Court considers that the shari'a, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. It is difficult to declare one's respect for the democracy and human rights while at the same time supporting a regime based on shari'a, which clearly diverges from Convention values." European Court of Human Rights, *Refah Partisi (Welfare Party) v Turkey*. (2003). Para 72.

5 According to Organization of Islamic Cooperation (www.oic-oci.org), it consists of fifty-seven Muslim-majority state members and twenty-two of them are the members of the Arab league (www.las-portal.org). As was stated by the Pew Research Centre, Muslims are the second largest religious group with 1.8 billion people, or 24% of the global population. Moreover, it is expected that between 2015 and 2060 with the growth of world's population by 32% to 9.6 million, the number of Muslims – the major religious group with the youngest population and the highest fertility – is projected to increase by 70%. More about this: www.pewforum.org/2017/04/05/the-changing-global-religious-landscape/global-population-projections-2015-to-2060

services in non-Muslim states[6] and a local state legal apparatus permit Sharia rules to be partly implemented within Muslim communities in a number of non-Muslim majority states[7]. It seems that the statement of the ECHR implies that Muslims who live, for example, in Western Europe are not able to follow the Sharia because of its incompatible nature as it was described by the ECHR. Whether it means that while living in non-Muslim countries Muslims are obliged to follow exclusively the land law? Does it not look like Muslims living in non-Muslim states appear in something like Antigone's dilemma to choose between two extremes, namely, religious beliefs and non-Muslim (legal) culture?

If to acknowledge the statement of the ECHR indisputable, Muslims following the Sharia in non-Muslim countries might find themselves in a truly complicated situation. In such a case, there is a number of supposed scenarios and several of them might be enumerated here: (1) Muslims cease to live under the normative rules of the Sharia;[8] (2) sooner or later Muslims return to the Muslim-majority countries where they are allowed to live under the Sharia;[9] (3) the Sharia takes a role of an universal legal system;[10] (4) the

6 Chapter Six of this dissertation discusses one of a huge number of Islamic institutions operating in the West in a comprehensive way. The Muslim Law Shariah Council UK was selected for the research conducted during a couple of internships. It might be said that all the results obtained during the research in the concrete Sharia council provide more or less clear picture about such Islamic institutions in non-Muslim states. More about the Muslim Law Shariah Council UK read here: www.shariahcouncil.org

7 By a state legal apparatus, we mean a statutory law and case law of one or another Western state. As an exemplary case of a statutory law which permits a number of the Sharia norms and Islamic legal rules to be enforced in the West one can mention particularly Greek state, to the lesser extent England, Canada and so forth. The legal regulation of Greece conditioned by the historical circumstances, international influence and relationship with Turkey to this day preserved the possibility for Muslims in Greek Thrace to apply Islamic law in personal matters. More on this theme read: Konstantinos Tsitselikis, *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers* (Leiden: Martinus Nijhoff Publishers, 2011). At the same time, there is a number of English, Canadian, Greek court judgments according to which some Sharia-based normative practices are accommodated because of their compatibility with the rule of law and local customs.

8 The third generation of Muslims living in the West is sometimes viewed as secularly motivated to refrain from any religious practice.

9 Although Yusuf al-Qaradawi states that there is a need to reconcile Islamic religious law with living requirements of Muslims in the West, he also tends to think that such necessity stems from the temporal state of affairs. It is evident from his discourse delivered in the religious opinions, official interviews or his TV shows that Muslim presence in non-Muslim states in the West means exceptional circumstances in which Muslims occurred today. To realize this, one should read his legal opinions: Yusuf al-Qaradawi, *Fiqh for Muslim Minorities: Contentious Issues & Recommended Solutions* (Cairo: Al-Falah Foundation, 2003).

10 Ayaan Hirsi Ali divides Muslims into three groups: Medina Muslims, Mecca Muslims and reformers or dissidents of Islam. According to her, Medina Muslims preach global jihad and these people are the most dangerous. The men and women who join groups such as al-Qaeda, ISIS, Boko Haram are all Medina Muslims having the aim to spread the violence in the name of the Sharia to conquer the lands of infidels. They argue for an Islam largely or completely unchanged from its original seventh-century version. More on this subject: Ayaan Hirsi Ali, *Heretic: Why Islam Needs a Reformation Now* (New York: HarperCollins Publishers, 2015). On the global Salafism as Islam's new religious movement and on its influences in the West, one more book is worth being read: *Global Salafism: Islam's New Religious Movement*. Edited by Roel Meijer. (London: Hurst & Company, 2009). Eventually, about the aims and tactics of such groups as ISIS and Al-Qaeda, the study of Michael Weiss and Hassan Hassan is worth attention: Michal Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (New York: Regan Arts, 2015).

Sharia normative system becomes a parallel legal system in non-Muslim states with a considerable Muslim minority;[11] (5) Sharia adapts to the other legal systems. Obviously, the first three options make no sense at all and the fourth one is counter-productive and, as is well known from previous experiences in England and elsewhere, it is usually condemned to failure. Although the fifth scenario sounds most realistic, it lies in a clear conflict with the thesis of the ECHR.

Our dissertation launches a research in the sense of the fifth scenario. In such a case, the problem of our research becomes adaptability of the Sharia norms and Islamic law in the changing time and living conditions. In the context of the growing number of Muslim population in non-Muslim states and emerging tendencies to spread political Islam within Muslim communities in the West, also, having in mind that the future of the Middle East region and other Muslim countries becoming increasingly uncertain, now more than ever before is important to study the Sharia and Islamic law on the question of its adaptability. It is worth noting that the main aim of this dissertation is to focus not so much on any particular country or region, but on the broader picture of the Sharia and Islamic law researching the question of adaptability from a number of perspectives. Thus, all the parts of the dissertation directly or indirectly concern the problem of adaptability. If to conclude that the core feature of the Sharia and Islamic law is adaptability, this could matter in at least two regards. For those who seek reformation in the field of Islamic law, this could signify green light in their efforts to formulate and to implement such ideas. Whereas for those who continue viewing the Sharia and Islamic law invariable and stable, such conclusion could challenge their stance and encourage the further discussions.

Important to notice that our research is conducted exclusively in the field of Sharia and Islamic law of Sunni Muslim branch. The Sunni branch is undisputably a dominant one among Muslims around the world.[12] Moreover, four traditional Sunni schools of law made decisive impact on the development Islamic law in the whole Muslim world. Having a task to bring clarity in the text of the dissertation, all the dates in the dissertation are written according to the Christian calendar and not according to the Muslim calendar.

---

11 On this question, the lecture "Civil and religious law in England: a religious perspective" delivered in 2008 by Dr. Rowan Williams, the former Archbishop of Canterbury, is particularly relevant. One quotation of his lecture is worth of attention: "It might be possible to think in terms of what calls 'transformative accommodation': a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that 'power-holders are forced to compete for the loyalty of their shares constituents.' …It is uncomfortably true that this introduces into our thinking about law as some would see as a 'marker' element, a competition for loyalty as Ayelet Schachar admits. But if what we want socially in a pattern of relations in which a plurality of diverse and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty, it seems unavoidable." The text of the lecture and discussion on it might be found in: *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*. Edited by R. Griffith-Jones. (New York: Cambridge University Press, 2013).

12 Sunni Islam and Shia Islam are the two major denominations in Islam. Their division stems from the conflict emerged just after the death of the Prophet Muhammad in the seventh century. In the course of the history of Islam, both groups developed sufficiently different Islamic religious law. Our research considers solely Sunni version of Islamic law. Today, Sunnis comprise approximately 90% of the world's Muslims, and about 10% are Shia.

The relevance of the problem. In the contemporary time, the question of adaptability of the Sharia and Islamic religious law receives new heights of significance, whether for those with the courage to coexist or for those promoting division in the world[13]. A forthcoming judgment in the ECHR regarding a Muslim community in Western Thrace and Greek civil law rules on the issue of Islamic inheritance might become prophetic in formulating an official Western stance on the question of compatibility between Greek law and the Convention, let alone on the fundamental issue of the coexistence between the Sharia and Western law.[14] However, this is just a tip of an iceberg showing the relevance of the subject. It is conditioned by a huge number of other factors and the most noticeable on the ground can be enumerated here: (a) Muslim presence in non-Muslim majority countries;[15] (b) the growing number of Sharia councils in the western countries;[16] (c) a variety of conflicts

13 Tom Fletcher, *Naked Diplomacy: Power and Statecraft in the Digital Age* (London: William Collins, 2016), 161.

14 In the case *Molla Sali v. Greece*, application was lodged with the ECHR on 5 March 2014. The Chamber of the ECHR to which the case *Molla Sali v. Greece* was allocated has relinquished jurisdiction in favour of the Grand Chamber of the ECHR on 6 June 2017. It is expected to have a final judgment in the end of 2018. The facts of the case, as they were delivered by the ECHR's press release, can be shortly described here: "The applicant, Ms Chatitze Molla Sali, is a Greek national who was born in 1950 and lives in Komotini (Greece). After the death of her husband Ms Molla Sali inherited his entire estate under the terms of a will drawn up by her late husband before a notary. The deceased's two sisters contested the will, on the grounds that their brother had belonged to the Thrace Muslim community and that all matters relating to his estate were therefore subject to Islamic law and to the jurisdiction of the Mufti rather than to the provisions of the Greek Civil Code. They relied on the 1920 Treaty of Sevres and the 1923 Treaty of Lausanne, which provided for Islamic customs and Islamic religious law to be applied to Greek nationals who were Muslims. The two sisters' claims were dismissed by the Greek courts at first instance and on appeal. However, the Court of Cassation quashed that judgment on the grounds that questions of inheritance within the Muslim minority should be dealt with by the Mufti in accordance with the rules of Islamic law. It therefore remitted the case to a different bench of the Court of Appeal for fresh considerations. On 15 December 2015 the Court of Appeal ruled that the law applicable to the deceased's estate was Islamic religious law and that the public will in question did not produce any legal effects. Ms Molla Sali appealed against that judgment on points of law. Relying on Article 6 (right to fair hearing), taken alone and in conjunction with Article 14 (prohibition of discrimination), Ms Molla Sali complained of the application to her inheritance dispute of Islamic law rather than the ordinary law applicable to all Greek citizens, despite the fact that her husband's will was drawn up in accordance with the provisions of the Greek Civil Code. She also alleged that she was subjected to a difference in treatment on grounds of religion. Under Article 1 of Protocol No. 1 (protection of property), Ms Molla Sali contended that, by applying Islamic religious law rather than Greek civil law to her husband's will, the Greek Court of Cassation deprived her of three-quarters of her inheritance." More on this read here:
https://hudoc.echr.coe.int/%7B%22fulltext%22:/[%2220452/14%22],%22sort%22:[%22kpdate%20Descending%22]%7D{"fulltext":["mollasali"]}

15 More than one fifth of the world's Muslims live in non-Muslim-majority-states and it is expected the number of Muslim population in non-Muslim states will increase in a steady pace. For instance, in the US, there are about 3.35 million Muslims or about 1% of the US. The source: http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/ By 2010 an estimated 44 million Muslims were living in Europe (6%), including an estimated 19 million in the EU (3.8%). It is expected that Muslim population in Europe will increase from 6% to 10% by 2050. The source: http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-europe/

16 If to take into account the case of Britain, there was only one Sharia council in the end of the twentieth century. According to Iyad Zahalka, about twenty Sharia councils have been established in different

between people and communities, for instance, psychological, cultural, social, religious, due to a specific legal regulation and so forth; (d) terrorist attacks in the name of Islam;[17] (e) refugees' crisis;[18] (f) anti-Islamic nationalist rhetoric;[19] (g) political Islam and its expansionist policy to spread an ideology among Muslims in non-Muslim countries;[20] (h)

---

cities around Britain where Muslim communities are large and continue to grow. More on this read: Iyad Zahalka, *Shari'a in the Modern Era: Muslim Minorities Jurisprudence*. Translated by Ohad Stadler and Cecilia Sibony. (Cambridge: Cambridge University Press, 2016), 118.

17 The terrorist attacks in the name of Islam make huge influence on the growing concern about everything what is somehow related with Islam. The first target in the West becomes local community of Muslims who follow Islamic normative rules in their daily life. Not rarely, in the eyes of Western people the Sharia norms and particularly Islamic law begin to be somehow equated with terrorist atrocities or at least with terrorists' slogans. According to us, it comes to be a duty of Western scholarly community in such dangerous atmosphere to spread the scientific knowledge about the Sharia and Islamic law or, in other words, on Muslim identity questions, seeking to avoid any kind of conflicts among different religious communities and their members. Because of all this, the subject related to the Sharia norms and Islamic law with particular emphasis on the adaptability of these normative systems becomes even more relevant as it directly touches the capability of the Sharia to coexist with the other legal systems.

18 The research related to the capability of the Sharia norms and Islamic law rules to adapt to the other legal systems is more than relevant in the light of contemporary process of migration and refugees' crisis. The question of adaptability of the Sharia norms and Islamic law is directly related to the growing refugees' crisis, when the majority of refugees arrive to the West from Muslim states in the Middle East and North Africa, because arriving Muslims come with the practice to follow Sharia norms and principles what is inseparable from their religious identity.

19 In the light of terrorist attacks and refugees' crisis, the right wing politicians seek their political goals by spreading anti-Islamic rhetoric which reaches ordinary people in the West through media sources. Here are some examples:
"Austria's far-right party wants to 'ban' Islam", *The Washington Post*. January 14, 2017, http://www.washingtonpost.com/news/worldviews/wp/2017/01/14/austrias-far-right-party-wants-to-ban-islam/. (last visited April 13, 2017).
"EU Migrant Falliout: Slovakia passes law to ban Islam from being registered as a religion", *Sunday Express*, December 2, 2016, http://www.express.co.uk/news/world/738462/Slovakia-law-Islam-ban-resgistered-religion-Eu-migrant-quota-Muslim-sentiment. (last visited April 13, 2017).
"Dutch party wants to outlaw mosques, Islamic schools, Koran", *Politico*, August 26, 2016, www.politico.eu/article/far-right-dutch-politician-backs-mosques-koran-ban-islamic-schools/. (last visited April 13, 2017).
"The village aiming to create a white utopia", *BBC News*, 7 Feb, 2017, www.bbc.com/news/world-europe-38881349 (last visited April 13, 2017).
As Shadi Hamid and Rashid Dar have recently noticed, "many nationalists see Islam and Muslims not merely a security threat, but as a civilizational one as well". Paradoxically, ant-Islamic Political messages of Western politicians usually repeat what the terrorists try to spread in their slogans or what the representers of political Islam talk on the subject of Sharia and Islamic law. In such a way, Western people, who not necessarily know much about Islam and Sharia concept, receive ideologically based information not only from the Islamists but also from more or less popular politicians in the West. Such a negative context encourages to research the themes related to the Sharia and Islamic law in order to challenge such a false discourse by spreading knowledge obtained in the scientific research. More about conservative nationalists in the West and how they are similar with Islamists one can read here: www.the-american-interest.com/2017/11/16/the-rise-of-the-westernists/.

20 More on the Political Islam one can read this: House of Commons Foreign Affairs Committtee. *'Political Islam', and the Muslim Brotherhood Review*. Sixth Report of Session 2016-17 (HC 118). Published on 7 November 2016.
How to counter the spread of political Islam, one can read more here: Ayaan Hirsi Ali, *The Challenge of*

the changing scientific discourse on the issue of Islamic law;[21] (i) diverging judgments of the national and international courts in the West;[22] (j) identities in the present Muslim-majority countries which become more and more based on religion, customs, ethnicity, and ideology than on nationality, constitution, state-made law or citizenship[23].

Novelty of the research. The subject of Islamic law has not received enough, if any, attention in Lithuania. Talking about the Western European states, the Sharia in general and Islamic law in particular has been researched from different perspectives. For instance, such themes as historical development, nature and sources, contemporary evolution and tendencies of the Sharia and Islamic law have been investigated by a number of Western scholars. However, the question of adaptability of the Sharia norms and Islamic law almost everywhere receives the status of additional subject. In contrast, this problematic question turns to be the main theme in this dissertation. The research conducted in a threefold

Dawa: Political Islam as Ideology and Movement and How to Counter It (Stanford: Hoover Institution Press, 2017).

21 In addition to the traditional, secularist, literalist and many other more or less prevailing approaches towards Islamic law and its flexibility, a set of alternative approaches emerged in the last centuries suggesting to refrain from all the outdated approaches. First of all, there is a need to mention such reformers as Muhammad Abduh and Abd al-Razzaq al-Sanhuri. The technique of *takhayyur* enabling the selection of a proper interpretation from different sources was suggested by both Muslim authors in order to reform Islamic law in XIX and XX centuries. For M. Abduh, *takhayyur* constituted a choice between the Islamic schools of fiqh law in order to meet the challenge of modern times. In other words, instead of long standing tradition to base interpretational activities on one doctrine of school of fiqh law, M. Abduh encouraged to use the most appropriate version of Islamic law written in one or another legal school's manual. The concept of *takhayyur* was reformulated in the XX century with the drafting the new Egyptian Code. As Guy Bechor revealed in his book, "the drafters including Sanhuri himself noted that they had adopted the technique of *takhayyur* in selecting from among dozens of codes from around the world, in addition to Egyptian case law, the Islamic law and the old Egyptian Civil Code, with the aim of formulating the new Egyptian Civil code." According to Guy Bechor, "The technique of *takhayyur* that began its life as an internal concept from the world of Islamic law was reincarnated in the Code not merely as a purely secular term, but as global one that could even be applied to the Polish Civil Code. The Islamic context of the term was detached, and only the essence of choice and selection remained." More on that read: Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Leiden: Brill, 2007), 75-77.
Later on, the reformer of Islamic law embarked on even more profound reform suggestions. To reformulate the whole methodology of Islamic law with the aim to adapt it in its totality to the present-day social transformations was that mission which connected such Muslim reformers of the late XX and XXI centuries as Jabir Al-Alwani and Abdullahi An-Na'im. One can read: Taha Jabir Al-Alwani, *Issues in Contemporary Islamic Thought* (London: The International Institute of Islamic Thought, 2005); Abdullahi Ahmed An-Na'im, *Toward an Islamic reformation: civil liberties, human rights, and international law* (New York: Syracuse University Press, 1996).

22 For example, from one side, in the case of the mentioned judgment of ECHR, it was affirmed that the Sharia is incompatible with Western legal values. Whereas, from the other side, the national courts of England, Canada or Greece speak about particular norms of the Sharia and Islamic law declaring that a number of them do not contradict to the principle of rule of law and local customary traditions.

23 More on the new chapter in the history of the struggle for identity, path, and direction in the Middle East one can read here: Avi Melamed, *Inside the Middle East: Making Sense of the Most Dangerous and Complicated Region on Earth* (New York: Skyhorse Publishing, 2016); Richard Haass, *A World in Disarray: American Foreign Policy and the Crisis of the Old Order* (New York: Penguin Press, 2017); House of Lords, Select Committee on International Relations. *The Middle East: Time for New Realism*. 2nd Report of Session 2016-17 (HL 159).

direction gives a chance to look into the subject of adaptability of the Sharia and Islamic law in a fresh and novel way. More precisely, the following three directions in the research were are helpful to analyse the subject in order to understand it.

First of all, the dissertation considers the question of adaptability in the context of the historical development of the Sharia and Islamic law. The research made in the Middle East with the aim to study the subject of traditional Islamic law and its place in the contemporary state of Jordan was more than useful in this regard. Muslim scholars at the University of Jordan provided sufficient amount of knowledge on the traditional Islamic religious law and the methodological theories which were aimed to adapt the Sharia norms and Islamic legal rules in the course of history of Islam.

Second, the problem of adaptability is analysed in the conditions of the contemporary scholarly discourse on the Sharia and Islamic law. A number of meetings with American professor Abdullahi Ahmed An-Na'im revealed a picture of a current Muslim reformist discourse on the Sharia and Islamic law. Its openness to the change in the light of the most controversial issues was that subject which received most of attention in our discussions. The methodological theory to reform the least developed Islamic law issues suggested by the professor in the late twentieth century gave stimulus for the debates on the question of the adaptability of the Sharia norms and Islamic law in the contemporary time.

Third, the issue of adaptability of the Sharia and Islamic law is researched as it is implemented today within Muslim communities in the West and in the Middle East. The subject of Islamic law and the level of adaptability of the Sharia norms in the West was investigated during the fellowship at Westminster University and during two internships at the Muslim Law Shariah Council UK in London. The survey conducted at the Muslim law Shariah Council UK gave a chance to understand the subject from a viewpoint of Muslim jurists and from their experience to enforce Sharia normative rules within Muslim community.

Significance of the results of dissertation. Our research and its results tend to enrich scientific discourse in Lithuania where the subject of the Sharia and Islamic law has not received sufficient attention yet. It might also become a contribution to the Western science because this dissertation is mainly devoted to the problem which is analysed in the ongoing debate of Western scholars solely as an additional subject. Further, we see many areas where the results of the research can be beneficial. For a variety of governmental institutions or non-governmental organizations the results of dissertation might become very useful. In the face of refugees' crisis, such knowledge becomes of utmost importance for those working in the public service. The diplomats, intelligence agencies might find the results interesting in terms of their responsibilities as well. In the context of growing Lithuanian interest to make financial ties with Middle Eastern states, businessmen thinking of making connections with Muslims can obtain necessary degree of information concerning Muslim identity questions.

The object of the thesis. The object of this doctoral research is Islamic law of Sunni branch and the problem of its adaptability.

The purpose and the tasks of the thesis. Our study seeks to research the concept of Sharia and Islamic religious law of Sunni branch and its capacity to be adapted in the

changing time and living conditions. To achieve the purpose of the research, the question of adaptability of the Sharia and Islamic law is analysed in three directions: in the context of the historical development, in the conditions of the contemporary scholarly discourse, and on the question of how the Sharia and Islamic law is implemented today within Muslim communities in the West and in the current Middle East.

For that purpose, the thesis sets the following **tasks**:

1. To clarify a number of overlapping definitions which are frequently used interchangeably with the Sharia, and to question an old-fashioned tendency to equate Sharia with law;
2. To research the Sharia and Islamic law in the historical context in order to prove that adaptability of Islamic law is a historical fact;
3. To analyse the primary sources of Islamic law with a task to find out whether they are the main obstacle in the human efforts to make the Sharia and Islamic law adaptable; also, to analyse Islamic legal sources of rational nature in order to reveal their strengths in the interpretation of Islamic law in the past and present contexts;
4. As Islamic law does not end with the sources, but rather with scholarly constructed law (fiqh law) through the channel of legal reasoning and interpretation (ijtihad), our primary task here is to study the concept of ijtihad through which fiqh law is derived from the sources of Islamic law. Further, Islamic fiqh law itself on the specific questions is studied. By means of comparative analysis the research takes into account a set of specific legal rules of four Sunni fiqh schools in order to prove that the flexibility might be regarded as inner feature of Islamic fiqh law;
5. To analyse traditional Hanafi fiqh law rules and their place in the selected civil codes of modern Muslim states in order to find out what place and role traditional Islamic law of Hanafi branch plays in modern legal acts;
6. To explore the contemporary scholarly discourse on Islamic law and prevailing hermeneutical approaches towards its sources and their interpretation. Also, to introduce the newly formulated idea of reform suggested by the representers of reformative/liberal approach towards Islamic law to transform the least developed issues of Islamic law;
7. To conduct a threefold research of the Sharia and Islamic law as it is applied in the contemporary reality. First, our task is to analyse the worldwide phenomenon of issuing Islamic religious opinions (fatwas) and to consider the newly formulated methodological theory of fiqh for Muslim minorities living in non-Muslim countries. Second, to analyse independent Islamic institutions operating in the West and the state legal apparatus of the Western countries in order to show how through these two channels the Sharia normative rules and Islamic law are partly implemented in the Western countries. Third, to research the contemporary state-made law of the Kingdom of Jordan in order to find out to what extent it is influenced by traditional Islamic law, what transformations Islamic law undergoes while being the consisting part of the Jordanian state-made law.

The hypothesis of the thesis. Openness and flexibility (adaptability) are characteristic to the Sharia norms and Islamic law and, for that reason, these normative systems have all the necessary capabilities to be adapted to the changing time and social circumstances.

The overview of the research. Although there is none research made in Lithuanian language in the field of Sunni Islamic law, there is a small number of translations on the introduction to Islamic culture and religion. In addition to this, prof. Egdūnas Račius, who is the author of various scholarly articles[24], has written the dictionary of Islamic terms including definitions related to the Sharia and Islamic religious law[25]. His work[26] on the basic questions of Islam provides a couple of answers concerning basic issues of law. Besides, the last book of Egdūnas Račius examines the history and contemporary situation of Muslim communities in Eastern Europe, the questions which have generally been ignored in western discussions.[27]

The literature on Islamic law is extensive in English and other European languages. The question of the adaptability of Islamic law was discussed as an additional question from one or another perspective by a majority of scholars who write on the subject of Islamic law. Here, we are to mention a number of these scholars by giving a number directions to their most influential works.

From historical point of view, Islamic law was researched by Ignaz Goldziher[28], Joseph Schacht[29], Norman Calder[30], Noel J. Coulson[31], Marshal Hodgson[32], Herve Bleuchot[33], Wael B. Hallaq[34] and many other scholars who besides else touched the question of the adaptability of Islamic law. Noel Coulson and Joseph Schacht, for instance, saw Islamic

24 Particularly important to mention the forthcoming scientific article which is expected to be published in 2018: "Islamic Law in Lithuania? Its institutionalization, limits and prospects for application", In *Exploring the Multitude of Muslims in Europe: Essays in Honour of Jorden S. Nielsen*. Edited by Niels Valdemar Vinding, Egdūnas Račius, Jorn Thielmann (Brill, 2018).

25 Egdūnas Račius, *Islamo žinynas* (Vilnius: Vilnius University Press, 2007).

26 Egdūnas Račius, *Musulmonai ir jų islamai* (Vilnius: Mokslo ir enciklopedijų leidybos centras, 2016).

27 Egdūnas Račius, *Muslims in Eastern Europe* (Edinburgh: Edinburgh University Press, 2017).

28 Ignaz Goldziher, *Introduction to Islamic Theology and Law* (Princeton: Princeton University Press, 1981).

29 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1953).

30 Norman Calder, *Islamic Jurisprudence in the Classical Era.* Edited by Colin Imber. (New York: Cambridge University Press, 2010).

31 Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964).

32 Marshall G. S. Hodgson, *The Venture of Islam: The Classical Age of Islam*. Volume One (Chicago: The University of Chicago Press, 1974); Marshall G. S. Hodgson, *The Venture of Islam: The Expansion of Islam in the Middle Periods.* Volume Two (Chicago: The University of Chicago Press, 1974); Marshall G. S. Hodgson, *The Venture of Islam: The Gunpowder Empires and Modern Times*. Volume Three (Chicago: The University of Chicago Press, 1974).

33 Herve Bleuchot, *Droit Musulman: Histoire*. Tome I (Marseille: Presses universitaires d'Aix-Marseille, 2000);
Herve Bleuchot, *Droit Musulman: Fondements Culte, Droit publice et Mixte*. Tome II (Aixe-en-Provance: Presses Universitaires d'Aix-Marseille, 2002).

34 Wael B. Hallaq, *Law and Theory in Classical and Medieval Islam*, 1995. Wael B. Hallaq, *The Origins and Evolution of Islamic law.* (New York: Cambridge University Press, 2005).

law system unlikely to be adaptable in the change of time and living conditions. Whereas Norman Calder and Wael B. Hallaq claimed that Islamic law was not an inflexible system.

The question of the openness of Islamic law was partly explored by the authors who introduced the results of the studies on the sources of Islamic law. Among these, we can mention Mohammad Hashim Kamali[35], Ayman Shabana[36], John Burton[37], Yasin Dutton[38], Jonathan Brown[39] and many others who paid more or less attention to one or another source of Islamic law. Methodological theories how to derive Islamic law from the sources were researched by David R. Vishanoff[40], Jasser Auda[41], Wael B. Hallaq[42], Mohammad Hashim Kamali[43], Imran Ahsan Khan Nyazee[44], Aron Zyzow[45], Ahmed El Shamsy[46], Khaled Abou Al Fadl[47] and others. By exploring the methodological theories the authors discussed the question of how one or another scientific construction serves as the channel through which Islamic law is able to undergo a change.

On the subjects of the ijtihad, fiqh law and the positions of qadi and mufti responsible for the formulation and application of Islamic law, there is an extensive amount of books. Among scholars who made a contribution in the research on the mentioned subjects, we can bear in mind Wael B. Hallaq[48], Sami Zubaida[49], Frank Vogel[50], Khaled Abou El Fadl[51],

35 Mohammad Hashim Kamali, *A Textbook of Hadith Studies: Authenticity, Compilation, Classification and Criticism of Hadith* (Leicestershire: The Islamic Foundations, 2009).

36 Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of 'Urf and 'Adah in the Islamic Legal Tradition* (New York: Palgrave Macmillan, 2010).

37 John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990).

38 Yasin Dutton, *The Origins of Islamic Law: The Quran, the Muwatta, and Madinan Amal* (New Delhi: Lawman (India) Private Limited, 2000).

39 Jonathan Brown, *The Canonization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon*. (Leiden: Brill, 2007).

40 David R. Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*. (New Haven: American Oriental Society, 2011).

41 Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008).

42 Wael B. Hallaq, *A History of Islamic theories: An Introduction to Sunni usul al-fiqh* (Cambridge: Cambridge University Press, 1997).

43 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Cambridge University Press, 1991).

44 Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul al-Fiqh)* (Selangor: The Other Press, 2003).

45 Aron Zyzow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013).

46 Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2013).

47 Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford: Oneworld Publications Limited, 2001).

48 Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (New York: Cambridge University Press, 2004).

49 Sami Zubaida, *Law and Power in the Islamic World* (London: I. B. Tauris, 2003).

50 Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000).

51 Khaled Abou El Fadl, *supra note,* 47.

and Imran Ahsan Khan Nyazee[52]. Here, besides else the theme of the adaptability of Islamic law was also somehow touched.

Eventually, those scholars who explored the subject of Islamic legal reformation tended to suggest a number of ways how to make Islamic law more adaptable in the contemporary time. The works of Muhammad Iqbal[53], Mahmoud Mohamed Taha[54], Taha Jabir al-Alwani[55], Abdullahi An-Na'im[56], Ayaan Hirsi Ali[57], Tariq Ramadan[58], Khaled Abou El Fadl[59] and others need to be researched if one intends to launch a study on the reformative projects in the field of contemporary Islamic law.

To sum up, the mentioned books were written on the specific subject and the question of the adaptability of Islamic law in most instances took a place of an additional theme. In contrast, the problem of the adaptability of Islamic law is the major subject of our dissertation. In the light of the fresh surveys made throughout the internships in the West and in the Middle East, we are to suggest the comprehensive study on the subject of the adaptability of the Sharia in general and of Islamic law in particular. The dissertation will be just the first step in a long way of exploring the phenomenon of Islamic law in the contemporary time.

The methodology. The following traditional theoretical jurisprudence methods have been applied in order to achieve the aim of this dissertation and to draw the conclusions: document analysis, linguistic, systematic analysis, logical-analytical, also, historical and comparative methods. With the aim of achieving comprehensive results of our research, the mentioned methods have been applied in combination with each other throughout the research, and the choice of the particular methods and their combination was determined by the particular issue and its features.

The method of document analysis. A variety of Islamic religious and legal documents are researched in our study. The Quran and the books of the Prophetic traditions as the primary sources of Islamic law are studied in the whole work. At the same time, the object of our study came to be the traditional fiqh law manuals of XI-XII centuries as the oldest documents delivering the first-hand interpretations of the primary sources. Later on, the texts of modern state-mad law documents and court judgments are considered at the great

52 Imran Ahsan Khan Nyazee, *Islamic Legal Maxims (Qawa'id Fiqhiyyah)* (Islamabad: Center for Excellence in Research, 2016).

53 Muhammad Iqbal, *Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934).

54 Mahmoud Mohamed Taha, *The Second Message of Islam*. Translated by Abdullahi Ahmed An-Na'im (New York: Syracuse University Press, 1987).

55 Taha Jabir Al-Alwani, *Issues in Contemporary Islamic Thought* (London: The International Institute of Islamic Thought, 2005).

56 Abdullahi Ahmed An-N'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990).

57 Ayaan Hirsi Ali, *Heretic: Why Islam Needs a Reformation Now* (New York: HarperCollins Publishers, 2015).

58 Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2009).

59 Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (London: Rowman & Littlefield, 2014).

length. The analysis of all these documents is helpful in making conclusions about the capacity of Islamic law to be adaptive in the changing time and circumstances.

The linguistic method. In the research of purely religious texts as the Quran and the Sunna of the Prophet, the method helps us to find out the meaning of a number of words and phrases through which the essence of the text becomes more understandable. At the same time, this method provides assistance in the capturing the essence of the language utilized in a variety of legal texts explored in our study.

The method of systematic analysis. In order to realize what the text, whether of religious or of legal nature, speaks in an explicit or implicit manner, it is necessary to study it in a systematic way. For example, one thing is to explore separate Quranic words and sentences and totally the other is to look at one or another verse in the light of the Quran as a whole. In the same manner, we try to explore Islamic fiqh law manuals. At first, by means of linguistic method our study concentrates attention on the separate fiqh rules on the specific issues. Later on, a set of separate rules are researched in the light of the fiqh doctrine as a whole.

The logical-analytical method. Our study is concerned with a variety of texts which are analysed in twofold manner. The logical ties among inner parts of the texts as well as the logics of connectedness between different sort of texts is taken into account throughout our research.

The historical method. Understanding the concept of Islamic law requires an understanding of its long history. Knowledge of Islamic legal origins can assist us in understanding where it is leading us. First of all, our study is based on religious source texts as Quran and the traditions of the Prophet which are collected in 6 books of the Prophetic traditions. All these texts provide knowledge on the specific issues as well as the historical contexts within which they are delivered. The content of the texts cannot be separated from the historical context within which it was brought. At the same time, our dissertation explores a number of the fiqh manuals of Hanafi, Shafii and Maliki schools of Islamic law. A number of classical texts translated into English had to be studied in order to fully realize intentions of the creators and circumstances within which the texts were formulated. Two exceptional masterpieces that set a course for the development of Islamic classical legal theory, al-Shafii's book on Islamic legal theory and Malik's work on the living law of Medina time, are investigated throughout our study. In the most comprehensive way, our study takes into consideration a number of classical manuals of Hanafi fiqh law. The book of al-Quduri of XI century and two volumes of al-Hidaya of al-Marghinani written in the course of the XII century serve as the means to realize the very advent of Hanafi law. To understand the influence of Islamic law on the state-made law in modern Muslim states, we consider the law documents written in the XIX-XX centuries.

The comparative method. In a way of comparative study, our dissertation seeks to find out whether and to what degree traditional Islamic law makes impact on the legal texts of modern Muslim states. Here, traditional fiqh rules written in the classical law manuals are compared on the selected legal issues with the modern texts of Muslim states of the Ottoman Empire and of the contemporary Jordanian state.

In addition to the theoretical methods, the empirical methods are used in this work. The case study conducted at the Muslim Law Shariah Council UK throughout two internships

in the time of the years 2015 and 2016 was very fruitful in the results with regard to the question whether the Sharia normative rules are capable to be adaptive within Muslim community in UK. A number of interviews made with the members of the Council were important in understanding far more related issues. Also, our investigation of the legal system of the Kingdom of Jordan conducted in the summer of 2016 in Jordan gave a number of necessary answers on the status of Islamic law in the contemporary Middle East. A number of interviews with Islamic scholars at the University of Jordan, Constitutional Court of Jordan and Sharia Court of Appeals permitted to deepen our understanding on the burning issues in the field of Islamic law. Moreover, the meetings and interviews with the contemporary scholar Abdullahi An-Na'im provided possibility to capture the essence of the reformist theory delivered by him. The perspectives of the Islamic law to be reformulated and revised in the present time were explored throughout our discussions.

The structure of the thesis. The dissertation consists of the introduction, the overview of the research, the presentation of the methodology of the research, the main part, the conclusions and bibliography.

The object, the tasks and the course of the research predetermined the structure of the main part of dissertation; it consists of six chapters.

Dissertation starts with discussion about the conception of the Sharia. To challenge an old-fashioned Sharia=law approach, the chapter is divided into three sections in order to explore the Sharia in its three different, albeit closely related, meanings. Regarding the Sharia as a set of purely religious prescriptions, the first section takes into consideration five religious pillars of Islam written in the Quran. In terms of the Sharia as Muslims' common identity, the second section explores a number of moral instructions set by the Prophet with the task to preserve a Muslim community. Eventually, the Sharia as law receives our attention in the third section where it is introduced as the concept having two inseparable sides, namely, divine and human.

Chapter Two turns attention to the historical development of Islamic religious law to illustrate its capacity to be adaptive in the changing time and social circumstances. The Chapter divides Islamic legal development into three stages and two of them are explored here at the great length. The formative period and post-formative period are researched here by taking into consideration the main scientific developments in the reading and interpretation of Islamic law.

Chapter Three is devoted to the research of the sources of Islamic law. Broadly speaking, the sources of divine and human origins are explored in this Chapter. In the first section, the Quran and the Sunna of the Prophet are researched. In the following section, two sources of rational nature, ijma and qiyas, are analysed on the question of how these sources were significant in the past and what role they could play in the present context. Eventually, supplementary sources are explained in the last section.

Chapter Four is divided into two parts. Firstly, the Chapter explores the concept of ijtihad as the very idea of human legal reasoning and interpretation in Islam. With the emergence of four official Sunni schools of fiqh law, for the majority of modern scholars, the doors of ijtihad were closed and the era of imitation (taqlid) of fiqh law precedents became the main source to construct Islamic law in the following centuries. Thus, the concept of taqlid

and the fiqh doctrines of four Sunni schools of law are researched in the second part of the chapter. The special emphasis is turned to the study Sunni Islamic law of Hanafi branch. In the end of the Chapter, the comparative study between Hanafi legal rules elaborated in the manuals of fiqh law of XI-XII centuries and modern state-made law of Ottoman Empire and current Jordanian state tend to show to what degree traditional Islamic fiqh law makes impact on the state-made law.

Chapter Five turns our attention from the study of the theoretical basis of Islamic law and its historical development to the research of the Islamic scholarly discourse in the contemporary time. A number of hermeneutic approaches towards the sources of Islamic law which are the most prevailing today are shortly discussed here. After affirming which of the prevailing approaches is the most adequate to explain the sources of Islamic law in the light of present-day conditions, the selected reformative theory to revise the least developed issues of Islamic law is tested.

Chapter Six goes further and suggests to survey Sharia and Islamic law as it is applied in the contemporary reality. The Chapter is divided into three sections. Initially, we are to talk about most recent trends in the field of Islamic law. Here, the contemporary phenomenon of digital fatwas and the newly emerged methodological theory of fiqh for Muslim minorities living in non-Muslim states are researched to show how the Sharia and Islamic law through these trends undergo the transformational process. Sharia in the West is the subject of the following study where we are to prove that Sharia normative rules and Islamic law are partly implemented through the Islamic institutions and organizations operating in the West and through the statutory law and court judgments of one or another Western state. In the end, our research object turns to be the legal system of the selected Middle Eastern country. The question whether and to what degree the present-day legal system in the Kingdom of Jordan is influenced by the traditional Islamic law needs to be answered. The other question is whether with the change of state-made law Islamic law as the consisting part of Jordanian state law undergoes particular transformations.

1. THE CONCEPT OF SHARIA IN ISLAM

To understand the problem of adaptability of the Sharia, it is striking to clarify a number of definitions and notions which are usually confused. Confusion does not permit to realise the essence of the Sharia and its relationship with law. To achieve this, the task ahead of us is to dismantle the concept of the Sharia dividing it in a number of meanings. Three meanings of the Sharia are essential to draw a clear picture of its concept and to distinct the Sharia from similar terms and notions. Before that, it is necessary to provide some words on the relationship between, from one side, the Sharia and religion and between the Sharia and law, from another.

Identification of the Sharia as religion is inaccurate because the Sharia in any meaning is only the normative path into being Muslim and does not exhaust the possibilities of experiencing Islam as religion. Mahmoud M. Taha puts all this in a clearest light by saying that the difference between Sharia and religion is one of degree and Sharia is that degree of religion addressed to ordinary people in accordance with their level of understanding.[60] Likewise, identification of the Sharia exclusively with law of Islam is misleading. The Quran speaks of the Sharia not (or not at least) in the sense of law, but rather in the sense of a direction or a course of action. If to look at the text of the Quran, it speaks for itself when it affirms that "religious communities differ in a way and in a law"[61]. According to T. al-Alwani, this verse means that each prophet faced his own special circumstances and this is why God gave each one of them a different legal system and way of life.[62] The fact of such distinction which is clearly stated in the Quran and confirmed by the scholars implies that to speak of the Sharia merely in legal terms is to diminish it and to risk missing the essence of the Sharia as the path to be followed by Muslims. That this is the true literal meaning of the Sharia confirms another instance of the Quran.[63] It is a path in religion of Islam, thus, the Sharia is only a part of religion, but it is far bigger part than a number of verses which relates to a set of rules and principles of legal quality. Thus, it is a normative instruction how Muslim should maintain a right course and not merely a set of legal rules.

The way how one should follow the right path of the Sharia is something to be discovered. What are the sources of knowledge whereby ordinary Muslim receives instruction in the right path of religion? There are three closely interrelated sources of guidance (of divine and human nature) and, as a rule, divine message written in extremely subtle manner becomes more evident if one reads all three at once. The Quran acknowledges the triple source of guidance in a number of verses, among which one verse states it in the clearest

60 Mahmoud Mohamed Taha, *supra note*, 54: 33.

61 The Quranic verse 5:48: "…For each among you we have appointed a law and a path. And had God willed, He would have made you one community, but (He willed otherwise), that He might try you in that which He has given you."

62 Besides that, T. al-Alwani stated that the Quranc verse 5:48 alerts us to the importance of comparing religious legal systems to our own, as these pertain to the differing circumstances of those who believe. More one can read here: Taha Jabir Al-Alwani, *supra note*, 55: 292.

63 The Quranic verse 45:18: "Thus, we put you on the right path of religion. So follow it and follow not the desire of those who have no knowledge."

manner prescribing that a pious Muslim is obliged to obey God, to obey the Prophet and those in authority.[64] Here, even the status of divine and rational authority is enumerated in the exact hierarchical line. As becomes evident, for Muslims obedience to God and obedience to the Prophet, also to those in authority are the channels from which one receives necessary guidance. According to Frank Vogel, the Sharia that every Muslim must follow, and that those in authority must explain, support and fight for, is the Quran and the Sunna of the Prophet.[65] This means that when there are no clear directions of guidance in these two sources, authoritative and knowledgeable Muslims in a way of reasoning convey the answers.

Holding all this as a point of departure, we need to clarify three overlapping and somehow different meanings of the Sharia. First, the guidance how to follow purely religious statements in the right path has a meaning of the Sharia as a faith. Here, five pillars or the main devotional matters in Islam need to be elaborated in order to understand the Sharia as faith. Second, the guidance how to construct the structure of Muslim nation (umma) and how to live within it was elaborated by the Prophet Muhammad through his practices and explanations. All this will have a meaning of the Sharia as a common Muslim identity. Nowhere is the agreement among Muslims over the meaningful existence of a universal entity called Islam in clearer evidence than in the idea that each Muslim as an individual is simultaneously a member of a universal community of Muslims.[66] If there is an agreement on the main religious pillars of Islam and on the concept of Muslim umma, the Sharia as law which represents the third meaning of the Sharia remains a point of disagreements to this day.

The guidance how to understand legal rules of the Sharia in the limits of which a Muslim must follow the right path comes from the interpretations delivered by religious legal scholars. It must be said, that the term "those in authority" speaks not only about the scholars, but also takes into account the rulers. The very traditional separation of powers in Islam was based on the distinction between the realms of rulers and religious scholars, between ruler-made law and scholar-crafted law.[67] It is necessary to emphasize that for Muslims the Sharia as law necessarily consists of divine and human elements. On the one hand, the Sharia as law are those legal rules and principles that are written in the Quran and the Sunna of the Prophet. On the other hand, in everyday life Muslims experience it as the result of humanly understood version of law somehow expressed in the Quran and the Sunna. Why? There is little in number of legal rules in the Quran and the Sunna and all of them are too general to be applied in all social affairs. At the same time, it requires to be interpreted and explained in order to be applied in the changing time and place. In the

64 The Quran 4:59: "O you who believe! Obey God and obey the Messenger and those of you who are in authority. And if you differ in anything amongst yourselves, refer it to God and his Messenger, if you believe in God and in the last day. That is better and more suitable for final determination."

65 Frank E. Vogel, *supra note*, 50: 23.

66 Shahab Ahmed, *What is Islam? The Importance of Being Islamic* (Oxford: Princeton University Press, 2016), 140-141.

67 Tilmann J. Roder, *The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives In Constitutionalism in Islamic Countries: Between Upheaval and Continuity*. Edited by Rainer Grote and Tilmann J. Roder (Oxford: Oxford University Press, 2012), 323.

words of al-Ghazali, "the law of God follows the principles of gradual development"[68] and the very idea of development is written in the Islamic concept of ijtihad. As Islamic history of the scholarly discourse and of the events on the ground shows, approaches towards the development of Islam and its law keep varying dramatically. This is why the meaning of the Sharia as law is the most controversial among enumerated three meanings.

1.1. Sharia as faith: five pillars of Islam

Five pillars of the religion, as was already mentioned, are the core principals of Islam that make up the framework of a Muslim's life. These devotional acts of primary importance with regard to any worldly affairs and submission to God's will primarily must be expressed by fulfilling purely religious obligations. The significance of the worship is expressed in the Quranic text itself.[69] Worshiping God Muslims need to put efforts to know God, thus, knowing God requires exploration, contemplation and enquiry. This makes it necessary for people to engage with the world and with the others, to see the hand of the Creator in the created.[70] Here, we are to discuss each of five pillars of Islam.

First, to be a Muslim, one must believe in and pronounce the declaration of faith according to which Muslim is obligated to worship God and his Messenger. For Muslims, this declaration testifies that God exists, that he is superior to his creation and that none is worthy of worship but God.[71] At the same time, the first pillar of Islam testifies that Muhammad is among the prophets who conveyed God's revelation to mankind.[72] In another Quranic verse Muhammad recognized as the last prophet.[73] In general, the Quran and the Sunna of the Prophet, are the basis of the religion, and they define every aspect of the Islamic way of life.[74]

Second, after the first pillar of Islam, prayer takes the most important place among religious acts because it creates an intimate connection and even closeness between believer and God. The Quranic text[75] simply establishes the obligation of prayer and the Sunna of the Prophet specifies required number of prayers, their times, and the modes of

68 Al-Ghazali, *The Revival of Religious Sciences*. Translated by Nabih Amin Faris (New Delhi: Islamic Book Service, 1962), 225.

69 The Quranic verse 51:56: "I created jinn and mankind only to worship me".

70 Ahmet Kurucan and Mustafa Kasim Erol, *Dialogue in Islam: Quran, Sunnah, History* (London: Dialogue Society, 2012), 20.

71 The Quranic verse 10:66: "No doubt! Verily, to Allah belongs whosoever is in the heavens and whosoever is in the earth. And those that worship and invoke others besides Allah, in fact follow not these associated-gods; they follow only a conjecture and they invent only lies".

72 The Quranic verse 34:28 says: "And we have sent you (O Muhammad) except to all of humankind, as a giver of glad tidings and a warner, but most people know not."

73 The Quranic verse 33:40: "Muhammad is not the father of any man among you, but he is the Messenger of Allah and the last of the Prophets."

74 *Discover Islam*. Edited by Al-Jumuah Staff (Saudi Arabia: Ministry of Islamic Affairs, Endowments, Da'wah and Guidance, 2007), 13-14.

75 The Quranic verse 2:43: "Observe the prayer and pay alms tax." and the verse 4:103: "Verily the Prayer has become for the believers a thing prescribed for stated times."

their performances.[76] The importance of the prayer is to be noticed in the Prophetic saying concerning the right to rebel against those in authority. Accordingly, it is not permissible to overthrow the worst of the rulers as long as they establish prayer among Muslims.[77] However, it is not enough to speak of prayer itself without discussing on the purification before prayer or before any other purely religious act.[78] In addition to this, al-Shafii notes that the requirement of the purification is established in the verse 4:43: "Nor (when you are) polluted, then purify yourselves, unless you be travellers on the road".[79] Impurities are divided into those that are caused by bodily secretions and those that are caused by external factors. To become in a clean state in order to perform ritualistic act, Muslim must use water and when there is no possibility to have water to wash, for instance hands and feet, the Quran permits to take sand as a means of purification. Besides purification before all forms worship, intention as such must lead the believer as in the act of purification so in the very acts of worship. According to W. Hallaq, intention is an internal state, giving acts of worship their identity and separating them from other identical acts that do not belong to the category of worship.[80]

Through prayer one comes closer to God because of performative acts of the day what makes religion an inseparable part of the daily life. God calls a believer to respond actively and regularly to him particularly through prayer and worship in general because worship itself is a form of dialogue with God.[81] The duty of prayer is exceptional among other pillars because of its frequency in the life of a Muslim. Muslim is required to pray five times daily within specified intervals, as taught by the Prophet. These prayers are obligatory and it is worth mentioning that Islam does not call upon Muslims to merely perform this act of worship, but rather, it wants of them to purify their souls.[82] In this respect the Quran itself emphasizes exceptional meaning of the prayer.[83] Every sane Muslim adult must perform prayer for religious and at the same time educational purposes. According to Y. al-Qaradawi, Islam is the religion of ease and practicality, and so it is permissible to combine prayers, for example, the *Zhuhr* (noon) and the *Asr* (afternoon prayers and the *Maghrib* (sunset) and the Isha (evening) prayers.[84] The Prophetic hadith affirms that it is permissible to combine prayers in case there is a need for that, for instance, when a Muslim is in a state of fear or in a state of journey.[85]

76 *Sahih Muslim*, translated by Abd-al-Hamid Siddiqui. Book 004, Number 1268-1281. P. 355-358.

77 *Sahih Muslim*, translated by Abd-al-Hamid Siddiqui. Book 020, Number 4573. P. 1159.

78 The Quranic verse 5:6 states clearly: "O you who believe: when you rise up for the prayer, wash your faces, your hands up to the elbows, and lightly rub your heads and wash your feet up to the ankles. And if you are unclean, purify yourselves."

79 Muhammad Ibn Idris Al-Shafii, *Al-Risala: Treatise on the Foundations of Islamic Jurisprudence*. Translated by Majid Khadduri. (Cambridge: The Islamic Texts Society, 1997), 73.

80 Wael B. Hallaq, *supra note*, 2: 229.

81 Ahmet Kurucan and Mustafa Kasim, *supra note*, 70: 19.

82 *Discover Islam.* Edited by Al-Jumuah Staff, *supra note*, 74: 15.

83 The Quranic verse 29:45 states that: "Indeed the prayer prevents you from licentiousness and other sins".

84 Yusuf Al-Qaradawi, *Fiqh for Muslim Minorities: Contentious Issues & Recommended Solutions* (Cairo: Al-Falah Foundation, 2003), 35.

85 *Sahih Muslim*, translated by Abd-al-Hamid Siddiqui. Book 004, Numbers of reports on the combination of prayer in the case of journey: from 1508 to 1514. P. 405-406.

Third, the alms-tax (zakat) follows the act of prayer in importance. According to M. al-Majali, amongst the benefits of giving alms are: it purifies one's wealth; it purifies the soul from stinginess and miserliness; it strengthens the love between the rich and poor, removes hatred, allows security to prevail and brings happiness to society; eventually, it gives to its giver a great reward in the Hereafter what is acknowledged by the Quranic verse 2:110[86]. Again, the Quran only establishes the obligation in the verse 2:43 and the minimum amount of zakat and the times of its payment are specified in the Sunna of the Prophet. Obligatory annual charity is significant not only in terms of religious matters but also with regard to the social justice. Its social significance is that it awakens in man a sense of brotherhood with less fortunate members of society, and stirs his moral conscience to make sacrifice for their sake.[87] W. Hallaq also noticed dualistic character of this pillar by saying that, on the one hand, it is an integral part of religious ritual, and, on the other hand, it functions as a substantive legal sphere, constituting itself as a tax law.[88] From purely religious side, it was said that zakat is neither a charity nor a tax, but an obligation due from Muslims who possess wealth in excess of their basic needs.[89] In any case, it is only due when a person has the minimum required amount, which varies with the type of wealth. In general, the amount of zakat is to be equal to 2.5 percent on the growth of one's wealth. As stated in Al-Muwatta by Imam Malik ibn Anas, the book which is recognized as the first formulation of Islamic law in the history of Islam: "The position with us concerning the dividing up of zakat is that it is up to the individual judgment of the man in charge. Whichever category of people are in most need and are most numerous are given preference, according to how the man in charge sees fit. It is possible that it may change after one year, or two, or more, but it is always those who are in need and are most numerous that are given preference, whatever category they may belong to. This is what I have seen done by people of knowledge with whom I am satisfied."[90]

Fourth, Islamic fasting which teaches believers patience and self-control is one more pillar of Islam. Islamic fasting which involves abstinence from eating, drinking, sexual intercourse and all prohibited habits such as smoking, is observed with intention throughout the daylight hours of the Ramadan month. The Quranic verses[91] in combination with the Prophetic traditions establish the obligation of fasting.

Fifth, the annual pilgrimage to Mecca as the fifth pillar of Islam is to be performed once in a lifetime for those who are physically and financially able to perform it.[92] This pillar

86 Mohammad Khazer Al-Majali, *Islamic Culture & Thought*. Fourth edition (Amman: The University of Jordan, 2010), 99.

87 *Sahih Muslim*, translated by Abd-al-Hamid Siddiqui. Introduction to the Book of Zakat. P. 540.

88 Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2013), 123.

89 *Discover Islam.* Edited by Al-Jumuah Staff, supra note, 74: 15-16.

90 Al-Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law. Third edition. Translated by Aisha A. Bewley (Norwich: Diwan Press, 2014), 160.

91 The Quranic verse 2:183-184: "Fasting is prescribed for you as it was for those before you; perhaps you will show piety. A certain number of days of fasting, but if any of you be sick or on a journey, then a number of other days." The verse 2:185: "The month of Ramadan in which the Quran was sent down as guidance for the people and as clear signs of the guidance and the salvation – so let those of you witness the arrival of the month fast it; but if anyone is sick or on a journey let him fast a number of other days."

92 The Quranic verse 3:97 establishes this obligation with following words: "Pilgrimage to the Ka'bah is

is an expression of pure faith and total submission to God's command, and the pilgrim performs rites of unqualified obedience, seeking nothing but the acceptance of their efforts and forgiveness of their past sins.[93] All in all, the pilgrimage is necessary in order to ensure a complete subordination to the set of five performative rituals. To summarize, by worshiping God in a manner of five purely religious obligations Muslims follow the right path of Islam.

1.2. The *Umma* of the Prophet and the second meaning of the Sharia

As believers, Muslims share common identity because they belong to the same community of the Prophet (Umma of Muslims) within which Muhammad played a role in the spiritual, political and legal areas. The Quranic text names it as "the middle community".[94] According to the Sunna of the Prophet, middle means 'just'. It can also mean that Muslims are in the middle in relation to other communities. Indeed, Muslims have argued that while Judaism emphasizes the law and Christianity emphasizes love and mercy, Islam creates a balance between the concerns of this world and the demands of the hereafter.[95] One observer describes the relation between Islam and other two religions by saying that Islam combines the main features of Christianity and Judaism. According to him, while Christianity set people free in the world of Caesar to effect the changes they would make, Judaism wrapped the world in a blanket of obligation, and Islam can be seen as combining the two attitudes.[96] In any case, for Muslims the very concept of distinct community receives its authority from the divine sources.

The community was started to be created after the migration of the Prophet and his followers from Mecca to Medina in 622. As was stated by M. Khadduri, the first treaty of Islam, drafted by the Prophet, constituted a formal agreement between Muhammad and all the tribes and families of Medina, including Jews, Muslims, Christians and pagans, and the Muslim community was defined here as "an umma in distinction from the rest of the people."[97] In the right path of the Sharia, alongside pure matters of faith which enable one to remain close to the heart of God's message, each believer became responsible in upholding the moral standards of the community, and the community obtained the collective responsibility to enforce these standards.[98] All this became exemplary model how to construct social building within community of believers for the future.

---

incumbent upon men for the sake of Allah, upon everyone who is able to undertake the journey to it".

93 *Discover Islam.* Edited by Al-Jumuah Staff, *supra note*, 74: 18.

94 The Quranic verse 2:143: "Thus, we did make you a middle community, that you may be witnesses for mankind and that the Messenger may be a witness for you. And we only appointed the qiblah that you had been following to know those who follow the Messenger from those who turn back on their heels, and it was indeed difficult, save for those whom God guided. But God would not let your belief be in vain."

95 *The Study Quran: A New Translation and Commentary* (New York: HarperCollins Publishers, 2015), 64.

96 Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*. Third Edition (Oxford: Oxford University Press, 2007), 194.

97 Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins Press, 1955), 206-209.

98 The Study Quran: A New Translation and Commentary, *supra note*, 95: 1786.

What makes a Muslim to imagine himself as a member of universal community in a changing time? First of all, an example of the Prophet unite all Muslims. The Quranic verses have been experienced by the Prophet himself in his own daily life what led to the formation of an exemplary code of behaviour written in the form of Sunna which is followed by Muslims till this day.[99] Gabrielle Marranci clarifies that it is by focusing on 'feel to be' more than on the symbolic 'Muslim' that we can understand how Muslims express, form and develop their identity. She speaks of a community of feelings or, more exactly, of a map of discourses derived from the different ways of feeling to be a Muslim.[100] According to us, the very moral strength and feeling of belonging primarily emanates from the memories that alongside divine word make one feel Muslim in the contemporary time. The memories of the umma from its early phase strengthen a feeling of Muslim unity despite a variety of contemporary differences, whether in attitudes, interests, living place and so forth. Muslims share common memories which make Muslim community somehow alive in their minds. Common heritage makes one feel Muslim and common identity makes historical memories alive. By calling Muslims a community of memories we are not to say that it is somehow stuck in the past. Rather, memories from the past become its historical and psychological source of attitudes. In this sense, wherever a Muslim is in the world, belonging to the Prophetic community is never ending. Contrary to those who hold the concept of umma in the contemporary world as purely religious category,[101] we primarily regard it as exceptionally moral concept.

The Quran speaks of the community of believers in more than fifty verses. It states clearly that God had a wish to create different religious communities[102] and one of them is to be Muslim community. The citation "For each among you we have appointed a law and a way" indicates that difference through which monotheistic religious communities are independent of other such communities, even if the essential truths and principles of the religion are the same.[103] The Quran a number of times stresses that the believers must judge by what was revealed to them from God and "who is better than God in judgment".[104] The mission of the Prophet was decisive in the creation of the social structure of the community within which five pillars became a part of peoples' life. The verse 4:59 states obligatory obedience to the Prophet whose word is of divine quality, as it is affirmed in the Quran in express terms.[105] From here, the authority of the Prophet to explain the Quranic word and to establish the community of Muslims finds its ground. Simultaneously, it must be kept

99 Betty Kelen, *Muhammad: The Messenger of God* (New York: Thomas Nelson Inc., Publishers, 1975), 238.

100 Gabrielle Marranci, *The Anthropology of Islam* (Oxford: Berg, 2008), 114.

101 Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives of Islamic Law* (Cheltenham: Edward Elgar, 2013), 70.

102 The Quranic verse 5:48: "And we have sent down unto thee the Book in truth, confirming the Book that came before it, and as a protector over it. So judge between them in accordance with what God has sent down, and follow not their caprices away from the truth that has come unto thee. For each among you we have appointed a law and a way. And had God willed, He would have made you one community, but (He willed otherwise), that He might try you in that which He has given you."

103 The Study Quran: A New Translation and Commentary, *supra note*, 95: 301.

104 Quranic verses 5:49-50. See also 2:213; 3:23; 4:58; 4:105; 5:44-47; 7:87; 10:109; 24:48.

105 The Quranic verse 4:80: "…whoever obeys the Messenger has obeyed God."

in mind that Prophet's example is of lesser authority than the Quranic message, thus, it cannot contradict to the letter and essence of the Quran. In combination with the Quran as the word of God and the Sunna of the Prophet, those in authority can settle the matters of the community in the way of the mutual consultation which reflects one of the aspects of democracy.[106] Even in some specific matters the consultation with the members of the community is recommendable.[107]

The concept of commanding right and forbidding wrong is crucial to understand the essence of umma and to clarify the second meaning of the Sharia as common identity of members of the Prophetic community. From the point of view of A. Shabana, the command to enjoin the good and condemn wrongdoing is one of the most fundamental tenets of Islamic faith, and this principle has always had a strong connotation in juristic, theological, and even political discourses.[108] It is not an exaggeration to say that from the beginning the community of the Prophet had a meaning as a moral community to a large extent because of the key conception of commanding right and of forbidding wrong. Through the introduction of this Islamic concept we are here to reveal in part the second meaning of the Sharia.

The Quran talks on the moral community making special emphasis on the duty of commanding right and forbidding wrong.[109] From here it is evident that the believers comprise the community which commands right and forbids wrong. It is certain from the Quran that the Prophet commanded right and forbade wrong already in the Meccan period.[110] The Quran speaks of this duty in the further verses whereby it is not easy task to realize whether this duty is of collective or individual nature. A number of verses speaks of collective duty of the community as a whole,[111] whereas 9:112 and 22:41 states that this duty is to be performed by the believers who engage in holy war. Eventually, in two instances (7:157 and 31:17) the Quran regards this duty as individual one which is to be made by each individual in the community.[112]

Two provisions in the Quran, namely, 5:79 and 7:163-6, provide an answer whether the duty of commanding right and forbidding wrong is in its nature collective or individual. With regard to the first verse which speaks of "those Children of Israel who disbelieved"

106 The Quranic verse 42:38: "And those who answer the call of their Lord and perform the prayer, and who conduct their affairs by mutual consultation, and who spend of what we have bestowed on them."

107 The Quranic verse 3:159: "…So pardon them, ask forgiveness for them, and consult them in affairs."

108 Ayman Shabana, *supra note*, 36: 51.

109 The Quranic verse 3:104: "Let there be among you a community calling to the good, enjoining right, and forbidding wrong".

110 The Quranic verse 7:157: "Those who follow the Messenger, the unlettered Prophet, whom they find inscribed in the Torah and the Gospel that is with them, who enjoins upon them what is right, and forbids them what is wrong, and makes good things lawful for them, and forbids them bad things, and relieves them of their burden and the shackles that were upon them. Thus those who believe in him, honor him, help him, and follow the light that has been send down with him; it is they who shall prosper."

111 Having in mind a number of verses (3:110, 3:114 and 9:71), we might cite the Quranic verse 3:110: "You are the best community brought forth unto mankind, enjoining right, forbidding wrong, and believing in God."

112 The Quranic verse 31:17: "O my son! Perform the prayer, enjoin right and forbid wrong, and bear patently whatever may befall you. That is indeed a course worthy of resolve."

and that "the Children of Israel forbade not one another any wrong that they committed", it seems that we may find here a Quranic basis for the conception of forbidding wrong as something that individual believers do to each other. The second verse conveys a concrete example of the performance of a duty of forbidding wrong. It is said in the verse 7:165 that God saved those who forbade evil, and punished those who did wrong. From this verse it is clear that the duty of forbidding wrong is to be performed by each member of the community of believers. In other words, it is one's duty towards community at large and responsibility towards each other within the community as well.

Alongside the Quranic provisions on the concept, we should take into account what the Sunna of the Prophet tells us about all this. The tradition of the Prophet often quoted in reference to this subject states: "Whosoever among you sees a wrong being done, let him change it with his hand, and if he is unable then with his tongue, and if he is unable then with his heart and that is the feeblest of belief"[113]. This so called "the three modes" tradition is inseparable of the triad of deed, word and thought. The majority of those scholars who used to write on the duty of commanding right and forbidding wrong used to cite this tradition. M. Cook quoted popular saying that allocates the three modes to three groups in society: the rulers are to perform it with the hand, the scholars with the tongue, and the common people with the heart.[114] Thus, from the literal and systematic approach to divine sources and scholarly discourse seems clear that the duty primarily must be performed by individual Muslims to each other and not by the community towards the world at large.

In the light of conclusion that the duty of commanding right and forbidding wrong is individual, the question is whether each Muslim has considerable degree of knowledge to pronounce a moral decision on whether the act of the fellow Muslim is right or wrong. According to the Prophetic saying, God made oppression unlawful so to commit oppression against one another within the community is forbidden.[115] In this light, the following passage from the Prophetic saying is important to be cited: "Any member of the community should help his brother whether he is an oppressor or an oppressed. If he is the oppressor he should prevent him from doing it, for that is his help; and if he is the oppressed he should be helped (against oppression)."[116] Those who perform the duty of commanding right and forbidding wrong are the pious ordinary Muslims within the community. Alongside Islamic devotional acts, these individuals remain active socially in commanding what Islam has ordained and in forbidding all what Islam has forbidden.

One may doubt whether each Muslim has sufficient amount of knowledge to take a decision in every occasion. Who could deny that can even be dangerous to permit one to impose his own standards of moral authority? Indeed, it can lead to the chaos within the community. However, although the duty to forbid wrong requires knowledge of right and wrong, there is a vast number of wrongs that require no specific expertise and can be settled by the ordinary Muslim. For instance, each Muslim can say to one another whether the

113 The Study Quran: A New Translation and Commentary, *supra note*, 95: 159.

114 Michael Cook, *Commanding Rights and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2001), 583.

115 *Sahih Muslim,* translated by Abd-al-Hamid Siddiqui. Book 032, Number 6246. P. 1548.

116 *Sahih Muslim*, translated by Abd-al-Hamid Siddiqui. Book 032, Number 6254. P. 1550-1551.

prayer is performed in a right way or not. Undoubtedly, there are wrongs that need to be scholarly evaluated and this authority belongs mainly to qualified Muslims. Ibn Taymiyya claimed that the duty must be performed first and foremost (though not exclusively) by what the Quran calls "those in authority" among whom he enlisted scholars, political and military leaders, also the leaders of the community. Particularly, he emphasized scholars and rulers on the power of whom successful performance of duty depended to the largest extent. There is a saying which belongs to the caliph Uthman: "Whoever of you sees a wrong, let him put it right; if he lacks the strength to do so, let him refer to me". Again, that forbidding wrong was primarily a matter for the scholars and rulers does not mean that it was not a business of ordinary Muslims. Any kind of monopoly of the duty of forbidding wrong in the hands of rulers or scholars was never widely admitted. From what was said it becomes evident that, as was noticed by M. Cook, the basic idea of the duty is antithetical to a hierarchic conception of society.[117] That means each member of the Prophetic community is responsible to perform the duty. Moral health of individuals contributes to the moral health of society and such state of affairs might be maintained just in case when each Muslim performs the crucial duty for the maintenance of order and peace in the community.

When we know that the duty on simple issues might be performed by ordinary Muslims and on the specific issues those in authority (usually scholars) are entitled to provide all the necessary answers, we can move on to discuss further issues. In the light of the concept of forbidding wrong, the right to rebel against the ruler is among most contested issues till this time. What if the ruler becomes a source of wrongdoing? Is there a moral ground to rebel against such ruler by the community members? Does forbidding wrong entail rebellion? Can rebellion be regarded as appropriate means of forbidding wrong? All these questions were relevant in the course of history of Islam and they are actual today in the light of events in the Middle East.

As was noticed, obedience to God, to the Prophet and to those in authority is prescribed in the Quran. In the words of the Prophetic saying, obedience shall be accorded to the ruler in all circumstances except when one has clear signs of his disbelief or disobedience to God-signs that could be used as a justification for non-compliance with his orders.[118] The Prophet also said: "The best of your rulers are those whom you love and who love you, who invoke God's blessings upon you and you invoke his blessings upon them. And the worst of your rulers are those whom you hate and who hate you and whom you curse and who curse you. It was asked then: "Shouldn't we overthrow them by the sword?" He said: No, as long as they establish prayer among you. If you then find anything detestable in them, you should hate their administration, but do not withdraw yourselves from their obedience"[119]. Why? Again the Sunna of the Prophet speaks for itself in a number of instances: "There is no submission in matters involving God's disobedience, submission is obligatory only in

117 Michael Cook, *Forbidding Wrong in Islam: An Introduction* (Cambridge: Cambridge University Press, 2003), 160.

118 *Sahih Muslim*, translated by Abd-al-Hamid Siddiqui. Book 020, Number 4541. P. 1150.

119 *Sahih Muslim*, translated by Abd-al-Hamid Siddiqui. Book 020, Number 4573. P. 1159.

what is good and reasonable"[120]; "…do not obey in sinful things."[121] If the ruler is corrupted, he must be removed peacefully by those who have qualification to elect or dispose a ruler on behalf of the community of the Prophet. It must be noted here that the divine scriptures in Islam have to be understood by the methodology that everything in the Quran and the Sunna of the Prophet has to be considered in entirety, without depending on only parts of it. This is declared in a number of the Quranic verses.[122] From here, it follows that in any question, including the possibility of rebellion against unjust ruler, it must be considered by taking everything what the Quran and the Sunna of the Prophet say about that point.

The question remains whether it is forbidden to rebel against a ruler even if he does not implement the Sharia or a portion of it. Here we need to take into account three verses of the Quran: "Whoever does not judge according to what God has revealed – such are the disbelievers" (5:44); and: "Whoever does not judge according to God has revealed, those are the evildoers" (5:45); and: "Whoever does not judge according to what has revealed, those are the wicked" (5:47). Here, we see three levels of those who do not implement the Sharia: disbelief, evildoing and wickedness. Whoever prevents the Sharia from being practiced at all in a Muslim state is a disbeliever, but one who does not implement part of it is merely an evildoer or wicked. Thus, whoever does not implement a part of the Sharia is evildoer, but he is not a disbeliever and rebelling against him is forbidden. From all this, it becomes clear that it is not permissible to rebel against the ruler who is not guilty of declared and candid disbelief that the ruler himself admitted openly and where all Muslims are in consensus regarding such a person being non-Muslim; or, by his prohibiting the establishment of prayer.

The main question among scholars was whether the duty of forbidding wrong against unjust rulers may be imposed by criticizing or also by embarking on activities similar to those of rebellion. There were various positions and most of them are similar to that of Abu Hanifa according to whom after rebellion even worse times could come. The whole Sunni discourse was similar in paying attention on the cost of rebellion, thus, the mainstream position by Sunnis was that criticism is to be that social weapon against unjust rulers while rebellion, armed and violent, must be rejected. However, the association of forbidding wrong with rebellion was and still is alive. One of the reasons why there were little in number of those who were ready to forbid wrong in a form of rebellion against those in authority was a lack of social standing. Also, the threat of violence from the side of the ruler.

The issue of rebellion today is relevant than ever before. In the light of Arab spring, the question remains whether dictatorships can be overthrown in a way of revolution. The case of Egypt in Arab Spring movement might be taken into consideration. What happens if Muslims want to get rid of their corrupted ruler? The Prophetic traditions and opinions of early leaders of scholarly community rejected the possibility of armed rebellion because this would lead to anarchy and social chaos. The mainstream suggestion was to embark on

120 *Sahih Muslim,* translated by Abd-al-Hamid Siddiqui. Book 020, Number 4535. P. 1149.

121 *Sahih Muslim,* translated by Abd-al-Hamid Siddiqui. Book 020, Number 4533. P. 1149.

122 The Quranic verse 2:85: "…What do you believe in part of the Book, and disbelieve in part?" The verse 5:13: "…they pervert words from their contexts: and they have forgotten a portion of what they were reminded of…" The verse 15:91: "…those who have reduced the Recitation to parts."

criticizing until the term of the ruler ends or until his death. Very recent uprisings in Cairo in 2011 represent the case when people embarked on the confrontation with the ruler what led to the unprecedented revolution. Regarding radio declarations of local scholars not to take part in revolution[123], Egyptian young generation responded by even more active participation. The scholars in their position towards events varied dramatically. The stance of Muslim Brotherhood or Islamists which for a long time belonged to the political opposition was that not rebelling is a sin. Another group of scholars pronounced that if a group of Muslims embarks on revolutionary activities, the fellow Muslims need also to join into fight because in this way it would become possible to perform duty of commanding right and forbidding wrong. Eventually, others claimed that rebellion is permissible against corrupted rulers. In any case, the position of the early scholar Abu Hanifa and most of other classic scholars that after revolution even worse times can come suddenly came to be true. After imprisonment of the President H. Mubarak, Muslim Brotherhood retook the rule. However, these were changed after a year in a military coup by military government the violence of which frightened ordinary people and most probably trapped Egypt into the long-term ruling of military government.

Today as in any other historical period the spreading of Islamic values becomes closely linked to the duty of commanding right and forbidding wrong. Truth, in modern times this duty becomes more organized and systematic than personal one. If, according to traditional concept, this is exclusively personal duty to command right and forbid wrong when wrong is committed by other members of the community when it is known publicly, now this conception comes to be as an organized communal duty to propagate Islamic values both within and outside Muslim states. The emphasis now is put on the long-term results or a mission as such to safeguard Islamic values. Nothing new lies in the organized and systematic manner to propagate Islamic values. As in the past so today, the rulers are empowered with force in propagating Islamic values within Muslim states. Ordinary Muslims wherever they live are divinely encouraged to perform the duty by their hearts. Eventually, the scholars or their groups are to perform this duty with their words, ideas and writings. Scholarly groups spreading Islamic message through internet is but one exemplary way how today the duty of commanding right and forbidding wrong might be imposed in a collective form. A very illustrative example may be recent initiative of a large group of leading world's Muslim scholars to publicize an open letter to the leading figures of the self-declared "Islamic state and its followers.[124] To sum up, individuals in Islam are entitled to act as the members of one community and the duty of commanding right and forbidding wrong is vital to safeguard it and Muslim identity as well.

123 In the middle of twentieth century Egyptian Al-Azhar University was nationalized and from then it depended on rulers' decision who can work at University. Naturally that a number of these scholars were alien to any kind of revolution against the ruler who gave them position.

124 It is an open letter written in 2014 to Abu Bakr al-Baghdadi, the leader of the self-declared "Islamic state". The letter was signed by numerous Sunni theologians, lawmakers and leaders. More about this and the text of the letter can be found here: www.lettertobaghdadi.com.

1.3. Sharia as law

A question of adaptability of the Sharia in the first two meanings is not relevant to our research because it regulates personal convictions and psychological-cultural relations among Muslims. The dissertation considers the Sharia as law or the Sharia solely in its third meaning. More precisely, the Sharia as law and its adaptability is that problematic question which receives most of attention in the course of this research. Important to notice that it is researched in the whole work from several perspectives: from historical, from theoretical, from contemporary scientific discourse and as it is applied today within Muslim communities in the West and in the Middle East. Bearing in mind the western principle of religious freedom, the fact of the presence of millions of Muslims in the West and that Islamic organizations and institutions legally operate in the West since the second part of the twentieth century, the thesis of the ECHR that the whole Sharia is incompatible with western legal values written in the European Convention is nothing but inaccurate statement. In the words of W. Menski, to translate Sharia simply as "law" is at least inadequate tendency.[125] In all probability such conclusion of the ECHR, first of all, stems from an old-fashioned and mistaken tendency to equate the Sharia and law. The study of this chapter based on the literal and systematic reading of the Quran shows that the Sharia is far more than solely law. We presume that the ECHR spoke solely about the Sharia as law or, simply speaking, Islamic law.

The Sharia=law approach which is still alive in the scholarly discourse, according to A. Shabana, constrains us to think of Muslims as subjects who are defined and constituted by and in a cult of regulation, restriction and control.[126] It should be noted that the Sharia=law approach is incorrect in at least two ways. First, it is insufficient to reveal the true meaning of the Sharia which should be regarded as a threefold notion. This is confirmed by the Quranic text (for instance, the Quranic verse 4:59) saying that the normative guidance in the right path of the Sharia comes from three sources, namely, from God, from the Prophet and those in authority. The verse inviting to obey God, to obey the Prophet and those in authority means unconditional obedience to the former two and conditional obedience to the latter. As was clearly stated, the Sharia is neither canonical law (Islam has no priesthood) nor secular law, because no such concept exists in Islam: it is rather a whole system of social morality, prescribing the ways in which man should live if he is to act according to God's will.[127] To sum up, if to see the Sharia simultaneously as purely devotional matters coming from God through the Quranic message, as common identity of Muslims belonging to the community established by the Prophet and as law which consists of divine and human elements, one can draw a clear picture of the concept of the Sharia.

Second, the tendency to equate Sharia with law brings confusion in the relationship between Sharia law written in the Quran and Sunna and fiqh law as humanly understood version of law written in the mentioned sources. Who could deny that one day a particular

125 Werner Menski, *Comparative law in a Global context. The legal systems of Asia and Africa*. 2 edition (Cambridge: Cambridge University Press, 2006), 287.

126 Shahab Ahmed, *supra note*, 66: 120.

127 Peter Mansfield, *A History of the Middle East.* Fourth Edition (London: Penguin Books, 2013), 15.

humanly made version of the Sharia law will not be introduced as Sharia in the sense that it is divine? As will be evident in the Chapter Two, not without reason al-Ghazali warned already in the late eleventh century: "Do not be deceived by the words of those who say that the giving off legal opinions is the pillar of the law because they are misleading people."[128] In addition to the early scholarly tendency to somehow "divinize" humanly made version of law, the modern tendencies to transform the Sharia from normative into legal system or to make it a kind of state law seem to be even more dangerous. Abdullahi An-Na'im warns that after making Sharia law as a state-law there will not be a way back because it will not be possible to restrict or even to replace it as it is divine law. Another question would be how to harmonize the necessity of imposition of legal provisions that constitute the essence of law and unquestionable respect of Quran (2:256) whereby: "There is no compulsion in religion. Verily, the right path has become distinct from the wrong way".[129] By affirming that "there is no compulsion in religion", the mentioned verse is not only saying that no person should be compelled to believe, but also asserting that whatever is coerced is not religion at all due to coercion.

From the early days, Islamic cultural synthesis was defined not so much by ethnicity but rather by its twin base, namely, religion of Islam and Arabic language. In addition to faith and language, law is often mentioned talking about those enduring monuments of Muslim rule in the conquered lands that remained in the place even when conquerors disappeared from the scene.[130] As was claimed by A. Shamsy, the main reason for the centrality of law lies in its dominant role in defining Muslim identity and culture.[131] As the whole text of dissertation talks about this phenomenon from one or another perspective, here we need to precise the meaning of the Sharia as law. Only if to regard the Sharia in its third meaning as a coin having two sides, we might pretend to understand it. Although it might sound strange, the Sharia as law consists of the Sharia law and fiqh law. As clearly notes K. Fadl, the Sharia written in the texts of the Quran and Sunna of the Prophet is God's will in an ideal and abstract fashion, but the fiqh is the product of the human attempt to understand God's will.[132] Sharia law is the part of the text of the Quran and the Sunna of the Prophet. Whereas fiqh law is through the process of human legal reasoning and interpretation understood and derived from the primary sources a particular set of rules and principles of Islamic law. Important to note that Islamic fiqh law is the fallible and imperfect attempt by Muslims over centuries to understand and implement the divine norms written in the sources of Sharia, the Quran and Sunna of the Prophet, in order to explore right and wrong, and to achieve human welfare.[133] As pointed out by Ibn Khaldun, jurisprudence is the knowledge of the classification of the laws of God, which concern the actions of all responsible Muslims, as obligatory, forbidden, recommendable, disliked, or permissible, and all these are derived

128 Al-Ghazali, *supra note*, 68: 99.

129 Burhan Ghalioun, *Islam et Politique: La Modernite trahie* (Paris: Editions La Decouverte & Syros, 1997), 199.

130 Bernard Lewis, *The Middle East: A Brief History of the Last 2,000 Years* (New York: Touchstone, 1997), 58.

131 Ahmed El Shamsy, *supra note*, 46: 3.

132 Khaled Abou El Fadl, *supra note*, 47: 32.

133 Khaled Abou El Fadl, *supra note*, 59: xxxii.

from the Quran and the Sunna, and form the evidence Muhammad has established; the laws evolved from this evidence are called jurisprudence.[134] Certainly, jurisprudence here is what we call fiqh law. It might be concluded that Sharia law in combination with fiqh law provides what is popularly known "Islamic law" which is the central subject of the whole dissertation. Simply speaking, the union between the Sharia and the fiqh signify Islamic law.[135]

In essence, usually one employs the term "Islamic law" when talks about humanly understood law as it is applied in the social arena. As clearly points out A. Shamsy, "In its classical formulation, Sunni Islamic law is the product of the private efforts of Muslim scholars to capture the divine commands and prohibitions inherent in revelation and to articulate these in the form of detailed legal rulings covering all aspects of a believer's ritual and social life"[136]. Thus, Islamic law is usually more fiqh law than Sharia law, or, more humanly constructed law than general principles and guidelines written in the texts of the Quran and Sunna of the Prophet. To illustrate, we may take the Quranic verse forbidding eat pork which alongside such rule makes an exception by saying that in a time of hunger a Muslim can eat it.[137] This exception became one of the principles of fiqh law enabling Muslim scholars to construct plenty of rules in the light of concept of necessity. As shows the Civil code of Ottoman Empire written in the nineteenth century, fiqh principles extracted from the Sharia might become a part of state-made law.[138] A number of fiqh rules may emerge from a single principle derived from the Sharia law and constructed as fiqh legal maxim.[139] As clearly concluded J. Auda, Islamic law is a matter of human cognition and understanding, rather than a literal manifestation of God's commands.[140]

Not rarely Islamic law is viewed as ijtihadic law. Ijtihad means human (legal) reasoning and it is a key concept in Islam. The root of the matter lies in the freedom of human mind from previous or present fetters which only through human reasoning and interpretation

134 Ibn Khaldun, *The Muqaddimah: An Introduction to History*. Translated by Franz Rosenthal (Princeton: Princeton University Press, 2015), 344-345.

135 Louis Milliot and Francois Paul Blanc, *Introduction a l'etude du droit musulman* (Paris: Editions Dalloz, 2001), 168.

136 Ahmed El Shamsy, *supra note*, 46: 3.

137 The Quranic verse 5:3: "Forbidden to you for food are carrion and blood, the flesh of swine and that which has been offered to other than God, that which has been strangled or beaten to death, that which has been killed by falling or has been gored to death, that which has been mangled by beasts of prey – save that which you may purify – and that which is sacrificed on stone altars, and that which you allot with divining arrows; that is iniquity. This day those who disbelieve have despaired of your religion. So fear them not, but fear me! This day I have perfected for you your religion, and completed my Blessing upon you, and have approved for you as religion, Submission (Islam). But whosoever is compelled by hunger, without inclining toward sin, then surely God is Forgiving, Merciful."

138 The introductory part of the Mejelle, the Civil code of Ottoman Empire, begins with ninety nine fiqh maxims or principles which was the framework to construct fiqh law in the Hanafi school of fiqh law, from the beginning chosen as official law of Ottoman Empire. The fiqh principle (Nr. 21) states: "Necessities make forbidden things canonically harmless." The concept of necessity enables Muslim scholars to keep formulating fiqh rules in the light of changing times and circumstances. For instance, although usury is forbidden, Muslim scholars in the West claim that under current circumstances it is necessity for Muslims in the West to have a possibility to take mortgage for a house.

139 Imran Ahsan Khan Nyazee, *supra note*, 52: 16.

140 Jasser Auda, *supra note*, 41: 46.

of that revealed message a Muslim might achieve such state of mind. The Quran states that "those were the ones who received God's guidance; so follow the guidance they received" (6:90). Sharia law is divine but in everyday life it is experienced as a result of human ijtihadic activities when the scholar seeks to find an evidence in the revealed sources to deal with one or another issue at hand. It is never-ending process, the process which shows that no human can totally understand the will of God written in the Quran. By the way, "the conceptual distinction between Sharia and fiqh was a product of a recognition of the inevitable failures of human efforts at understanding the purposes or intentions of God"[141]. If ijtihad ceased to be practiced, the potential for change might be extremely minimized. On the whole, general provisions of legal quality written in the Quran and the Sunna of the Prophet are inseparable from the process of ijtihad through which fiqh law reflects and adapts Sharia law in a particular time and place. Interpretation of those provisions designed to translate divine law into the humanly constructed law written either in the form of rules or non-binding opinions with the aim to extend and adapt it is the core function of Sharia as law in the social life of Muslims.

M. Iqbal pointed out that change is one of the greatest signs of God and the principle of movement in the structure of Islam is guaranteed by the concept of ijtihad.[142] Taha al-Alwani adds that Muslims in the contemporary time should speak of an ijtihad that is more a methodology of thought than the concept limited to legal matters. According to him, such limited understanding of ijtihad engendered a malaise that allowed taqlid or imitation of humanly constructed fiqh rules to attain such prominence and respectability that its cancerous, constricting, and irrelevant fiqh law spread throughout Muslim life.[143] Such an ijtihad which is suggested by T. al-Alwani intends to allow the Muslim mind to generate ideas and build a new Muslim identity. As the whole discourse on the ijtihad and vacuum into which it was placed will be analysed in the course of our work, it is important to say here that all the reformative projects that are suggested to somehow transform Islamic law are related to the concept of ijtihad.

As the whole dissertation is entitled to explore the Sharia as law or, properly speaking, Islamic law exclusively on its capacity to be adapted in the changing time, here it was necessary to reveal three categories around which the whole subject of Islamic law is placed, namely, the Sharia law, fiqh law and ijtihad. Whether the Quran and Sunna, as claimed by T. al-Alwani, indeed equipped with the necessary flexibility in every aspect of Islam?[144] Whether ijtihad as the means to seek knowledge and derive Islamic law from the sources is the part of the Quranic message? If ijtihad is the very idea of movement in Islam, why early scholarly intention was to prevent people from exercising ijtihad? If the task was to adapt Islamic law through the derived corpus of rulings, whether the further course set by scholarly community to replace ijtihad completely by the imitation of their books of rulings was consistent with the very message of the Quran inviting to follow the God's message[145]?

141 Khaled Abou El Fadl, *supra note*, 47: 32.

142 Muhammad Iqbal, *supra note*, 53: 141.

143 Taha Jabir Al-Alwani, *supra note*, 55: 65-66.

144 *Ibid*., 70.

145 The Quranic verse 6:90: "Those were the ones who received God's guidance, so follow the guidance they received."

After the preliminary conclusions, we are to launch a study of historical development of Islamic law which will help us to reveal the answers.

1.4. Summary

Regarding the Sharia as the normative instruction guiding a Muslim how to maintain a right path in Islam, the text of the chapter shows that the Sharia is far from solely law. According to us, the Sharia can be truly understood if to look into it as a threefold notion. First, the Sharia as faith means the guidance of God how to uphold purely religious obligations written in the sense of five pillars of Islam in the Quran. Second, the guidance how to build the structure of Muslim community and how to live within it as was mainly elaborated in the Sunna of the Prophet represents the Sharia as Muslim common identity. Third, the Sharia as law is the third meaning which represents both the law written in the Quran and the Sunna of the Prophet and its human version derived in a way of human legal reasoning and interpretation. From all what was said, it is evident that the Sharia=law approach is incorrect because of its failure to reveal the concept of the Sharia in its essence.

The question of adaptability of the Sharia in its first two meanings is not relevant to our research because it regulates personal convictions and psychological-cultural relations among Muslims where, from the Western point of view, freedom must be guaranteed. Bearing in mind the Western principle of religious freedom, the fact of the presence of millions of Muslims in the West and that Islamic organizations and institutions legally operate in the West since the second part of the twentieth century, the thesis of the European Court of Human Rights that the whole Sharia is incompatible with Western values looks like a curiosity. According to us, this, first of all, stems from the old-fashioned and mistaken tendency to equate the Sharia and law. We presume that the European Court of Human Rights spoke solely about the Sharia as law or, simply speaking, Islamic law. In the following five chapters of the dissertation, the question of adaptability will be researched solely in the light of the third meaning of the Sharia, namely, the Sharia as law. More exactly, the problem of adaptability of Islamic religious law in the changing time and circumstances.

If to clarify the Sharia as law, it needs to be understood in a double sense, namely, as a combination of Sharia law and fiqh law. Sharia law is expressed in the primary sources of Islam, the Quran and the Sunna of the Prophet. Whereas fiqh law is humanly understood and derived from the divine sources particular version of law designed to regulate Muslim behaviour on the ground. Sharia law in combination with fiqh law provides what is popularly known "Islamic law" which is the central subject of our dissertation. To understand Islamic law and the question of its adaptability, it is vital to start research with its history. A great amount of current Islamic law is a direct reflection of traditional Islamic legal rules constructed in the formative or post-formative periods. Thus, our study now turns to the survey of Islamic legal development taking into account a period between the birth of Islam and the very beginning of colonization in the end of the eighteenth century.

2. ISLAMIC LAW AND ITS HISTORICAL DEVELOPMENT

From now Sharia as law or, more precisely, Islamic religious law on the question of its adaptability becomes the object of research. Chapter Two considers the subject in the light of its historical path. A premise to be proved here is that the adaptability of Islamic law is a historical fact. Islamic law in its nature was meant to withstand the changing time. As the mission to maintain such course was attributed to those who have knowledge, the adaptability of Islamic law mostly depended on the intentions of its interpreters, a class of specialist scholars who, in the words of Ahmed al-Shamsy, in the early days of formation of the written culture dedicated themselves to the mapping of the world of ideas within the nascent classical disciplines"[146]. As a result of the intentions of Muslim scholars, Islamic law underwent the periods of growth as well as long stages of stagnation. Instead of regarding this as a ground to declare Islamic law rigid and inflexible, we hold such course of events as a proof of adaptability of Islamic religious law. To illustrate all this, there is a need to take into consideration the historical development because much of Islamic law was rooted in its fourteen hundred years of history. The dissertation divides the history of Islamic legal development into the formative, post-formative and modern periods. The main criterion of such classification is the paradigm in formulating law which mainly conditioned its level of openness and flexibility in one or another period. The historical development of Islamic law from the beginning of a new order set by Islam till the beginning of the nineteenth century is to be taken into consideration in this chapter.

The formative period which began with the seventh century and ended approximately in the thirteenth century was determined by the paradigm of ijtihad (human reasoning and interpretation). Ijtihad was then viewed more as a methodology for dealing with all aspects of life than solely with legal matters.[147] A variety of ijtihadic forms how to derive law from the sources emerged on the scene. In the time of Companions of the Prophet as well as in the time of the scholarly community of later centuries it was possible to witness the emergence and steady formation of a new kind of reasoning.[148] According to K. El Fadl, it is only after development of juristic corps and development of the technical legal culture with its specialists, language, symbols, and structures that Islamic law acquired consistent institutional representation.[149] It is not an exaggeration to say that methodological theory of Islamic law (usul al-fiqh) made the process truly consistent and Islamic law more and more systematic. In this sense, Islamic legal system maintained its close link with the Quran and Sunna and its openness through mechanism of ijtihad.[150] On a basis of usul al-fiqh, a number of theories of law were created and the main difference among them lied in the attitude towards ijtihad and its forms through which law was to be formulated. As was noticed by Ibn Khaldun, implicit meaning of the Quran and different attitudes towards the reliability

146 Ahmed El Shamsy, *supra note*, 46: 2.

147 Taha Jabir Al-Alwani, *supra note*, 55: 65.

148 Ahmed El Shamsy, *supra note*, 46: 22.

149 Khaled Abou El Fadl, *supra note*, 47: 12.

150 Jasser Auda, *supra note*, 41: 54.

of the recensions delivering one or another Prophetic tradition conditioned the emergence of a variety of ijtihadic forms.[151] However, if in the first part of this period ijtihad was widely utilized, in the second part ijtihadic activities were more and more restricted. Despite that, Islamic law underwent a huge development throughout the formative period and the main channel was ijtihad which made Islamic law adaptable in the particular reality. Islamic legal evolution in the formative period of Islamic law ended with the final elaboration of the theory usul al-fiqh and complete constitution of four Sunni schools of law.

The post-formative period beginning in the thirteenth and ending in the very beginning of the nineteenth century was particularly determined by the paradigm of taqlid (imitation) which made considerable impact on the development of Islamic law. Primary sources were superseded by humanly created law precedents (fiqh law rules) formulated within one or another school of fiqh in the limits of which Islamic law was to be interpreted. If one tried articulate ideas to which people were unaccustomed or to announce his readiness to practice ijtihad, the person would become, in the words of T. al-Alwani, an immediate target of ridicule and abuse by the supporters of taqlid.[152] The fundamental belief brought on the scene by the scholarly community was that it is perfectly enough to follow the fiqh rules constructed within one or another school of fiqh law in order to live according to the Sharia.

Contrary to the mainstream thought favourable to the paradigm of taqlid in the formulation of Islamic law, a number of independent scholars insisted on the renewal of the ijtihadic activities on the totally fresh framework. Instead of concentrating attention solely to the separate texts, their methodological theory of maqasid al-Sharia suggested to start interpretational activities having in mind the very purposes of the Sharia law. True, this idea received not much attention from the side of scholarly leaders because they were not in favour to reconsider usul al-fiqh or to return to the ijtihadic activities. However, in the modern period, when the paradigm of neo-ijtihad retook its positions, a modified version of maqasid al-Sharia came to be regarded as the most suitable approach to make Islamic law alive and adaptable. From the nineteenth century to the present Islamic law to a considerable extent is influenced by the paradigm of neo-ijtihad. This stage of development will be taken into consideration in the Chapter Five and Chapter Six when our attention will be turned respectively to the contemporary Islamic legal thought and to the Sharia and Islamic law as it is implemented today within Muslim communities in the West and in the Middle East.

2.1. Formative period of Islamic law

In the middle of the twentieth century Felix Frankfurter was perhaps the first man who brought the image of Islamic law into the American legal discourse. One quotation from his dissenting opinion needs to be cited here: "We do not sit like a kadi under a tree, dispensing justice according to considerations of individual expediency".[153] N. Coulson

151 Ibn Khaldun, *supra note*, 134: 345.

152 Taha Jabir Al-Alwani, *supra note*, 55: 67.

153 The judge Felix Frankfurter brought Max Weber's image of Islamic law as being inseparable from so called 'palm-tree justice. *Terminiello v. City of Chicago*, 337 U.S. 1, 11 (1949).

gives exemplary quotation which reflects very similar opinion expressed by the British Lord Justice Goddard: "The court is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him".[154] The Western term "palm-tree justice" was here to describe Islamic sort of justice. As A. Shabana said, there is a near consensus that Max Weber was the first to coin the Qadi justice notion in the context of his famous comparative legal typology.[155] Among four categories of legal systems presented by M. Weber, the first category was introduced as irrational substantive law in which legal decisions follow the emotional feelings of the judge instead of any normative criteria. As prime example of this category is named Islamic Qadi justice system which knows no rational rules of decision whatever.[156] Thus, the tendency to portray Islamic law as an ad-hoc subjective enterprise which lacks kind of logical legal methodology is the result of Weberian thought. According to us, it speaks more about the speaker and his political intentions or even educational boundaries than about the phenomenon of Islamic law. To talk about the absence of norms and principles of legal nature in Islamic law even in the early days, let alone in the further stages of the development, would be inaccurate. From a viewpoint of A. Shabana, any simplified conclusion that was suggested by M. Weber ignores the extended historical development of Islamic law.[157]

In the period between the seventh and thirteenth century the methodological framework of Islamic legal system was already established. This period encompasses: the living time of the Prophet Muhammad till his death in 632; the reign of the first four caliphs till 661; the period of the ruling by Umayyad dynasty till 737; and the Abbasid age which somehow continued till about the time of the attack of Mongols in the thirteenth century. There is no clear agreement among scholars as on the periodization of the stages of Islamic law so on the question of the main legal developments. In most cases, the following factors of the formative period considerably influenced the course of Islamic law : (a) the creation of qadi institution; (b) the growing amount of the substantive law as the result of the qadi's work; (c) the emergence of the self-regulating scholarly community which if at first represented a number of tendencies differing in the approach to the human intervention in the process of construction of Islamic law, later on grew up into the doctrinal schools of fiqh law; (d) the construction of usul al-fiqh or the theory of Islamic law as the methodological basis for the creation of Islamic legal system.

154 The citation is taken from the case Metropolitan Properties Co. Ltd. v. Purdy, 1940. More on this: N. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), 40.

155 Ayman Shabana, *supra note*, 36: 28.

156 The second type is formally irrational law guided not by reason, but rather by oracles and divination. The third type is substantive rational law, which is based on judgments derived from sacred scripture or ideology. The fourth type is formal rational law, which is based on abstract thoughts without recourse to non-legal sources. More about this: Bryan Turner, *Weber and Islam* (London: Routledge, 1974), 109-110.

157 Ayman Shabana, *supra note*, 36: 30.

2.1.1. Islamic law in the hands of the qadis and scholarly community

The Quran, which is believed by Muslims to be literal and final word of God, was revealed to the Prophet Muhammad in the first part of the seventh century. For thirteen years the Prophet preached Islamic faith to his own tribe, Qurysh, and other Arabs who from the beginning of revelation followed the Prophet and dictates of new religion. Meanwhile, the growing hostility and real threat towards Muhammad came from the leaders of other tribes. Many people of Mecca were not in favour with the idea to break with old customs and were in the negative mood for changing their life. In 622 the Prophet and his followers were forced to migrate to another town of western Arabia where local tribal leaders promised to secure their activities to promote new faith. The Quran continued to be revealed in Medina. Overall, the Quranic message was revealed through about twenty three years, respectively, thirteen years in Mecca and ten years in Medina. The moment of migration to Medina is significant for at least two reasons. First, the beginning of Muslim calendar is chosen the time of migration, thus, with the year 622 Islamic era begins. Second, migration signifies a shift in the content of Islamic message. Some aspects of the Islamic message were changed in response to the fresh social, legal and political realities of that time. The explanation and application of the Quranic message mirrored social needs of the growing Muslim community in Medina. The shift of Islamic message in the light of the changed circumstances on the ground proves its capacity to be adaptive.

The efforts to build a new legal system were firstly associated with the Prophet. In addition to his functions as a Prophet delivering divine message to Muslims and as a ruler of the city of Medina, he also took a position of arbitrating judge (hakam).[158] Although this position was later abolished, the very step to take this customary position shows that the Prophet was not in favour of totally refraining from the pre-Islamic practices. The formation of new identity when individual was to be regarded independently from any type of tribal affiliation had to take a time. There could not have been any kind of immediate break with customary law and the Prophet tended to incorporate as many as possible customary practices into the corpus of Islamic rulings. At the same time, many customary practices of tribal nature were prohibited or modified. Such a way of incorporating customs and instilling Islam on the ground was very safe and comfortable. Safe because it permitted to maintain positive attitudes towards Islam in the eyes of locals. Comfortable because transitional period enabled to absorb those customary practices that were not alien to Islamic message and to abolish those which were in contradiction with Islam. After the Prophet, the Caliphs and appointed servants in the administration continued to harmonize new message of Islam and customary practices, law written in the Quran and customary law traditions. All this could happen not without debates and fight over who become the repository of legitimate authority after the Prophet.

In the following years after the death of the Prophet (632), the leadership in Medina had two cares. First, to spread Islam in the hands of the Quran readers whose mission

158 Betty Kelen, *supra note*, 99: 107.

was to teach people the essentials of Islamic faith.[159] Second, the aim was to rule and the military campaigns were growing in a number. For the military campaigns, there was a need to organize Arabs for the conquests of the land. To achieve this, Islamic law was to be made the key instrument to deal with the growing amount of social matters. Meanwhile, the group of the pious Muslims gradually emerged on the scene. The activities to study the Quran with so called "Quran readers" became more and more popular among ordinary people. Thus, for the law to be spread especially within the increasing territory of Islam, the specialists were to be selected and the rulers knew very well the preferences of locals. Such personalities had to be seen favourably in the eyes of local communities. Nothing better one could suggest than to appoint for this task the leaders of the local communities. This is why those men who had been proficient tribal arbitrators with experience, wisdom and charisma[160] were appointed to the post of qadi. The qadi was to be familiar not only with the Quranic injunctions but also with the customs prevailing in the area within which he was nominated to deal with social disputes. Such personalities were most suitable to connect religious and customary factors in the process of deciding the cases. This is how the adaptability of Islamic law emerged case after case came to be its core feature from the very beginning of Islam. To achieve this, the fact that the qadis actively took part in the religious affairs of community added even more strength. In the main garrison towns the mosques were to be built in order to spread the message of Islam among local communities and qadis were the main figures to lead the daily prayers. As we can see, the qadis were at the same time the people of the old order and the people who were responsible for the spread of the new message of Islam, loyal servants in the office of the ruler and pious Muslims. To fulfil the task to adapt new order in the society living according to the old customary traditions, the qadis were of particular importance.

Later, the qadis became exceptionally occupied with legal affairs. To deal with the cases at hand, judges grounded their judgments mainly on the Quran, on the sunan and on the ra'y. To ground all the answers on the basis of the Quran was not likely to be achievable task mainly because of broadness and general nature of its injunctions. During the whole seventh century qadis were occupied mostly with the sunan to seek an answer for the legal issue on the ground. The concept of sunan was pre-Islamic with the meaning to emulate the normative conduct of the tribal leader in society, of the father in family and so forth. More exactly, sunan before Islam were customs that formed the common law of the local people. After the rise of Islam, the sunan of the Prophet, of his Companions, of the caliphs, of other leading and exemplary figures in society were those sources whereby the qadis settled disputes. Through the exemplary mode of conduct of those who were respectable people in the community, the qadis were able to find out the meaning of the Quranic message. Thus, the Sunna of the Prophet was just one of the sunan and had no exceptional status yet.

One more source of law was so called ra'y or personal opinion of the qadi. In general the term ra'y denotes the exercise and outcome of a jurist's individual reasoning in resolving a legal question. This is very similar to the concept of ijtihad what is to be understood as legal

159 Marshal G. S. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization.* Volume One (Chicago: The University of Chicago Press, 1974), 199.

160 Wael B. Hallaq, *supra note*, 2: 36.

reasoning and interpretation. It is not surprising that because of its highly individualistic and rational nature, this source was criticized by the Quranic readers who were intensely concerned about such kind of jeopardizing revelation. Despite that, the ra'y of a jurist was that decisive source through which the judgments were delivered very often. For the qadis, there was nothing harmful in the use of ra'y. It might be concluded that in the hands of the qadis personal sense of justice consisted of the understanding of the Quran, of the sunan and of capability to formulate personal opinion on the specific question. Either in combination with the norms of the Quran and/or sunan or when all the sources were in silence, the ra'y was significant source in the formulation of final judgment. For the Quran readers it was not yet possible to curb this tendency because of the absence of the system in law and because their popularity was not yet sufficient to challenge the ruling elite.

Could we say that Islamic judicial order of the seventh-eighth century somehow confirms already mentioned appellation "palm-tree justice", attributed to it by foreigners? Perhaps no. Why? Because, as noted by K. El Fadl, from the beginning the precedents of the Prophet and the Companions as well as the Quranic laws formed the cornerstone that would eventually give rise to a specialized juristic culture in Islam.[161] Although there was no clear methodological system to derive law from revealed sources, the judges were aware of the Quranic legal provisions which were of the highest position among all the sources. Additionally, a variety of sunan practices, caliphal law and the concept of ra'y were those instruments through which the substantial body of rulings was growing case after case. Of course, the very derivation of legal rulings from the Quran and the other sources was far from uniform and systematic. It was commonly asserted among qadis that ad hoc legal rulings must be deduced in a way of combination of divine and human elements. Again, for the Quran readers such rational thinking was of course a clear departure from the essence of religious letter. All in all, from legal point of view, even the early formative period of Islamic law, let alone the post-formative period or modern one, cannot be equated to the supposed "palm-tree justice".

So far we have not considered the Sunna of the Prophet as a source of law. Important to note that the question of the authority of the Sunna of the Prophet led to the changes as in the creation of the theoretical basis of Islamic legal system so on the ground. As was said, in the beginning, the Sunna of the Prophet was not somehow distinguished from a number of other sunan. However, in a gradual manner, it came to be recognized as the second source of Islamic law. By the tenth century, the authoritativeness of the Prophet had become firmly deposited in the concept of Islamic law.[162] There were several reasons of this. Firstly, the Quran, the authority of which posed no doubt, established obligatory obedience to the Prophet and his Sunna.[163] With regard to the issue of obedience to God and the Prophet, and the relationship between them, we may find at least thirteen verses in the text of the Quran.[164] Secondly, in the eighth century those who were occupied with the studies of the Quran were no longer viewed as the Quranic readers. Gradually, they came

161 Khaled Abou El Fadl, *supra note*, 47: 12.

162 *Ibid.*

163 For instance, the Quranic verse 4:80 says: "Whosoever obeys the Messenger obeys God".

164 For example, Quranic verses: 3:32, 132; 4:59; 5:92; 8:1, 20, 46; 24:54; 33:33; 47:33; 49:14; 58:13; 64:12.

to be viewed as the religious scholars and jurists who began to be particularly busy with the transmitting Prophetic material relating to his traditions. Why it was necessary? The scholars and qadis were to understand how one or another Quranic provision was relevant to a concrete case at hand and Prophetic Sunna here could have played ultimate role. As the text of the Quran was often too general to derive an answer, the scholars believed that the words and actions of the Prophet were able to generate all the answers how to consider one or another Quranic verse on the ground. The interest in the Prophetic Sunna has been growing not only from the side of the groups of religious scholars or judges. These were followed by young students. Larger and larger groups of people were occupied with interpretation of the Quran and Prophetic traditions. As in the mosque so in the streets people participated in the discussions on these issues. A more careful look at this popular activities reveals a striking moment. Religious knowledge which included law became a business of the community of Muslims.

The religious scholars were occupied with one controversial issue related to the Prophetic traditions. A plenty of time have passed from the death of the Prophet and reports about his words and actions increased enormously. These reports symbolized the Sunna of the Prophet. A hadith (plural: ahadith) is one of various reports describing the words, actions and habits of the Prophet Muhammad. It became obvious that falsification of the Prophetic traditions was widely spread. In other words, it appeared evident fact that the Prophetic reports written by one or another man from ruling elite or the scholar sometimes totally differed from the authentic actions and words of the Prophet. Particularly this became evident in the communities of Medina where the memories about the Prophet were still alive. The masses of supposed Prophetic reports were in contradiction to the memory and practice of such communities. As a result of this, a number of religious scholars turned their attention to the collecting of the authentic Prophetic reports.

The main task was to establish the reliable chain through which one or another Prophetic saying or action could have been confirmed. The chain was aimed to prove the authenticity of the Prophetic report. In fact, the chain had to begin with the latest authority and to go back to a Companion who was a witness of the Prophet's saying or action. This transmission had to be uninterrupted and made on the authority of an eye or ear witness, and all the transmitters were to be reliable.[165] If the Prophetic report passed such a test, the scholars were satisfied and it obtained a confirmation as authentic one. In the ninth century a huge number of authentic reports was collected. Overall, six compilations of thousands of authentic reports became recognized. These six books may be described as an attempt to delineate in written form what was, at that time, considered to be the text of the Sunna of the Prophet. This is not to say that just after the compilations were made, they were recognized. To the contrary, the two collections of al-Bukhari and of Muslim as the most authoritative works were not recognized until the beginning of the eleventh century.

The whole region around Mecca and Medina was more or less preoccupied with the collecting of the Prophetic reports which was believed to be the only source of religious law alongside the Quran. These religious scholars were called the representatives of the Prophetic

165 Majid Khadduri, *The Historical Background of the Risala*. In *Al-Risala: Treatise on the Foundations of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 1997), 30.

traditions. Whereas the scholars in Iraq were more cautious regarding the Prophetic Sunna as a source of Islamic law. For them, the fact of falsification of Prophetic traditions was too wide to be ignored and, as a result, they preferred to use rational methods to derive law from the Quran. According to them, the concept of ra'y was to remain the key instrument in the process of legal interpretation of the Quran. Talking about the Sunna of the Prophet, they disagreed to use unreliable Prophetic traditions as the sources of Islamic law. Instead of that, they were particularly in favour to use such ijtihadic forms as reasoning by analogy (qiyas) or juridical preference (istihsan). This is why Iraqi religious scholars were called representatives of human reasoning. In this light, two camps of thought, the supporters of the Prophetic traditions and those who were dealing with traditions in a more rational way, found themselves in a growing tension. This is not a cause to divide these camps strictly into the rationalists and traditionalists as both were in favour to practice rational methods and to regard the Quran as the main source of law in the interpretation of Islamic law. The main difference lied in the way of looking into the Prophetic reports. As noted by J. Auda, the two schools represented two alternative methodologies of applying the scripts.[166]

If in the end of the eighth century it was popular to belong to either of the waves of religious thought, in the end of the ninth century the majority of scholars combined both attitudes towards religious law. While the majority of Muslims were participants of the popular discussions led by the scholars, the qadi institution began to be negatively associated with the formal building of the court established by the rulers. In other words, if in the beginning they occupied a place of community's leaders, gradually the qadis came to be viewed as the representers of the power of ruler. The rulers had a right to appoint judges and to pay their salaries and this kind of dependency was closely related to the decreasing of popularity of judges. Meanwhile, the self-regulating and independent groups of religious scholars underwent the best times. Leading figures of the scholarly community were pious religious people interested in Islamic theology and Sharia law. These were already regarded not so much as Quran readers but rather as the religious scholars capable to interpret the sources and to derive law from them. This is not to say that none of judges belonged to the scholarly community or that scholars were not appointed as judges. What is necessary to note is that the centre of power of the construction of Islamic law gradually passed into the hands of religious scholars who at that time were specialists in theology and law at the same time.

The events that took place later mark the turning point in the history of Islamic legal development. The supporters of the Prophetic traditions came to be in opposition to any kind of human interference into the formulation of Islamic law. They disapproved of analogical reasoning in the derivation of law from the sources and rejected its use. As was said by I. Khaldun, they restricted the sources of the law to the texts and the general consensus.[167] For those who tended to think in a more rational way, this was the red line. The Abbasid caliph al-Ma'mun instituted a purge of traditionalists' beliefs from the empire's corps of judges. The Inquisition (*Mihna*), pursued by the caliph and rationalist scholars was about whether or not the Quran was created, but perhaps even more about the role of human reason in

166 Jasser Auda, *supra note*, 41: 64.

167 Ibn Khaldun, *supra note*, 134: 346.

interpreting divine texts.[168] The torture, imprisonment and humiliation of the leaders only increased the enmity between the scholars of Prophetic traditions and the supporters of opinion (reasoning) who were mainly Hanafi scholars. This inquisition was mainly directed at those people who claimed to be the upholders of the Prophet's Sunna. Eventually, the rationalist camp was defeated and the pretention of the centrality of human reasoning was refused for a long period of time. This will be apparent in the chosen direction to construct usul al-fiqh through which the further course of Islamic legal interpretation was set on the ground.

Paradoxically, the advocates of the Prophetic traditions were too rigorous under the influence of Ibn Hanbal and the advocates of reasoning, headed by the caliphs and the majority of Hanafites, were too liberal for the Muslim community of Islam. For the majority of Muslims neither extreme stance was regarded as appropriate. It was the mid-point between the two movements that constituted the normative position of the majority; and it was from this centrist position that Sunnism, the religious and legal ideology of the majority of Muslims, was to emerge.[169]. As a result, human reasoning came to be limited to the language of revealed texts of the Quran and the Sunna of the Prophet. The Great synthesis between traditionalism and rationalism found its expression in theoretical terms by the emergence of usul al-fiqh in the limits of which four major Sunni doctrinal schools emerged on the scene. Examination of these two major developments is of huge importance to capture the pulse of Islamic law in the formative period and its further evolutionary process.

To conclude, although legal field was in its infancy throughout the first centuries after the Prophet, the emergence of judiciary or, more precisely, of the qadi institution was the first step towards the formation of Islamic law. Judges' law was based first of all on the prevailing customary practices of the old order. Additionally, the Quranic legal instructions, sunan and, eventually, individual legal reasoning of the judges were the sources through which the growing amount of ad hoc judgments emerged on the scene. If in the beginning it was judges' law, in the second part of the formative period Islamic law is to be regarded as the result of activities of religious scholars. K. El Fadl is assured that, although Muslims debated and fought over who become the repository of legitimate authority after the Prophet, the most serious and formidable candidate had emerged as a coherent and systematic contender: the law of God, the Sharia, as constructed, articulated, and represented by a specialized body of professionals known as the scholarly jurists.[170] After being Islamized, the law in Islam came to be systematized and these achievements belong first of all to the scholarly community. All religious scholars agreed to build up the *corpus juris* of Islamic law on the basis of the usul al-fiqh or the methodological theory of sources. In this way, the early ad hoc decisions of the qadis were incorporated into and gradually replaced by the law manuals of religious scholars.

The problem is that if the law of the qadis emanated directly from the actual practice on the ground, the growing amount of scholarly made rules being the result of hypothetical

168 Wael B. Hallaq, *supra note*, 2: 57.

169 *Ibid.*

170 Khaled Abou El Fadl, *supra note*, 47: 11-12.

contemplation lacked the colour of social pulse. It may be said that through the shift from judges to the scholars as the central figures in the construction of Islamic law, the process became too focused on the theory rather than on the practice. For the majority of religious scholars, the process of interpretation and adaptation of Islamic law was completed with the crystallization of the legal manuals of scholarly made rules.[171] Whereas for the early qadis adaptation of Islamic law was never-ending process. In any case, the very process of fixing Islamic law in the manuals of scholarly made rules also signified its capability to be adaptable. To derive Islamic law from the sources and to fix it in the scholarly fiqh law manuals had a meaning to adapt it to the particular context and time.

2.1.2. The theory of sources (Usul al-fiqh)

Usul al-fiqh, literally roots/sources of law, has many appellations among scholars. In this dissertation this theoretical construction will be usually called "the theory of sources" because of two reasons. First, it is a methodological framework to derive law from the evidences written explicitly or implicitly in the sources. Second, this is all about Islamic legal sources and their hierarchical order. In short, usul al-fiqh deals with source evidences and how legal rulings are derived from it, as well as with the status of jurists and scholars who derives such rulings.[172] There was no systematic attempt to create the theory to derive law from the language of revelation till Muhammad Idris al-Shafii (767-820. By his time Islamic law was extensive but uncoordinated, reflecting differing local needs and tastes.[173] Through mechanism of usul al-fiqh, al-Shafii suggested a systematic way how to derive fiqh law from the Sharia law. If to say more exactly, al-Shafii posed an idea that the entire legal system can be discovered in the divinely revealed texts. All what was necessary is to concentrate attention to the language of the Quran, to give the status of the second source to the Sunna of the Prophet through which most of the Quran becomes understandable, and to fix consensus and qiyas (analogical reasoning) in the hierarchy of the sources just after the Quran and Sunna. As many of the things that happened after the Prophet were not included in the established texts[174], the consensus and analogical reasoning were necessary to respond to the changing requirements on the ground and al-Shafii knew it very well. Therefore, the whole idea of al-Shafii lied in the combination of revelation, language and law. Of course, this is not to say that with the emergence of the theory of al-Shafii, it at once received the widespread recognition among scholars. It was unreasonable to expect to have kind of rapid consensus, but in a long run al-Shafii's theory, albeit modified by one or another group of scholars in a particular fashion, came to be recognized within the whole scholarly community.

171 Solomon A. Nigosian, *Islam: Its History, Teaching, and Practices* (Indiana: Indiana University Press, 2004), 85-86.

172 Taha Jabir Al-Alwani, *supra note*, 55: 86.

173 Laura S. Etheredge, *Islamic History* (New York: Britannica Educational Publishing, 2010), 85.

174 Ibn Khaldun, *supra note*, 134: 347.

Al-Shafii's methodology is aimed at prescribing how a scholar must derive law from the sources of divine nature. According to M. Kamali, the purpose of usul al-fiqh is to help the jurist to obtain an adequate knowledge of the sources of Sharia law and of the methods of juristic deduction and inference.[175] Four sources of Sharia law, namely, the Quran, the Sunna of the Prophet, consensus and qiyas are enumerated as the roots of law under the theory suggested by al-Shafii. According to M. Kamali, all these divine and rational sources stem from the Quranic text, especially, from the Quranic verse (4:59). If the status of the Quran and the Sunna of the Prophet are recognized without any hesitation within scholarly community, the consensus and qiyas as the sources of rational nature posed a number of questions. But for al-Shafii, the law also stems from the consensus among scholars. For him, consensus regarding five pillars of Islam is to be reached by Muslim community as a whole. The most contested issue was related to the scope of human legal reasoning and interpretation (ijtihad). Here, al-Shafii suggested to equate it with qiyas (analogy) by saying that ijtihad is possible only in a form of analogical reasoning. From today's perspective, to view ijtihad solely in a form of analogical reasoning is to restrict it to a large degree. However, in the formative period when there were a number of opposing opinions regarding ijtihad, to achieve consensus on it, albeit in a sole form of analogical reasoning, was a great victory in the efforts to combine divine and human elements in the process of Islamic legal interpretation. It needs to be emphasized that analogical reasoning was that channel through which Islamic law was able to be linked to the reality, thus, to preserve its core feature of adaptability.

It needs to be indicated that usul al-fiqh not only provides exact explanation of the potentiality and limits of the enumerated four sources. Also, it establishes clear hierarchical order whereby the Quran is on the top and the Sunna of the Prophet takes the second place in the hierarchy. Both sources are recognized to be of divine nature. The Quran for Muslims delivers the message of God, whereas the Sunna of the Prophet is the interpretation of the first order of that message. In the case when two primary sources deliver no answer or evidences to a legal question at hand, the interpreter must find out if there was no consensus on the matter. If no, then, according to the theory of sources, the interpreter may use his personal legal reasoning. But only in a form of analogical reasoning. Overall, this played a crucial role by giving the interpreter methodological tools to derive fiqh from the Sharia. In addition to four enumerated sources, there are supplementary sources which are considered differently according to the different schools of law. Alongside the custom as a source, all other sources are rather the forms of ijtihad than sources as such. Four official Sunni schools of fiqh mostly differed in their views to the forms of ijtihad. As may be expected, Shafii School of fiqh was in favour of the ijtihad solely made in a form of analogy. Whereas Hanafi school of fiqh takes into consideration more forms. On the sources and fiqh schools, we will continue our discussion in the Chapter Three and Chapter Four.

Throughout the ninth and tenth centuries legal theorists were divided into more or less united camps. Theology-oriented and law-oriented theorists of law preferred, respectively, to emphasize the importance of stability of divinely revealed message and to maximize the significance of law in the revelation. A broad consensus on the principal issues of legal

175 Mohammad Hashim Kamali, *supra note*, 43: 3.

hermeneutics was reached only by the middle of eleventh century when all four Sunni official legal schools agreed to ground the further process of Islamic legal construction on the law-oriented hermeneutical theory.[176] In this light, al-Shafii's theory was extended and modified. Thus, only in a long run, al-Shafii's theory was to become the fundamental basis of all later theories of law, which were elaborated under the theory of usul al-fiqh.

What was the *raison d'etre* of the usul al-fiqh? According to A. Shamsy, this classical legal theory represents the primary site for theorizing the relationship of the Muslim community to revelation and the sacred past.[177] Of course, it also enabled scholar jurists to derive fiqh rules from the revealed sources. The official reason was that it was aimed to systematize law and to save it from the possible chaos. Bearing in mind that the usul al-fiqh was established in the ninth century and throughout the tenth century it was already applied, it is hard to resist a sense that the methodological system was also created to justify already existing law made by the qadis. The substantive law which was formulated by the qadis and the scholar jurists till the emergence of the theory of sources must have been explained in retrospective manner and usul al-fiqh here probably served as suitable mechanism. It is very likely that rational theory of usul al-fiqh was also aimed to divinize fiqh law in a way of making very close link between scholarly constructed law and divine texts. Because of this link, the religious scholars began to construct religious law rather than simply human, thus, fallible law. To divinize law, if to speak in concrete terms, is to make it workable in a system and at the same time unquestionable because of the authority of the Quran, the word of God. In any case, the very theory of sources is undoubtedly rational creation of the early learned men. Neither the Quran nor the Sunna of the Prophet speak of a concrete Islamic legal theory or system. Thus, any rational construction may be reconsidered and reconstructed. This stems not only from its rational nature, but also from the very idea of usul al-fiqh that divinely revealed language is ambiguous, thus, flexible for the reinterpretation at different times.

Let us return now to the study of the theory of usul al-fiqh. The work named al-Risala of al-Shafii was the first on the usul al-fiqh in Islamic legal history. The word al-Risala means an epistle or a communication in writing made to an absent person. Although this is true that in reality al-Risala was written mainly to defend the overriding authority of the Sunna of the Prophet,[178] the main al-Shafii's contribution rests in showing that the entire Islamic legal system can be discovered in the Quranic language which is mostly ambiguous, thus, inseparable from the process of interpretation. Here, we are to embark on the book of al-Risala in order to explore the usul al-fiqh at a greater length. The core idea of *bayan* which gave a clue to create the whole theory of sources here is of particular significance. In the following section, the question to be answered is how the idea of bayan was understood by al-Shafii in his early masterpiece. The idea of bayan is a clue to understand how religion and law came to united in the task to create the system of Islamic law and how Islamic law as a result of such unity obtained a chance to be adapted on the ground.

176 David R. Vishanoff, *supra note*, 40: 190.

177 Ahmed El Shamsy, *supra note*, 46: 3.

178 Abdur Rahman I. Doi, *Shari'ah: Islamic Law* (London: Ta-Ha Publishers Ltd, 2008), 161.

2.1.2.1. The key idea of *bayan* to construct the theory of sources

Al-Shafii had a mission to negotiate the problematic relationship between legal rules and revealed texts,[179] or fiqh law and the Sharia law. To solve this key issue, he turned attention to the ambiguity of language of divinely revealed sources. By ambiguity of language we are not to say that divine textual sources are ambiguous. Rather, ambiguity as a feature here is related exclusively to the provisions of legal quality in the Quranic text. If one has a task of interpreting and extending the texts of divine origins, he must have access to the legal information written in the form of language, either clear or ambiguous. The Pandora's Box opens when one realizes that the majority of the texts of legal quality are expressed in ambiguous language. As a result, the process of interpretation to clarify the textual ground comes to be indispensable. To sum up, D. Vishanoff accurately expressed the matter by saying that ambiguity of language makes it possible to regard revelation like "a jigsaw puzzle". In the interpretive process that al-Shafii imagined and illustrated in his al-Risala, the interpreter already has a general idea of what the law should look like: it is pictured on the box, so to speak, and it should be possible to create a similar picture by fitting together the pieces of revelation.[180]

The al-Shafii's predominant idea is that God's guidance lies in the Book which contains, explicitly or implicitly, the entire law. Bearing in mind that the text does not provide law in detail what al-Shafii perfectly knew, the statement that the Quran contains the entire law looks like as if it were from the sphere of imagination. However the gap between imagination and reality may be filled by one methodological step. To fill it, al-Shafii suggested the key concept of bayan.[181] Bayan literally means "to make something clear". For al-Shafii, divine revelation is bayan, thus, it clearly delivers all the legal meaning one could ever need. The bayan, according to al-Shafii, has two meanings and both of them are of particular importance to capture the very essence of usul al-fiqh. Here, we are to clarify both meanings.

With regard to the first meaning of bayan, the text of al-Risala enumerates four types of bayan by which the Quran reveals the law.[182] What is noticeable is that all four types are delivered in a clear order whereby only if upper in the grade type fails to give an answer, one may pass on the further one. First, in a number of instances the Quran makes clear an obligation or prohibition in the text. Alongside the explicit prohibitions of adultery or the drinking of wine, al-Shafii mentions obligations to pay the alms tax, to observe the fast and so on.[183] To take but some more examples from the text of the Quran, we can refer to the prohibition to have more than four wives, the prohibition to marry the daughters of sister or the obligation to sign the contracts of loan in the written form. Second, when Quranic text is unclear on the issue at hand, the Sunna of the Prophet is to be tested in order to find out if it explains vague provisions of the Quran. For instance, the Quran impose the duty

179 David R. Vishanoff, *supra note*, 40: 12.

180 *Ibid.*, 61.

181 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 67.

182 *Ibid.,* 68.

183 *Ibid*.

to pray without specifying when or the obligation to pay the alms tax is prescribed without mentioning the specific amount. In these cases, the Sunna of the Prophet clarifies the time of prayer as well as the amount of alms tax. Third, when there is no clear stipulation in the text of the Quran and there is no unclear one that could be explained and clarified by the Sunna of the Prophet, Prophetic traditions on the matter are to be regarded as an elaboration. In such instances, the Sunna of the Prophet plays the role of the separate source of law. According to al-Shafii, this stems from the very text of the Quran where the obedience to the Prophet and recourse to his decision is established.[184] Fourth, when even the Sunna of the Prophet does not provide an answer, one must seek an answer through ijtihad or personal reasoning. To illustrate this, the text of al-Risala speaks of the God's command to face the Sacred Mosque in prayer.[185] When there is no possibility to turn the face in its direction, one may determine that direction through his personal reasoning. Thus, all four types of bayan are presented in al-Risala as ways in which the Quran itself reveals the law. In D. Vishanoff's words, every rule, even if it is known only with the help of Sunna or by personal reasoning, is actually imposed or even "made clear" by the Quran itself.[186]

Two preliminary conclusions can be made here. One point is that by imagining revealed law, al-Shafii established a link between law and revelation. The whole legal system came to be associated with the Quran which reveals that law. If the text of the Quran gives no clarity of a legal issue, the link may be established in a way of the Quranic interpretation based on the Sunna of the Prophet and ijtihad. Another point is that such vision embraces all the prevailing viewpoints on the ground. The literalists who saw a sole basis for law in the text of the Quran, the supporters of the Prophetic traditions, and those who saw rational element indispensable in the construction of Islamic law, all were to be satisfied with usul al-fiqh. As we understand, the main idea of al-Shafii was that all law is grounded in the Quran because this text reveals law relying on the Prophetic Sunna and ijtihad. Till now we can call it a promising abstract idea. However, for D. Vishanoff, this correlation between law and revelation is far from obvious and perfect.[187] The problem lied in the absence of the clarity whether such imagined revealed law can exist in reality. Rare instances of correspondence between specific laws and specific Quranic texts, sometimes because the reports of the Prophet were simply invented to justify those laws, did not give much of hope to find a way from a deadlock. Al-Shafii obtained the name of the architect of usul al-fiqh by no means without reason. His theory had an answer and the second meaning of bayan was to fulfil this function.

Alongside the four ways in which the Quran reveals or makes law clear, al-Risala speaks of the second meaning of bayan consisting of five ways in which the very legal meaning of the Quran can be made clear with the help of other evidences. Only at first glance one may find two meanings of bayan similar. In fact, the heart of the matter is that the first meaning of bayan was about revelation or revealed law and the second is about interpretation itself or interpretational ways to make clear revealed law. It was not enough to convey the general

184 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 68.

185 *Ibid.*, 69.

186 David R. Vishanoff, *supra note*, 40: 40.

187 *Ibid.*,41.

idea that all law is Quranic. Rather, there was a need to suggest how the revealed law can be made clear in a way of interpretation in order to clarify the legal message of revelation. The first meaning of bayan speaks of the idea of revealed law and the second suggests how this law may be clarified with a help of evidences within one or another related text. As D. Vishanoff rightly pointed out, the five inter-textual relationships define all the ways in which an imagined interpreter can use one piece of evidence to interpret another, so that together they dictate or justify an acceptable legal rule.[188] Here, we need to expound the list of five ways in which the revealed law can be clarified by other evidences.

First, a clear Quranic textual provision can be confirmed by another verse of the same text. As the meaning is already clear from the text, the other text just confirms it and puts nothing further to the meaning. Al-Shafii here wish to argue that not all divinely revealed texts talking on the same issue are in conflict. What is suggested is that two texts should be regarded as confirming or particularizing rather than contradicting or abrogating. The text of al-Risala gives several examples of this type of bayan.[189] One example is related to the verse 2:196 which prescribes fasting for three days followed by seven days, and then states that this makes ten full days.

Second, although the text of Quran may be clear enough, it can still be detailed and modified by another Quranic text. As the example al-Shafii takes the concept of inheritance.[190] Two Quranic verses 4:11 and 4:12 must be taken into consideration. The former one prescribes precise shares of inheritance. The latter clarifies that the shares are to be calculated after payment of bequests and debts so that no loss is caused to anyone. Causing harm in this way is considered a major sin.[191] Important to mention that specific rulings regarding inheritance and bequests in various schools of fiqh are based on different interpretations what will be explored in the following chapters. Why this type of interpretation is important for al-Shafii? Obviously, the essence lies in the idea that the clarity of a text does not make it immune to reinterpretation. Despite the degree of clarity, a text may be clarified by the other evidence written in the different verses of the Quran.

Third, because the text of the Quran is far from being detailed code of law, it needs to be clarified by the other text. For al-Shafii, the clarification comes with the Prophetic reports. To illustrate, the text of al-Risala takes into account the issue of prayer. The Quranic verse 4:103 says that prayer for the believers is prescribed for specific times without delivering more details on the issue. This is specified clearly by the tongue of the Prophet by clarifying the required number of prayers, their times and the modes of their performances.[192] As apparent from this example and from the whole text of al-Risala, al-Shafii's system of hermeneutics is inseparable from the idea that the Quran and the Sunna of the Prophet are twin sources of divine nature.

Fourth, in case when the Quran is silent and no relation between the divine texts can be established, the Prophetic report can be regarded as the only achievable source to answer

188 David Vishanoff, *supra note*, 40: 43.

189 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 71-72.

190 *Ibid*., 74.

191 The Study Quran: A New Translation and Commentary, *supra note*, 95: 195.

192 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 75.

to a legal question. For those who doubt about such a position to attribute high status for the Prophetic reports, al-Shafii suggests to take a look into the numerous of the Quranic verses whereby it is prescribed obedience to the Prophet. According to him, everything in the Sunna of the Prophet is a clear explanation for the divine communication in the Book of God.[193] In this light, the Prophetic reports are to be found in the same hermeneutical position as Quranic verses.

Fifth, when neither the Quran nor the Prophetic reports deliver a legal answer, non-textual sources may deliver the wishful outcome to the case at hand. Here, we find nothing less than the recognition of the ijtihad in a form of analogy as possible source of evidences. Thus, to al-Shafii, ijtihad can clarify revealed law, as long as that reasoning can be considered an extrapolation from some divinely revealed text. As noted by al-Shafii, no one at all should give an opinion on a specific legal matter by merely saying: It is permitted or prohibited, unless he is certain of legal knowledge, and this knowledge must be based on the Quran and the Sunna, or derived from consensus and qiyas or (analogy).[194] Apparently from the mentioned, human legal reasoning in a form of analogy receives green light to serve as a source of law. Truth, any kind of analogical reasoning is to be constrained by the divinely revealed texts. The text of al-Risala is strict about this by noting that analogy is the method of reasoning through which indications are sought from parallel precedents in the Quran or the Sunna of the Prophet and the analogy's conformity to precedents should be based on two conditions: the first is that God or the Prophet have either prohibited a certain act by an explicit text in the Quran and the Sunna or permitted it by an implied reason. If such a reason is found in the absence of a specific divinely revealed text, the act should be prohibited or permitted in conformity with the implied reason of permission or prohibition; the second is that we may find a certain act analogous to only one aspect of a certain precedent and analogous to another aspect of another precedent, but neither the latter nor the former provides a close analogy.[195]

Apparently, these five ways according to which the revealed law can be made clear are closely linked to the four ways in which the Quran reveals law. Again, how? Revelation and law becomes connected in a twofold argument: the Quran reveals law which is to be made clear through the inter-textual interpretation. On the one hand, al-Shafii limits the interpreter and the whole Islamic legal discourse in the dimension of sacred texts. On the other, he encourages the interpreter to depart from the apparent meaning of revealed texts with a condition to justify any departure through a vast range of evidences. Simply speaking, when the revealed text is not detailed enough to answer a legal question, other texts or, more exactly, their evidences provide the necessary detail. This is how the Quran makes clear the law and the Quranic legal meaning can be made clear.

In addition to the twofold concept of bayan, al-Shafii clarifies what needs to be known for the interpreter in order to be qualified to interpret the revealed law. The text of al-Risala enumerates five themes with which one must be familiar. One must realize the importance of Arabic language richness. It enables al-Shafii to ground his arguments concerning the whole

193 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 76.

194 *Ibid*., 78.

195 *Ibid.*, 79.

process of Islamic legal interpretation in the very ambiguous language which delivers the answers of legal nature. Further, the concept of abrogation must be kept in mind. According to this, a set of texts abrogates the other texts due to the fact that they were revealed later. Also, one must understand that legal force of the Quranic provisions is different. Alongside prohibitions and obligations, there is a number of advises or recommendations. What is of particular importance for al-Shafii is that the interpreter of the revealed text must be aware with all the ways in which the Prophet's Sunna can extend, elaborate, or otherwise make clear the legal meaning of the Quran. The last but not least, one must know the Quran's examples which direct people to obedience and clarify how to avoid disobedience.

Whether al-Shafii clarified what he meant by regarding Quranic language highly ambiguous? The long quotation of al-Risala helps to enumerate a number of concepts: "God has addressed His Book to the Arabs in their tongue in accordance with the meanings known to them. Included in the words "in accordance with the meaning they know" was the extensiveness of their tongue. It is God's divine disposition to express something, part of which is literally general which is intended to be obviously general with the first part of the phrase not needing the second. Something "literally general" means that the concept of the particular is included in the general; that is indicated by some of the words expressed. Also "literally general" means only what is particular, with the word literally recognized in its context to mean what is not literally so. Knowledge of all of this is to be found either in the beginning of what is said or in the middle or at the end. The Arabs may begin the subject of a speech whose first word makes the last clear; and they may begin a speech whose last word makes the first clear. And they may speak about a certain subject, in which they indicate the meaning – just as gestures indicate – without clarifying it with words. To them this kind of speech is of the highest order which only their learned understand, not those who are unlearned. They also call a certain object by several names, and one word may have several meanings".[196] Al-Shafii mentions here a number of the kinds of ambiguity and five of them were enumerated by D. Vishanoff: generality and particularity, transgressive usage, indirect reference, synonymy and homonymy.[197] Thus, for al-Shafii, ambiguity of the Quranic text is far from being problematic issue. Rather, ambiguity of the text enables the qualified interpreter to use his hermeneutical tools in order to bring into the light a legal answer from the divinely revealed law. Ambiguity, after all, means interpretive flexibility, and flexibility means that a given set of texts can be used to support a variety of legal opinions.

Only after a period of discussions and debates among Sunni theorists with, at one extreme, theology-oriented and law-oriented attitudes, in another, the theory of usul al-fiqh was taken into consideration in unanimous way. According to D. Vishanoff, for the next two centuries after al-Shafii time, Sunni legal theorists were torn between four rival hermeneutical systems, embodying four profoundly different conceptions of the nature of law, the nature of God's speech, and the epistemological relationship between them.[198] In the very end of the formative period, one hermeneutic paradigm became acknowledged by the majority of the participants in the debates and other alternatives have disappeared

196 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 95.

197 David R. Vishanoff, *supra note*, 40: 46.

198 *Ibid.*, 2.

from the scene. One hermeneutical project came to be the best choice for the majority of scholar jurists and all Sunni legal schools agreed to base their legal theories on the so called law-oriented hermeneutical paradigm. Strictly speaking, the law-oriented interpretational paradigm was to achieve two main tasks. They are perfectly summarized by D. Vishanoff: to maximize the power to derive as much definite legal meaning as possible from revealed language, and to maximize flexibility to clarify that meaning as needed to correlate it with a coherent legal system.[199] In the theory of usul al-fiqh, al-Shafii mainly concentrated on the latter, while later legal theorists who were the supporters of the law-oriented turned particular interest to the extension of legal meaning of divinely revealed language. The triumph of the law-oriented paradigm was a watershed in the development of Islamic legal theory, because, as stated by D. Vishanoff, it guaranteed that scholars of law would always be able to imagine their systems of legal rules as revealed and thus divinely authoritative, even as they continued to adapt those laws to changing social contexts.[200] It remained the cornerstone of post-formative and contemporary Islamic legal theory in each of four official Sunni schools of fiqh law, namely, Hanafi, Maliki, Shafii and Hanbali. Certainly, all these schools differed in the recognition of additional sources of law.

On the basis of bayan al-Shafii grounded all law in the Quran which, because of its ambiguous language of legal nature, was to be clarified by interpretation. On the one hand, the interpreter became limited by the divinely revealed texts, while on the other, he preserved a great degree of a space for the departure through the process of interpretation by invoking other texts to find necessary evidences. It seems that the interpreters were encouraged to speak louder than divinely revealed words might speak but at the same time in the limits of these words. As is evident from the history of Islamic law, there can be but one step from the imagined revealed law to the imagined freedom of the interpreter. This is exactly what has happened when the tendency to identify views with the official doctrine of school became prevailing and obligatory. It was frequently opposed to that of individual jurists.[201] By imagined freedom we refer to the concept of taqlid or blind imitation of humanly made law precedents which came to be acknowledged as the dominant legal course of all four Sunni schools in the whole post-formative period till the very beginning of modern era.

With al-Shafii's imagined divinely revealed law and with the formulation of law-oriented hermeneutical paradigm, the so called "closure of the doors of ijtihad" gradually emerged on the ground. The era of blind imitation of fiqh doctrines of the selected schools came to be regarded as a normal practice. Ijtihad was restricted in the limits of the legal doctrines of the schools. Instead of the direct interpretation of divinely revealed sources, the further process of interpretation and derivation of legal rules was to be limited in the prevailing understanding of Islamic law in one or another school of fiqh. This is what we meant by saying that from the imagined revealed law till the imagined freedom may be just one step. Ijtihad as the very idea of development in Islam came to be superseded by the rationally created idea that all law must be based on the fiqh doctrine. While about this phenomenon

199 David Vishanoff, *supra note*, 40: 190.

200 *Ibid.,* 3.

201 Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (Leiden: Brill, 1996), 76.

we are to talk later on, here we need to devote some attention to the creation of the schools of fiqh law in Sunni world. Law and the schools of fiqh law had historically proved much more permanent than the programs or policies of any particular state or government.[202] Schools of fiqh law are closely related to the theory of usul al-fiqh because gradually all four official Sunni schools of fiqh began to ground their methodological doctrines on the basis of the theory of al-Shafii. With some differences on the question of supplementary sources, religious scholars from all schools gradually restricted use of ijtihad. Our question here is related to the stages of development during which individual religious scholars became the members of doctrinal schools of fiqh law. Bearing in mind that in the period between eleventh and nineteenth centuries all law in Islam was constructed in the limits of scholarly constructed legal precedents, the issue of schools and their doctrines becomes more important.

2.1.3. The birth of schools of law

By the end of the formative period of Islamic law, the formation of doctrinal legal schools marked one more huge development in the history of Islamic law. As stated by W. Hallaq, two stages of development preceded and paved the way for the rise of the doctrinal schools: the first was the stage of study circles and the second, the stage of the personal schools.[203] The early interest in the discussion on law was maintained within the so called "study circles". A number of ordinary people found themselves interested in the general principles of Islam and in the Quran. We are talking about the early eighth century, when discussions were already directed by the teachers. Later on, the substantive law became more systematic and the religious scholars began to develop their legal assumptions. Individual conceptions of law were challenged in the debates within study circles. Men were the students of more than one or two study circles in the same local area. The most curious began to travel to other cities in order to obtain more knowledge on one or other legal question, or the field of law. Teachers of the study circles suggested their understanding of law. When we say that in the beginning the judges were mostly relied on their personal sense of justice, we are to note that they came from different study circles and their knowledge of law was very different. In the end of the eighth century, the term madhhab already meant a group of students, legists, judges and jurists who had adopted the doctrine of a particular leading teacher and this phenomenon is called "a personal school".[204] Such leading scholars as Abu Hanifa, al-Shafii or Malik were very famous teachers around whom personal schools were established. By personal schools we mean more the growing group of people adhering to unique legal doctrine and having one leading teacher then the school as we understand today. In this stage to change the personal school or adopt a combination of legal doctrines of a number of schools was still usual thing. In a long run, it had become a norm to refer to the only one legal thought. The emergence of doctrinal schools was under the way.

202 Sherman A. Jackson, *supra note*, 201: 68.

203 Wael B. Hallaq, *supra note*, 2: 60.

204 *Ibid.,* 64.

The self-regulating entities which evolved from the study circles to the personal schools and, eventually came to be regarded as doctrinal schools. W. Hallaq enumerates a number of characteristics that was inseparable from the doctrinal schools and belonging to them: the doctrinal school was a collective, authoritative and authorized entity; it has its own legal methodology and substantive principles it adopted; the doctrinal school was defined by its substantive boundaries, namely, by a certain body of law and methodological principles that clearly identified the outer limits of the school as a collective entity; loyalty was a defining feature of both the school itself and the careers of its members.[205] The leading figure or a founder of the school played extremely important role in the formation and survival of the doctrinal school. Of all the leaders of personal schools – only four were raised to the level of the founder of a doctrinal school, namely, Abu Hanifa, Malik, Shafii and Ibn Hanbal. With the exception of the Zahirite School, no more Sunni schools reached the level of doctrinal school. The survived four doctrinal Sunni schools were born in distinct regions of Muslim lands and these entities were occupied with the construction of practice-based fiqh law system. The doctrinal schools were called under the name of the leading figures. Till this day there are four official Sunni schools of fiqh, namely, Hanafi, Maliki, Shafii and Hanbali schools. The founders of the first three schools were highly qualified religious scholars and jurists, whereas Ibn Hanbal was exclusively concerned with the collection of Prophetic reports. Alongside the founding leader, schools were occupied with the question of successors who would continue doctrinal development of the school.

To sum up, the formative period was decisive because major developments made Islamic law matured. At the same time, al-Shafii's imagined interpreter of the formative period made imagined divinely revealed law somehow detached from the pulse of social development. How? By trapping it in the doctrinal limits of schools of fiqh law. Unquestionable and untouchable revealed law came to be nothing more than scholarly made law (fiqh law). As scholarly constructed law became closely linked with revelation, it received another kind of authority. By grounding law in the revelation, they attributed to Islamic law divine authority. By divinizing scholarly formulated law, a scholarly community made it the consisting part of Muslim's identity not only for the generation of the early time but also for the subsequent ones. In the eyes of ordinary Muslims, fiqh law came to be equated with Sharia law. Or, a particular humanly made interpretation of the sources with the very sources. In this light, Islamic law obtained such a force that it was able to serve its functions in the absence of ruling dynasty or government.

2.2. Post-formative period of Islamic law

Ijtihad as free independent thinking based on reason[206] in one or another form flourished in the formative period of Islamic law. By ijtihad we mean here human legal reasoning as a means through which scholars were able to derive law from divine sources. As was clearly

205 Wael B. Hallaq, *supra note*, 2: 65-66.

206 Tamim Ansary, *Destiny Disrupted: A History of the World through Islamic Eyes* (New York: PublicAffairs, 2009), 97.

noticed, without it Islamic law can be reduced to a state of immobility.[207] Even more, any kind of intention to restrict or deny it, is tantamount to negate one of the main ideas written in the Quran. Despite that, an agreement of four official Sunni schools of fiqh gave rise to the era of taqlid (imitation) which with some breaks continued to conduct the course of Islamic law till the very beginning of the nineteenth century. In the words of J. Auda, in this era the 'scripts' of the fiqh schools were practically given precedence over the original scriptural sources of Islamic law.[208] Such a paradigmatic approach towards the further construction of Islamic law prevailed throughout the whole post-formative period. However, this does not mean that there were no scholarly attempts to reverse the discourse set by orthodox Sunni schools. The methodological theory of maqasid al-Sharia (purposes of the Sharia law) which was introduced by the individual scholars with the aim to make Islamic law more adaptable in the light of changing time and social requirements was that achievement which, albeit not on the day of its introduction, gave additional strength for the process of derivation of Islamic law from the sources. Regarding the problem of adaptability, our thesis is that both methodological constructions of usul al-fiqh and of maqasid al-Sharia show how open and flexible Islamic law might be in its sources and to what extent its adaptability remains in the hands of human interpreters. This section is aimed to prove it through the study of the theory of maqasid al-Sharia as the main achievement in the field of Islamic law in the post-formative period.

In order to explore the post-formative period, short blush into the context is necessary. If under the Ummayad ruling (661-737) the scholarly community was truly independent and this guaranteed to them the growth of popularity among the ordinary people, the Abbasid rulers (737-1276) realized perfectly well that their authority strongly depends on the relationship with the self-regulating community of scholars. As a sign of respect, the Abbasid caliphs began to nominate scholars in the position of qadis. Although, in the beginning scholars disagreed with such nominations, later on they realized that this might enable them to start implementing the fiqh doctrines of their schools in social reality. From about the tenth and eleventh century we might see that a part of the members of fiqh schools became the members of the ruling establishment. Besides the right to construct Islamic legal rules in theoretical dimension, now they were also responsible for the enforcement of legal rulings. As a reaction to such practice, al-Ghazali cited the words of the Prophet: "as long as the ulemas associate not with the rulers, they are the deputies of the Prophets over their servants, but when they associate with rulers, they betray Prophets.[209] To say that scholars or ulemas obtained the power to somehow clarify politics of law would be to underestimate the rulers. In fact, the religious scholars were consequently engaged in their academic pursuits with little involvement in the business of government and the rulers condoned this isolation under the umbrella of taqlid as it left rulers with initiative and control over public affairs.[210] The rulers were aware of the fact that this is the best way to maintain its authority over the religious people of Muslim lands. They started codifying

207 Muhammad Iqbal, *supra note*, 53: 141.

208 Jasser Auda, *supra note*, 41: 75.

209 Al-Ghazali, *supra note*, 68: 173.

210 Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld, 2008), 95.

the legal texts and declaring a particular fiqh doctrine as state's law. The membership of the guardians of Islam in the government helped the rulers to maintain their positions. It could seem that all the sides were to be satisfied with a course of events, however, from about the twelfth century new force emerged on the scene in Muslim lands.

The emergence of the Sufi movement of mystics brought a change in the attitudes towards the ruling elite. Also to those who are in charge to implement that politics. The Sufis were in favour with rejection of any kind of utilitarian interpretation of Islam. According to Sufism, ruling dynasties and their governments cannot conduct the path of religion because their main interest to maintain positions in the government. Obviously, the ruling elite and scholar jurists were suspicious about the growing popular force of Sufism.[211] According to B. Ghalioun, the reconciliation between Sufism and Muslim legalism was made with the efforts of Abu Hamid al-Ghazali (1065-1111). In the eyes of ordinary Muslims the Sufis came to be regarded as the spiritual leaders of Islam. Certainly, Muslims continued to deal with their legal issues with religious scholars who were appointed not only as judges but also as muftis to give non-binding legal opinions. However, their links with the government and self-isolationist course to maintain themselves busy solely with academic affairs increased the distance from the pulse of social life. Meanwhile, all the questions of the faith, of the religious values shared among Muslims were addressed to the Sufis. Gradually, the religious scholars found themselves obliged to recognize the supremacy of the Sufis in order to retain their authority. This is why they tended to associate themselves with the spiritual project of Sufism.[212] Interestingly, that the leaders of reformative movements of eighteenth and nineteenth centuries will treat the victory of Sufism over the hearts of ordinary Muslims as one of the core reasons of the decline of Muslim civilization.[213] On the one hand, the Sufism made Islamic religion and its values prevailing subject as in the public so private spheres. On the other hand, the stagnation in the areas of law, public order, decision-making, public obligations was also evident. The reaction was violent in the eighteenth century against the Sufism, its system and all the expressions of cult a la Sufism. The Wahhabi ideas in the eighteenth century and Muslim reformers in the nineteenth century changed the course of Islam and Islamic law in a profound way. The change was seen as indispensable in order to make Islam and Islamic law alive and consistent with modernity.

To return to the main subject, we should have in mind the end of the formative period which coincides with the closure of the doors of ijtihad. This phenomenon is direct result of the agreement among all four Sunni schools of fiqh law to limit the ijtihadic activities of individual jurists. The limits were determined in the boundaries of the methodological doctrines of fiqh schools. Imitation of the doctrine of selected school in the interpretation and derivation of legal rules is what taqlid means. Whereas ijtihad is a legislative function to derive legal rules from the divinely revealed sources. As compared to ijtihad, the purpose of taqlid is to lay down a methodology for the jurists for discovering and

211 Burhan Ghalioun, *supra note*, 129: 194.

212 *Ibid.*

213 *Ibid.*, 195.

applying the law in the light of already settled law.[214] The extended form of taqlid was introduced later according to which the jurists received a right to base his decision of one of the doctrines of fiqh schools. In one or another way, the direct work with divinely revealed sources ceased to be used in practice. This is how the jurists were to exercise their functions throughout the whole post-formative period of Islamic law.

A change from a paradigm of ijtihad to a paradigm of taqlid gave rise for a number of developments in law and legal science. What was the essence of the concept of taqlid in law and its influence on the activities of the individual jurists? The seeking point of the scholarly community was to restrict ijtihadic activities of individual jurists by setting methodological boundaries on the basis of established fiqh doctrines. Thus, the source of law became fiqh of the selected official Sunni school of law rather than the very divinely revealed sources. This particularisation of ijtihad confined the Muslim mind and taqlid eventually paralyzed its creative abilities.[215] For those who saw the process of human reasoning inseparable from the Quran and the Sunna of the Prophet, the innovatory concept of taqlid to accept the legal statement of another scholar without demanding evidences contradicted to the Islamic manner of seeking knowledge. According to T. al-Alwani, taqlid cannot be regarded as an alternative to either revelation or science.[216] Only directly though the revelation or through the ijtihadic activities for which the point of departure is the revealed message the scholars should search for evidence.

There are different opinions about the concept of taqlid and whether the doors of ijtihad were really closed. To W. Hallaq's mind, alongside the formulated fiqh doctrines the muftis (religious scholars responsible to give non-binding legal opinions) were those qualified jurists who were entitled to exercise ijtihad in the era of taqlid. According to him, the practice was such that any new case that arises must first be checked against those relevant cases contained in the corpus of fiqh law; if no precedent is found then ijtihad must be exercised and this was the function of mufti through fatwas.[217] From this, it is likely that the process of further legal development was conducted by muftis. However, for J. Auda, despite W. Hallaq's tracing of some remnants of independent ijtihad in various schools, what is known as the 'doors of ijtihad' was closed.[218] Such scholars as J. Schacht and N. Coulson added that the potential for change in Islamic law was minimized or even eliminated in the post-formative period. For scholars who argue that creative juridical thinking (ijtihad) continued to varying degrees even in the post-formative period, A. An-Na'im affirms that there has not been any change in the basic structure and methodology of Islamic law for a whole post-formative stage.[219] Obviously, such a long history of unquestioning imitation seriously disrupted the natural growth of fiqh and arrested the

214 Imran Ahsan Khan Nyazee, *supra note*, 44: 328.

215 Taha Jabir Al-Alwani, *supra note*, 55: 65

216 *Ibid.,* 75.

217 Wael B. Hallaq, *supra note*, 42: 160-161.

218 Jasser Auda, *supra note*, 41: 75.

219 Abdullahi Ahmed An-Na'im, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law", *The Modern Law Review* 73, 1 (2010): 6.

efflorescence of ijtihad.[220] It seems that the scholars of fiqh schools who were regarded as the guardians of Islam agreed to change a flexible nature of Islamic law. While it is not fair to say that none of proposals of reform were suggested in the course of post-formative period, the question is another, namely, that of quality. Can we speak of reformative ideas of the post-formative period that made a considerable shift in reality? According to us, one major reformative theory was suggested in the post-formative period which was significant scientific achievement. However, it had to wait until the modern era to be truly implemented.

The majority of scholars opted to imitate the predecessors from their respective schools, while only a handful chose a different path and called for a complete ijtihad from the primary sources that was independent of any school.[221] Reformative approach was introduced by those scholars who insisted on the necessity to take far beyond the textual ground of the divine sources. These scholars saw that the texts embrace more than meets one's eye and the key suggestion was to ground the reform on the spirit of Islamic law. In the beginning of twelfth century al-Ghazali stated that the learned men should rely on their studies, rather than on books or the blind acceptance of what one hears from others because only God, the Prophet and his Companions should be emulated.[222] Instead of blind imitation and simple acceptance of things of authority (taqlid), al-Ghazali insisted on the human legal investigation and personal observation.[223] In the further century Ishaq al-Shatibi proposed his project of reformation by inviting to stay away from the ground of taqlid or following another's view without seeking supporting evidence and to make progress in Islamic law.[224] To prove that Islamic law is far from being static legal system because it adopts the idea of flexibility whereby it can adjust itself according to changed circumstances,[225] the scholars suggested a new religious methodology called the *maqasid al-Sharia.* As explains it one scholar, the maqasid al-Sharia are the five ultimate principles reflecting the intentions of God that the Sharia places before us as objectives or goals to be achieved.[226] This methodological theory reached its most mature stage in the time of al-Shatibi who till this day is known as the author of comprehensive theory of maqasid al-Sharia.

The maqasid-based approach was that idea under which the whole Islamic legal system was to be expanded in the post-formative period. The term 'maqasid' refers to a purpose, objective, principle, intent or goal. Thus, maqasid of the Sharia are the objectives, purposes, intents or goals behind the Islamic rulings. For some scholars it is an alternative term to people's interests and maslaha. Important to notice that the history of the ideas that inner purposes or intents lie behind the Quranic and Prophetic injunctions goes back

220 Mohammad Hashim Kamali, *supra note*, 210: 36.

221 Iyad Zahalka, *Shari'a in the Modern Era: Muslim Minorities Jurisprudence*. Translated by Ohad Stadler and Cecilia Sibony (Cambridge: Cambridge University Press, 2016), 16

222 Al-Ghazali, *supra note*, 68: 199.

223 *Ibid*., 223.

224 Imran Ahsan Khan Nyazee, *The Introduction*. In Ibrahim ibn Musa Abu Ishaq al-Shatibi, *The Reconciliation of the Fundamentals of Islamic Law*. Volume I. (Reading: Garnet Publishing Limited, 2011), xxxii.

225 Mohamed A. Abdelaal, "Taqlid v. Ijtihad: The Rise of Taqlid as the Secondary Judicial Approach in Islamic Jurisprudence", *The Journal Jurisprudence* 14 (2012): 156.

226 Imran Ahsan Khan Nyazee, *supra note*, 52: 66.

to the companions of the Prophet.[227] After the era of Companions, the theory of maqasid started its gradual evolution. It was not until the time of Ibrahim al-Shatibi (1320-1388) that significant reformative theory was suggested. The very theory of maqasid will be researched here through the ideas of al-Shatibi.

The scholarly approach from the time of al-Shafii remained rooted in the utilization of words and sentences of the texts and what was beyond the text, it was confined to the strict analogical reasoning. As noticed by T. al-Alwani, despite the passing of centuries, the subject of usul al-fiqh has not developed a great deal: except in works of collation, abridgment, interpretation and commentary, there has hardly been any significant new contribution.[228] To T. al-Alwani, the main contribution worth mentioning was that of al-Shatibi relating to the objectives of Sharia and al-Shatibi's contribution stands as a landmark in the evolution of the theory of usul al-fiqh.[229] The maqasid-based approach was aimed at refraining from the pure textualism and limitations of the concept of qiyas. What was really suggested was that jurists should resort on evaluating thinking instead of determining the meanings of words. More exactly, instead of taking into account the texts based on semantics and analogy, the reformers suggested to look what was written behind the textual rulings and to establish the universal intentions of the Sharia as the bases for the rulings. At the same time, there are positions that maqasid-based approach is only revised usul al-fiqh, thus, it is still limited because created under the framework of usul al-fiqh. To find out all this, we are to embark here on the study of maqasid al-Sharia.

2.2.1. The maqasid-based approach and the spirit of Islamic law

Islamic law is a sacred knowledge because it is derived from sources of the Sharia, however, as pointed out by al-Ghazali, this was forgotten by the majority of jurists of his time when instead of embarking on the knowledge in the sources, the majority of jurists were busy with nothing more than blind emulation of already existing legal decisions of the other jurists. According to him, the town is crowed with jurisprudents employed in giving legal opinions and defending cases.[230] He doubts if it signifies that these men

227 Among a number of multi-chained hadith on this theme, we are to give one example here. This is related to the afternoon prayers at 'Bani Quraizah'. As was narrated, the Prophet sent a group of companions to Bani Quraizah and ordered them to pray their afternoon prayer there. The span of time allowed for afternoon prayers had almost expired until the group reached the place. Therefore, they found themselves divided into supporters of two conclusions. One opinion insisted on praying at Bani Quraizah anyway, and the other opinion for praying on the way before the prayer time was over. From one side, the companions insisted on the clear Prophet's instruction to pray at Bani Quraizah. While the rationale of the second group's opinion was that the Prophet's intent of the order was to ask the group to hasten to Bani Quraizah, rather than intending to postpone prayers until after its due time. After the companions narrated the story to the Prophet, he approved both stances. For later jurists this signified the permissibility and correctness of both views.

228 Taha Jabir Al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections*. The third edition. Translated by Ashur A. Shamis (London: The International Institute of Islamic Thought, 2010), 11.

229 *Ibid.*, 12.

230 Al-Ghazali, *supra note*, 68: 44.

have knowledge, because knowledge is a work, an acquired activity, but not every work is knowledge. While early jurisprudents were seeking knowledge from the word of God, the jurisprudents of al-Ghazali's time only claimed to be like the early colleagues. For al-Ghazali a real jurisprudent is not that who knows all legal opinions.[231] For him, it is necessary to follow those Companions of the Prophet, their followers, the first scholar jurists from the seventh century because their knowledge is the closest to that of the Prophet. This is what should jurist do instead of emulating blindly opinions of jurists who bent themselves to the study of the science of legal opinions and offered their services to governors from whom they sought office and reward because such company of rulers and learned men is a source of evil.[232] He warned not to be deceived by the words of those who say that the giving off legal opinions is the pillar of the law because they are misleading people.[233]

Without doubts, al-Ghazali admits that jurists cannot be proficient in all legal matters. Even the Quran encourages to ask the people of knowledge in case one does not know the answer. Al-Ghazali to this point recites Prophetic tradition whereby knowledge comprises of three parts: the expressed word of the Quran, the observed Sunna of the Prophet, and finally a great deal which I do not know.[234] In the Quranic verse 16:43, the "people of Remembrance" is taken to refer to those who are qualified and their knowledge may be useful for one or another legal matter at hand. The learned men should rely on their studies, rather than on the books or the blind acceptance of what one hears from other.[235] However, taqlid-based mentality and fiqh-based partisanship gradually replaced the mentality of free inquiry that the Quran had instilled in the early Muslims.[236] Despite that, al-Ghazali encouraged to avoid any type of blind imitation and simple acceptance of things on taqlid and to pass on the investigation and personal human reasoning. Al-Ghazali compares imitators with a blind man who enters a house and, stumbling over some vessels says, "Why were not these vessels removed from the way and returned to their places?" He is then told that they are in their right places and what is wrong is his sight.[237]

This is not the only theme that was discussed by al-Ghazali in the field of law. He was one of the first to talk about the higher purposes of the Sharia. From the point of view of al-Ghazali, literal approach was not the only one through which jurists can analyse the whole content of the message of God. His essential contribution lies in the taxonomy which was established by him. The ultimate purpose of the Sharia with regard to human beings consist in the realization and protection of five necessary things, namely, religion, life, intellect, family life and wealth. As was already noted by al-Ghazali, these five principal matters are universal and constitute the core values of human life throughout all times.[238] On the

231 Al-Ghazali, *supra note*, 68: 52.

232 *Ibid*., 172.

233 *Ibid.,* 99.

234 *Ibid*., 176.

235 *Ibid*., 199.

236 Taha Jabir Al-Alwani, *supra note*, 55: 79.

237 Al-Ghazali, *supra note*, 68: 223.

238 Mohammad al-Tahir al-Mesawi, "From al-Shatibi's legal hermeneutics to thematic exegesis of the Quran", *Intellectual Discourse* 20, 2 (2012): 193-194.

whole, already in the time of al-Ghazali the efforts to somehow extend the boundaries of the legal methodology of al-Shafii in order to give sufficient explanation of what a jurist has to take into consideration were made.

"Stay away from the lowly ground of taqlid and make progress by rising up to a higher vision". The words of al-Shatibi reflect the general atmosphere within which not all were satisfied with Islamic legal course conducted by the religious scholars. Higher vision was to mark new attitude towards the divinely revealed law. Whether it was possible to suggest a substantial reform when the mainstream of scholarly community agreed to live under the regime of taqlid based on the strict theory of usul al-fiqh? To answer whether in general reform is possible within the field of Islamic law, our attention should be always turned to three key points. A. An-Na'im clearly enumerates them: concept, content and context.[239] Any kind of methodological concept how to interpret Islamic law is a rational human creation which in its essence cannot pretend to the infallibility. As a result, the content of Islamic law may be changed in the light of new contexts. Alternative methodological constructions might be suggested and applied in any specific historical context. Apparently that the conceptual reform to reconsider the content of Islamic law can be suggested in any context.

The whole methodological system of Islamic legal hermeneutics was suggested by the jurist from Andalusia al-Shatibi who was not content with the status quo in the field of law. His reform was a complete restructuring of usul al-fiqh from a new perspective. For critics his theory lacked a convincing methodology.[240] There is no specific textual evidences on the maqasid al-Sharia in the divinely revealed sources. However, there is also nothing said in the sources about the theory of usul al-fiqh. Evidently, every theoretical construction is of human nature, thus, it is mutable and requires to be rethought time after time. In any case, the traditional usul al-fiqh failed to provide a workable methodology for human legal reasoning and this was the main reason for al-Shatibi to suggest a new approach. The emerging rigidity and the gap between theory and practice was to be somehow filled. Al-Shatibi's contribution in this point is unquestionable. From here, we move to the discussion about al-Shatibi's core ideas which we tried to understand and identify through the research of his famous book "The Reconciliation of the fundamentals of Islamic law". Before reading this book one should be aware of al-Shatibi's warning that "it might be difficult for a person examining his book to do so beneficially or seek benefit from it, unless he is well versed in the discipline of Sharia with respect to its principles and detailed rules, its transmitted and rational evidences, and does not insist upon blind following and does not have bias for a particular school".[241]

The question is whether al-Shatibi's reform was able to proceed only in the parameters of classical usul al-fiqh. Only natural continuation of the prevailed methodological ground could have expected any kind of recognition or at least neutrality. Al-Shatibi was concerned

239 Abdullahi Ahmed An-Na'im, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law". *The Modern Law Review* 73, 1 (2010): 8.

240 Muhammad Hashim Kamali, *supra note*, 210: 123.

241 Abu Ishaq Al-Shatibi, *The Reconciliation of the Fundamentals of Islamic Law*. Volume I. Translated by Imran Ahsan Khan Nyazee (Reading: Garnet Publishing Limited, 2011), 41.

with the further stagnation of Islamic law because of the restriction on ijtihadic activities. According to him, to base human legal reasoning on the literalism and limited concept of qiyas is tantamount to restrict ijtihad to the enormous degree. Certainly, to achieve necessary degree of objectivity of law and to reach independence from the ruler, such theory was sufficient. However, it was not enough to respond adequately to the requirements of the changing world. His refusal to recognize limits of the regime of blind imitation of fiqh doctrines led to the proposal to renew and profoundly reformulate the concept of usul al-fiqh. By doing this, his aim was to adapt Islamic law to the requirements of the time and living conditions.

Al-Shatibi connected the main human values and the purposes of Sharia law. According to him, Sharia in the letter and spirit of the Quran and the Sunna protects five basic human interests: religion, life, intellect, family life and wealth. It is necessary to preserve them and the Sharia, for al-Shatibi, fulfils this task in two ways: by ensuring their establishment and by protecting them. It is human interest to live under the rule of law which guarantees these necessities. In this sense, alongside analogical reasoning, one more form of ijtihad, namely, maslaha or human utility (interest) appeared on the scene. What Muslim jurists mean by maslaha is the seeking of benefit and the repelling of harm as directed by God in the Quran. Al-Shatibi denied the assumption that the Sharia has been laid down in accordance with desires of humans, with the demands for their worldly benefits whatever they may be.[242] Rather, the aspect of human interest (maslaha) is the foundation of religion and the whole theory of al-Shatibi stems from the Sharia law and its objectives to safeguard those human interests. Al-Shatibi finds the normative basis of Sharia which is deeply rooted in human reason and social practices.

For al-Shatibi, the usul al-fiqh, as it was suggested by al-Shafii and extended by the later doctrinal schools of fiqh, was not sufficient to reveal all what is written within the divine sources. In other words, the classical usul al-fiqh gave no guarantees to touch the substantive dimension of textual sources without which substantial fiqh law cannot emerge on the scene. For al-Shatibi, the problem is that, firstly, the jurists take into account only those verses of the Quran that are of legal nature and, secondly, the search of evidences in the divinely revealed sources is limited to the specific textual injunctions. For the first problem, al-Shatibi suggests to look into the Quran as an integral whole, taking into account all verses and chapters of the Quran. He insisted not to pay attention solely to the Quranic verses revealed in Medinan period, but rather to seek knowledge by taking into consideration both Meccan and Medinan parts of divinely revealed message. If to look at a specific Quranic verse or a Prophetic tradition in combination with the remaining verses and traditions, the examination would become of the whole body of texts. When the individual texts understood as a whole, they do not present any kind of ambiguity. In other case, each of the evidences taken separately remains probable and, as a result of it, it cannot convey certain knowledge. Thus, his holistic outlook to the textual sources made it possible to base human legal reasoning on the whole text of the Quran.

242 Abu Ishaq Al-Shatibi, *The Reconciliation of the Fundamentals of Islamic Law*. Volume II. Translated by Imran Ahsan Khan Nyazee (Reading: Garnet Publishing Limited, 2015), 30.

With regard to the second problematic issue, for al-Shatibi, it is not sufficient to study the specific evidences alone without analysing the universal objectives of the Sharia which stand behind all the specific textual evidences. According to al-Shatibi, five human values as objectives of the Sharia are eternal, universal and general for all types of obligations and subjects, and under all circumstances.[243] Purposive (legal) interpretation was to assist in the analysis of one or another particular textual evidence. Purposivism understands the text based on the purpose that it is intended to fulfil. One might find significant similarities between this theory and the thoughts of contemporary jurist Aharon Barak on the purposive interpretation in law.[244] The universals in al-Shatibi's view are the purposes of the Sharia and specific textual injunctions are nothing more than particulars. To al-Shatibi, it is not enough to build up Islamic law on the separate specific evidences founded in the texts. The rules and its meanings should be interpreted in the light of the objectives of the Sharia as understood from the Quran and the Sunna. In other words, rules are to be sometimes derived from direct statements themselves, sometimes from their meanings and at other times from the underlying wisdom of the statements.[245] To sum up, by looking into the Quranic text as a whole and by embarking on the search of the higher intentions written in the spirit of divine sources, the jurist becomes capable to find an answer to any of legal question and to make Islamic law closer to the social reality.

There had to be two major elements, to al-Shatibi's mind, in the process of derivation the rules from the Islamic legal sources: proficiency in the Arabic language and knowledge of universal principals of Sharia. The first generations of the Companions and of their followers, who lived in the time of the Prophet and just after his time, were those people who did not need to strive to learn neither of them. Why? They were native Arabic speakers and the knowledge of Sharia which they acquired from the companionship of the Prophet is unquestionable. The generations to come were obliged to obtain this knowledge. A number of leading scholars including those who created the whole doctrinal schools of fiqh devoted themselves to the elaboration of the rules of Sharia. In this light, the theory of usul al-fiqh emerged on the scene. From the point of view of al-Shatibi, all this lacked a major component. The religious scholars limited themselves in deriving rules through specific evidences founded in the divinely revealed law and did not speak of the higher intentions of God written in the rules of Sharia. They were trapped in the limits of words and sentences of the text giving far from all the answers in the developing society. In addition to the textual injunctions or specific evidences founded in one or another textual part, it was permitted to utilize the method of qiyas. But the methodology of analogical reasoning was also increasingly subjected to technical conditions and requirements.[246] The maqasid approach sought to open the doors of human legal reasoning from the limits of literal approach and restricted qiyas.

243 Abu Ishaq Al-Shatibi, *supra note*, 242: 29.

244 Aharon Barak, *Purposive Interpretation in Law*. Translated by Sari Bashi (Princeton: Princeton University Press, 2005).

245 Abu Ishaq Al-Shatibi, *supra note*, 242: 43.

246 Mohammad Hashim Kamali, *supra note*, 210: 128.

What was suggested by al-Shatibi was to connect the discipline of usul al-fiqh and the spirit of the Sharia. To his opinion that the Quran is an ultimate source, the text of which is to be viewed as integral system, the scholarly community was able to agree. Whereas the suggestion to look into the Quranic text exclusively through the purposes of it received none of support from the scholars. Paradoxically, ijtihad in a form of analogical reasoning which was initially contested by a large group of scholars from the camp of literalists, in the eyes of al-Shatibi, was the sole, albeit insufficient, methodological tool through which jurists were able to open the way to the purposes of Sharia. Why was it regarded as the advantage of the theory of usul al-fiqh? To construct qiyas, a jurist needs to identify original and new cases and then to clarify effective cause (Illa) which unites both cases. Illa is to be necessarily extracted from the text, however, it was not rare case when the text did not explicitly declare its illa. What was left in such instances was to extract it from the meanings of separate words, whether general or particular, definite or speculative. This process was explored in al-Shafii's al-Risala. As M. Kamali says, speculation and doubt was inseparable from such a process.[247] The search for the underlying cause, in al-Shatibi's eyes, was somehow related to the task to grasp the higher purposes of the Sharia because the search for illa forced the jurists to pose questions which were beyond the textual basis. These higher questions were more or less related to the search of the purposes of the Sharia. Thus, if we are to admit al-Shatibi's claims, the methodology of usul al-fiqh whereby the schools of fiqh interpreted and derived rules of Islamic law lacked a large part of the content of the Sharia and only through the analogical reasoning the development of Islamic law was to some extent connected to the progress of life.

The purposes of the Sharia have been determined from the texts through a process of induction and not through deduction. Induction is the most important method for al-Shatibi to identify intentions of the Sharia in the divine sources. According to I. Nyazee, this is the reason why the purposes are considered definitive and can be relied upon without a doubt.[248] Thus, the purposes are indicated by the Sharia what is nothing more than the Quran and the Sunna. Each rule and the rules as a whole of the Sharia, according to al-Shatibi, can be expressed in the three types of universal purposes (intentions) of Sharia (*maqasid al-Sharia*): the necessary purposes (*daruriyat*), the purposes that pertain to needs (*hajiyat*) and the complementary purposes (*tahsinat*). The essential needs are supplementary to the five necessities. Likewise, the complementary norms lend completion to the essential needs.[249] The obligations of the Sharia written in the form of rules refer to the preservation of its purposes. Thus, each rule expresses the following: the preservation of one of five interests of religion, life, family life, intellect and wealth which are the foundations of mankind; the preservation of supporting needs, like the various forms of civil transactions that if found not to support the necessities would have placed human beings in great difficulties; the preservation of complementary values that rely on ethical norms and good practices. According to M. Kamali, the Sharia in all of its parts aims at

247 Mohammad Hashim Kamali, *supra note*, 210: 128.

248 Imran Ahsan Khan Nyazee, *supra note*, 44: 204.

249 Abu Ishaq Al-Shatibi, *supra note*, 242: 11.

the realization of one or another of these purposes or, as he calls, the essential benefits.[250] All this was necessary for renewal of ijtihad and led to the fresh rational extrapolation of general principles of Sharia to new cases.

It is important to note that preservation should be understood in two meanings: positive (establishing) and negative (protective). From a positive aspect, the interest is secured by establishing what is required by the Sharia through each of purpose. From the negative or defensive aspect, interests are secured by preventing the destruction or corruption of the positive aspect. For instance, interest of family life is supported by facilitating and establishing family life through maintenance of healthy family life and institution of marriage, while penalties for adultery or false accusation of adultery are designed to protect it. Another example is the interest of religion which is established by the creation of conditions that facilitate worship and establish five pillars of religion of Islam. To defend religion and its five pillars it is prescribed the concept of jihad.[251] Simply speaking, what is established must be protected and both sides, to al-Shatibi's mind, are inner in the intentions of the Sharia. From what was mentioned here becomes clear that to concentrate attention only on the protective side of the purposes of the Sharia, as modern scholars used to do, is a misleading step.

It is clear that the main objective of all the rules of the Sharia is the realization of three types of universal principles of the Sharia. These three types – necessities, needs and complementary norms – are to be viewed in grades that differ one from another in their level of importance. The first level is that of the necessities without which any social structure would collapse. This is why these are preserved and protected by all the nations in the world. Al-Shatibi noted that the entire Muslim community agreed that the Sharia was laid down for the preservation of the five necessities, which again are religion, life, family life, intellect and wealth.[252] Five necessities are the primary purposes of Sharia and the jurists focus mostly on these. These primary purposes are supported by the two other levels – supporting needs and complementary values. The existence of these two lower levels depends upon the primary purposes and they cannot be maintained on their own.[253] The order of the necessities also should be kept in mind. Accordingly, religion has precedence over life, life has precedence over family, this has precedence over intellect and intellect has precedence over wealth.[254] As is evident from this, the preservation and protection of religion is viewed as most important. Speaking of the relationship between necessities and two other levels, each primary purpose considered to be a necessity has its own supporting needs and complementary values.

The essential need are required so as to attain facility and removal of constrains that usually lead to difficulty and hardship and are accompanied by the loss of the desired object. For instance, in the civil transactions the essential needs are like advance-payment

250 Mohammad Hashim Kamali, *supra note*, 210: 33.

251 Abu Ishaq Al-Shatibi, *supra note*, 242: 9.

252 Abu Ishaq Al-Shatibi, *supra note*, 241: 6.

253 Imran Ahsan Khan Nyazee, *supra note*, 44: 208.

254 Sami A. Aldeeb Abu-Sahlieh, *Religion et droit dans les pays arabes* (Bordeaux: Presses Universitaires de Bordeaux, 2008), 53.

to obtain the desired object or the exclusion of additional things within a contract which may become obstacle or difficulty. This category includes all what improves human life and what makes it comfortable. In the religious affairs this pertain to the removal of impurities, the covering of the private parts. In the practices this pertain to the way of eating and drinking. In the civil transactions it may be the prevention of the sale of impure things. All these matters refer to additional merits over and above the interests pertaining to necessities and needs.

According to A. An-Na'im, the theory of al-Shatibi is still very limited as it is created under the framework of usul al-fiqh. He takes as an example the protection of religion and states that only Islam as religion is kept in mind here. Even more, for instance, if Sunnis of Salafi branch are in the government, the protection of religion makes no sense because the leading figures in all probability will strengthen protection of their supporters and not of Muslims from other branches. Accordingly, it is still too narrow concept to respond to the emerging issues in the field of Islamic law. There were suggestions to revise the scope of maqasid in the fourteenth century. Ibn Taymiyya suggested to revise it from the specified list into an open-ended list of values. His approach, by the way, is generally accepted by the scholars in the contemporary time. There are contemporary claims to include social welfare, freedom, and human dignity among the higher objectives of the Sharia. M. Kamali made a proposition to add protection of the fundamental rights and liberties, economic development, peaceful coexistence among nations to the structure of maqasid, as they are crucially important and, to M. Kamali's mind, can find support for the most part in the Quran and Sunna.[255] Although during the post-formative period the theory of maqasid received not much of attention, the ideas of al-Shatibi came to be regarded as the cornerstone for the proposals of the reform in the nineteenth century and onwards. According to us, the theory might be regarded as one of the tools of neo-ijtihad which requires to be reconsidered from present-day perspective.

It is fundamental premise of this dissertation that human dignity could be that key addition to make the maqasid al-Sharia even more appropriate methodology to construct Islamic law today. Both Islamic sources and the essence of the theory of maqasid al-Sharia encourage us in making such a suggestion. The belief in the dignity of every man insomuch as he is a human being primarily stems from the Quran[256] and from the Sunna of the Prophet[257]. In the sense of the maqasid al-Sharia, the five essential values of the Sharia, namely, religion, life, family, intellect, and property, are the overriding objectives

255 Mohammad Hashim Kamali, *supra note*, 210: 127.

256 The Quranic verse 17:70 states: "We have bestowed dignity on the progeny of Adam and conferred on them special favors, above a great part of our creation." Here, the text recognizes dignity for all human beings without limitations. In the verse 63:8 the Quran speaks of dignity regarding Muslim community: "And honor belongs to God, His Messenger and the believers."

257 Narrated 'Abdur Rahman bin Abi Laila: Sahl bin Hunaif and Qais bin Sad were sitting in the city of Al-Qadisiya. A funeral procession passed in front of them and they stood up. They were told that funeral procession was of one of the inhabitants of the land i. e. of a non-believer, under the protection of Muslims. They said: "A funeral procession passed in front of the Prophet and he stood up. When he was told that it was the coffin of a Jew, he said: "Is it not a living being (soul)?"" More on the subject see: *Sahih Bukhari.* Translator: M. Muhsin Khan. Volume 2, Book 23, Number 399. P. 301.

(maqasid) of the Sharia which are to be safeguarded and promoted through Islamic laws. According to M. Kamali, a firm commitment to protect these values is tantamount to the protection of human dignity.[258] However, this is not enough and the scholar insists on the identification of human dignity as one of the objectives of the Sharia in a way of regarding it as a strategic value of overall significance.[259] The fundamental revision of Islamic (legal) thought, from the point of view of T. al-Alwani, should be made, besides else, in the light of dignity of humanity.[260] Thus, if to incorporate preservation and protection of human dignity into the traditional maqasid al-Sharia, it could become additional driving force in order to question a number of controversial issues written in the books of fiqh law. The very ijtihad could become capable to reinterpret plenty of issues written in the primary sources of Islamic law. The questions of inequality, the very severity of criminal punishments, the issue of violent jihad and other could be reconsidered and revised. In the Chapter Six we argue that the paradigmatic shift in Islamic legal field is achievable through the theory of maqasid al-Sharia with human dignity as a core objective in the construction of Islamic laws in the contemporary time.

2.3. Summary

Islamic legal development can be divided into three periods, namely, the formative period (from the beginning of Islam till the thirteenth century), the post-formative period (from the thirteenth century till the nineteenth century) and modern period (from the nineteenth century till the present day). As Islamic legal development in modern era will be explored in the Chapters Five and Six, this chapter was devoted to the study of the first two periods. The historical development throughout the formative and post-formative period proved that adaptability of Islamic law is a historical fact. Changing paradigmatic approach towards the construction of Islamic law through the methodological theories of usul al-fiqh and maqasid al-Sharia showed that the level of the openness and flexibility of Islamic law mostly depended on the intentions of the interpreters. Whether it was aimed to restrict or to expand Islamic legal system, all this proved the capacity of Islamic law to be adapted according to the changing time and social circumstances.

In the formative period, the prevailing paradigmatic approach was ijtihad through which Islamic law was to be derived from the sources. The evolution of the institution of qadi, the emergence of self-regulating community of scholars, the introduction of the theory of usul al-fiqh and the final formation of four official Sunni schools of fiqh were the largest developments that made law Islamic and systematic. It became truly Islamic when divinely revealed sources, the Quran and the Sunna, came to be regarded as the main instruments in the construction of the body of Islamic law. The theory of usul al-fiqh

258 Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective* (Cambridge: The Islamic Texts Society, 2002), 90.

259 *Ibid.*, 102.

260 Taha Jabir Al-Alwani, *supra note*, 55: 14.

was that achievement which gradually turned Islamic law into a systematic body of law. Through the literal approach towards the ambiguous language of scriptural sources and through ijtihad solely in a form of analogical reasoning, usul al-fiqh transformed much of the Sharia law into humanly made law to govern social affairs on the ground in the formative period.

If the formative period is associated with more or less active ijtihadic practices, the post-formative period looked very differently. The theory of usul al-fiqh was the first scholarly step towards the restriction of ijtihad transforming it into one of its forms, namely analogical reasoning. In a gradual fashion, juristic freedom to exercise ijtihad which is the very idea of development in Islam turned to be something from the sphere of imagination. In place of ijtihad the scholars increasingly relied on taqlid, unquestioning acceptance of established scholarly doctrines.[261] Instead of regarding divinely revealed sources as a guide, the growing amount of man-made fiqh law precedents became the main source of law. In most cases, the creation of the position of mufti with the aim to give non-binding legal opinions did not make the distance between the sources of Islamic law and requirements of the society closer. The muftis were the members of one or another school and their opinions were nothing more than the reflections of prevailing fiqh doctrines. At the same time, the process of giving opinions (fatwas) significantly influenced on the decreased interest of learning and seeking knowledge from the textual evidences. Muslims were more and more satisfied with the answers from the scholarly community which based their decisions on fiqh precedents. For T. al-Alwani, the decisive stage was characterized by the Muslim masses accustoming themselves to accepting legal opinions without listening to either arguments of evidence, and by the legal scholars becoming comfortable with making pronouncements and providing no justification for doing so.[262]

Although the whole post-formative period was determined by the paradigm of taqlid when the scholars operated mainly in the limits of fiqh law, new ideas how to extend these constraints emerged on the ground from the side of independent scholars. Between the eleventh and fourteenth centuries some jurists suggested to look into the spirit of Islamic law rather than solely into the texts. Al-Shatibi was that scholar who delivered on the scene the full-fledged theory of maqasid al-Sharia by which he suggested to restructure usul al-fiqh which was mainly based on the literalism and the limited concept of qiyas. Al-Shatibi insisted on the holding the higher purposes of the Sharia as the main directions in the construction of Islamic law. By such a new reformative approach al-Shatibi invited to resort on the fresh ijtihadic activities what could mean nothing more than the clash with prevailing paradigm of taqlid set by the scholars of fiqh law. This is one of the main reasons why such ideas received not much of attention among scholarly community of that time. It was necessary to wait until the modern era when maqasid al-Sharia, albeit modified to a considerable extent, started to play a key role in the interpretation of contemporary Islamic law.

261 Bernard Lewis, *The Middle East, A Brief History of the Last 2,000 Years* (New York: Touchstone, 1997), 227.

262 Taha Jabir Al-Alwani, *supra note*, 55: 77.

3. PRIMARY AND SUPPLEMENTARY SOURCES OF ISLAMIC LAW

The question of the sources of Islamic law is very important in the light of the problem of adaptability of Islamic law researched in this dissertation. For Muslims, Islamic law is of double nature, namely, divine and human. God and the Prophet are represented by texts, thus Quran and the Sunna of the Prophet as the texts of divine origins stand as the authoritative center in Islam.[263] Neither the Quran nor the Sunna, of course, do not speak by itself. It is a part of God's law that he delegates sovereignty to people in interpreting what God said.[264] According to the Quran[265], revealed message needs to be explained and explanation in itself varies depending on changing time, capacity of the audience and the abilities of the people. As the Quran so the Sunna of the Prophet can never be finally and conclusively explained[266], thus, human agency in interpreting the texts is ultimate. F. Vogel adds that the law of God can be known only through ijtihad, the process by which scholars find law by interpretation of the revealed texts.[267] What signifies such an introduction of sources? According to us, this is an explanation of the key verse of the Quran (4:59) stating obedience to God, to the Prophet and to those in authority. In other words, the Quran, the Sunna of the Prophet and human reason are those sources through which religious scholars find evidences to settle a case at hand.

To comprehend the aforementioned words of F. Vogel, there is a need to divide them into four aspects. First, the Quran and the Sunna of the Prophet as divinely inspired sources are a point of departure for any type of construction of law in Islam. Second, humanly constructed forms and methodologies of ijtihad, often being named rational or secondary sources, play a role of a channel through which scholarly formulated law (fiqh law) is derived from the Quran and Sunna of the Prophet (Sharia law). Third, being the result of ijtihadic activities fiqh law is a source for a plenty of judgments and opinions of Muslim scholars and jurists. Fourth, if the fiqh law rules elaborated in and for the particular context began to be regarded binding for all the generations to come, it would contradict to the very message of the Quran and to the essential feature of development in Islam written in the concept of ijtihad. Although these four aspects are overlapping, Chapter Three considers solely the first two. The other themes will be taken into consideration in the Chapter Four. In terms of adaptability of Islamic law, this chapter tends to prove that both divine and human sources in constructing Islamic law are open and flexible enough to respond adequately to the factor of change on the ground.

Our discussion on the theme of sources is to be divided into several sections. At first, two divine sources, the Quran and the Sunna of the Prophet, will be analysed. Then, consensus as a rational source and qiyas as a process of juridical decision making will

263 Khaled Abou El Fadl, *supra note*, 47: 11.

264 *Ibid*., 24.

265 The Quranic verse (16:44): "And we have revealed to you the Reminder (the Quran) so that you may explain to mankind that which has been sent down to them".

266 Mahmoud Mohamed Taha, *supra note*, 54: 147.

267 Frank E. Vogel, *supra note,* 50: 24.

be taken into consideration. According to the theory of usul al-fiqh, these four sources are to be viewed as the roots of Islamic law. It can be said that the whole body of Islamic law was derived from these sources. Such a traditional thinking that law emanates first of all from the Quran, Sunna, consensus and qiyas still prevails among the scholars of Islamic law. Although Ibn Khaldun claimed that the basis of all further kinds of evidence is weak[268], the so called supplementary or secondary sources of evidence played significant role in the interpretation of Islamic law. If the schools of law and individual scholars were in agreement about the primacy of four roots of Islamic law written in the theory of usul al-fiqh, the rulings were different because of the preference to give a status of a source of law to one or another secondary or supplementary source. By these sources we mean more the forms of ijtihad than the sources as such. The list of supplementary sources will be delivered and discussed in the end of the chapter.

3.1. Twin divine sources of Islamic law: the Quran and Sunna of the Prophet

To regard the Quran and the Sunna of the Prophet as twin sources for Muslims is to stem their authority from God. By saying this, we are not to equate the Quran and the Sunna as it would lead to confusion in understanding the true relationship between the two sources what is clearly fixed in the letter of the Quran.[269] For Muslims the Quran and the Sunna of the Prophet are twin sources of divine origins whereas the other sources are rational in terms of being founded in human reasoning.[270] The Quran is the source that sets the rules, values and standards that are explained and elaborated further in the Sunna of the Prophet. There is no disagreement on the divine authority of the Quran among Muslims. One may not accept that the origins of Sunna is divine as the Sunna is a general name given to what was reported from the Prophet as being his words, deeds, decisions, and qualities in those matters related to inspiration and legislation.[271] However, the Quranic text itself is expressive on the question of the authority of the Sunna of the Prophet. It is stated clearly in the Quran (4:80): *Whoever obeys the Apostle has obeyed God.*[272] In other words, the Sunna of the Prophet in either form represents God's command.[273] Although obedience to the Prophet is tantamount to the obedience to God, from a number of verses and from the

268 Ibn Khaldun, *supra note*, 134: 347.

269 At least three Quranic verses speaks of the relationship and of a key role the Quran takes in it: "We have revealed to you the Book so that you may clarify to people what has been revealed for them, and that they may reflect." (16:44); "We have revealed to you the Books that you may clarify for them that they had disputed over, and as a guide and a mercy for true believers." (16:64); "We have revealed to you the Book that explains everything and which is a guide and a mercy and good news for those who surrender themselves to God." (16:89).

270 Taha Jabir Al-Alwani, *supra note*, 228: 18.

271 Mohammad Khazer Al-Majali, *supra note*, 86: 35

272 The Study Quran: A New Translation and Commentary, *supra note*, 95: 228. Regarding the relationship between God and the Messenger, see also such Quranic verses as 3:32, 132; 4:59; 8:1, 20, 46; 24:54; 33:33; 47:33; 49:14; 58:13; 64:12.

273 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 121.

Quran as a whole we see that with regard to the Quranic message, the Sunna of the Prophet takes a secondary place in the hierarchy of the sources of Islamic law.

The Quranic verse 4:59 states obedience to God, obedience to the Messenger and to those in authority. According to this verse, the Quran, the Sunna of the Prophet and human reason are those sources what enables scholars to find evidences to settle a case at hand. Truth, the Quranic text is written in general and rarely in concrete terms. The general manner of the Quranic language is to be treated as the fundamental tool and value on its own because it gives an opportunity for those in authority to interpret and to derive a fresh message and new principles according to the changing circumstances. The Quranic warning not to try to regulate everything in the express terms because an over-regulated society might lead to rigidity and far reaching restrictions is to be kept in mind here. General guidelines of the Quran are to help one to seek knowledge in the right path during which individual is personally responsible for his choices. Whereas the Sunna of the Prophet serves as the Quranic interpretation of the first-order which is very helpful in the task to grasp the message written in the Quran. Eventually, those in authority represent one more level of source to capture the essence of the divine message. On the whole, what was unregulated is meant to be regulated in accordance with the intention of God written in the Quran and interpreted by the Prophet; mutual consultation within the community of Muslims among the community members or the most knowledgeable among them; and ijtihad of the scholar jurists. It was left open for the scholar jurists, political rulers and community in general to respond adequately to the factor of change in the limits of general principals and specific rules of divine texts. Important to not oversee and to understand both the Quranic message according to which "We have neglected nothing in the Book"[274] and the significant role that reason must play side by side with the revelation.

The very idea of movement from the old static view to the dynamic view is inherited in the history of Islam and particularly in the Quranic message. Accordingly, the Prophet appeared to stand between the ancient and the modern world as the living interpreter of the divine message. More than correct was M. Iqbal by describing the ultimate position of the Prophet. In so far as the source of his revelation is concerned he belongs to the ancient world; in so far as the spirit of his revelation is concerned he belongs to the modern; in him life discovers other sources of knowledge suitable to its new direction.[275] The Sunna of the Prophet confirms, clarifies (4:12) and may consist of rulings on which the Quran is silent. After the demise of the Prophet, the function to make divine message suitable to the realities of living time passed to the people with knowledge. The Quranic part where its message is self-evident and specific cannot be changed. With some exceptions that will be elaborated in the following pages, this part of the Quran relates to the basics of belief, basic principles of morality and man's relations with God. The largest bulk of the text consists of broad principles and guidelines and all of them need a great deal of elaboration. Naturally, from the concept of the change inherited in the divine texts and from transformative experiences

274 Quran 6:38: "There is not a moving (living) creature on the earth, nor a bird that flies with its two wings, but are communities like you. We have neglected nothing in the Book, then unto their Lord they all shall be gathered."

275 Muhammad Iqbal, *supra note*, 53: 120.

of the Prophet, the claims of the present Muslim generation to reinterpret the foundational legal principles in the light of their own living conditions are perfectly justified. Muslims always find in its texts what addresses new issues and recent developments that continually unfold through the ages and which people in former times never expected to occur.[276] At the same time, if the law is to remain Islamic, any kind of reform cannot be justified solely on the ground of social necessities *per se*.[277] Juristic basis must be found in divine will written in the Quran and the Sunna of the Prophet. In the words of Y. al-Qaradawi, the Quran forms the constitution for the legislative body by laying down general principles and the Sunna deals with day-today affairs.[278] If, as was stated here, the texts of divine origins pursue the harmony between religious basic principles and the needs of change, then the responsibility to make law rigid or adaptable lies in the hands of humans, representatives of God after the life of the Prophet. Paradoxically, as in the following chapters will be clear, in all probability Islamic law was made dormant for a period of more than 6 centuries by those from the scholarly community.

The text of the Quran and the Sunna of the Prophet as the first interpretation of the divine message are to be considered as the essential parts of Sharia law. But these two sources hardly comprise the bare skeleton of Islamic legal system. This may be compared to the list of the most general and important *jus cogens* norms in the field of international law. In addition to the language of the divine texts, it is important to note the purposes or intentions of the text, its content and meaning. In the absence of textual language, Islamic law was able to flourish and remain adaptable in different times and places mainly due to the interpretation of the content and meaning of the divine message. Furthermore, the context or rather the contextual clue to the divine message and its first interpretation exercised by the Prophet is of paramount importance in the process of man's effort at defining God's law. Self-contradictory Islamic legal heritage may become more evident in a way of revealing all three elements: textual language, purposes or intents of it and the context within which revelation took place.

3.1.1. Quranic legislation

As Muslims believe, the Quranic message was revealed from God to the Prophet Muhammad through the angel Gabriel.[279] The message was revealed gradually, in separate stages over a period of about twenty three years. The whole Quranic message as well as the Quranic verses of legal quality is marked by the phenomenon of graduality.[280] The Quran

276 Yusuf Al-Qaradawi, *supra note*, 84: 36.

277 Noel J. Coulson, *supra note*, 31: 6-7.

278 Yusuf Al-Qaradawi, *supra note*, 84: 9.

279 According to the Quranic verse 16:30, the message was communicated in pure and clear Arabic language.

280 The verse 17:106 states that "It is a Quran which we have divided into parts in order that you might recite it to men at intervals. And we have revealed it by stages". The gradual manner of receiving the message is to be emphasized here.

was revealed in two distinct periods of time. Over twelve and a half years larger part of the Quran (eighty five chapters) was revealed in Mecca. The other part of the message (twenty nine chapters) was revealed after the Prophet's migration to Medina over nine and a half years. Al-Shatibi stated that the verses revealed in Mecca cover most of the universal principles, whereas those revealed at Medina are an elaboration and affirmation of such principles, thus, the revelation of the Medina verses was necessary after those revealed in Mecca.[281] The former period mostly relates to the devotional matters and introduction of the basics of religion. While the latter period marked the establishment of the umma of believers. As a result of this shift, the revelation in Medina was mainly concerned with social life of the new community of Muslims. The first part of the whole message concerns the relation between human beings and God and the second part turns attention to the inter-human relations within one community. With regard to the legal dimension of the Quranic message, universal principles of Islamic law were laid down in the Meccan phase of revelation, and what followed in the Medinese phase were either specific legal rules or supplements to the Meccan principles.[282] For instance, social relationship between Muslims and non-Muslims was necessary to be regulated as the territorial expansion was gradually increasing. Here, law gradually turned to the instrument of regulation, organization and social harmonization.

As we see, initially, the mission of the Quran was to provide the new faith and to stipulate new socio-cultural reforms. Certainly, just after the emergence of Islam, the new rules or, in general, the new religion had to undergo the transitional period. Here, the Prophet as a leader in spiritual, social and legal areas had to balance the conflicting expectations of the new Quranic provisions and the old but still very alive customary and tribal rules of society. As was argued by N. Coulson, the whole social picture of relations led at times to a restrictive interpretation of the Quran.[283] Less reformist effect paved the way to the new social order whereby Islamic social vision written in the Quran was fulfilled. Thus, divine message written in Quran underwent the transitional period throughout the first part of the formative stage of Islamic law till it became the main source of new direction. Until the emergence of the theory of sources (usul al-fiqh) in the ninth century whereby the tendency of disintegration of Islamic law was almost suppressed, the qadis preferred to give judgments based on the personal opinion, local customary practices or decisions of political rulers. The Quranic legislation was one of the sources taken into consideration and its interpretations varied dramatically. Only after the emergence of the theory of sources, the methodology of how to derive legal rulings and the place in the hierarchy of sources of the Quran was finally established. Generally speaking, the theory of sources simply reflected the order of Islamic legal sources that is expressly revealed in the Quranic verse 4:59 whereby the Quran receives the highest rank. Additionally, the Sunna of the Prophet and human reason of those in authority are enumerated. What does this mean for the process of legal construction? On the one hand, all law somehow stems from the Quran,

281 Imran Ahsan Khan Nyazee, *The Introduction*. In Abu Ishaq al-Shatibi, *The Reconciliation of the Fundamentals of Islamic Law.* Volume I (Reading: Garnet Publishing Limited, 2011), Xxi.

282 Wael B. Hallaq, *supra note*, 42: 190.

283 Noel J. Coulson, *supra note*, 31: 58.

thus, it would be a grave mistake to overlook the influence of the Quran in the creation of the Islamic legal system.[284] However, on the other hand, the Quran does not specify law as is found in traditional Islamic legal manuals but rather contains instructions and various evidences from which legal rulings can be deduced.

The whole Quranic message including its legal dimension is to be perceived as reconciling two, at first glance, unrelated concepts of permanence and change. Permanence lies in the very authority of the Quran and its fundamental principles of immutable nature that are related to religious pillars of Islam, the key concepts of family life, of moral nature of the umma and so forth. Whereas change is guaranteed by the Quranic text in three ways. First, the very textual message highlights the significance of the factor of change. For instance, the Quranic words "…God alters not what is in a people until they alter what is in themselves…"[285] might mean that God will not alter the positive or negative circumstances of people until they themselves bring about changes in their actions and lives. Second, ambiguity of the Quranic instructions requires to be interpreted and explained. This is obvious at least from the verse 3:7 which speaks of clear and ambiguous Quranic verses.[286] Here, the Quran indicates that interpretation (explanation) is the act of taking something whose meaning is either unclear, ambiguous, symbolic, allegorical, or metaphorical and returning it to its true meaning. As pointed out by R. Doi, this verse gives us an important clue to the interpretation of the Quran because it seems pretty clear that the Quran has two systems of meanings: the clear or definitive judgments and those open to interpretation.[287] Moreover, broadness of the Quranic principles acts as an awakener of human thought. Dynamic outlook to the life is rooted in such kind of the Quranic language which remains open to various interpretations. As a result, each generation permitted to solve their own problems. Third, the ijtihad as the very principle of movement of Islam written in the Quranic message provides ground for the reinterpretation of the general Quranic instructions in the light of fresh circumstances on the ground. The circumstances, the contexts are changing, the views and opinions of people also can change and what prevails today may be rejected in the future. The inherently continuous nature of ijtihad according to which life is a process of progressive creation makes meaningless discussion on the finality of the Quranic message.[288] To sum up, it may be said that immutability as the Quranic feature serves mainly as a safeguard of five pillars of Islam. Regarding legal injunctions aimed at regulating inter-human relations, they are mainly conveyed in a language that is open to interpretation. The divine will must be interpreted and explained in order to enable ordinary Muslims to follow the right path of God.

284 Abdullahi Ahmed An-Na'im, *supra note*, 56: 20.

285 The Quran (13:11): "For him there are attendant angels to his front and to his rear, guarding him by God's Command. Truly God alters not what is in a people until they alter what is in themselves. And when God desires evil for a people, there is no repelling it; and apart from Him they have no protector."

286 The Quran (3:7): "It is he who sent down to you the Book. In it are verses that are entirely clear, they are the foundations of the Book; and others not entirely clear."

287 Abdur Rahman I. Doi, *supra note*, 178: 63.

288 Muhammad Iqbal, *supra note*, 53: 159.

The discussion on the Quranic openness to the change emanates not only from the very text but also from its link to what was happening on the ground. Here, the role played by the Prophet, later, his Companions and eventually scholarly community in the interpretation of the Quran is undisputable. For Muslims, the first who had a responsibility to 'translate' a new message to the society whose hearts and minds were in favour of the ancient world order was the Prophet Muhammad. He was the main figure interpreting the Quranic message in the light of new social circumstances in Medina. At least from one change established by the Prophet we might see the adaptability of Islamic law in the light of the social transformations. Some prescriptions followed by Muhammad's time had been temporary and superseded by more permanent ones, for example, turning towards Jerusalem in worship had been superseded by turning towards the Ka'bah in Mecca.[289] This change established by the Prophet proves that the Quran can hardly be seen rigid and immutable divine source.

After the demise of the Prophet, the further process of development was to be guaranteed by the Companions and, eventually, by the scholarly community through the ijtihadic activities. Without this concept, the conflict even between different exegeses of the Quranic passages was inevitable.[290] The members of the scholarly community who were under the obligation set by the Quran[291] to exercise ijtihad were the mediators between stability and change, between old rules and new ways of life. For ijtihad to be fully exercised, the environment of complete freedom of thought and expression was necessary.[292] The main task was to liberate the mind and to overcome all the constraints of the past and present.[293] To achieve this, there was a need to seek knowledge according to the message of the Quran.[294] As clearly pointed out by M. Kamali, all the non-revealed sources of Islamic law are an embodiment of the single Quranic phenomenon of ijtihad.[295]

If to discuss the concept of ijtihad, one might wonder about the number of verses of legal quality in the text of the Quran as the ground for the process of extrapolation of legal

289 Marshall G. S. Hodgson, *supra note*, 159: 334.

290 John Burton, *supra note*, 37: 208.

291 The Quranic verse 4:59 states: "Obey God, obey the Prophet and those in authority". True that the verse 33:21 invites to follow the Prophet's example. However, after the demise of the Prophet, only people of knowledge had a right to explain and interpret the sources. The Quranic verse 16:44 encourages to as those who know the scripture. The verse 16:45 adds that the Quran can be clarified and explained clearly to mankind. The Quranic verse 16:78 states the following: "God brought you forth from you mothers' wombs when you knew nothing; and then He gave you hearing and sight and intelligence." All this and especially ambiguous part of the Quran can become clear just through the knowledgeable people.

292 Taha Jabir Al-Alwani, *supra note*, 55: 67.

293 The Quranic verse 2:170: "When it is said to them: "Follow what God has revealed," they say: "On the contrary, we shall follow the ways of our fathers." What? Even though their fathers were devoid of wisdom and guidance?"; The Quranic verse 43:23: "In the same way, We never sent a warner before you to any people except that the wealthy ones among them said: "We found our fathers following a certain religion: and certainly we shall follow in their footsteps."; The Quranic verse 33:67: "O God! We obeyed our chiefs and our great ones, and they led us astray from the right path."

294 The Quranic verse 6:90: "Those were the ones who received God's guidance; so follow the guidance they received."

295 Mohammad Hashim Kamali, *supra note*, 43: 267.

rules. The Quran embraces approximately 500 verses out of over 6200 which directly or indirectly are related to the subject of law. As W. Hallaq pointed out, the Quran contains no less legal material than does the Torah, which commonly known as the law.[296] The verses of legal nature represent a larger weight than the number may indicate.[297] It is common feature of repetitiveness in the Quran, but this tendency of repetition is absent in the legal subject matter. Besides, the average length of the legal verses is twice or even thrice than of the non-legal verses. Despite this and that the other Islamic legal sources receive their status and authority from the Quranic text, it is not accurate to describe the whole Islamic law as Quranic. It contains relatively little legal material which very often conveys legal rulings just if it used in tandem with Sunna of the Prophet. It is truth that, according to Islamic legal theory, no law that was formulated independently of the foundational texts of the Quran and the Sunna of the Prophet could be regarded as God's law. It is also agreed that in the boundaries of the clear and ambiguous text of the Quran, the whole body of Islamic legal rules is to be produced. However, it would be too simplistic approach toward Islamic law to equate it with the Quran as the only one, albeit the most significant, source. All the other sources are explanatory to the Quran and this mind perfectly captures the link which is very similar to that between Constitution and the statutory law in Western states. To sum up, the major juristic traditions of Islam deny that the Quran is an all-sufficient guide and demonstrate the support for the other sources and methods whereby Islamic law may be constructed and interpreted according to the changing time.

What the jurist has to take into account during the process of derivation of legal rules from the Sharia? The qualified jurist can fulfil his duty through the search of evidences in the sources of Islamic law starting from the Quranic text. The verse 16:89 states clearly: "We have sent down to you the Book as an exposition of everything". All agree that the text of the Quran is of certain authenticity and this feature distinguishes Quran from the other sources. The jurist must resort to the Sunna of the Prophet, the second source of Islamic law, only when he fails to find legal ruling in the Quran. It is to be noted that a majority of legal verses are not self-evident, thus, requires further interpretation. Talking about the clarity of the verses in Quran, the author of al-Risala mentioned that one should be aware not only of expressed words of the Quran but also meaning implied in those words.[298] This reflects the very message of the Quran which in one instance (16:44) states that: "We have sent down to you Quran, that you may explain clearly to men what is sent down to them, and that they may give thought". In the other instance (3:7) ambiguity of

296 Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 21.

297 Muslim jurists have differed over the precise number of legal verses in the text of the Quran, due mainly to their differential approaches to the subject. According to M. H. Kamali, some jurists were inclined to increase the number as they often extracted a legal ruling from a historical passage, or even a parable in the Quran, whereas others counted a lesser number as they looked for legal verses mainly in a legal context. Differences over the rules of interpretation among jurists also explain some of their different conclusions. Similar differences obtain, even more widely with regard to the hadith which resulted in different accounts of the legal hadiths given by the scholars of hadith, whereas some put the total number of legal hadith at 3000, others have reduced this number to 1200 hadiths.

298 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 94.

the Quranic verses is evidently acknowledged. Later, al-Shatibi paid most of his attention to that part of the Quranic message which is implied in the purposes of God. Important to take into consideration evolutionary process with regard to the discussion on the Quranic legislation. Al-Shafii in the ninth century concentrated attention to the textual ground. The attention was concentrated on the separate words, sentences, verses or chapters. By acknowledging that the Quran and Sunna of the Prophet contain two kind of meanings, literal and implied,[299] the text ceased to remain a sole target of the scholar jurist. Alongside pure literalism, a tool of analogical reasoning was incorporated into the whole schema of the theory of sources. Whereas al-Shatibi, a scholar of the fourteenth century, by mapping out five purposes of the Sharia, affirmed that the spirit of Islamic law as well as its literal expression is of equal status and both should be the objects of the Quranic interpretation if one wish to derive legal rules in the changing time.

We have already described the phenomenon of graduality in Quranic legislation, we have also emphasized the fact that the Quran was revealed in Arabic language, that the question of ambiguity of language in legal verses in a course of history was suggested to be settled in different ways, eventually, that the permanence and change are enshrined in the Quranic message and that the concept of ijtihad here plays exclusively important role. In the discussion below, we should talk on one more significant characteristic feature of Quranic legislation, namely, its division into definitive (qat'i) and speculative (zanni) text. As stated by M. Kamali, a definitive text is one which is clear and specific; it has only one meaning and admits of no other interpretations.[300] Whereas the speculative verse of the Quran is open to human legal reasoning and interpretation.

The rulings of Quran that deal with the essentials of the faith such as fasting or prayer are definitive. Also, those injunctions of the text which prescribe penalties and specify exact shares in the case of inheritance are clear. For instance, the command to give orphans their property is of definitive manner: "Give orphans their property, and exchange not the bad for the good, nor consume their property with your own. Truly that would be a great sin". The verse 4:2 requires the guardians to maintain the orphans' property until the children who lost their fathers or both parents reach maturity. However the verse which speaks of the age of maturity or the meaning of a sound judgment that the guardian of the orphan should give is to be treated as open to interpretation.[301] Not without reason the opinions of scholars and even Sunni schools of fiqh differ on these issues. Some have said that the age of maturity should be the age at which one is considered morally responsible, from the point of others that it is a simple biological puberty. One more example of definitive textual injunction is related to the entitlement of the husband in the estate of his deceased wife.

299 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 289.

300 Mohammad Hashim Kamali, *supra note*, 43: 21.

301 The Quranic verse 4:6: "And test the orphans until they reach the age of maturity; then if you perceive in them sound judgment, deliver unto them their property, and consume it not wastefully and in haste before they come of age. Whosoever is rich should abstain, but whosoever is poor should partake thereof in a honorable way. And when you deliver unto them their property, bring witnesses on their behalf, and God suffices as a Reckoner."

The Quranic verse 4:12 states: "In what your wives leave, your share is a half, if they leave no child". This text is clear and requires no interpretation.

The speculative text is not self-evident, thus, is open to interpretation. As is evident from the previous chapter, the Quranic text may be clarified by other sources or even by the Quran itself, whether by a specific verse or by taking into account the Quran as a whole. When the Quran itself explains one or other Quranic verse, any further interpretation becomes unnecessary. Particularly important to realize that the very Quranic text may appear in contradiction. To deal with it, the Quranic text (2:106) gives a key: "Whatever a verse do we abrogate or cause to be forgotten, we bring a better one or similar to it. Know you not that God is able to do all things?" The majority of scholars find here the theory of abrogation or naskh. Because the concept will be explored in the Chapter Five at a greater length, suffice here to say that naskh refers to the replacement of one legal ruling by another one that is instituted or revealed later in time, in which case the original case remains in the Quran, but is no longer binding as a matter of law or practice.[302] Apparently, to have ability to distinguish between definitive and speculative text of the Quran is inseparable from the knowledge of the theory of abrogation. The scholar jurist who wished to embark on human legal reasoning was required to understand the essence of the theory of abrogation.

With regard to speculative Quranic verses, it is worth mentioning the verse 5:33[303]. The verse contains one of the five Quranic hudud punishments – that is, divinely ordained capital or corporal punishments – to be carried out by the state against those convicted of crimes considered to undermine the moral fabric of the Islamic community as a whole, including murderers, thieves, adulterers, slanders and here, those who wage war against God and his Messenger.[304] This phrase related to the crimes by which the members of Islamic community are attacked and terrorized. These crimes covered under this hudud punishment are referred to collectively as hirabah and consists of armed robbery, assault, and murder, particularly of innocent travellers along the road. The emphasis should put in the mentioned verse on the words: "to be banished from the earth". Banishment in this verse can mean exile from the place the offence is committed and this is the meaning which is adopted by the majority of ulema. However, the Hanafi ulemas state that the phrase means imprisonment, not exile. According to them, here the literal approach is inappropriate as the banishment form the face of the earth is achievable through the penalty of death and here the killing as the punishment is already mentioned in the verse.[305] One more example could be the verse 17:33, according to which: "And he who kills wrongfully, we have given power to his heirs". Clearly, the term "power" here is not clear and open to interpretation.

302 The Study Quran: A New Translation and Commentary, *supra note*, 95: 49.

303 The Quranic verse 5:33: "Verily the recompense of those who wage war against God and his Messenger, and endeavor to work corruption upon the earth is that they be killed or crucified, or have their hands and feet cut off from opposite sides, or be banished from the land. This is their disgrace in this world, and in the Hereafter theirs shall be a great punishment."

304 The Study Quran: A New Translation and Commentary, *supra note*, 95: 292.

305 Mohammad Hashim Kamali, *supra note*, 43: 22-23.

The Quranic injunctions may also possess a definitive and a speculative meaning. The example could be the verse which relates to the polygamy.[306] The number of wives cannot exceed four and this is precisely clear and definitive statement. All commentators are explicit that this verse limits the more excessive practices of polygamy common in pre-Islamic Arabia by setting four as the maximum number of wives a man can have at one time. What regard to the meaning to deal with wives justly, it has more than one or two interpretations among scholars. In all probability, it means treating wives equitably. Paradoxically, the very text of Quran is extremely doubtful about the possibility to remain fair to all wives.[307] To sum up, the text of the Quran is to the large extent open to interpretation and human reasoning in this respect is encouraged. Just after the consensus on the interpretative verse is made or the Muslims state selects one of the various interpretations for purposes of enforcement is becomes obligatory. Till it happens, those who are qualified to exercise ijtihad are free to do it.

There are also specific and general, absolute and qualified, literal and metaphorical verses in the text of the Quran. All these are complementary to either definitive or speculative verses. In addition to the text, the scholar jurists were encouraged to work with the objectives of the Sharia which are written in the Quranic content. This is due partly to a certain shortfall of the legal theory of usul al-fiqh which has shown signs of rigidity and has failed in some ways to provide a workable methodology for contemporary law-making and ijtihad.[308] Thus, the focus from words and sentences was gradually turned on the goals and purposes of the text. The early part of the Quranic revelation for al-Shatibi was the most essential in this regard. The Meccan verses embody the general message of Islam in which the universal sources of law were laid down, and the whole this part of the message is of certain, thus, immutable quality. If to follow the line of argumentation of al-Shatibi, the very purposes of the Quran first of all emanate from the early part of the Quran. Meanwhile, the Medinan verses and the Sunna of the Prophet constitute the particulars which in the essence are probable and are subject to change.[309]

As was noted by al-Shatibi, five higher objectives of the Sharia are the most important in human life and in the content of divine sources. Induction to al-Shatibi was one of the most important methods to identify these objectives. As there is no specific textual ground in the sources, the conclusion that God intended to preserve and to protect the objectives was based on induction. Texts are to establish and to protect those five values which are religion, life, family life, intellect and wealth. Here, we may take but several examples. Protecting the religion means, for instance, to safeguard freedom of belief what is stated in the verse 2:256. By defending the right of ownership the right to property is protected.

306 The Quranic verse 4:3: "If you fear that you will not deal fairly with the orphans, then marry such women as seem good to you, two, three, or four; but if you fear that you will not deal justly, then only one, or those whom your right hands possess. Thus it is more likely that you will not commit injustice."

307 The Quran 4:129: "You will not be able to deal fairly between women, even if it is your ardent desire, but do not turn away from altogether, so that you leave her as if suspended."

308 Mohammad Hashim Kamali, *supra note*, 210: 123.

309 Felicitas Opwis, *Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Legal Theory* In *Shari'a: Islamic Law in the Contemporary Context*. Edited by Abbas Amanat and Frank Griffel (Stanford: Stanford University Press, 2007), 69.

How? For example, the fundamental Quranic statement here would be "O you who believe! Fulfil faithfully all your contracts" (5:1). Also, "Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent" (4:29). The verse 2:282 states: "And take witnesses when you buy and sell between yourselves". In addition, the verse 4:4 states unquestionable status of dower which might be necessary for the requirements of women in case of divorce: "And give women (that you marry) their dower as a free gift". One more verse (4:58) speaking of the right to property is directed to all those who hold a "trust" of any kind, including deposits as well as borrowed or found things: "God commands you to return trusts to their rightful owners and, if you judge between men, to do so with justice". All in all, we see that knowledge on the text of the Quran and ability to work with its content which reflects the higher objectives of the Sharia enable scholar jurists to take into consideration much of the Quranic legislation.

In legal terms the Quran touches both the private and public law issues. With regard to constitutional law, the Quran limits itself to specifying the principles of consultation, justice and equity. Consultation or shura in the Quran is mentioned several times. The verse 2:233 speaks of the matter of collective family decision regarding weaning the child from the mother's milk. Next in the row is the verse 42:38 which states that shura is praiseworthy life style of a successful believer. Eventually, the verse 3:159 orders the Prophet to consult with believers. The latter verse is the most significant because it advices on how mercy, forgiveness and mutual consultation can win over people. As is stated in the dictionary of Islam the term justice (adl) in the meaning of appointing what is just; equalizing; making of the same weight or ransom occurs twelve times in the Quran.[310] As an example the verse 16:76 may be given here: "God sets forth a parable: two men, one of whom is dumb, with power over naught, who is a burden to his master; wheresoever he dispatches him, he brings no good. Is he equal to one who enjoins justice, and who is on a straight path?" All these general principles are laid down and it is for the community and its leaders to elaborate them in the light of prevailing conditions.[311]

With regard to criminal law, the Quran stipulates five punishments, for the crimes of murder, theft, adultery and fornication, the open robbery and rebellion. In addition to this, some verses provides broad principles of criminal law that we may explore here. The verse 42:40 states: "The recompense of an evil is an evil like unto it. Yet whosoever pardons and sets matters aright, his reward is with God. Truly he loves not the wrongdoers." Accordingly, people are only punished for their bad deeds in a measure that is equal to the sins they have committed, and they are rewarded greater for good deeds. This is also mentioned in such verses as 40:40, 28:84, and 6:160. As stated in the commentary of the Quran, in the present context, it refers to the bounds within which justice can be pursued when defending against those who are tyrannical or when seeking retribution after an offence.[312] In all probability, the term "evil" here refers to physical harm, cursing another, or insulting another. In combination to this, we may take into account two other verses (24:22

310 Thomas P. Hughes, *Dictionary of Islam*. First published in 1885 (New Delhi: Munshiram Manoharlal Publishers Pvt. Ltd, 1995), 10.

311 Mohammad Hashim Kamali, *supra note*, 210: 51.

312 The Study Quran: A New Translation and Commentary, *supra note*, 95: 1184.

and 5:39) that concerns the act of pardoning as the form of retribution. If a crime is a minor and the offender acknowledges the error in his act and seeks forgiveness, than pardoning is preferable as it is stated in the verse 24:22: "And let them pardon and forbear. Do you not desire that God forgive you?" With regard to the retribution for the wrongdoing of individual the acts of whom harmed the society but they repent after the crime which caused not mortal consequences, then seeking retribution is preferable in the terms of the verse 5:39 which says: "But whosoever repents after his crime ad does righteous good deeds, then verily, God will pardon him by accepting his repentance."

The Quran also speaks of the importance of contracts. The fundamental principal of civil law *pacta sunt servanda* might be found in the verse 5:1 according to which one is obliged to fulfil contracts. An example of the Quranic regulation on the contracts is the verse 2:282 which stipulates that loan transactions should be documented in written form. A huge number of legal verses are devoted to the questions of inheritance, marriage and divorce, adoption and custody, eventually, of peace and war. These are mainly related to the concept of jihad on which we will talk in the Chapter Five. Of course, there are matters about which the Quran remains silent, and this silence on the part of the lawgiver is deliberate. It is meant to leave more room for manoeuvre and choice to the interpreters of the Quran on the ground. It is even stated that the work to interpret the foundational texts was part of the divine plan.[313] The first interpreter of the Quranic message was the Prophet Muhammad and his Sunna remained the second after the Quran in the hierarchy of legal sources.

If to take but one contemporary issue which is explained in the verses of the Quran, the concept of mahr (dower) is very suitable example. As divorce among Muslims is a problem which is at increase, the question of mahr becomes also very popular. The most common statement of Muslim men is that women must return the whole mahr that was paid as the condition of the Islamic marriage. However, such statement makes no sense in terms of the Quran as a whole and concrete Quranic verses. From the point of the Quran, mahr is devoted to woman as a gift and is her personal property. This is obvious from a number of the Quranic verses, for instance: 4:4; 4:19; 4:20; 4:24; 60:10; 60:11. As more on the subject of mahr we will talk in Chapter Six, here it is necessary to understand that it is not only the question of mahr, but rather, the complementary principle of the concept of woman's wealth in Islam. The General Fatwa Department issued legal opinion (fatwa) when the question regarding husband's right to wife's salary to cover household expenses was received: "Under Islam, a woman has the right to do what she likes with her money and property; therefore, a husband has no right to claim her salary except with her approval. Not only this, but he is also obliged to spend on her, and she is entitled to this provision more than his parents, even if they were poor. Allah said: "Men are the protectors and maintainers of women, because God has given one more strength than the other, and because they support them from their means" (4:34). Accordingly, the husband can neither dispose of wife's salary, nor spend any of it on household expenses except with her approval."[314]

313 Bernard G. Weiss, *The Spirit of Islamic Law* (Georgia: The University of Georgia Press, 1998), 89.

314 The fatwa No. 3269 on the subject "Husband's Control of Wife's Salary". More information on this issue is available at: www.aliftaa.jo (last visited January 28, 2017).

3.1.2. The Sunna of the Prophet

To view both the Quran and the Sunna of the Prophet as twin sources does not mean to deny the status of Sunna as an independent source. The Quran clearly states the function of Sunna in the verse 16:44: "We have sent down to you the Remembrance so that you may explain to the people what has been revealed to them". It is obligatory to follow the explanation of the divine message because, as stated al-Shafii, God imposed the obligation upon his creatures to obey his apostle.[315] Overall, Sunna of the Prophet fulfils at least three functions with regard to the Quran. The largest bulk of Sunna confirms Quranic message and this part of Sunna is to be treated as integral part to the Quran. The fact that the Prophet followed the commands of God is evidence that his Sunna conforms and represents a parallel to the Quran.[316] Also, Sunna may clarify the ambiguous terms of the Quran, qualify its absolute statements, or specify the general guidelines of the Quran. In other words, the additional details explaining the Quranic principles may be added. As the example may be taken the Quranic verse 5:3: "Forbidden unto you for food is carrion". The Prophetic hadith allowing the consumption of dead fish clarifies the Quran. For M. Kamali, the Sunna which confirms and clarifies Quranic message may not be regarded as independent source of Islamic law.[317] Eventually, the Sunna of the Prophet which consists of rulings on which the Quran is silent in the eyes of a majority of scholars is independent source of law in Islam. It should not be regarded as departure from the Quran to ground one or another law on the Sunna when the Quran is silent. Rather, in the matter on which Quran is silent, the Sunna plays exceptional role because the Prophet, according to Muslim belief, was the first who had to grasp divine intent.

The role of the Prophet Mohammad as the first interpreter of the Quran as in the beginning of Islam so for Muslims today is of crucial importance to understand the Quranic message, especially, when Quran lacks relevant provision. God revealed his final law to govern all aspects of human life to the Prophet Muhammad and this revelation took form as Quran. While there is no doubt that the Quran is the foundation of the whole life of Muslims, not less important is the personality of Muhammad that is a model par excellence to follow.[318] The Quran (33:21) speaks for itself in the verse regarding the Prophet as example: "Indeed, you have in the Messenger of God a beautiful example for those who hope for God and the Last Day". The Prophet's divine mission for humanity involves the laws that organize life of the individual, family, community, nation and relations among countries.[319] As we see, a great number of the Quranic verses states obligatory obedience to the Prophet what means that the example of the Prophet's life becomes a secondary revelation. For instance, the Quranic verses 3:132 and 4:80 expressly say: "And obey God and the Messenger, that haply you may receive mercy" and "Whosoever obeys the Messenger obeys God". It is apparent

315 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 116.

316 Wael B. Hallaq, *supra* note, 42: 24.

317 Mohammad Hashim Kamali, *supra note*, 43: 62.

318 Samir Khalil Samir, *Islam en Occident* (Saint-Maurice: Editions Saint- Augustin, 2009), 44.

319 Yusuf Al-Qaradawi, supra note, 84: XIII.

from at least these two, that the Quran and the Sunna of the Prophet are regarded by Muslims as emanating from God, thus, they are of divine origins. The provisions written in both the Quran and the Sunna that are certain, are equally obligatory for the Muslims. The Quran acknowledges it by saying that "When God and His Apostle have decreed a certain matter, it is not for a believing man or a woman to have a choice in a matter affecting him". With regard to the scholarly community, al-Shafii said that it is the duty of those who have legal knowledge never to express an opinion unless it is based on certainty.[320]

There are some terms which are closely related to the concept of the Sunna of the Prophet. The scholars use such words as sunna, the Sunna of the Prophet and hadith (plural form of the word ahadith). The very word sunna means precedent and custom. This was pre-Islamic term according to which is was customary to follow the sunna of the local leader. Whereas the Sunna of the Prophet is the actual embodiment of the will of God in the form of Muhammad's deeds.[321] By the majority of scholars the Sunna of the Prophet as the exemplary model is subdivided into four types: things which the Prophet said; things which the Prophet did; things which the Prophet affirmed in others; things which the Prophet avoided doing. Hadith literally means a piece of news, a tale, a story or a report relating to a present or past event. Technically, hadith is authentic report of the words and deeds, approval and disapproval of the Prophet. All authentic ahadith were compiled in the manuals and two most reliable of them are explored in our study.

How the terms "sunna", "the Sunna of the Prophet" and "hadith" are related? Quranic law could not replace pre-Islamic customs and many people did not become Muslims at once. The transitional process from local customary practices to an exclusive reliance on Muhammad's precedent as a source of law[322] was inevitably gradual and had not occurred over a day. The Prophet had to balance the new Quranic regulations and the standards of customary law on the ground. Then, after the death of Muhammad, the Sunna of the Prophet had to be gradually detached from the sunna in the sense of traditions of an individual Muslim leaders or community in general and eventually it had to become the authoritative source of law placed in the hierarchy of sources just after the Quran. The rising tendency to delineate and to fix in written form of hadith what was considered to be the text of the Sunna of the Prophet was of particular importance. More precisely, the search of the authentic traditions of the Prophet turned to be the main activity of the time of the formative period of Islamic law. Why? The fabrication of Sunna was the persuasive reason to make compilations of the authentic hadith of the Prophet. Paradoxically, by discouraging documentation of his own sayings and Sunna at the early stages of Prophet's mission in order to preserve the purity of the Quran and prevent the possibility of confusion between the Quran and his Sunna, the Prophet made it possible to emerge on the ground for the fabricated traditions. The scholars are unanimous on the occurrence of extensive forgery in the hadith literature.[323] According to W. Hallaq, with the rapid proliferation of the

320 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 80.

321 *Sahih Muslim*, Volume I. Rendered into English by Abdul Hamid Siddiqi (New Delhi: Kitab Bhavan, 1971), ix.

322 Jonathan Brown, *supra note*, 39: 33

323 John Burton, *supra note*, 37: 14.

Prophetic reports during the course of the eighth century, significant differences between hadith and the Prophetic Sunna frequently became apparent – especially to those living in the Prophet's homeland.[324] Malik b. Anas was sure that primary source of normative Sunna was both the actions of knowledgeable men from Medina and the practice of the Prophet in the city of Medina. This is why his famous Muwatta is a mixture of Prophetic ahadith, the rulings of his Companions, the practice of the scholars of Medina and the opinions of Malik himself. As pointed out by John Burton, eventually al-Shafii offered a completely fresh way of expressing the uniqueness of the Prophet-figure.[325] For him, the Prophetic Sunna could be determined only through formal and authentic hadith. Those reports that were delivered by a number of transmitters, without any rupture of continuity are called recurrent reports and have the status of certainty. By explaining a clear distinction between interrupted and well-authenticated traditions, al-Shafii noted an obligation to accept well-authenticated traditions.[326] The only mean to combat such practices was to compile the so-called authentic collections of hadith.

It is also significant to highlight that the very Quranic text (49:6[327]) expressly introduces the method of historical criticism towards the reports which must be verified in terms of its reliability. How was the solution reached with regard to the method to identify the truly Prophetic reports and those fabricated? Al-Shafii stated that the authority and reputation of the transmitter is to be regarded as ultimate factor when one seeks to choose between two traditions of the Prophet.[328] A hadith as such contains two parts: normative statement and then, as proof of legitimacy, the detail or chain of the tradition which it has followed. Example of the structure of the hadith would be as such: A said, 'B narrated that, "C said that D said… until it came to the last link after which there followed the very text of hadith, 'The Prophet said…'. The chain of reporters is a canal whereby the story reaches the last transmitter and the very text of report.[329] The trustworthiness of those through whom the hadith is transmitted can be reliably judged with the help of a science which critically scrutinizes the lives of the narrators of the ahadith.[330] The very content of the Sunna lies in traditions, statements which have been passed on or transmitted in a continuous and reliable chain of communication from the Prophet to present Muslim scholars. Thus, from generation to generation the reports about the Prophet's sayings and acts were transmitted

---

324 Wael B. Hallaq, *supra note*, 296: 105.

325 John Burton, *supra note*, 37: 14.

326 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 284.

327 Quran 49:6: "If a liar – evil person comes to you with any news, verify it, lest you should harm people in ignorance, and afterwards you become regretful for what you have done."

328 "If there is no relevant text in the Book, we shall choose the more reliable of the 2 traditions, the one related by an authority better known as an expert in transmission and who has a greater reputation for knowledge, or better memory." More: Al-Imam Muhammad ibn Idris al-Shafii, Al-Risala: Treatise on the Foundations of Islamic Jurisprudence. Translated by Majid Khadduri. Cambridge: The Islamic Texts Society, 1997. P. 217-222.

329 Sami Aaldeeb Abu-Sahlieh, *Introduction a la societe musulman: fondements, sources et principles* (Paris: Eyrolles, 2006), 109.

330 *Sahih Muslim*, Volume I. Renderred into English by Abdul Hamid Siddiqi (New Delhi: Kitab Bhavan, 1971), iv.

over the time and this, according to Sunni Muslims, proved irrefutable authority of Sunna of the Prophet as the second source of Islamic law.

If the Quranic text is not subject to the test of transmission, because the mode of its transmission in the Muslim community excludes the possibility of any doubt or error, the reports of the Prophet are subject to such test. The collections of the Prophetic traditions were compiled after testing them. Gradually, six collections of hadiths, made in the later part of the ninth century, succeeded in gaining general approval that later generations accepted as the six canonical collections. These six major collections of reports were eventually accepted among Sunnis as canonical. The six books were treated as the different attempts to delineate in written form what was, at that time, considered to be the text of the Sunna.[331] The most reliable of books on hadith were the two Sahihs of al-Bukhari and al-Muslim. According to J. Brown, after the Quran, the books of these two scholars are the most venerated book in Sunni Islam.[332] Al-Bukhari's and Muslim's remarkable contribution came with their decision to compile books devoted only to ahadith they considered authentic and sound (sahih). A Sahih hadith basically means that it consists of words that the Prophet has truly said, and if it described an action of the Prophet or a tacit approval on his part, that he actually did what is reported. That means to prove the authenticity of a hadith is thus largely a question of establishing that it has been accurately and reliably transmitted and recorded.[333] The ahadith which are recognized as absolutely authentic are included in the two compilations of al-Bukhari and of Muslim[334] because it was felt the reports they contained were sifted by the most careful test of genuineness.[335] Our study of the Sunna of the Prophet as the source of Islamic law is namely based on the hadith collections of al-Bukhari and al-Muslim. The traditions that are reported by the six imams of hadiths, namely, al-Bukhari, Muslim, Abu Dawud, al-Nasa'i, al-Tirmidhi, and Ibn Majah, takes priority over those ahadith which might have been reported only by some and not all of these authorities. Among ahadith which are not reported by all the six authorities, those which are reported by al-Bukhari and Muslim are preferred. If one of conflicting hadith is reported by al-Bukhari and the other by Muslim, the former is preferred by the latter.

The ability of al-Bukhari's and Muslim's collections to serve as an acknowledged convention for discussing the Prophet's authenticated legacy would serve three important needs in Sunni legal culture of the eleventh century. Firstly, as the division between different schools of law became more defined, scholars from the competing Shafii, Hanbali and Maliki schools began employing these two collections as a measure of authenticity in debates. Later on, even Hanafi School could not avoid adopting this convention. Secondly, with the increased division of labour between jurists and hadith scholars in the eleventh

331 Brannon M. Wheeler, *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship* (Albany: State University of New York Press, 1996), 2.

332 Jonathan Brown, *supra note*, 39: 5.

333 Mohammad Hashim Kamali, *supra note,* 35: 181.

334 *Sahih Muslim*, Volume I. Rendered into English by Abdul Hamid Siddiqi (New Delhi: Kitab Bhavan, 1971), v.

335 Marshall G. S. Hodgson, *supra note*, 159: 332.

century, the two collections of hadiths also became an indispensable authoritative reference for jurists who lacked expertise in hadith evaluation. Thirdly, al-Bukhari's and Muslim's works served as standards of excellence that shaped the science of hadith criticism as scholars from the eleventh to the thirteenth century sought to systematize the study of the Prophet's word.[336]

The majority of Muslim scholars agree on the classification of the Prophetic traditions into the continuous and discontinued hadith. The discontinued hadith is a report whose chain of transmitters does not extend all the way back to the Prophet and this is why this type of hadith does not possess binding force. Our attention here is to be paid mainly to the continuous hadith. The continuous hadith may be recurrent, well-known and solitary. There are some conditions for the report to be named recurrent hadith. Firstly, the number of reporters in every period or generation must be large enough to preclude any kind of fabrication. By no means, the exact number is required to fulfil this condition. Rather, the knowledge and the trustworthiness of reporters is the main factor. Secondly, the reporters must base their reports on sense perception. Report must be based on certain knowledge. Thirdly, the reporters must have positive reputation. The fourth condition is that the reporter cannot be associated with one another through political line. These conditions are prevailing among the majority of Muslim scholars. Undoubtedly, there are more conditions according to one or another fiqh doctrine. All in all, the authority of recurrent is equivalent to that of the Quran.[337] Besides the recurrent hadith, the scholars enumerate well-known hadith. The hadith may be called well-known if it is originally reported by one, two or more Companions from the Prophet or from another Companion but has later become well-known and transmitted by a number of people. Widely known such hadith became during the period of Companions or their successors. To Hanafis, the well-known hadith may qualify or confirm what is stated in the Quran. For instance, the well-known hadith "The killer shall not inherit" qualifies the general provisions of the Quran on inheritance.[338]

The solitary reports are reported by a single person and this is the reason why such kind of hadith are contested by the scholars. To al-Shafii, this report stems from one, two or more reporters from the Prophet but it fails to fulfil the requirements of recurrent and well-known hadith. Of course, if there are reliable narrators and content of the report is not repugnant to reason then these reports are binding. Overall, majority of scholars states that it is obligatory to act upon solitary hadith even if it fails to engender positive knowledge. In addition to this, M. Kamali concludes that the solitary hadith may form the basis of obligation if it fulfils certain conditions: the transmitter is to be Muslim; competent; possessing positive reputation; with good memory; the narrator is not implicated in any form of distortion either in the textual contents or in its chain of transmitters; the transmitter must have met with and heard the hadith directly from his immediate source.[339]

We may find many reports of legal quality in all the compilations. As the whole dissertation is full of citations from ahadith, here we are to enumerate just several examples.

336 Jonathan Brown, *supra note*, 39: 7.

337 Mohammad Hashim Kamali, *supra note*, 43: 70.

338 *Ibid*., 71.

339 *Ibid.*, 72-79.

For instance, one report concerns the question about the acts made in pre-Islamic period. More precisely, whether for the acts made in pre-Islamic period one should be punished under the new order of Islam. Compilation of al-Bukhari states what was narrated by Ibn Mas'ud: "A man said, O, Allah's Apostle! Shall we be punished for what we did in the pre-Islamic period of ignorance? "The Prophet said, "Whoever does good in Islam will not be punished for what he did in the pre-Islamic period of ignorance."[340] This line is more than similar to the legal principle whereby the law has no effect retrospectively. Another example is provided by the author of the encyclopaedia of Islam. Here, the case of adultery is described by saying that although the Quran (24:2) pronounces the fixed punishment of one hundred lashes for adulterers, some ahadith go on to specify that this punishment is reserved for unmarried adulterers, while married adulterers are to be stoned to death.[341] To confirm it, we are to take a look into two ahadith of al-Bukhari's compilation which are related to the case of adultery of unmarried and married individual. It is reported by Abu Huraira: "Allah's Apostle judged that the unmarried person who was guilty of illegal sexual intercourse be exiled or one year and receive the legal punishment (i.e., be flogged with one-hundred stripes."[342] Whereas the other punishment is prescribed by the Prophet when it is related to the case of adultery of married person. "Narrated Jabir bin Abdullah Al-Ansari: A man from the tribe of Bani Aslam came to Allah's Apostle and informed him that he had committed illegal sexual intercourse and bore witness four times against himself. Allah's Apostle ordered him to be stoned to death as he was a married person."[343]

One more issue to be discussed here is inheritance and bequest. According to the Quranic verse 2:180: "It is prescribed for you, when death approaches one of you and he leaves some good, to make a bequest for parents and kinsfolk in an honourable way – an obligation upon the reverent." The verse 2:240 speaks of the obligation to make testament for wives and husbands. At the same time, exact shares of inheritance that heirs must inherit are enumerated with precise clarity in the text of the Quran. Here, we need to have in mind two main restrictions in Islamic law. Firstly, bequests account for no more than a third of one's property. Secondly, the bequest cannot be designated for a person who automatically inherits according to the Quranic injunctions concerning shares of inheritance. Some scholars say that the verse 2:180 was abrogated in full or in part by the Prophetic hadith which states: "Let there be no bequests for heirs". According to the authors of the commentary of the Quran, this hadith, if taken as universally applicable, renders the verses concerning bequests partially incompatible with those describing inheritance shares.[344] As it is evident from the ahadith, a will can be made only for one-third[345] and not for those who receive a share of inheritance as prescribed by the Quran. As a moral issue, bequests are to be made first to relatives and only secondarily to non-relatives. All in all, the Sunna is inseparable means of interpretation of the Quran but it also not the last source to

340 *Sahih Bukhari.* Translator M. Muhsin Khan. Volume 9, Book 84, Number 56. P. 1538.

341 J. E. Campo, *Encyclopedia of Islam* (New York: Facts on File, 2009), 13-14.

342 *Sahih Bukhari.* Translator M. Muhsin Khan. Volume 8, Book 82, Number 819. P. 1530.

343 *Sahih Bukhari.* Translator M. Muhsin Khan. Volume 8, Book 82, Number 805. P. 1524.

344 The Study Quran: A New Translation and Commentary, *supra note*, 95: 78.

345 *Sahih Muslim.* Translator Abd-al-Hamid Siddiqi. P. 989.

be researched here. Alongside twin sources of Islamic law, the Quran and the Sunna of the Prophet, the third one is ijma or consensus among Muslims. The result of consensus is the source on either question which is of binding force. As an example, the consensus of the prohibition of slavery can be mentioned. That the re-establishment of slavery is forbidden under the general consensus of Muslim scholars was one more time repeated in the open letter to the leaders of self-declared "Islamic State" and its followers what was signed in 2014 by the majority of leading Muslim scholars in the world.[346]

3.2. Ijma as a source of rulings, limits and possibilities

Ijma as a source of rulings in Islam cannot be regarded as a mere Islamic concept or as a tool which has nothing in common with Muslim social and legal affairs in modern times. Why? The concept of consensus (ijma) had been in existence since pre-Islamic times, and referred to the formal agreement of the tribe.[347] Thus, it is rather a customary concept than merely Islamic one. In the beginning of Islam, ijma occurred for the first time in Medina among the Companions of the Prophet. It is clear that ijma may serve as a source of Islamic law only after the demise of the Prophet because during his life he was the highest authority and any agreement during his lifetime is not considered ijma. After the Prophet, the collective agreement of the Companions was accepted by the community and obtained the status of the source on the agreed issues. Later, the leadership role passed on to the next generation of successors, the agreements of whom were treated as a source of rulings. After that, the early religious scholars referred to the opinions of the Companions and their successors. Gradually, ijma was defined as the unanimous agreement of qualified scholar jurists of the Muslim community of any period following the demise of the Prophet on any issue. Or, according to Ibn Khaldun, as the consensus of scholars from the umma of Muhammad, after his death, in a determined period upon a rule of Islamic law.[348] Incorporation of ijma into the theory of sources led to the fact that it came to be regarded a legal tool to produce legal rulings. It is important to note that ijma continues to play an important role in the process of making law in Islam in the modern times. As will be evident in the following pages, modern Egyptian legislative process was successful in producing a new civil code in the form of a broad consensus. In the first part of the XX century, the main drafters of the mentioned code found an element of flexibility in the tool of ijma enabling them to overcome the apparent flaw of an apparently frozen Islamic legal system.[349] Even more, the most recent global Muslim consensus on the pressing Islamic questions proves the strengths of this source that is capable of adapting Islamic law to the present day requirements.

346 The text of the letter to Baghdadi. P. 12. More about this: www.lettertobaghdadi.com

347 Muhammad Iqbal, *supra note*, 53: 169.

348 Imran Ahsan Khan Nyazee, *supra note*, 44: 183.

349 Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Leiden: Brill, 2007), 50.

The effect of ijma on the whole early Islamic legal development is unquestionable. It might be seen as having an effect of the glue by means of which the whole judicial process in Islam came to be cohesive. According to Ibn Khaldun, through the consensus the Quran, Sunna of the Prophet and analogy received the status of the source in Islamic law. More exactly, the Quran and the Sunna became forceful as a result of the consensus of the community of believers in God and the Prophet who confirmed that the Quran was revealed to Muhammad. As many things were not included in the texts after the Prophet, the scholars started to compare and to combine new issues and the evidences found in the Quran and Sunna. Such comparison of similar cases made reasonable impression that both cases are covered by the same divine law. This is how analogical reasoning became another kind of legal evidence, because the founding scholars all agreed on it.[350] As a result of such a huge role of ijma in the social arena, ijma was introduced as a consisting part of the system of Islamic legal sources (usul al-fiqh) by means of which the whole system of Islamic law was created.

One might wonder whether the issue agreed in consensus can contradict to the provisions of the Quran and the Sunna of the Prophet. First thing which needs to be realized is that ijma is the third in the hierarchy of sources of law according to the theory of sources. What is repugnant to the Quran and the Sunna cannot be argued from consensus.[351] Apparently, the revealed sources of Islamic law are two, the Quran and the Sunna of the Prophet. All the other sources including ijma are founded through ijtihad, thus, are derivative ones. In fact, ijma as such originates in ijtihad, thus, it is a rational source. Ijma as all the other rational sources of Islamic law are all designed to link Islamic law to social reality and to serve as instrument of adaptation in the social arena. In this light Aron Zyzow speaking about ijtihad and ijma claimed that ijtihad as a process of law-making and interpretation is more significant than ijma on the question of flexibility of Islamic law. According to him, ijtihad maintains the continuity of the legal system, whereas ijma merely broadcasts this to a wider public and fixes it beyond the reach of dispute.[352] Although consensus has been recognized by the majority of scholars and schools, however, there is a disagreement over the validity and scope of it. Bearing in mind that Islamic law is pluralistic as a result of different schools of law and even different movements in Islam, it is clearer to speak of a consensus in plural form. Also, there is no unanimous position on the conditions that must be met before ijma can be said to have taken place. Before taking into consideration these issues, we need to find out the textual basis on which ijma as a source is grounded.

What is the basis of textual evidences on which ijma as source came to be accepted by the majority of Muslim scholars? Al-Shafii and other commentators considered the Quranic verse 4:115[353] as the proof of the authority of ijma. Accordingly, the part of this verse which states that "…one who follows a way other than that of the believers…" establishes the

350 Ibn Khaldun, *supra note*, 134: 347.

351 John Bowker, *The Oxford dictionary of world religions* (Oxford: Oxford University press, 1997), 467.

352 Aron Zyzow, *supra note*, 45: 117.

353 Quranic verse 4:115: "But whosoever opposes the Messenger, after guidance has been made clear to him, and follows a way other than that of the believer, We shall leave him on the path he has taken, and We shall cause him to burn in Hell – what an evil journey's end!"

status of ijma as the source of Islamic law. Here, God has promised bad ending to those who follow a way different from that of the believers, and the way of the believers is determined by explicit and unanimous ijtihad. As concluded by I. Nyazee, consensus after ijtihad is the true path to be followed, and it is not proper to go against it.[354] In the light of the mentioned Quranic verse, I. Doi highlights that the concept of ijma can be derived from a number of other Quranic verses: 3:159, 42:38, 24:4, and 4:59.[355] In contrast, one observer states that the Quran do not offer evidence on the authoritativeness of ijma and only solitary reports of the Prophet speak on the impossibility of the community on the whole ever agreeing on an error.[356] In fact, there are at least two Prophetic reports from which the authority of ijma was derived: "My community shall never agree on error" and "He who departs from the community ever so slightly would be considered to have abandoned Islam". A number of scholars regards these two Prophetic reports as solitary and solitary reports are probable, thus, cannot prove anything with certainty. To solve this task, the jurists worked with the large number of transmitted reports, what enabled them to transform these reports into the recurrent ones. As we already know, recurrent reports of the Prophet convey certain knowledge of an infallible nature. Thus, the mentioned verses in Quran and the reports of the Prophet are two main groups of evidences on which the majority of jurists are in agreement.

The concept of ijma played a crucial role with regard to the fundamental questions of Islam. It is through the consensus of successive generations of Muslims that was possible to accept the text of the Quran to be the accurate representation of divine revelation as received by the Prophet more than fourteen hundred years ago. The authenticity of Sunna as an accurate representation of what the Prophet said or approved is also established through consensus. Through ijma was also agreed on the fundamental issues of Islamic law, namely, on the necessity of Caliphate, on the concept of abrogation, on the recognition of the method of analogy, on recognition of the fiqh schools and on the other question. In the field of inheritance, for instance, it is agreed that if a person is predeceased by his father, then the grandfather – taking the share of the father – participates in the inheritance of the estate with the son. In the field of family law it is also agreed that since the Quran prohibits marriages with mothers and daughters then, similarly, grandmothers and granddaughters fall within the prohibited degrees.

As is evident from the history of Islamic legal development, ijma may affect the path of Islamic law in several divergent directions. It is capable to produce rulings as well as limits. From one side, ijma may give the potential for evolution of Islamic law by attributing for the agreed results of ijtihadic practices the status of Islamic fiqh law itself. After saying that the collective will and consensus of the community is the only recognized source of binding legislation next to the Quran and Sunna, M. Kamali proudly posed a question: "What could be more honourable than the affirmation, in Islam, that the will and consensus of the community stands next in authority to the will of God and the normative

354 Imran Ahsan Khan Nyazee, *supra note*, 44: 188.

355 Abdur Rahman I. Doi, *supra note*, 178: 98-100.

356 Wael B. Hallaq, *supra note*, 2: 99.

Sunna of the Prophet?"[357] In his doctoral dissertation, Sanhuri portrayed ijma as a tool for political definition rather than solely the interpretation of religious law by ending up with a question: "What is more democratic than the confirmation that the will of the nation in the will of God Himself?"[358] Because of the inseparable ties among such Islamic as well as democratic in nature concepts as ijtihad, shura and ijma, it is possible to dispel such myths as the rigidity and immutability of Islamic law as such. Even more, ijma, according to M. Kamali, can be used more effectively to promote human dignity, human rights and welfare.[359] Through ijma as a source, Islamic law may always be revived as completely compatible social phenomenon. Instead of romantically attempting to recast Islam as super-philosophy, M. Iqbal suggested to use consensus because only in this way alone it is possible to stir into activity the dormant spirit of life in Islamic legal system and give it evolutionary outlook in modern time.[360]

However, the other side of the matter gives more room for being concerned. The role ijma played after the formative period of Islamic law shows its equally possible capacity to serve as a source of isolation and stagnation. The so called 'closure of the doors of further human legal reasoning' was nothing but consensus *per se*. It was agreed that all the questions of Islamic law are decided and the answers to all the legal issues must be searched in the manuals of fiqh law. If we agree that ijma begins with the personal ijtihad of jurists and culminates in the universal acceptance of opinion, then with closure of ijtihad also ijma as the source of rulings disappeared from the scene. The paradox lies in the fact that ijma as a source of rulings was restricted to the mere theoretical idea by the scholar jurists who came into agreement to limit further creative discussions on the matters of law. The growth from permissive and inclusive to a purely prohibitive and exclusive was the course of transformations the concept of ijma underwent in the formative period. Discovery and formulation of the divine law as a process of growth was superseded by the growing amount of legal treaties within one or another recognized Sunni law school. Evolution promoted by ijtihadic practices ceased to reflect social reality and what was left for the jurists was commenting stable fiqh rules whereby all legal decisions was to be made. This is what was left from the concept of ijtihad. Such "state of coma"[361] was the result of the consensus of infallible ulemas to attribute rigidity to the phenomenon which by the nature was contrary for any type of stagnation. To stick Islamic law to the understanding of religious scholars of fiqh schools as binding to all subsequent generations is contrary to its essence. Moreover, to attribute immutability as the feature of Islamic law as if it stems from the very sources of Islamic law is equally wrong as to regard closure of the doors to ijtihad final and irrevocable.

The question of the conditions of ijma is extremely important to discuss here as well. There is no agreement on the exact number of conditions among Muslim scholars. Here we are to deliver those conditions that are recognized by the majority of scholars. Firstly, ijma is that of the umma as represented by all its scholar jurists who live in a particular

357 Mohammad Hashim Kamali, *supra note*, 258: 55.

358 Guy Bechor, *supra note,* 349: 47.

359 Mohammad Hashim Kamali, *supra note*, 258: 94.

360 Muhammad Iqbal, *supra note*, 53: 164-167.

361 Noel J. Coulson, *supra note*, 31: 5.

generation. Thus, an agreement of another umma will not be considered ijma. The reason lies in the textual evidences supporting this fact that it is only the umma of Muhammad that is protected against error in collective agreements. Despite this condition, ijma in one region of Muslim umma differed from the other Islamic region not only on the content, but also on the authority. Important to note here the role of the jurists of Medina which is the Prophet's town. Al-Muwatta, a digest of the agreed legal opinions of the schools of Medina, which was reviewed and commented on by a famous scholar Ibn Malik (795) for the followers of Maliki school is the most authoritative source of a number of authentic agreements or amal. 'Amal' literally denotes practice and juristically indicates the agreed practice of the people of Medina. The founder of Maliki School of fiqh, Ibn Malik and the jurists of Medina claimed that their city was the home of true Muhammadan traditions. It is reported that Malik compiled his book al-Muwatta from the several thousand hadiths which he submitted to approval to seventy jurists-theologians of Medina.[362] To Malik, the agreement of Medina jurists on a rule of law based on hadith constituted the true Islamic law. Their ijma was a weapon with which Medinan jurists attacked the jurists of Hanafi School on the ground that they had departed from the Sunna of the Prophet. There is a disagreement over the Maliki claim that their consensus is to be regarded as universally binding. Why? In all probability, because there is no other consensus than the consensus of the entire community of Muslims. Regardless the opposition, the Maliki School of fiqh keep regarding the exclusive role of consensus of Medinan scholars under the authority of Maliki.

The doctrine of ijma speaks of the consensus of the community at large and of the agreement among scholars. Al-Shafii insisted on the ijma of all Muslims. As was said of Ibn Malik, ijma was tantamount to the Medinan consensus of the Companions of the Prophet and two successive generations. The Hanbali jurists regarded ijma as the agreement of the Companions of the Prophet. Apart from these positions, there were more divergent opinions. Al-Shafii in his famous al-Risala discussed briefly the concept of ijma noticing the distinction between the consensus of all Muslims on essentials and the consensus of the scholars on points of detail by giving higher authority to the former one. To the question of the meaning of the Prophet's order to follow the community, al-Shafii noted that there is one meaning and that the error comes from the separation from the Muslims community at large and only those knowledgeable ones.[363] To J. Schacht, the author of al-Risala has neither succeeded in clarifying his idea of consensus at large nor was he able to dispense completely with the idea of consensus of the scholars. According to J. Schacht, the unanimous opinion of the scholars merges into the consensus of the Muslims at large and serves to eliminate stray opinions by showing them to be below the general scholarly standard.[364] The fundamental weakness in the doctrine of the consensus of the community at large was procedural – the lack of an adequate method which would provide means for the community to arrive at an agreement.[365] The more territory and population was conquered, the less possible was the agreement of all Muslims on the ground.

362 Majid Khadduri, *supra note*, 97: 31.

363 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 287.

364 Joseph Schacht, *supra note*, 29: 91-94.

365 Majid Khadduri, *supra note*, 97: 33-34.

Talking about the consensus of Muslim scholars, one more condition was that agreement must take place among qualified scholars. What are the conditions to become a qualified scholar in order to obtain a right to participate in consensus? Traditionally they are: knowledge of Arabic language; knowledge of Quranic language with regard to the verses of legal quality, also the occasions of abrogation; knowledge of the Sunna of the Prophet with regard to the legal matters; knowledge of ijma aimed at preventing mujtahid not to reopen an issue when there is ijma on it; possession of knowledge of the purposes of Islamic law and of the process of ijtihad and how it must be exercised. According to I. Nyazee, although this was true for a sizable period of Islamic history, there is limited scope of ijtihad by individuals today. To prove it, the author gives an example of the Council of Islamic Ideology in Pakistan where members cannot be deemed to have the qualifications of a mujtahid.[366] Also, the qadis of the Sharia courts in one or another Muslims state today must have competence in the enumerated issues and, at the same time, to have sufficient degree of knowledge on the state made law. Furthermore, there are Islamic centres of religious education where one might find out any particular question in the discussion with qualified religious scholars.

There are more conditions. For instance, the agreement must be among scholar jurists of a single period of time or, more precisely, of one generation. Additional condition is that the agreement must be on the rule of law (the hukm). On any issue that is not related to the legal area agreement will not be treated as ijma. Another disputed condition was that the mujtahids should have relied on and evidence in one of the accepted sources of law for deriving their opinion. If we agree with this condition, than the question of whether the ijma is to be regarded as independent source of law may be raised. In any case, the jurists employ their functions within the limits posed by the two primary sources of Islamic law. As to the ijma as independent source, the strength of it lies in the agreement itself. Accordingly, while it is true that the jurist agreeing on a rule would be relying on an evidence from the whole legal system, it cannot be a condition that such evidence must be found in the text in order to convey the agreement on the issue at hand.

As stated in Quran (16:43) the way to find solution in the case when there is juristic disagreement is to ask knowledgeable people. The clearest solution is conveyed in the Quranic verse (4:59) where the obedience to God, to His Messenger and "those in authority" (*ulu al-amr*) is required. Those in authority again are mentioned in the verse (4:83) which confirms the authority of those in authority next to the Prophet himself. Whether they are political rulers or scholar jurists, it is certain that the agreement on one or other issue is to be emanating from knowledgeable people. Another question is whether there is to be an agreement of any number of scholar jurists available at the time when the issue is encountered. As noted by M. Kamali, consensus can never exist unless there is a plurality of concurrent opinions,[367] thus, no ijma could be expected to materialize if there is only some jurists in agreement. According to most jurists, the agreement must be unanimous, that is, among all the mujtahids. To a number of scholars seemed that such ijma is not feasible because the scholar jurists normally were located in distant places, cities and continents,

366 Imran Ahsan Khan Nyazee, *supra note*, 44: 272-273.

367 Mohammad Hashim Kamali, *supra note*, 43: 172-173.

access to all of them and obtaining their views is beyond the bounds of practicality.[368] This is why there are jurists who consider a consensus of the majority as valid ijma. In fact, there would be no problem in the current globalized world to come into unanimous agreement because of technological possibilities and other ways whereby the world became much closer. In any matter the agreement of the whole umma would be equal to the consensus of the scholar jurists of the recognized schools of law within Muslim world.

It is not an exaggeration to say that ijma could play a very important role in the development of Islamic law in the contemporary time. To achieve this, it is necessary to come into agreement for leading scholars within one or another Muslim state or among a worldly Muslim community of scholar and political leaders depending on whether an issue touches solely the particular state or the global Muslim community. The central question is whether any example of such consensus has emerged on the scene in the present context. Two recent cases prove how the concept of ijma might serve in making Islamic law as a whole and legal system of a Muslim state in particular even more open and adaptive to the change on the ground. The Civil Code of Egypt and the process of its adoption which lasted twelve years (1936-1948) is the first example which must be taken into account. Also, the most recent case of consensus among a worldly Muslim community made in Amman (2004) of scholars and political leaders can be considered as a most recent case of ijma.

In its content, the Egyptian Civil Code that came into force in 1949 reveals how Abd al-Razzaq al-Sanhuri, the main architect of the Code, understood both the principle of *takhayyur* as a technique enabling the selection of a proper interpretation of the legal texts[369] and Islamic legal principle which states that Islamic law is capable of adaptability when circumstances change.[370] In essence, the code suggested to put a barrier on Islamic religious law that was not compatible with the Code, to select what was best for the Egyptian society from foreign codes and in such a way to reform the whole Egyptian Civil law in order to meet the aspirations of Egyptian people. Talking about the very process of its adoption, it shows how Islamic ijma might become a very useful procedural tool in the modern times in order to negotiate, to convince and to achieve an agreement on the proposed issue. When that issue touches the Sharia and legal reform, it is too naïve to expect finding a compromise in a short period of time. Also, a successful result depends on the architects of the suggested idea and how they present it to the audience. The long-lasted procedure

368 Mohammad Hashim Kamali, *supra note*, 43: 182.

369 Although the principle of takhayyur was understood by the traditional and modern scholars as a technique enabling the selection of a proper interpretation from the four legal schools of Sunni Islam, this concept was reconsidered in the XX century with the drafting of the Egyptian Civil code (1932-1949). For the architects of this Code, the technique of takhayyur cannot be limited within four doctrines of Sunni law schools. As was said by G. Bechor, the drafters noted that they had adopted the technique of takhayyur in selecting from among dozens of codes from around the world, in addition to Egyptian case law, the Islamic Sharia law and the old civil code, with the ultimate goal of formulating the new Egyptian civil code. Evidently, the Islamic context of the term was detached and only the essence of choice and selection remained. More on this subject read: Guy Bechor, *supra note*, 349: 75-78.

370 The Ottoman Civil Code (Mejelle) in the Article 39 describes it in the best way: "It is an accepted fact that the terms of law vary with the change in the times." *The Mejelle: An English Translation of Majallah El-Ahkam-I-Adliya and a Complete Code On Islamic Civil Law*. (Kuala Lampur, Malaysia: The Other Press, 2001), 8.

of adoption of the new Egyptian Civil Code was gradually achieved through a process of professional consultations and broad social discourse. In addition to the members of the Parliament, leading academics, jurists, religious figures were invited to participate in the process of adoption of a new Civil Code as the regulator of a new social order. The comments of leading figures of the nation and of the parliament members were many times forwarded to Sanhuri's re-examination committee. After a long process of consultations the new Code was adopted by parliament in October 1948 and went into force one year later[371]. As noted by G. Bechor, despite the turbulent events that have followed and attempts to attack the Code, it has continued to serve as the foundation of Egyptian and Arab civil law into the twenty-first century.[372] All this only proves how helpful might become the concept of ijma in making modern legislative process effective and successful in such a polarised Muslim state as Egypt.

The Amman Message as the contemporary example of ijma also proves that this source is capable to play important role in the present context. It is very likely that it is possible to unite Muslim scholarly and political positions on a particular heating issue or, in general, to make unity among Muslims at large.[373] Amman Message issued in 2004 was an agreement made the majority of Muslim scholars in the world calling for the unity in the Muslim world on a number of fundamental issues. The three-point agreement was issued by 200 Islamic scholars from over 50 states. It was agreed on the further issues: on the recognition of eight legal schools of fiqh and the varying schools of Islamic theology; on the forbiddance from pronouncing declarations of apostasy between Muslims; on the preconditions to the issuing of religious and legal opinions (fatwas), intended to prevent the circulation of illegitimate fatwas. To agree on these issues and to announce it for the world is more when important in the age when a number of so called 'religious/legal opinions' continue to circulate on internet. Very frequently these opinions express the aim to justify terrorist groups' behaviour in the name of Islam. In the light of this example, it seems that the consensus of Muslims in large is neither achievable nor necessary. It seems that what is necessary for the present-day ijma is the majority of leading scholars from the Muslims states.

3.3. Analogical reasoning (Qiyas)

Qiyas or individual reasoning in the form of analogical deduction received the place in the theory of usul al-fiqh alongside the other three sources. Truth, a mistaken decision to name qiyas a source requires to be corrected. Rather, it is the rational method whereby legal rulings may be derived from the textual sources of Islamic law. In other words, qiyas is a form of ijtihad and in all probability al-Shafii had this in mind when he said that ijtihad

371 Sanhuri's Civil Code exerted a crucial influence throughout the whole Arab world in making new civil codes. It might be said that it has been copied in Syria (1949), Libiya (1953). Sanhuri himself drafted the civil code of Iraq in 1951. Also, it served as the main basis of reference for the civil codes of Jordan (1976), Yemen (1979), and Kuwait (1981).

372 Guy Bechor, *supra note*, 349: 322-323.

373 More information on the official page on internet: www.ammanmessage.com.

is qiyas[374]. To define by this kind of precision human reasoning was obviously aimed at curbing the use of ra'y or early way of human legal reasoning based solely on the personal sense of justice. Very important to note that it is not accurate to say that if a scholar had exhausted Quran, hadith, qiyas and ijma, then and only then could he move on to the final stage of thinking, ijtihad,[375] because even ijma and qiyas as the sources of Islamic law may be regarded as the rational manifestations of the ijtihad. Although ijma and qiyas differ in many respects from the ijtihad, it would be a mistake to draw a clear line and separate them from ijtihad. Meanwhile, there is one reason why it is particularly important to distinguish ijtihad from qiyas. As noticed by A. An-Na'im, since the gates of ijtihad were supposed to have been closed, it became possible only through qiyas to continue to deduce rulings for new cases out of the precedents of earlier established principles and rules of Islamic law without claiming to exercise ijtihad as such.[376] Thus, it is more useful not to perceive qiyas synonymous term to ijtihad.

For al-Shafii, analogy is of two kinds. The first, if the case in question is similar to the original meaning of the precedent, and the second, if the case in question is similar to several precedents, analogy must be applied to the precedent nearest in resemblance and most appropriate.[377] Strictly speaking, only the former is to be associated with the analogical legal reasoning. Whereas the latter is the situation in which the method of istihsan or juristic preference may be applied. Qiyas extends the textual rulings to similar cases and issues which fall, not within the letter, but the rationale (illa) of a given law. In the case of istihsan there is a need to find an alternative solution to a given problem when the jurist is convinced that applying the existing law may lead to rigidity and unfairness.

Qiyas was not simply authorized individual reasoning in the form of analogy, this form of reasoning was taken to exclude more affirmative forms of reasoning.[378] Thus, individual reasoning came to be regarded as the channel through which the law might be derived, but only in analogical form. Only with qiyas that the theory of usul al-fiqh gains a method capable of generating legal content outside of or beyond revelation. This was the result of compromise between strict adherence to the hadith and admission of more affirmative forms of thinking, or between revelation and reason.[379] One may say that this kind of preclusion of other sources was aimed at reducing potential means to respond to the factor of change. However, in all probability without restrictions any efforts to systematize law would fail. Especially, it fits for the case of Islamic law because without the limits suggested by al-Shafii in the formative period, in all probability Islamic law would have not survived. Probably, by rationalizing Islamic law through the creation of the theory of sources and leaving considerable space for the sources of rational nature within it, scholars of that time saved from the chaos and absolutist ambitions of rulers not only law, but also religion as such. It seems that rationalized and systematized Islamic law gave strength for Islam as

374 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 288.

375 Tamim Ansary, *supra note*, 206: 97.

376 Abdullahi Ahmed An-N'im, *supra note*, 56: 25.

377 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 39.

378 Patrick Glenn, *supra note*, 96: 177.

379 Noel J. Coulson, *supra note*, 154: 6.

such to undergo various challenges of the time. Although through qiyas had a possibility to be applied within the limits of the Quran and the Sunna, for a long time only in this way Sharia law was connected with the social reality what was of enormous significance in order to remain on the scene as the efficient legal system.

The opponents of qiyas argue that the Quran precludes from regarding qiyas as the source of Islamic law. Such an argument is based on the Quranic verse 6:38 according to which "There is not a living creature on earth, nor a bird that flies with its two wings, but are communities like you. We have neglected nothing in the Book, then unto their Lord they all shall be gathered." Apparently, the supporters of the literalist approach towards the textual sources hold this verse as evidence for their claims. However, it is not permissible to quote a verse, or part of a verse, without considering everything that the divine scriptures say about the issue. We might see from a number of verses (for instance, 2:85; 5:13; 15:91 and so forth) that one must consider everything that has been revealed relating to a particular issue in its entirety, without depending only on parts of it.

The majority of scholar jurists from the Sunni schools of fiqh law find the proof of qiyas in the passages of the Quran and in the ahadith. Among the Quranic verses the one which is often cited is the verse 4:59. As we have already noted, this verse reflects the very essence of the theory of sources, namely, the sources from which and through which Islamic law is to be derived and even the order of priority among the sources. Suffice it to cite the part of this verse where scholars find support for qiyas, the fourth source of Islamic law: "…should you dispute over something, refer it to God and to the Messenger, if you do believe in God." The reference to God and to the Prophet means that in the case of any dispute, it is necessary to follow the signs and passages of the Quran and the Sunna of the Prophet. One way of achieving this is to identify the rationale of the ruling and apply them to disputed matters, and this is precisely what qiyas is all about.[380] As was concluded by I. Doi, there is nothing wrong in using qiyas in deriving a logical conclusion in Islamic law in-as-much as that conclusion does not go against the injunctions of the Quran or the Sunna of the Prophet.[381]

Qiyas as a form of ijtihad is expressly mentioned and, thus, received support in the Prophetic reports. It is reported that the Prophet asked Mu'adh upon the latter's departure as judge to the Yemen. Mu'adh told the Prophet that he would resort to his own ijtihad in the event that he failed to find any guidance in the Quran and the Sunna, and the Prophet was pleased with his reply. In addition to this hadith, it is also narrated that during his lifetime the Prophet sent Abu Musa al-Ashari to Yemen, and told him to judge on the basis of the Quran, and that if he did not find a solution in the Quran, he should make use of the Sunna of the Prophet, and if he did not find the solution here, he should use his own judgment. Since the hadith does not clarify any form of human reasoning in particular, analogical reasoning falls within the meaning of this hadith.

There are four requirements for qiyas: (1) the original case on which the ruling is given in the text and which analogy seeks to extend to a new case; (2) the new case on which a ruling is necessary; (3) the effective cause which is an attribute of the original case and is found to be in common between the original and the new case; (4) the rule governing the

380 Mohammad Hashim Kamali, *supra note*, 43: 216.

381 Abdur Rahman I. Doi, *supra note*, 178: 110.

original case which is to be extended to the new case. A popular example of the drinking whisky may be taken here to see how the answers through analogical legal reasoning may be produced. The Quran expressly in the text forbids wine drinking in the verse of 5:90, thus, this textual evidence proves that wine is the original subject. Whisky is the new subject which is under investigation in our case. As from the drinking wine so from the drinking whisky common cause would be the intoxicating effect. Due to the same or even worse effect, their common legal qualification is prohibition. One more example can be presented here. According to the Quranic text, the selling is prohibited after the last call to Friday prayer. This rule may be extended by analogical reasoning to the other kinds of transactions that turn away Muslims from fulfilling their obligation. In addition, the analogical reasoning may be exercised through the text of the Sunna of the Prophet. For instance, the man who kills cannot inherit one of the fixed shares from his victim if he is a relative. This rule may be extended by the analogy to the law of bequests.

When common cause is not specified in the sources, the jurist is obliged to identify it in the light of the purposes of Islamic law. To take but one contemporary example, we might mention the permission for Muslims living in the West of taking bank loan for buying a house. The so called fiqh for Muslim minorities on the permission to take mortgage was agreed by the Muslim scholarly institutions operating in the West. As the doctrine of fiqh for Muslim minorities is built on the methodology of maqasid al-Sharia, the scholars agreed that such decision was necessary to fulfil at least two fundamental purposes of the Sharia, namely, to safeguard life and wealth (property) of Muslims living in non-Muslim countries. According to us, this rule might be extended by the analogical reasoning to the issue of taking loans for studying at universities. Important to note that not all Muslim scholars agree to identify the common cause between original and new case in the light of the purposes of Islamic law. For them strictly literalist way of reading Quran is prevailing and to permit to base the process of analogical reasoning on the purposes of the Sharia law looks like the expanded version of ijtihad.

As the matters uncovered by the revealed texts were just increasing because of the changing of the time and human living conditions, Islamic law through qiyas was augmented in such an amount that neither of other rational sources of Islamic law in that time were capable to be even compared. To sum up, through qiyas as a means of discovering and developing the existing law, Islamic law had a chance to be more effective on the ground. In addition to qiyas as the main form of ijtihad, there are other forms of ijtihad that are treated as sources of Islamic law. It remains here to discuss in short the other additional sources of Islamic law among which the other forms of ijtihad dominate. After that, the preliminary conclusions of the Chapter Three will be delivered.

3.4. Supplementary sources of Islamic law

Besides the recognized four sources of Islamic law, there is a number of additional or supplementary sources. These sources were recognized by one or another school of Sunni law. It might be even said that the doctrines of schools differed mainly in the choice of

delivering the authority of a source of law to one or another additional source. According to A. Shabana, in addition to the textual sources of the Quran and the Sunna of the Prophet, the jurists have also relied on a number of derived and rational sources such as consensus, analogical reasoning, juristic preference (istihsan), public interest (maslaha), private interest or benefit (darura) and custom (urf or adah).[382] As the consensus and analogical reasoning have been already discussed, istihsan, maslaha, darura and the concept of custom will be shortly discussed taken in the following pages of this chapter.

Istihsan is the first supplementary source which is more a form of ijtihad than a pure source as such. Istihsan literally means "to approve, or to deem something preferable". In legal sense, it is a method of exercising personal opinion. Istihsan as juristic preference is mostly known in the area of law. The option to prefer alternative ruling belongs to the jurist if the school to which he belongs recognized it as valuable source of Islamic law. Here, we need to see a relationship between qiyas and istihsan. If an established analogy gives the result which according to the jurist is not appropriate, he then embarks on the search of an alternative ruling which would serve the value of Islamic justice and human interest in a better way. Al-Shafii regarded istihsan as a new version of the concept of ra'y and rejected it as an unwelcome addition to the theory of usul al-fiqh. According to Shaffi, it is unacceptable because it permits virtually unlimited use of juristic discretion.[383] Only one form of human reasoning was acceptable to Shafii and this was analogical reasoning. On the whole, there were no common agreement on istihsan among Sunni schools of fiqh law. Abu Hanifa deserves the credit of having been the first to recognize that a strict adherence to qiyas would deprive law of that elasticity and adaptability which alone make it the handmaid of justice.[384] In a gradual fashion, Maliki and Hanbali jurists have validated istihsan as a subsidiary source of law.

The Hanafi jurists who are in favour of the principle of istihsan state that a jurist through istihsan seeks facility and ease in legal injunctions and all this, according to them, stems from the divine sources. Strictly speaking, it may be viewed as a departure from qiyas in favour of a ruling which dispels hardship and brings about ease to the people.[385] Such principle is derived from the Quranic verse 2:185 according to which: "God intends facility for you, and he does not want to put you in hardship". In addition to this, the Prophetic hadith may be mentioned: "The best of your religion is that which brings ease to the people". The authors of the commentary of the Quran in this light adds one more hadith where the Prophet says: "Make things easy, not difficult. Cause people to rejoice, not to flee."[386] All this may be regarded as justification of the use of juristic preference in particular situations. The scholars as A. Doi[387] reveals the concept of istihsan from the Quranic verse 39:18: "Those who listen well to what is said and follow the best of it, they are the ones whom Allah has guided, and they are the people of intelligence". At first glance, this verse

382 Ayman Shabana, *supra note*, 36: 48.

383 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 304-333.

384 N. Hanif, *Islamic Concept of Crime and Justice*. Volume 1 (New Delhi: Sarup & Sons, 1999), 16.

385 Mohammad Hashim Kamali, *supra note*, 43: 247.

386 The Study Quran: A New Translation and Commentary, *supra note*, 95: 81.

387 Abdur Rahman I. Doi, *supra note*, 178: 124.

speaks of the knowledgeable people and their ability to answer to the questions of people. However, it also indirectly speaks of the concept of istihsan. To prove it, the commentator has interpreted this verse in the way to mean that "what is said" to people means the word of God and only the people of intelligence may help to choose the closer to Islam course of conduct. Thus, the judgment is left in the preference of those who have knowledge and only they are able to derive the answer not only through analogical reasoning, but also through istihsan.

An example of the case of istihsan might be related to the requirement of oral testimony in Islamic law. It is the standard form of evidence in Islamic law. Oral testimony means direct and personal speech of the witness before the judge. The Quran speaks of a number of witnesses in one or another case. Muslim jurists in a form of consensus gave priority to oral testimony over other methods of proof. However, we may take an example of sound recording or photography or any other of equal significance methods which might help to establish the necessary facts. Juristic preference would be when instead of oral testimony, a judge would prefer to rely on more reliable means of proof. According to M. Kamali, the rationale of such istihsan would be that the law requires evidence in order to establish truth, and not the oral testimony for its own sake.[388] If this is the spirit of the law, then recourse to istihsan in a number of instances might offer a better way to uphold that spirit.

Maslaha or public interest is one more form of human legal reasoning when public interest is regarded as the main factor in the process of derivation the law from divine sources. Consideration of public interest encourages initiative on the part of the jurists to take all necessary measures to secure benefit for the community. Imam Malik ibn Anas speaks of public interest particularly in a positive way. His example of maslaha is when the Muslim ruler asks for additional taxes from wealthy people in the time of emergency. This could be justified under the task to protect public interest. From the point of view of W. Hallaq, the use of the concept of public interest may amount to the utilitarian or subjective way of looking at the law. However, it is only partly truth. According to us, the true subjectivity is to make binding the results of interpretation made in the light of totally different time and circumstances on the disputes of our time. The concept of public interest deserves much more attention today as it may serve as the means to reawakening Sharia law. The concept will be investigated in the following chapters.

Darura or necessity is one more source of Islamic law aimed at protecting private interest of individuals. Darura is a comprehensive concept aimed at facilitating and allowing for actions which are normally forbidden. Its existence can lift a prohibition or a compulsory act. When there is darura, a mufti may issue a legal opinion in accordance with the ruling of a given mujtahid or school of fiqh most suitable for the circumstances at hand. Interesting to mention that contemporary muftis receives a number of question on the very concept of necessity and its suitability to various situations. For instance, the mufti was asked: "We have noticed the recurrence of the use of the word "necessity" as a condition to allow the examining doctor to touch or look at the body of woman. What does it mean and what are its limits?" And the answer of mufti was the following: "What makes it necessary to look at or touch a woman' body is confined to what the diagnosis and

388 Mohammad Hashim Kamali, *supra note*, 43: 248.

treatment of the illness require. As to its limits, it is judged by the degree of the need for it."[389] Thus, darura is a necessity of an emergency nature because it may be used only when one's life or circumstance is threatened.

One more example of contemporary fatwa where the concept of necessity is discussed can be delivered here. The question raised by an individual was whether a blind and disabled people can keep a dog that is trained to help them. The question was: "The woman is in need of this kind of dog. Is it permissible for her to keep it in the house because of necessity?" The scholar answered in this way: "Keeping dogs is basically haram but the Prophet granted a concession with regard to keeping dogs if it is for guarding the fields, herding livestock or hunting. Is it permissible to keep a dog for purposes other than the three mentioned? The answer is yes. There was a difference of opinion with regard to whether it is permissible to keep dogs for purposes other than these three, such as guarding houses and roads. The most correct view is that it is permissible, by analogy with these three, based on the reason that is to be understood from the Prophetic hadith, which is necessity."[390]

The very concept of darura is written in the form of fiqh maxims. The Ottoman civil code Mejelle, written in nineteenth century only in a form was of Western nature. The very content of the document was made in accordance to the Hanafi fiqh legal rules and the second part of the code is composed of ninety nine articles devoted to the most significant fiqh maxims within the Hanafi School. One of the legal principles undoubtedly reflects the concept of darura: *Necessities make forbidden things canonically harmless.*[391] From the whole corpus of fiqh rules jurists once derived a number of legal maxims or principles and the fact that one of legal maxims is attributed to the concept of darura talks for itself. The scholars regard darura as the sub-category of ijtihad or human legal reasoning. Alongside such categories as maslaha, maqasid al-Sharia, darura plays complementary role. These concepts are overlapping and will receive more attention while discussing the status of Islamic law in the contemporary time, both within the communities of Muslim living in the West and in Muslim states.

To give but one example of the darura, we can look at the contemporary fatwa given by Y. al-Qaradawi which concerns the case of burying Muslims in non-Muslim state. There are fixed legal rulings concerning the dead body of a Muslim, such as washing and shrouding him or her and performing the funeral prayer over the dead. Burying the Muslims decedent in Muslim cemeteries is one of a set of legal rulings on the issue. Muslims have their own way of burying which is simply directing the body towards the Mecca. The answer to the question related to the burying Muslims in Christian cemeteries, Y. al-Qaradawi answered: "Muslims are to seek private cemeteries. If they fail to obtain it, they should obtain a private piece of land at the outskirts of Christian cemeteries to bury their decedents. If they fail to obtain it, they should bury in another city in Muslim cemeteries. Otherwise, in Christian cemeteries according to the rules of necessity. By the way, if cemetery is far

389 More on that look at the fatwa "Meaning of "necessity"" issued on 19 February, 2017 on the internet page: www.leader.ir

390 The fatwa is available at: www.turntoislam.com (last visited Feb. 15, 2017).

391 *The Mejelle: An English Translation of Majallah El-Ahkam-I-Adliya and A Complete Code On Islamic Civil Law* (Kuala Lampur, Malaysia: The Other Press, 2001), 6.

from relatives of the decedent, it is not an excuse to bury him in non-Muslim cemeteries, as burying Muslims in cemeteries for Muslims, according to the majority of Muslim scholars, is obligatory whereas visiting the descendent is optional. The optional should not take priority over the obligatory."[392]

One more additional source is urf or custom. In the Islamic tradition custom has been associated with the terms urf and adah. Urf is to be understood as a more collective custom or practice and adah means and individual habit. It is to be noted the Islam emerged on the scene where customary practices served as the main source of social life and law as well. The main mission was that of the Prophet to create a so called harmony between old order and new one. The Quran speaks of the customs a number of time. For instance, in the verse 2:233 the Quran instructs husbands to provide for their nursing wives and babies according to common standards in comparable situations. Another example of how the Prophet regarded customary practices may be found in the Muwatta of Malik. As we know, this book is one of the earliest collections of written Prophetic ahadith. The Prophet is reported to have indicated to his wife Aisha that when Meccans were renovating the Ka'ba, they failed to rebuild it one the foundations of the Prophet Ibrahim. Aisha asked the Prophet Muhammad why he declined to rebuild the Ka'ba on the original foundations. The Prophet said that he had to take the Meccans' recent acceptance of Islam into consideration.[393] As explained by A. Shabana, for the Meccans, Ka'ba was the most sacred place and the Prophet Muhammad felt that they would not be able to tolerate the shock of seeing it being desecrated.[394] It was necessary for the Prophet to acknowledge the customary practices as long as this does not violate the rules written in the Quran. In a gradual manned the Prophet affirmed, reformed or prohibited the existing customary practices.

Certainly that not all customs were islamised throughout the ages of Islam. Because of this, we find reference to the customary practices as a binding source in the Ottoman civil code. Here, we may take into account but several written principles with regard to the concept of custom in the Mejelle: "Custom is of force", "A thing impossible by custom is as though it were in truth impossible", "Custom is only given effect to, when it is continuous or preponderant", "It cannot be denied that with a change of times, the requirements of law change."[395] Even more, the current civil code of the Kingdom of Jordan recognizes in the primary sections the status of custom. The section (2) of the civil code requires particular attention because it clarifies not only the place of custom in the legal system of the state, but also establishes the hierarchy of sources of law in the current Muslim state. It is stated: "If the court find no provision in the code, it shall decide by the rules of Muslim jurisprudence which are more adaptable to the provisions of the code, and if there is none then by the principles of the Muslim Sharia. And if there is none then by custom, and if there is none then by the rules of equity. Custom shall be general, ancient, stable and continuous and shall not contravene the provisions of the law, public order or morals. But if custom is that of a certain town it shall be applicable in that town." It is apparent from the mentioned that

392 Yusuf Al-Qaradawi, *supra note*, 84: 48.

393 *Al-Muwatta of Imam Malik ibn Anas, supra note,* 90: 229.

394 Ayman Shabana, *supra note*, 36: 53.

395 *The Mejelle, supra note,* 391: 7-8.

custom as the source of law can be applied just if there is no any provision in state made code, then in the fiqh of the selected school or among the doctrines of schools, then in the divine sources and only after that one should embark on the custom to settle a case at hand. Also, it is evident that one or another town or area may have specific customs and the court is obliged to apply them in those areas rather than in the whole state. All in all, customs cannot contradict to the state law which is created in the light of the norms and principles of Islamic law as such. As rightly noticed I. Nyazee, no custom can automatically be accepted as law, it has to be analysed before it may be accepted.[396] It may be concluded that customs as in the past so today obtain a status of supplementary source which might be acknowledged just if it does not contradict to the Islamic law and to the state law which is also constructed in the light of the divine sources and traditional fiqh law.

3.5. Summary

On the question of adaptability of Islamic law, the chapter investigated the sources of Islamic law. The research of the sources proved that divine as well as humanly made sources do not give any reason to state that they can be the obstacle in the task to adapt Islamic law in the changing time and circumstances.

Four principal sources are traditionally the main in the construction of Islamic law. These are of divine and rational nature. The flexibility and openness of the Quran and the Sunna stems from the very text, from its language which is mainly of ambiguous nature and from the concept of ijtihad which stems from the very text of the Quran. All these three channels encouraged scholars to interpret the twin sources in the light of living context. There is a number of the Quranic and Prophetic textual references to the possessors of knowledge who are entitled to harmonize the texts and social requirements

The possessors of knowledge are the main actors in the use of the ijma and qiyas. Ijma is rational source emanating from the ijtihadic activities. From modern scholarly discourse and from the previous exemplary Muslim agreements, there is a ground to highlight that ijma might become the most important legal source to adapt Islamic law in contemporary time. The Amman Message was perhaps the largest contemporary ijma's example in its number and diversity of religious leaders and representatives of global Islam. Qiyas as the other rational source written in the theory of usul al-fiqh is rather the form of ijtihad than the source as such. Although restricted, human legal reasoning in the form of qiyas was that tool of the formative and post-formative period through which Islamic law was able to be expanded into the cases on which other sources were silent.

If there was an agreement of the scholarly community on the Quran, Sunna, ijma and qiyas, a variety of supplementary sources came to be a point of disagreements among schools of fiqh law and individual scholars as well. Such additional sources as maslaha, istihsan, darura and similar are nothing but the forms of ijtihad which were recognized by one or another school. All these ijtihadic forms play profoundly important role in the modern era of Islamic law in the task to adapt it in the present circumstances.

396 Imran Ahsan Khan Nyazee, *supra note*, 44: 258.

4. INTERPRETATION OF THE SOURCES AND MAN-MADE LAW IN ISLAM

Islamic law does not end with its sources, it ends with fiqh law as the result of ijtihadic activities. This is why in the research of the problem of adaptability of Islamic law, alongside sources, it is necessary to analyse the concept of ijtihad and fiqh law. The task in this chapter is twofold. It concerns, from one side, the concept of ijtihad and, from another, the fiqh law. One premise to be proved is that Islamic law is indeed ijtihadic law. It means that the main driving force in making Islamic law adaptable is human reasoning and interpretation (ijtihad). Here, we tend to reveal the essence about the human role and the process through which divinely revealed law in Islam becomes understandable and applicable in the social life. Another premise is that fiqh law adapts Islamic law in the particular time and context in a way of fixing it in the fiqh law books. Even though the intention of fixing law in fiqh manuals would be combined with the attempts to make it immutable and final, adaptability of Islamic law seems irrefutable at least from the fact of fixing it. Very often fiqh rules of one or another school directly or indirectly influence the content of state-made law which regulates social affairs. In the second part of the chapter, Hanafi fiqh rules written in the manuals of the eleventh-thirteenth century will be discussed and compared with the Civil Code of Ottoman Empire of the nineteenth century and with the present day Jordanian Civil Code. Such comparative analysis tends to show that fiqh law as the continuation of the Sharia law can make impact on the law texts made by the state.

According to M. Iqbal, the very movement in Islam is enshrined in the idea of ijtihad.[397] From legal perspective, F. Vogel claims that ijtihad is not at all just individual moral-legal decision-making, the means by which one makes one's private moral choices, but rather, it is law in all its senses.[398] To T. al-Alwani, there is no doubt that the role of ijtihad is to regulate and guide man's actions to accomplish his role as the vicegerent of God on earth, as God intended.[399] Despite this, many scholars speak of ijtihad as the phenomenon exclusively belonging to the formative period of Islamic law. The majority of observers used to mention the phenomenon of the closure of the doors of ijtihad which, according to them, was agreed by the scholarly community. Y. al-Qaradawi describes this period of time as the ages in which fanaticism to schools' of fiqh and imitation prevailed.[400] In this time it was even not permissible to issue fatwas based on sayings of the first four Caliphs because law was to be formulated solely in the limits of the fiqh doctrines. To Y. al-Qaradawi, a stark contradiction with the fundamental premise that the more you approach the age of the Prophet, the more you find the correct fatwa, here is more than noticeable.[401] In this sense, the so called era of blind imitation (taqlid) of fiqh doctrines restricted or even eliminated ijtihadic activities of individual scholar jurists what became the reality of the whole post-

397 Muhammad Iqbal, *supra note*, 53.

398 Frank E. Vogel, *supra note*, 50: 24.

399 Taha Jabir Al-Alwani, *supra note*, 228: 13.

400 Yusuf Al-Qaradawi, *supra note*, 84: 111.

401 *Ibid.*, 112.

formative period. Gradually, Islamic law found its place in the largest law manuals written by one or another leading scholar and in the limits of particular school's doctrine. Scholarly task ahead of us is to analyse the process through which Sharia law becomes fiqh law. Ijtihad as the process and fiqh law as its result are the main objects of the Chapter Four.

4.1. The concept of ijtihad

In Islam the fact is that law cannot be treated Islamic if it does not stem from the primary sources. Equally important fact is that nothing can be further from the truth as statements that Islamic law as it is written in the Quran and the Sunna covers all cases and deals with all issues with certainty for all subsequent generations. Knowing that there is only a relatively small number of issues that have a clear rulings in either the Quran or the Sunna of the Prophet, the central matter lies in two inter-related questions: how ordinary Muslims can understand the divine language and what the role should be played by "those in authority"?[402] Naturally enough to think that in the instances of legal ambiguity and doubt, the interpretive process to arrive at a conclusion of law should be carried out by the qualified specialists. In other words, only knowledgeable people in the way of expending the maximum efforts are able to capture the essence of divine message. The obligation to ask those who have knowledge emanates directly from a number of the verses of the Quran.[403] Since the Quran is named "the Reminder" in a number of verses (5:44, 7:2), it is reasonable to think that the people of the Reminder here are those who are knowledgeable about the Quran. It may be concluded that the qualified Muslims and their ijtihadic efforts to translate the language of divine scripture into understandable fulfil the function of a guide on the matters of religion and law.

The study of the concept of ijtihad requires to discuss the following issues. At first, our attention is to be turned to the definition and the textual authority on which ijtihad is grounded. Those who have the right to exercise ijtihad in Islam is another question to be answered. How far one might push the boundaries of the text in the process of exercising ijtihad? If ijtihad provides inherently a great deal of room for manoeuvre in Islamic law then why knowledgeable people once decided that working with legal sources may suddenly be seen as fixed. What are the inner and the outer factors that put restrictions on the use of ijtihad? Did the so called 'closure of the doors of ijtihad' set a prohibition on the activities of ijtihad? Could it be that the supposed closure of the ijtihad was one of the inevitable steps to preserve integrity of religion which was in danger because of uncontrollable proliferation by the fiqh schools and personal jurists?[404] Can we say that the restrictions

402 The Quranic verse 4:59 states: "O you who believe! Obey God and obey the Messenger, and those in authority among you." The authors of the commentary of the Quran says that a major part of scholars identify "those in authority among you" as Muslim religious and legal scholars (ulama), because of their knowledge of the Quran and the Sunna, through which God and the Prophet are obeyed. More: The Study Quran: A New Translation and Commentary, *supra note*, 95: 219.

403 For example, the Quranic verses 16:43-44 states that "one should ask the people of the Reminder if he knows not clear proofs and scriptures."

404 Burhan Ghalioun, *supra note,* 129: 204.

on the use of ijtihad was the further process of traditionalisation of Islamic law which started even earlier than the schools of law were officially established? Why discussion on the closure of the doors of ijtihad still matters and what are the internal and external arguments for reopening the doors of ijtihad in the modern times? How the relationship between ijtihad and taqlid needs to be understood? In the light of modern influences, there is a dispute over the nature of ijtihad, namely, whether it is merely individualistic reasoning or whether it may also be exercised in the collective form. What the authors have in mind when they insist on the need of neo-ijtihad? These and other questions in the following paragraphs will be analysed in order to understand the concept of ijtihad and related issues.

4.1.1. Definition and textual authority

After a long-term research of the system of law in Saudi Arabia, F. Vogel distinguished two forms of law in Islamic legal tradition, namely, the microcosmic and the macrocosmic. According to him, the microcosmic has been and remains the main logic of Islamic legal justification, its constant orientation. Microcosmic law is inner-directed and instance law, law linked to a concrete event and generated by an act of individual conscience. What is most important is that the root conception of microcosmic law is Islamic legal notion of ijtihad. For F. Vogel, Islamic law as microcosmic law is nothing but ijtihad.[405] W. Hallaq explains the concept of ijtihad by giving exemplary description of ijtihad proposed by al-Ghazali. Here the picture in which a man cultivates a tree reflects the essence of the role and concept of ijtihad. The fruits of the tree represent the legal rules that constitute the purpose behind planting the tree; the stem and the branches are the textual materials that enable the tree to bear the fruits and to sustain them. But in order for the tree to be cultivated, and to bring it to bear fruits, human agency must play a role. Thus, the principles of legal reasoning and hermeneutics, employed so that the tree may bear the fruits.[406] Such process of human reasoning is known as ijtihad, the effort or the process of striving itself. Of course, there are more definitions that may reveal the concept of ijtihad in more certain terms. For instance, ijtihad may be defined as the total expenditure of effort made by a jurist in order to infer, with the degree of probability, the rules of Sharia from their detailed rulings in the sources.[407] Or, ijtihad is nothing but fiqh's answer to how God's law can be determined in conditions of uncertainty, conditions that the law itself declares are pervasive, indeed arise urgently for every act.[408] Anyway, ijtihad is relevant when there is a possibility of a text having more than one meaning. Human intellectual faculty to mediate between God's will and human reality is the cornerstone idea of the Sharia because the main tool for transformations on the ground is ijtihad through which knowledge is to be reached.

The Quran and the Sunna of the Prophet speaks of ijtihad in express terms. From one side, the clarity of divine message is stated in a number of instances (for instance, 16:89),

405 Frank E. Vogel, *supra note*, 50: 17-25.

406 Wael B. Hallaq, *supra note*, 42: 117.

407 Mohammad Hashim Kamali, *supra note*, 43: 367.

408 Frank E. Vogel, *supra note*, 50: 61.

and, from another, the obligation to ask for the guidance from the learned people means that an ambiguity of the textual injunctions may be resolved only with the help of human legal reasoning or interpretation (for instance, the Quranic verse 3:7, 16:44). There are some verses that speaks merely of ijtihad. These are 4:59, 9:122 and 29:69. They may be also regarded as the suppliers of the authoritative ground for ijtihad. The first verse speaks of the necessity to have knowledge of the Quran, the Sunna of the Prophet and this becomes the basis to resolve disputed matters. The second verse speaks of the devotion to the study of religion what is the essence of ijtihad which should be a continuous feature of the life of the community.[409] The third verse says: "And those who strive in our cause, we will certainly guide them in our paths". The emphasis is to be made on the plural form of the word 'path'. It is asserted that there is a number of possible paths toward the truth and all of them are open to be reached through the ijtihadic activity. Thus, those who strive to obtain knowledge will be guided to the ways of acting in accord of it. All the Quranic provisions that are utilized by scholars in support of the status of qiyas, may also be cited in support of ijtihad. This is not to say that ijtihad is tantamount to qiyas. Even al-Shafii, by stating that ijtihad and analogy are two terms with the same meaning was not to equate the two terms.[410] Rather, qiyas or analogical reasoning is a particular form of ijtihad because ijtihad covers a variety of mental processes, ranging from the interpretation of texts to the assessment of the authenticity of the Prophetic traditions.[411] Besides qiyas, there are other types of legal reasoning as istihsan, maslaha, darura and so forth. Alongside the Quranic text on the ijtihad, the Sunna of the Prophet also speaks of it. By the way, the Sunna of the Prophet is more specific on the ijtihad. In the hadith, the Prophet is reported to have said: "Strive and endeavour, for everyone is ordained to accomplish that which he is created for". The other hadith is clear by stating that "When God favours one of His servants, He enables him to acquire knowledge in religion."

Ijtihad is validated by the Quran, the Sunna of the Prophet and dictates of reason. Al-Shafii's arguments on the ijtihad are to be taken into account as well. His arguments stems namely from the Quranic verses which speak of the obligation to pray in prescribed direction. The obligation to face the Ka'ba (the direction of Mecca) is known by the explicit text, but the very direction of the Ka'ba is known through ijtihad. More precisely, justification of the interpretive method is grounded in the Quranic injunctions (2:144 and 2:150) to pray in the direction of the Ka'ba: "Turn your face towards the sacred place of worship, and you, wherever you may be, turn your faces towards it". To attempt to find out the direction of it is the obligation of Muslims. To follow the minds of al-Shafii, there is a need to quote two more important Quranic verses in order to realize the roots of ijtihad. According to other Quranic verses (6:97 and 16:16), God has stated that he created stars, mountains, rivers, light, darkness, so that the Muslims may be guided by these signs. To combine these verses altogether means to realize that Muslims are not free to pray in any direction, but rather they are bound to exercise their best efforts in order to find out the

409 Mohammad Hashim Kamali, *supra note*, 43: 373.

410 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 288.

411 Noel J. Coulson, *supra note*, 31: 60.

location of Ka'ba. By analogy, all Muslims are under the obligation to determine the legal values governing their conduct, values that are hidden in the language of the texts.[412]

It is important to mention that the concept of ijtihad is not related solely to the legal matters. In essence, the term ijtihad denotes the expenditure of mental and intellectual effort. According to T. al-Alwani, only when ijtihad began to be viewed as limited to legal matters, rather than as a methodology for dealing with all aspects of life, the Muslim mind experienced a crisis of thought.[413] Such particularisation of ijtihad was not the last step taken by the scholarly community. The later phenomenon of closure of the doors of ijtihad which was agreed by the scholars in the end of the formative period led to the elimination of it because of various reasons.

4.1.2. Who are traditionally entitled to exercise ijtihad?

Who are traditionally entitled to interpret and apply law in Islam? No doubt from the textual sources, they are possessors of knowledge or ulemas. They were the experts of religious matters and law. We prefer to name them "scholar jurists" but this by no means should signify that they were mere jurists as such. As the guardians of religion and exemplary figures in their lifestyle they were the representatives of the masses who, according to the Prophetic report, were to be treated as "idealized heirs of the Prophet". Because of the close relation with people and good knowledge of the social context, they were able to respond adequately to the disputable issues on the ground. There was no question of their reputation and this was one of the reasons why rulers have been forced to respect knowledgeable people and not to refrain from their interpretive conclusions related to Sharia standards of law. In legal terms, the ulemas were mainly occupied with augmenting the theoretical corpus of fiqh law. Among them, the qadis and muftis were those public figures who were qualified enough to fulfil a variety of legal functions.

The rulers were temporal symbols of power, while the ulemas enjoyed a collective permanence and were the rulers of everyday life in Islam. What is of crucial importance to realize is that the society and public opinion accorded the Sharia and its ulemas their near monopoly of legal and moral legitimation even in the centuries when Sufi mystics, offering an alternative form of devotional sensibility.[414] This is not to say that ruler had no role in the development of law. Although Islamic law was jurists' law in that its content was determined by the ulemas, and not the state, it was also state law in that it had a mechanism for being enforced by the state. That mechanism was the judiciary or the qadis, appointed by the caliph and serving under his direct authority. The caliph fulfilled the Quranic injunction to command the right and forbid the wrong through the hands of qadis with the aim to apply God's law as interpreted by the scholar jurists. The qadis were to know the complexities of law and this meant that they usually were from among the scholars. Certainly, as the judges

412 Wael B. Hallaq, *supra note*, 42: 23.

413 Taha Jabir Al-Alwani, *supra note*, 55: 65.

414 Marshall G. S. Hodgson, *The Venture of Islam: The Expansion of Islam in the Middle Periods*. Volume Two (Chicago: The University of Chicago Press, 1974), 120.

they were obliged to fulfil the caliph's will to follow the law, however, this did not mean that they followed caliph's legal interpretation. Judicial authority came from the caliph, but the law came from the ulemas.[415] This is how the qadis combined their duties in the office and a membership in one or another Sunni school of fiqh.

Before embarking on the discussion about the qadis and muftis, there is a need to clarify the difference between another two terms, namely, "mujtahid" and "muqallid". According to the Islamic legal theory, the only scholar jurists who are qualified to exercise ijtihad are mujtahids. Ijtihad in practice means human legal reasoning, interpretation and reinterpretation, rather than the following the legal norm.[416] From here, the difference between mujtahids and muqallids is to be made. The former sort of scholar jurists have qualification to exercise ijtihad. The other scholar jurists were the followers of the interpretive results of mujtahids and had no right to resort on the ijtihadic activities. All the muqallids or the followers of the opinions of mujtahids were under obligation not to resort on the ijtihadic activities because, as stated by W. Hallaq, the very text of the Quran expressly preclude such possibility. He had in mind the verse 16:43 according to which if one does not know, he is obliged to ask the possessors of knowledge who are in this case mujtahids. Because of the assumption that muftis have to be aware of the fiqh rules to issue their legal opinions, I. Nyazee concludes that the activity of mufti cannot be called ijtihad.[417] This approach differs from that of W. Hallaq and from other observers who are sure that mufti can be treated as mujtahid as well. The truth as always lies somewhere in the middle. Due to the capabilities to exercise ijtihad, mujtahids cannot follow the ijtihad of others. Certainly, the obligation to give opinions through the personal ijtihad cannot preclude the instances of inability to solve the question at hand. That means in some instances the mujtahid may follow the opinion of the other mujtahid. To I. Nyazee, the muftis are nothing more than the followers of the ijtihadic results of others. From the point of the view of the majority of scholars, muftis were those who had the possibility to interpret the divine texts and directly from them to derive rules for the formulation of legal opinion if they had the necessary qualifications. While in already resolved legal questions, muftis were equally able to follow the position of one or other fiqh rule with which the opinion of mufti corresponded whether they were mujtahids or muqallids. Among muftis as well as among qadis were people who were mujtahids and muqallids.

The scholar jurist who wants to exercise ijtihad must fulfil a number of conditions. There was no any particular lists of conditions to become mujtahid in the first two centuries of Islam. The theory of the requirements to obtain qualification to exercise ijtihad came to be known just after the emergence of the theory of sources or during the late ninth and tenth centuries. Accordingly, he is obligated to know Arabic language, the Quranic and Sunan juristic passages, those verses of the primary sources which were abrogated and those that abrogated other verses, the matters on which the consensus was made, the intentions of Islamic law and the strengths of the concept of analogy, more exactly, he must be highly

415 Noah Feldman, "Rule of Law and Balance of Power in Classical Islam", The Review of Faith & International Affairs, (2010): 7.

416 John Bowker, *supra note*, 351: 467.

417 Imran Ahsan Khan Nyazee, *supra* note, 44: 264.

proficient in the entire range of the procedures of human legal reasoning.[418] As stated by I. Nyazee, the method of discovery of the rules should be through interpretation of the texts with the help of the other sources with which mujtahid is to be familiar, and this excludes the memorization of such rules from the books of fiqh.[419] Apart from the mentioned, the person who wished to become a mujtahid, should have personal intellectual abilities.

Interestingly enough to mention the position of present leading scholars on the question of the conditions that must fulfil one if he wish to take a position of mufti or qadi in the current context. To find out this, we may look at the official letter to the leaders of the self-proclaimed "Islamic state" signed by the leading scholar jurists of our day. Regarding the qualities of a scholar jurist who might be a mufti, a qadi or a professor at scholarly institution, he must master such disciplines: "He must be a scholar of Arabic language and syntax, of the Quran as the Quran is the basis of all rulings. Knowledge of textual abrogation is indispensable and the science of usul al-fiqh is the cornerstone of the whole subject. He should also know the various degrees of proofs and arguments as well as their histories. He should also know the science of hadith so that he can distinguish the authentic from the weak; and the acceptable from the apocryphal. He should also know fiqh law. Moreover, having "legal intuition is needed: it is the capital of anyone who derives legal rulings. Scholars have summarized all this by saying that a mufti is "someone who independently knows all the texts and arguments for legal rulings". Texts refers to mastering language, Quranic exegesis and hadith; while arguments indicates mastering legal theory, analogical reasoning of the various kinds, as well as legal intuition."[420] Al-Ghazali and other scholars of the post-formative period mentioned very similar things. If we compare the conditions that were prescribed by al-Shafii in al-Risala and the requirements for the current scholar jurists, the conclusion would be that it reflects the very tradition which seems to be alive today at least in the scholarly discourse.

Apparently, among those who belonged to the guild of ulema, the qadis and muftis are of paramount importance in making Islamic law living law. As noted by Egdūnas Račius, only highly qualified jurists took the name of qadi or mufti.[421] The matters that could be settled privately – personal ritual and ethics, of course, and matters as inheritance or fulfilment of contract – a person need only consult a mufti, jurisconsultant of selected school of fiqh. If a matter was carried to the point of litigation in a court, the qadi appointed by the governor ruled according to his own school.[422] Not all qadis were to be mujtahids in order to serve in the courtroom. Qadis like local arbitrators stand in contradiction with modern judges at least in terms of their position in the society. Muslim qadis were always familiar with and willing to investigate the history of relations between disputants. They were people from the same local community and this fact made it possible to understand the social context and resolve conflicts with full consideration of the set of present and future social relations

418 Herve Bleuchot, *Droit Musulman: Fondements Culte, Droit publice et Mixte*. Tome II (Aixe-en-Provance: Presses Universitaires d'Aix-Marseille, 2002), 463.

419 Imran Ahsan Khan Nyazee, *supra note,* 44: 263.

420 The whole text of the letter to Baghdadi can be found here: www.lettertobaghdadi.com

421 Egdūnas Račius, *supra* note, 26: 73.

422 Marshall G. S. Hodgson, *supra* note, 159: 335.

of disputants. According to W. Hallaq, Muslim court as the social and legal institution was the very product of community it served.[423] Thus, despite the fact that the qadis served as the officials appointed by the rulers, the fact that they were leaders from the same area to which the court was established made them easier to pertain into the social reality.

While qadis were representatives of the officialdom, the muftis were private legal specialists who were legally and morally responsible to the society they lived. His duty was to issue legal opinions (fatwas) or legal answers to the questions he was asked to address. An individual might consult a mufti purely for a personal reasons unrelated to an actual dispute with other people. Although not legally binding, the fatwas of mufti played significant role in the community. Even courts regarded fatwas as authoritative statements of law and frequently applied in the courts. In fact, the law applied by Muslim qadis was always the fiqh law and not a law that emerged out of judicial precedent, because the only type of precedent that defines the law in the Sharia system is the earlier opinion or fatwa, used as a basis for the later fatwas. The fatwa, not the judicial record, was the conduit of the law.[424] Interestingly, the fatwas rather than court decisions that were collected and published, contained new law or represented new legal elaborations on older problems that continued to be of relevance. Even more, it is commonly believed that fatwas are the best means to provide change in the field of Islamic law because they change with the change of time, place, customs and circumstances. As clearly sums up the matter W. Hallaq, fatwas became part and parcel of legal doctrine of one or other school of fiqh law.[425] This is how the jurists' law or fiqh law acquired social relevance.

Before moving to the discussion on the phenomenon of the closure of the doors of ijtihad, there is a need to make some final remarks about the concept of ijtihad. Scholar jurists who either were appointed as qadis or their function was to give fatwas or they were the teachers within the school, they developed methods of thinking about interpretation of the law. These interpretive methods were nothing else than the tools of ijtihad through which they put the efforts to arrive at the best guess of what he thought the law pertaining to a particular case might be. As was already noted, most of laws, rules and regulations of Islamic law are the results of ijtihad. Important to note, that the very modes of ijtihad are different. The first mode or stage of ijtihad is that when the jurist discover the law from explicitly or implicitly enshrined provisions of the revealed texts. If a jurist cannot find the evidence by using the literal approach, he turns to the second stage or mode of ijtihad. The law may be extended to new cases through exactly similar cases found in the texts. Here qiyas as the method to derive legal rules is to be used. The third stage would be that when a jurist extends the law according to the spirit of the law and its purposes. All texts here are considered as a system and by using this systematic method the rules are to be deduced.

Limited texts and unlimited number of new problems was always that reality in which the jurists exercised their personal ijtihad. The very process of ijtihad is to be employed by various methods, literal and rational. Regarding previously mentioned three modes of stages of ijtihad, the first stage is the textual one and the other two are exercised through

423 Wael B. Hallaq, *supra note*, 88: 57.

424 Bernard Weiss, *supra note,* 313: 143.

425 Wael B. Hallaq, *supra note*, 88: 54.

rational methods. More exactly, if the law is stated explicitly in the primary sources or is implied by these texts, the mujtahid discovers law through interpretation. When there is a need to extend the law to the new cases that may be similar to cases mentioned in the divine sources, but cannot be covered through literal methods, the mujtahid is obligated to base his ijtihad by combining textual and rational methods. Eventually, when there is a need to extend the law to new cases that are not covered by the text explicitly or implicitly and there is no similarity between new cases and the cases mentioned in the textual sources, then ijtihadic activity is to be employed through the rational methods.

The twin revealed sources are the basic ones from which the whole religious and legal tradition receives its roots. Whereas ijtihad provides a set of methods and strategies in terms of which the whole tradition retains the capability to respond to the requirements of time and new generations. However, the scholarly community in the end of the formative period decided that all major question of law are decided. Because of this, the further interpretational activities of jurists were permissible solely in the limits of the doctrines of fiqh law within one of four selected Sunni schools of fiqh. It seems that the period of imitation (taqlid) of fiqh doctrines in the construction of law took the scene from the ijtihad and, speaking metaphorically, the doors to it were closed. What was achieved by this is that law became more and more predictable and at the same time more and more rigid. For the centuries, according to T. al-Alwani, it has been able to do no more than repeat itself, by offering the same commentary on the same texts of fiqh law.[426] This shift was and still is seen as the cause of the conundrum in which Islamic law was trapped for a long time.

4.2. The closure of the doors of ijtihad and the notion of taqlid

To speak of ijtihad separately from the closely related concept of taqlid is to present but a part of the whole picture of Islamic law and its historical development. The episode when ijtihad had to give a way to taqlid is known as "closure of the doors of ijtihad". From the end of the formative period of Islamic law all the arguments and rulings had to be grounded on the fiqh law of chosen Sunni school. The idea was that every Muslim must become an imitator of one or another doctrine of recognized schools of fiqh law. The agreement lied also in the fact that any kind of new school of fiqh in Sunni world is impossible. This is not to say that ijtihad ceased to exist on the ground or that the schools of fiqh had such kind of aim. Ijtihad as such had not disappeared because even the leaders of schools excluded such scenario. The Hanbali School hold it as impossible option, other schools admitted such possibility but only in theory.[427] Rather, the key point was that any kind of further legal reasoning must be exercised in the limits of the doctrinal school of fiqh law. Thus, to call such imitation "blind" is not correct because what was imitated was the doctrine of school to which one belonged. The aim was to stick any interpretative act to the existing corpus of fiqh rules and this was gradually achieved. The limitation lied in the fact that fiqh rules was

426 Taha Jabir Al-Alwani, *supra note*, 55: 4.

427 Herve Bleuchot, *Droit Musulman: Histoire*. Tome I (Marseille: Presses universitaires d'Aix-Marseille, 2000) 144.

said to be the only source of Islamic law and any type of ijtihad was to be permissible only within the boundaries of selected fiqh school doctrine.

The potential of human reasoning rooted in the primary sources and widely experienced on the ground throughout the formative period suddenly came to be regarded as detrimental to the very tradition of Islamic law. It was felt by the scholars that could lead to error or one's adherence to the unacceptable, thus, taqlid became attractive as a prudent alternative.[428] The construction of the theory of usul al-fiqh, the ultimate emergence of the four Sunni schools and the recognition of their canonical doctrines led to the so called "double traditionalisation" of Islamic law. What do we mean by this? The greater part of formative period was marked by the process of traditionalisation of law with regard to its correspondence with the Quran and Sunna of the Prophet. With the emergence of the theory of usul al-fiqh, twin sources obtained the status of the highest order and all the further human efforts to construct Islamic law were forced to be somehow grounded in the divine scriptures. However, the same usul al-fiqh appeared to be the source of the deeper restriction of ijtihadic activities. In the years of the end of the formative period, the process of traditionalisation took new directions. According to the mainstream idea of the scholarly community, all law was to comply one or other traditional fiqh doctrine of Sunni school. In this light, one or another official school of law became exceptional with regard to its own way of outlook towards the divine texts. In this light, Hanafi, Maliki, Shafii and Hanbali traditional thought or tradition itself emerged on the scene. According to M. Hodgson without all these developments Islamic law could have been left open to unpredictable reinterpretation by every legist qualified to go back to Quran and hadith and re-evaluate them for himself, and such a consequence was avoided and predictability assured by the device of expecting each Muslim to adhere to a given school of fiqh law.[429] While this is true, the other side of the coin also needs to be seen.

Social experience must judge tradition, whether political or legal. Obviously from the history of law that the law which ceased to reflect a social pulse most frequently became inoperative. The very consensus among Islamic scholars to affirm the imitation of selected school's legal doctrine as dominant way to construct Islamic law in the centuries that follow, reflected their intention to stick the development of law to the interpretation of their time. This was decision of rational nature as no divine text speaks of such necessity. In the words of T. al-Alwani, taqlid is not presented as a source of knowledge in the primary sources of Islam and cannot be seen an alternative to either revelation or science based on ijtihad.[430] The essence lied in the conservative stance of ulemas to interpret the present in terms of the past law.[431] The inherent idea of development of law written in the sources and in the very idea of ijtihad was translated as if it was dependent on the humanly created fiqh doctrine. Stagnation of Muslim civilization was the result of the will to protect and ensure the growth of tradition in the boundaries of fiqh doctrine. Idealized legal doctrine in the

428 Taha Jabir Al-Alwani, *supra note*, 55: 80.

429 Marshall G. S. Hodgson, *supra note*, 414: 122.

430 Taha Jabir Al-Alwani, *supra note*, 55: 75.

431 Will Durant, *The Reformation: A History of European Civilization from Wyclif to Calvin: 1300-1564*. The Story of Civilization: 6 (Norwalk, Connecticut: The Easton Press, 1992), 708

eyes of ulemas lost sight of the time and necessities. In all probability, this was that reason why Islam of the populace, or the Islam of everyday life, ceased to coincide with that of the scholars.[432] Inevitably, the burning question of the supporters of reformation as in the thirteenth so in the nineteenth centuries was how to reconsider the questions of law in Islam that have been lain dormant for the centuries.

The real debate, as we can see, arose from the stark contradiction between the concept of ijtihad and the institution of school of fiqh. The former, provided the supposed risk of increased individual improvisation and never-ending rule of variability. At the same time, it was the main idea of movement in Islam which was capable to make Islamic adaptive in the changing time. The latter, according mainly to the followers of the Hanafi and Maliki schools, suggested consistency as the vital feature to make Islamic law into a systematic body of rules. As a result, four distinct manifestations of Sharia law promoted by one or another Sunni fiqh school came to be dominant in the field of law. Because of specific historical reasons and preferences of the community, one or another region of Islamic world made a choice to select Hanafi, Maliki, Shafii or Hanbali School of fiqh as the official law of the region. To conclude, the closure of the doors of ijtihad was nothing more than decision of ulemas to attribute the status of the source of law to doctrines of fiqh law which was the manifestation of Sharia law and not Sharia law itself.

According to W. Hallaq, the doctrinal schools were the last major stage of development that in turn gave Islamic law its final form.[433] However, the sources of the Sharia were alien to any kind of finality. If this was innovative project to curb the chaos within the field of law at that time, later consequences for the whole corpus of Islamic law showed very controversial results. The clash between rigid dictates of the traditional fiqh law and the demands of society[434] soon appeared to be a growing problem. By freezing the development of Islamic law, the scholar jurist tended to solve the problems of their time, but, simultaneously, Islamic law was divorced from the exigencies of developing Muslim society.[435] This solution had enormous consequences on the subsequent generations who were under the obligation to resolve the complexities of changing time and living conditions by the Islamic legal rules developed during the 10-12th centuries. In his time, al-Shatibi warned his colleagues that ijtihad cannot cease except at the end of the world when man's subjection to the law ceases. This voice represented minority of scholars and taqlid came to be the dominant way of creating and applying Islamic law.

W. Hallaq doubts on the closure of the doors of ijtihad and as an argument takes the role of muftis. According to him, any kind of closure of the doors of ijtihad contradicted to the very idea of the theory of sources because it placed the role of mufti mujtahids to settle new question of the time and this obligation was the obligation of community as such.[436] T. al-Alwani disagrees on this point by saying that the process of issuing fatwas caused the

---

432 Abdelmajid Sharfi, *Islam: Between Divine Message and History* (Budapest: Central European University Press, 2005, 193.

433 Wael B. Hallaq, *supra note*, 296: 204.

434 Noel J. Coulson, *supra note*, 31: 6.

435 Norman Calder, *supra note*, 30: 3.

436 Herve Bleuchot, *supra note*, 427: 128.

decreased interest of learning and seeking knowledge from the primary sources: "Learning and scholarly pursuits were no longer priorities for most Muslims, as they were more occupied with making a living. When people had questions they would satisfy themselves with an answer from the scholar. This new practice permeated the intellectual environment and laid the groundwork for taqlid."[437] In any case, the closing of the door of ijtihad implied that jurists could only practice taqlid adopting the existing position of a school of fiqh. Even muftis who belonged to either school of fiqh could no longer go directly to the sources to deduce legal rulings.

For a number of authors, this is nothing more than different levels of ijtihad.[438] However, this does not change the fact. The power and strength of Islamic law which is essentially open to the factor of change stemming from the individual efforts to make compatible the letter and spirit of the sources with the necessities of life was refused by the scholarly community. According to us, if one insists on the assumption that the so called closure of the doors of ijtihad has never happened because the interpretation of Islamic law continued to prevail on the ground in the direction delimited by one or other doctrine of fiqh law, then there is no room for dispute. In one or another case, we speak of the taqlid. Ijtihad cannot be regarded as ijtihad *per se* if it is diminished to the activity of imitating the fiqh law.

The real question one needs to ask is whether rigidity and mutability is the feature of Islamic law because these features are rooted in its nature. Was it rather the cause of deliberate legal politics chosen by the ulemas? The sources of Islam and the jurists who represented Sharia law for centuries, all recognized the permanency of the Islamic law as moral law of Islam. At the same time all of them recognized the fact that the particular legal norms to be derived from the sources are situational and, as rightly said W. Hallaq, subject to the never-ending ijtihad.[439] However, the concept of ijtihad aimed at making Sharia law adaptable to changing time, social needs and circumstances, was diminished to the degree to achieve methodological missions and functions of one or another school of fiqh law. What was left from ijtihad as an effort to reason the Sharia law? It is clearly evident from the transformed relationship between ulemas and rulers which came to be seen not as the relation between fiqh and siyasa (the concept of Islamic governance) but, rather, as the relation between Sharia and siyasa. It is striking to realize the meaning of this shift. Fiqh came to be equated with Sharia in the eyes of ordinary Muslims. Such a confusion to equate the Sharia and fiqh marked the victory of ulemas. The paradigm of taqlid gave rise for the far-reaching tendency to equate Sharia and its manifestation represented by one or another school. The progress of Islamic law became dependent on the evolution of doctrine of the school of fiqh.

The process of derivation of legal rulings directly from the divine sources was superseded by the imitation of inherited fiqh rules which served as universal guides to action. According to F. Vogel, classical scholars who announced a closure of ijtihad did so in a strange idiom, namely, they did so not by amending the theory of sources (usul al-fiqh) to displace ijtihad's centrality but rather by merely remarking on a contingent state of fact:

437 Taha Jabir Al-Alwani, *supra note*, 55: 77.

438 Amjad Mohammed, *Muslims in Non-Muslim Lands: A Legal Study with Applications* (London: The Islamic Texts Society, 2013), 70.

439 Wael B. Hallaq, *supra note*, 88: 167.

mujtahids are absent.[440] Jurists decided that all the essential questions had been settled and that permitting any new interpretations would not be productive. Important to notice that the gates of reinterpretation were not suddenly slammed shut: it was, as A. Hirsi Ali said, a gradual process, but once shut, they proved impossible to reopen.[441] All was done despite Islamic point of view that no human authority was or is entitled to declare that ijtihad is not permitted.[442]

It seems that the same Islamic scholar jurists, who made it possible to curb the absolutist ambitions of rulers and secular tendencies of Islamic law, became those who attached rigidity as the main feature of Islamic law. Systematization of Islamic law paved the way to the so called closure of the doors of ijtihad. The schools of fiqh and the agreement to follow their pure and ideal doctrine led to the period of almost one thousand year of imitation. If to admit the opinion that Islamic turn to law saved its original identity, then its gradual and necessary systematization within the schools of fiqh to the equal extent isolated it from the social needs and the factor of change. Paradoxically, the more legal practice was detached from the idealized doctrine of fiqh law, the more legal development was possible.

M. Kamali states that taqlid remained a dominant practice for a number of centuries until the reform movements of the late nineteenth century when the modernist schools of thought challenged taqlid and called for a return to ijtihad.[443] As in the past so in modern times, all observant Muslims believe the message of the Quran was eternal and equally valid for all times. The essence of the matter lies in interpretation of the Quran. In the form of fiqh law suitable for that time, interpretation was deliberately frozen by Islamic scholars in the eleventh century. Inevitably, Islamic scholars of the nineteenth century were taught theology and law by the same books as scholars of the twelfth century. As a result of this, clearly a new interpretation or reinterpretation of the Quran was called for, to bring Islamic scriptures up to dates and address the challenges of the nineteenth century – challenges that medieval theologians could never have foreseen.[444] From the point of view of M. Kamali, this long period of stagnation and taqlid has undoubtedly hampered the process of its evolution and created a gap wide enough to put the relevance of fiqh to the concerns of modern society seriously in doubt.[445] Regardless of the period of stagnation, the process of interpretation in the formative period of Islam demonstrated that Sharia is not fixed and permanent entity. Rather, it is capable to be adapted in the light of changing circumstances.

With regard to the incapability of development, M. Iqbal added some remarks. It is worth mentioning to realize the degree to which Islamic law is "alien" to the change. The fact that from about the middle of the seventh century up to the beginning of eleventh not less than nineteen schools of law and legal opinions appeared in Islam shows how early doctors of law worked in order to meet the necessities of a growing civilization.

440 Frank E. Vogel, *supra note*, 50: 61.

441 Ayaan Hirsi Ali, *supra note*, 57: 103.

442 Abdullahi Ahmed An-Na'im, *Islam and Secular State: Negotiating the Future of Sharia* (London: Harvard University Press, 2009), 15.

443 Mohammad Hashim Kamali, *supra note*, 210: 94.

444 Eugene Rogan, *The Arabs: A History* (London: Penguin Books Ltd, 2010), 174-175.

445 Mohammad Hashim Kamali, *supra note*, 210: 95.

Additionally, the supposed rigidity of official schools is simply the fiction because the very analysis of the accepted four sources of Islamic law is inseparable from the further Islamic legal evolution. Lastly, the very idea of movement enshrined in the concept of ijtihad in combination of other reasons prove irrefutable that Islamic law in its essence is open to the change.[446] This is why Islamic law is but the ijtihadic law. Diversity of ijtihadic opinions provides ground to call Islamic law pluralistic one. It has neither the claim of monopoly on juristic truth nor it instigates any powers of enforcement.[447]

It is unreasonable to expect to find in the texts a body of rules that suffice for all times, that covers all future situations. This idea was clearly contested by pointing out that the Quran and the Sunna are unfinished and awaiting completion in the work of generations to come.[448] Mankind struggles to learn Sharia from the sources, also, the changing life conditions are to be responded adequately. Knowledgeable people under the never-ending obligation to evaluate the sources and construct the legal rulings by delivering it to people. In other words, the knowledgeable people are involved into the activity similar to that of translation. To translate the ambiguous language written in the sources according to the requirements of time and circumstances in order to make Islamic law understandable among people in their daily life was their primary task. Ideal law is to be translated into actuality in a given area and time[449] and this is the essence of the concept of ijtihad.

4.3. Fiqh law: from schools of fiqh to fiqh rules

Fiqh law consists of humanly constructed legal rulings derived from the textual sources. As was stated by Ibn Khaldun, fiqh is the knowledge of the classification of the rules of God, which concerns the actions of all responsible Muslims, as obligatory, forbidden, recommendable, dislike, or permissible. These rules are received from the evidences grounded in the Quran and the Sunna and the means God has established to ascertain them. The formulation and articulation of these rules, using those means, is what referred to as fiqh.[450] In general, fiqh is often called the science of legal rulings. Fiqh is not jurisprudence in its essence. Rather, it might be regarded as legal opinion or, more precisely, doctrine stemming from a number of legal opinions. This is why Jean-Paul Charnay says that fiqh is rather the law of jurist consultants (muftis) due to their function to derive answers from the sources of Islamic law than the law of judges who usually applied existing legal precedents.[451] By the very nature of the function of judge in Islam, he is interpretive agency through which fiqh law was mediated and made to serve the imperatives of social order and harmony.[452]

446 Muhammad Iqbal, *supra note*, 53: 157.

447 Wael B. Hallaq, *supra note*, 2: 110.

448 Ignaz Goldziher, *supra note,* 28: 39.

449 Noel J. Coulson, *supra note*, 31: 3.

450 Ibn Khaldun, *supra note,* 134: 523-524.

451 Jean-Paul Charnay, *Esprit du droit musulman* (Paris: Editions dalloz, 2008), 142.

452 Wael B. Hallaq, *supra note*, 2: 169.

The difference between sources of law and the fiqh law is to be established clearly in order to understand the meaning of fiqh law. The former does not specify law and the latter consists of legal rulings written in the manuals of fiqh and collections of fatwas. Fiqh law relies on human means to interpret the sources of divine origins. As sources do not necessarily mean a clear and one meaning on every instance, they must be interpreted in order to derive opinion as sound as possible which then becomes fiqh law. Thus, Islamic law as it is applied on the ground cannot be found in Quran, the Sunna of the Prophet or even in the jurisprudence of the first decades of Islam. The law may be found in the manuals of fiqh doctrine formulated by the scholars of fiqh schools.[453] At the same time, to say that fiqh law is tantamount to positive law[454], at least in modern way of legal thinking, is also incorrect. Positive law or law of the state usually reflects the spirit and letter of fiqh law of one or another school of law which due to various reasons is chosen as official school of law of the state. According to us, fiqh law in its spirit and letter is to be regarded as one of the formal sources from which state-made law obtains its status and in the light of which its content is constructed. The examples of Ottoman Empire or of the current Kingdom of Jordan show how their state-made law can be directly influenced by fiqh law of Hanafi branch.

Four methodological approaches towards the sources gave rise to the gradual creation of somehow different fiqh doctrines within each of four official schools in Sunni world. To put it differently, four manifestations of Sharia law came to be recognized as the official ones. Of course, the different schools were aware of each other, and they often defined their doctrines through a kind of indirect dialogue.[455] The attitudes towards the primary sources were almost identical, however, the role of ijtihad was that question on which all schools had their own positions. The difference lied in the decision to hold one or another ijtihadic form as the supplementary method to derive law from the sources. Later on, one significant agreement on ijtihadic activities particularly influenced the course of Islamic legal development. It was agreed within and among schools of fiqh law that ijtihadic activities must be supressed in order to attribute the status of the main formal source in formulating Islamic law to the fiqh rules. Improvisation and Islamic notion of infallibility of religious scholars suddenly came to be regarded detrimental to the stability of law. The shift was enormous because the law built up by the scholar jurists was always seen as representing his understanding of the Sharia law.[456] It will not be an exaggeration to say that the famous legal principle "Every jurist is correct" was transformed into the other principle that "Every jurist is correct if he follows the doctrine of the school of fiqh law".

The law built up by the scholar jurists who were qualified to exercise human legal reasoning was always seen as representing their understanding of the law. This way of looking at the law emphasizes the human element in the law because although Islamic

453 Fiqh doctrine means not necessarily the fundamental works of those who found the schools of fiqh (Abu Hanifa, Malik, al-Shafii, Ibn Hanbal). Rather, Islamic legal rules may be found in the commentaries of the jurists who formulated and classified basic rules of legal nature according to the subject a number of fiqh books. More about this: Herve Bleuchot, *supra note*, 418: 479-484.

454 Egdūnas Račius, *supra note,* 26: 68.

455 Noah Feldman, *supra note*, 415: 6.

456 Bernard Weiss, *supra note*, 313: 116.

law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God as humanly understood.[457] Thus, any deliberate decision of scholar jurists regarding the methodological issues or any concrete question of law were humanly made decisions and acts which, according to Islam, could not pretend to any kind of finality. From this, it appears evident that fiqh law as such is of mutable nature. Just because the possibility of change and development is one of the greatest signs of God in the Quran, any kind of supposed finality of fiqh rules is to be questioned and challenged.

4.3.1. Comparing four Sunni schools of law

Madhhab is to be translated as the chosen way or course. More precisely, the madhhab is the doctrinal legacy that binds members of a school together.[458] There is nothing in the sources of Islamic law or in the books of legal theory on the exact number of schools. It is more an accident of history than any kind of requirement that four massive schools were created and spread their influence in particular region. The Imams Abu Hanifa, Malik, al-Shafii and Ahmad ibn Hanbal are the founders of main four Sunni schools. Hanafi, Maliki, Shafii and Hanbali schools of fiqh law are those entities which were to construct the law in one or another particular Muslim region or area. Ordinary Muslims usually accepted the madhhab prevalent in their regions. All schools agreed on the essential elements which were accurately systematized by al-Shafii in the theory of usul al-fiqh which later was somehow modified within one or another school. Four major Sunni schools had come to agree on a common ground, namely, that the primary sources of Islamic law are: the Quran, the Sunna, ijma and qiyas.[459] The methodological questions related to the supplementary sources and their role in formulating law were the main points of disputes among schools. The search of authentic traditions of the Prophet, ijtihadic activities in the form of analogical method also gave rise for plenty of incompatibilities.

457 Bernard Weiss, *supra note*, 313: 116.

458 Bernard Weiss, *The Madhhab in Islamic Legal Theory* in *The Islamic School of Law: Evolution, Devolution, and Progress*. Edited by Peri Bearman, Rudolph Peters, Frank E. Vogel (Cambridge: Harvard University Press, 2005), 2.

459 Abdur Rahman I. Doi, *supra note*, 178: 167. At the same time it very important to note that both founding fathers of two major schools of Islamic fiqh law added their special and not rarely divergent contribution to the whole corpus of Islamic law. As was already mentioned, Hanafi scholars were more favorable to the human legal reasoning in the formulation of Islamic legal judgments and legal opinions. Whereas Maliki scholars were preferable to use sacred sources and the customary practices which were treated most authoritative because Mecca and Medina was the cities where the Prophet had lived. To mention but one example of difference, it is enough to take a look into *Al-Hidayah*, one of the famous books of Hanafi fiqh, where a number of differences among schools' doctrines is enumerated and explained. According to the Hanafi doctrine, witnessing is a condition for the legal category of marriage (Nikah) due to the words of the Prophet that "There is no Nikah without witnesses". However, Maliki did not agree with this condition by saying that there is no need of witnesses. More on this: Burhan al-Din al-Farghani al-Marghinani, *Al-Hidayah: The Guidance*. Volume Two. Translated by Imran Ahsan Khan Nyazee (Islamabad: Centre for Excellence in Research, 2016), 579.

Abu Hanifa with Malik is regarded as the founder of sunnism.[460] Hanafi madhhab as the official methodology by some of the major Islamic dynasties led to its dominance until the end of the caliphate in the beginning of the twentieth century. The Abbasid caliphate and Ottoman Empire regarded Hanafi School their official school of fiqh law making huge influence on the state-made law. It is now very influential formal source of law in Syria, Jordan, Lebanon, Pakistan, Afghanistan, also, among the Muslims of India. Important to mention that Hanafi School's adherents constitute about one third of the Muslims of the world. The majority of Muslims living in the West are also followers of Hanafi branch. For instance, the Hanafi School is dominant within the community of Muslims in UK and in Greece.

Hanafi School was called by the name of grand scholar jurist Abu Hanifa. From the beginning, he was the supporter of the legal reasoning (ra'y) in the process of derivation law from the Sharia law sources. His disciples were famous for the efforts to systematize what now we call Hanafi fiqh law. Thus, regarding any specific ruling of law, the Hanafi School's followers usually deliver several opinions which were elaborated by Abu Hanifa, Abu Yusuf and Muhammad al-Shaybani.[461] This school is known for the extensive reliance on human legal reasoning in the form of qiyas. As a trader himself, Abu Hanifa was particularly interested in the law of contracts. This is why essentially important feature of this school is its special regard towards individual freedom and reluctance to impose any restrictions on it. Accordingly, neither community nor the government have the authority to interfere in the sphere of individual liberty so long as the latter has not violated the law. This principal attitude might be felt in a number of branches of law. For instance, Hanafi School is the only one among four Sunni schools which entitles an adult girl to conclude her own marriage contract in the absence of her legal guardian.[462]

The Maliki School was founded by Malik ibn Anas al-Asbahi, who spent his entire life in Medina, the city of the Prophet Muhammad. In Malik's opinion, legal practice (amal) of the scholars of Medina constitute the pure message of the Prophet because this part of Muslim world was the living place of the Prophet himself. Imam Malik is famous for his work al-Muwatta which is often described as a work of hadith, but in which the hadith are arranged according to the topics of fiqh. The traditions of the Prophet and his companions, the practice of the scholars of Medina and a number of solutions of Maliki himself composed this famous work. For the majority of Muslim scholars al-Muwatta is the earliest complete work in the history of Islam after the Quran.[463] In addition to the four recognized sources of law, Malikis added some other sources. For instance, the Medinese consensus and the ijtihad in the light of public interest were particularly important for the Malikis in the construction of law. This does not mean that they were the supporters of the use of ijtihad. Imam Malik

460 Herve Bleuchot, *supra note*, 427: 96.

461 Rudolph Peters, *What does it mean to be an official madhhab? Hanafism and the Ottoman Empire*. In *The Islamic Schools of Law: Evolution, Devolution and Progress*. Edited by Peri Bearman, Rudolph Peters, Frank E. Vogel (Cambridge: Harvard University Press, 2005), 149.

462 *The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Hamdan Al-Quduri.* A Manual of Islamic Law According to the Hanafi School. Translated from the Arabic by Tahir Mahmood Kiani (London: Ta-Ha Publishers Ltd, 2012), 383.

463 Mohammad Hashim Kamali, *supra note*, 210: 74.

would not rely on personal opinion if he could find authority in the Prophetic hadith. Malik maintained that the Quran and the Sunna is to be regarded as the foundational texts in the creation of the whole Islamic legal system. Only this school recognized public interest as a methodological principle in deriving law from the sources. Malik gave several fatwas based on public interest. For instance, the Muslim ruler may ask for additional taxes from wealthy citizens in a period of emergency. For him, the safeguard of the public interest was inseparable from the relationship with the ruler. Also, according to Malik, it is better to persuade unjust caliph in the discussion or at worst to resist passively than to take armed action against the ruler as it is not in favour of public interest of community.

Shaffi School of fiqh was named by the name of al-Shafii who was and still is famous by his al-Risala, the first work on the subject of usul al-fiqh in Islamic history. The theory which established a clear order of priority between sources was confirmed by all schools of fiqh law. Besides else, his methodological system was aimed at reconciling divine and human elements in the further construction of the system of Islamic law. This is evident from the very text of al-Risala: "On all matters touching the life of a Muslim there is either a binding ruling or an indication as to the right answer. If there is a ruling, it should be followed; if there is no indication as to the right answer, it should be sought by ijtihad, and ijtihad is qiyas (analogy)."[464] Here we see that human reasoning in the strict form coexists with divine sources and both are inseparable tools to formulate the system of Islamic law. It is evident that his supreme purpose was the unification of the law and his method of neutralizing the forces of disintegration was the exposition of a firm theory of the sources from which law must be derived.[465] To achieve the purpose to Islamize law, he narrowed the free use of legal reasoning what prevailed under the influence of Hanafi fiqh law. The tendency to follow the doctrine of a recognized school rather than to go directly to the sources of divine nature may be said to have begun at the time when al-Shafii presented his theory of sources or usul al-fiqh. The concern was less with the developing the law than with its systematization.

The fourth school of fiqh law was called by the name of Ahmad Ibn Hanbal (780-855). According to Ibn Hanbal, the Quran as the word of God and the Prophetic tradition is the only source of morality and law in Islam. For him, every Muslim may find all the answers in the Quran and the Sunna of the Prophet. Ibn Hanbal's reliance on the Prophetic hadith was so strong that he and his followers were sometimes regarded not as jurists but as primarily traditionalists. The followers of Ibn Hanbal relied on the letter of the textual sources and were hostile towards any kind of innovations. Even more, as the supreme exponents of an anti-rationalist attitude in law, the Hanbalis at first rejected the method of legal reasoning by analogy and were regarded by the other schools as collectors of the Prophetic traditions rather than lawyers proper.[466] Although we say that all four schools of fiqh recognized qiyas, Hanbalis used this method very little and paid attention mainly on the sacred texts. In the eighteenth century, the Wahhabi, a puritanical movement in the Arabian Peninsula, derived its doctrine and inspiration from the Hanbalis and in particular the works of the

464 Muhammad Ibn Idris Al-Shafii, *supra note*, 79: 288.

465 Noel J. Coulson, *supra note*, 31: 55.

466 *Ibid.*, 83.

popular jurist Ibn Taymiyya.[467] The Hanbali School is currently predominant in Saudi Arabia and also has followers in Oman, Bahrain and Kuwait.

After describing some salient features of four Sunni schools of fiqh, our attention should be turned now to the more detailed study. The study of the approaches to one or another Quranic verse or tradition of the Prophet could open at the same time broader and clearer picture of the differences among four schools of fiqh. The comparative analysis may provide different approaches of fiqh schools towards one or another injunction written in the primary sources. Of course, clear and definitive rules regarding, for instance, specific shares of inheritance or the prescribed penalties would be treated identically, thus, there is no room for comparative study here. However, the attitudes towards those textual injunctions that are open to interpretation can show the differences in the interpretation among schools. Here, we take some examples to illustrate the differences among schools in a way how they transform one or other provision of divine source into the fiqh rules.

The example of the speculative verse in the Quran is the text which states, "Forbidden to you are your mothers and your daughters" (4:23). There is no disagreement among schools of fiqh on the point that this verse speaks of the prohibition of marriage with one's mother and daughter. Concerning 'your daughters', there exists two meanings, literal and juridical, according to which the scholar of one or another school may understand it. In terms of the literal meaning, 'your daughter' is female child born to a person either through marriage or through unlawful sexual intercourse. However, in the juridical sense 'your daughter' can only mean a legitimate child. In the Hanafi thought, if a person commits unlawful sexual intercourse (zina) with a woman, her mother and daughter become prohibited to him.[468] Thus, the prohibition of marriage to one's illegitimate daughter is stated according to Hanafi fiqh. Whereas al-Shafii said that unlawful sexual intercourse does not lead to the prohibition of marital relations. According to this interpretation, marriage with one's illegitimate daughter is not forbidden as the text only refers to a daughter through marriage.[469]

Another Quranic verse (5:33) states that "The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed, or crucified or their hands and their feet be cut from opposite sides, or be banished from the land." The disagreement lies in the words 'or be exiled from the land'. This phrase speaks of the penalty for highway robbery or for waging was on the community and its legitimate leadership. For the majority of jurists, banishment means exile from the place the offence is committed. According to Hanafi jurists, this phrase means imprisonment and not exile. There are several reasons of such understanding. On the one hand, if the offender is to be banished from one place to another within Muslim territories, the harm will not be prevented and he may commit more offences. On the other hand, the banishing a Muslim outside the territory of Islamic community is not legally permissible. In contrast to the

467 Mohammad Hashim Kamali, *supra note*, 210: 84.

468 Burhan al-Din al-Marghinani, *Al-Hidayah: The Guidance*. A Classical Manual of Hanafi Law: Volume One. Translated by Imran Ahsan Khan Nyazee (Bristol: Amal Press, 2006), 481.

469 Mohammad Hashim Kamali, *supra note*, 43: 22.

other three opinions dominating within Shafii, Maliki and Hanbali schools, the conclusion according to the Hanafi thought is that the only meaning of the phrase is imprisonment.

In a number of verses the Quran speaks about the serious nature of oaths. The verse 5:89 makes it clear that swearing to abstain from certain lawful things does not make them actually forbidden according to God. As stated in the verse: "God will not punish you for what is unintentional in your oaths, but he will punish you for your deliberate oaths; for its expiation feed ten poor people, on a scale of the average of that with which you feed your own families, or clothe them or manumit a slave. But whosoever cannot afford that, then he should fast for three days. That is the expiation for the oaths when you have sworn." According to Hanafis, unintentional oath is one which is taken on the truth of something that is suspected to be true but the opposite emerges to be the case. The jurists from Maliki, Shafii and Hanbali School have held it to mean taking an oath which is not intended, that is, when taken in jest without any intention. With regard to the question of expiation, there are three ways to do it, namely, to feed ten poor people, to clothe ten poor people, to free a slave and if one is unable to fulfil any of these three things, he should fast for three days. There is a disagreement as to whether the three days of fasting should be consecutive or could be three separate days. As was stated in explicit terms by famous Hanafi scholar jurist al-Quduri, the three day of fasting must be consecutive.[470] Meanwhile, Malik speaks of three days and not necessarily of consecutive manner.[471]

One more issue on which the positions of schools of fiqh vary is the effect of the consent of the victim. The common idea that homicide is a civil wrong rather than a crime led Muslim jurists to opposite views on the effect of consent of the deceased. The Shafii, Hanbali and Hanafi schools are reported to hold that the consent of the deceased precludes qisas or retaliation. The Malikis also hold that this is civil wrong, however, they think that qisas must be enforced because the right thereto belonged to the heirs of the victim and could not be affected by the victim's consent. Differences among schools are obvious not only in details but also in the treatment of human conduct, more exactly, on its externality and intent. The Hanafis and Shafiis tend to stress the externality of conduct without delving in the intent behind it, whereas Malikis and Hanbalis are inclined towards to credit the intention behind the act. It becomes evident from the examples that this difference is crucial in understanding Islamic legal thought. The issue of marriage here may be taken as example. Marrying a woman who has been finally divorced with the intention merely of legalizing her remarriage to her former husband is valid according to Hanafi and Shaffii fiqh but not according to the Maliki and Hanbali.

With regard to the compensatory payments for crimes (diyah), there are also some differenced among schools. Diyah is the financial compensation paid to the victim or heirs of a victim in the cases of murder, bodily harm or property damage. This is known as blood money which is an alternative punishment to qisas or retaliation. The offender might either face equal retaliation, pay blood money to the victim or heirs of the victim, or be forgiven. There was considerable disagreement among Muslim early scholars on the issue of murder

470 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 583.

471 Al-Muwatta of Imam Malik, *supra note*, 90: 297.

of non-Muslim by Muslim. According to Hanafi fiqh, if a Muslim killed a non-Muslim (dhimmi), qisas was too applied against a Muslim.[472] Or, it might be replaced by the blood money if the heirs of victim agreed. As stated in the book of al-Quduri, the Hanafi scholar or post-formative period of Islam: "A compensatory payment for a Muslim and for a non-Muslim living under Muslim governance (dhimmi) is the same.[473] Meanwhile, the Maliki, Shafii and Hanbali fiqh had different attitude to this issue. According to their rulings, qisas does not apply against a Muslim, if he murders any non-Muslim. The attitude of Malikis is described in al-Muwatta: "Malik said, "What is done in our community is that a Muslim is not killed in retaliation for the death of an unbeliever unless the Muslim killed him by treachery. In such a case he is killed for it.""[474] A diyah was payable instead. The Hanafi and Hanbali considered the payable diyah for Muslim and non-Muslim male victims to be the same, while the Maliki fiqh considered a non-Muslim male's value of life as worth half of a Muslim. To prove it, the statement from al-Muwatta, the most famous Maliki book, again is worth being quoted: "Yahya related to me from Malik that he heard that "Umar ibn 'Abd al-'Aziz gave a decision that when a Jew or Christian was killed, his blood-money was half the blood-money of a free Muslim.""[475] By the way, the Shafii scholars considered it worth a third.

Our aim here was to shortly present all four recognized Sunni schools of fiqh law and the differences in viewing how one or another open to interpretation injunction might be understood. Although it is beyond of our research to make the comprehensive comparative study of all four doctrines, the short comparative study regarding a number of selected issues was aimed to give a picture of how different might be interpretational answers to one or another contested point. We also understand that we risk to reveal but a half of the matter by providing such a general picture. This is why the last pages of this chapter will be dedicated to the specific analysis of fiqh rules of Hanafi branch. At first, we are to introduce a number of peculiarities of Hanafi fiqh regarding marriage law and criminal law. Later, our task will be to illustrate the close relationship between traditional Hanafi fiqh rules and modern state-made law in the light of some issues regarding contracts of sale. For the comparative study, we will take into account Hanafi fiqh rules written in the manuals of the eleventh-thirteenth century. To measure their impact, we will investigate the Civil Code of the Ottoman Empire established in the nineteenth century and the Civil Code of the current state of Jordan. To sum up, by discussing all four schools and their different methodological regards towards one or another ruling written in the revealed sources, our seeking point was to find out the relationship between the Sharia law and traditional fiqh law. Now, we are to introduce a number of peculiarities of Hanafi law. Also, the following pages present a comparative study in order to find out the relationship between traditional hanafi fiqh law and modern state-made law of Muslim states.

472 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 506.

473 *Ibid.,* 515.

474 Al-Muwatta of Imam Malik, *supra note*, 90: 580.

475 *Ibid*.

4.4. Hanafi fiqh law and its peculiarities

Whether fiqh law is adaptable to the circumstances of contemporary time? From the point of view of Amjad Mohammed, at least fiqh law of Hanafi branch possesses both theoretically and practically the ability to adapt to different times and situations.[476] In contrast, T. al-Alwani is assured that such traditional approach did not prevent Muslim umma from falling into a stage of decline and failure from which it is still suffering.[477] Despite that, it is certain that among all the schools of fiqh law, the Hanafi School is the most comprehensive Sunni school which has all the provisions of law required to run the state. For example, the Hanafi law was the land law in the Ottoman Empire. Moreover, modern Egypt state applies Hanafi fiqh despite the fact that the majority of people regard themselves as Shafii. According to Muslim scholars at the Sharia Council in London, there is no Muslim-majority country which applies solely Maliki or Shafii fiqh law because only Hanafi fiqh manuals can provide all the necessary details regarding law. What is the main reason that Hanafi law is so exceptional in comparison to the other three Sunni fiqh doctrines? The answer lies in the fact that one of the founding fathers of Hanafi fiqh doctrine had an opportunity to be involved in the formulation of Islamic law from the very beginning. Abu Yusuf as a disciple of Abu Hanifa was a qadi, thus, he knew all issues and problems concerning the field of law. He wrote in detail how to run a court and how to apply the law. Thus, his role is ultimate in making Hanafi doctrine a comprehensive set of fiqh rules. If one is interested in the history of US Constitution, the first thing to be done is to read the papers of the founding fathers. Similarly, to find out all the peculiarities of Hanafi law doctrine, a jurist is forced to start his scientific journey from the very beginning.

It is very likely that Hanafi fiqh law has a majority of adherents among Sunni Muslims not only due to the political and historical circumstances, but mainly because of its potential to adapt to the changing social conditions and time. To prove its capacity to be adapted, we selected Hanafi fiqh for the further investigation. Our foreign internships were devoted to the countries and communities where Hanafi fiqh is regarded as the main source of knowledge in the scholarly discourse as well as in the process of implementation of Islamic legal rules. All in all, direct discussions with Muslim scholars in the selected Muslim-majority state and within particular Muslim community in the West, possibility to read translations of the most authoritative manuals of Hanafi fiqh from eleventh-thirteenth centuries encouraged us to launch a study of the Hanafi fiqh.[478]

476 Amjad Mohammed, *supra note*, 438: 149.

477 Taha Jabir Al-Alwani, *supra note*, 55: 10.

478 In general, there are six grades of jurists in the Hanafi School. The first grade is that of great mujtahids and includes jurists like Abu Yusuf, Muhammad al-Shaybani and other disciples of Abu-Hanifa. The second grade is that of the jurists who are able to settle issues on which there is no narration from the jurists of the first grade, however, such these jurists stay within the sources and rules of the school and employ them to settle new issues. The third grade consists of those jurists who are capable of elaborating issues, highlighting the underlying reasoning and identifying the proper rule. The fourth grade is that of the jurists like al-Quduri and al-Marghinani. These jurists are able to prefer, through reasoning, one opinion over another from among the opinions prevailing within the school. The fifth grade is that of muqallids or followers, who are able to distinguish between the stronger and weaker opinions, like

4.4.1. A study of some Hanafi fiqh rules

In the beginning, the classification of Hanafi fiqh laws needs to be delivered. Traditionally, it was classified into three categories of devotional matters, civil transactions and criminal laws. Generally speaking, every major work of Hanafi fiqh begins with a detailed exposition of devotional matters. Here, such themes as the cleanliness, prayer, fasting, pilgrimage, the concept of zakat always receive much of attention. Further, the chapter on civil transactions includes exchange of valuables, equity and trusts, matrimonial law, civil litigation, administration of estates and so forth. Important to notice that marriage as the civil contract possesses the place immediately next to devotional matters. The criminal laws are usually divided into the concept of retaliation and prescribed offences which are subdivided into the five offences of theft, adultery, slanderous accusation, wine drinking and apostasy. In the following pages of this chapter our attention will be paid to a number of peculiarities of traditional Hanafi fiqh doctrine. After the short discussion on the devotional matters, the section will turn to the analysis of law of marriage and offences in order to illustrate some specific points of traditional Hanafi law. In the end, the law of civil transactions and its influence on the Civil Code of Ottoman Empire and on the current Jordanian Civil Code will be explored.

To separate the pillars of religion and the rest of fiqh by regarding the former as merely ritualistic and the latter as constituting the law would not be accurate decision. Islamic law, as was noticed by N. Coulson, has a much wider scope and purpose than a simple legal system in the Western sense of the term because fiqh law not only regulates the ritual practices of the faith and matters which could be classified as medical hygiene or social etiquette, but also it is a composite science of law and morality whose exponents or scholar jurists are the guardians of the Islamic conscience.[479] In all probability, the solution of the founding Muslim scholars to place devotional issues into the law texts was related both to safeguard Islamic conscience and to sacralise scholarly made law. In such a way fiqh law obtained divine element or, strictly speaking, it was deliberately divinized. The result of such a move was that the scholars in the eyes of the society obtained a right to curb the power of rulers. Thus, the questions concerning the performance of the prayer, payment of alms-tax, performance of pilgrimage, the fasting during the month of Ramadan, together with the matters of purification as a preface to prayer occupy a prominent place in the majority of fundamental works of Hanafi fiqh. Al-Hidayah of Al-Marghinani[480] or

---

the authors of the four acknowledged texts. The sixth is that of the grade below the previous grade, who have no ability to distinguish between the strong and the weak opinion. Two Hanafi fiqh authors and their works belongs to the fourth grade. This study is based on the translations of the most authoritative manuals of Hanafi fiqh law written in eleventh and twelfth century. Respectively, the Mukhtasar (Epitome) of al-Quduri (1037) that is regarded as the subject of further exposition and commentary in the centuries that followed, and Hidaya (Guide) of al-Marghinani (1197) whereby the Hanafi jurisprudence was developed.

479 Noel J. Coulson, *supra note*, 31: 83.

480 Al-Hidayah is the commentary consisting of two volumes. The first volume consists of 661 pages and first 473 pages are devoted to the questions of devotional matters.

the Mukhtasar of Al-Quduri[481] can be taken as examples. W. Hallaq concluded that the function of such placement of devotional matters within fiqh law manuals was subliminal as well as psychological, laying as it did the foundations for achieving willing obedience to the law that was to follow, that is, the law regulating human affairs.[482]

Nikah or marriage as the civil contract frequently possess the place immediately next to devotional matters as is in the case of Al-Hidayah. Strictly speaking, there was no family law as such in the fiqh manuals. Rather, this was represented by the law of marriage, law of divorce, law of custody and so forth. The law of marriage and some related issues need to be shortly explored here. In the Hanafi thought, the marriage contract must fix the offer and acceptance. According to the letter of the Quran,[483] key to any contract is the presence of mutual consent without any trace of compulsion. The contracts are valid when they are concluded in written form.[484] An explicit language which reduces ambiguity of contractual intent to the minimum is essential in marriage contracts and the absence of which will invalidate the contract. The questions of witnessing, of guardianship and of receiving dowry here are also important. In essence, the contract of Muslims in Hanafi fiqh is not concluded unless there are present two Muslim, free, major and sane male witnesses, or one male and two women, whether or not they possess moral probity or whether they have been awarded the penalty of false accusation of unlawful sexual intercourse.[485] In contrast, for followers of Shafii School of fiqh as other schools, being a witness belongs to the legal category and one who received accusation of the crime cannot serve as a witness. For Hanafis, non-Muslims had the right to be witnesses to marriages between a Muslim man and a non-Muslim woman.

With regards to the issue of guardianship, the Hanafites were alone in permitting a woman, who has reached the age of majority, to conclude her own marriage contract without a guardian who was normally, but not always, the father of the woman.[486] This shows Hanafi view towards women as independent individuals. In contrast, according to the majority of jurists of other schools, the guardian (wali) was essential element of the contract. One more essential feature of marriage is the dower, paid by the husband to the wife, which is usually divided into two parts, immediate and delayed. In pre-Islamic time the dower was paid to the bride's family, and Islam transformed this rule in a way that the given dower is the property of the wife. The Quran (4:4) verse says to a man "And give the women their bride wealth as a free gift…" From the Quranic law and fiqh law is obvious that any kind of saying similar to that "the dower is the bride price" has no sense and is un-Islamic. According to Islam, no one has the right of guardianship of wife's money because she is a free and

481 The Mukhtasar of al-Quduri consists of 727 pages and first 153 pages speak of the questions related to the legal pillars of religion

482 Wael B. Hallaq, *supra note*, 2: 226.

483 The Quranic verse 4:29: "O you who believe, do not devour each other's property in vain, except it be a trade by mutual consent."

484 The Quranic verse 2:282 states: "When you contract a debt for a fixed term, record it in writing". By analogy, it is preferable to conclude all other contracts also in written form.

485 Burhan al-Din al-Marghinani, *supra note*, 468: 476.

486 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 383.

independent individual in her marriage. This is why Abu Hanifa said that a woman has the right to enter and execute her own marriage contract without any guardian. According to Hanafi fiqh, the contract of marriage is valid even if no dower is named in it. Although W. Hallaq disagrees with this point,[487] the proof lies in the classical manuals of Hanafi fiqh given by al-Quduri or al-Marghinani. Accordingly, the marriage contract is valid when the dowry is mentioned in it, and it is also valid even if the dower is not mentioned in it.[488] This is because the minimum amount of dower is mentioned in the Quran and the Sunna of the Prophet. The minimum amount of dowry is also prescribed in the Hanafi law manuals.[489] A wife is not required to share her money with a husband, because, according to the Quran, it is a husband who is obliged to support his wife, even if she is wealthier than he is. In the case of divorce, the dower rests in the hands of a woman because it belongs personally to her. If only one part was given to a wife in the time of marriage, the delayed part must be also given in the case of divorce. Thus, any requirement from the side of men to return it has no ground according to the Hanafi law and to the Quran itself[490]. "And how can you take it back, when you have lain with one another and they have made with you a solemn covenant?" This is the question raised by the Quranic verse 4:21 which speaks of the private and intimate manner of relation and covenant between both. If such condition were stipulated in the marriage contract, it might be treated null and void.

According to Hanafi doctrine, stipulating any invalid condition in the marriage contract does not nullify the contract itself and only the condition itself would be regarded as null and void. Exemplary issue might arise when the condition about not allowing a husband to marry the second wife is prescribed by the marriage contract. What is the legal ground to hold this stipulation invalid? The Quranic verse 4:3 prescribes a possibility to marry more than one woman and not more than four at once. Such provision is in direct conflict with the enumerated stipulation in the marriage contract what means that it is null and void. In essence, there is no need to put such provision in the contract because the separate Quranic verses and the Quranic message as a whole states clearly that if a man is unable to adequately provide for multiple wives or treat them equitably, he is advised to marry one woman. The Quranic verse 5:129 makes everything even clearer by saying that "men will never be able to deal equitably between their wives, even if they desire to do so". After all, women might always seek divorce if they think a husband deals with her in different way than with another wife or, eventually, by saying that the maintenance is insufficient to their requirements. In this light it is important to mention one more relevant Hanafi fiqh stipulation whereby a woman is able to make a request for a separation if the husband is impotent.[491]

487 Wael B. Hallaq, *supra note*, 2: 277.

488 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 384.
Burhan al-Din al-Marghinani, *supra note*, 468: 493.

489 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 385.

490 The Quranic verse 4:20: "If you desire to take one wife in place of another, even if you have given to one of them a great sum, take back nothing from it."

491 "If the husband is impotent the qadi is to grant him a year. If he is able to cohabit with her, then it is

Criminal law is not regarded as a single, unified branch of law in the fiqh manuals. Almost in all cases it is discussed in three separate chapters. There could be identified three main categories of offenses: jinayat, hudud and ta'zir. First, we find provisions regarding offences against persons, homicide and bodily injury. What is covered by *jinayat?* These are punished by either qisas (retaliation) or payment of diya (monetary compensation) to the victim or his surviving kin. Truth, homicide and bodily injury belonged to the other category of offenses. However, the Shafiites acknowledged both homicide and bodily harm as hudud offences. Second, hudud are those offenses for which a specific punishment is strictly enshrined in the primary sources. These offenses constitute violations of the claims of God with mandatory fixed sanctions. These are unlawful sexual intercourse, false accusation of unlawful sexual intercourse, drinking alcohol[492], theft and highway robbery which were accepted by the jurists from all four schools of fiqh as hudud offenses. Third, provisions concerning discretionary punishments of sinful or forbidden behaviour of acts endangering public order or state security.[493] Discretionary punishment as one more category reserved for offenders who neither were guilty of any hudud offense nor were guilty of homicide or bodily harm.

Hanafi fiqh recognizes those five offenses that are explicitly established in the text of the Quran. These five are limits prescribed by God in the clear Quranic verses which lay down severe sanctions. As noted, since human nature is weak and covetous, the wisdom and loving kindness of God necessarily lay down limits (hudud) for human liberty.[494] What is clear from the strict evidential procedures to prove these offences is that the sanctions were mainly intended to deter from wrong doings. As it is written in Al-Hidayah, Hadd literally means prevention and in this sense, the word haddad is applied to mean a guard.[495] According to W. Hallaq, this shows why these sanctions were infrequently implemented

---

good, otherwise he is to announce a separation between them if the woman makes a request for that." More on this: Burhan al-Din al-Farghani al-Marghinani, Al-Hidayah: The Guidance. Volume Two. Translated by Imran Ahsan Khan Nyazee (Islamabad: Centre for Excellence in Research, 2016), 799.

492 According to the he general Hanafi fiqh rule on the offence of drinking, "if a person drinks *khamr* (wine) and is caught when the smell is still on him, or they bring him in a drunken state and witnesses testify against him about drinking, then he is to be subjected to had. Likewise, if he confesses and the smell is still on him". Additionally, there are many exceptions and even positions in which Hanafi founding fathers differ from the Prophet himself. For instance, if a man confesses after the disappearance of smell, he is not to be subjected to hadd according to Abu Hanifa and Abu Yusuf. Whereas the Prophet said that a man in such a case is still subjected to hadd. Also, it is interesting to mention one more Hanafi fiqh rule which is very relevant in the present time. As it is stated Al-Hidayah, "if a man is taken into custody by the witnesses and the smell is found on him, or he is intoxicated, but they go from one town to another where the imam is located, but his state changes prior to their reaching the destination, a man is to be awarded had in the opinion of all the jurists". By the way, the hadd for drinking khamr in the case of a freeman is eighty lashes due to the consensus of the Companions of the Prophet. The strikes are to be distributed over his body. More on this read: Burhan al-Din al-Farghani al-Marghinani, *supra note*, 491: 1019-1023.

493 Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (New York: Cambridge University Press, 2005), 7.

494 Ann K. Swynford Lambton, *State and Government in Medieval Islam. An Introduction to the Study of Islamic Political Theory: The Jurists* (New York: Oxford University Press, 1981), 2.

495 Burhan al-Din al-Farghani al-Marghinani, *supra note*, 491: 979.

in practice.[496] As hudud offences will be explored in the next chapter in a greater length, our attention is to be turned here to the second category of offences, homicide and bodily injury. It is important to notice that homicide is a private wrong, prosecuted only on the demand of the victim's next of kin. According to Hanafi fiqh, there are five types of homicide which are graded on a scale of intentionality. These are: intentional homicide, quasi-intentional killing, unintentional homicide, a semblance of unintentional homicide, homicide by accidental cause.

To distinguish each kind of homicide there is a need to define them and to give an exemplary situation which according to Hanafi fiqh could mean one or another type of homicide. Intentional and quasi-intentional killings are similar and differ from the other three forms of homicide in the presence of intention. Intentional homicide is when one intends to strike the victim with a weapon, or with that which is a substitute weapon. This offence involves not only intention to kill but also the use of an instrument that is customarily used to kill. All weapons or potential weapons are those instruments like piece of wood, stone and fire that would normally cause the death of a person. The consequences of that action is sin and retaliation unless the heirs forgive him and there is no expiation for it. Every intentional homicide for which retaliation lapses due to doubt, the compensatory payment is taken from the property of the murderer as well as every compensation which is incumbent because of compounding a negotiated settlement or confession is also taken from the property of the killer. The intentional killing by a minor or insane person is regarded as being unintentional, and for it there is compensatory payment from the group responsible for him.[497] The second type, quasi-intentional homicide. According to Abu Hanifa, it is when one intends to strike with that which is not a weapon nor a substitute for it. His disciples, Abu Yusuf and Muhammad al-Shaybani said that when one strikes another with a large stone or with a large piece of wood, then that amounts to intentional homicide, but quasi-intentional homicide is when one intends to strike the victim with that which does not ordinarily kill. A quasi-intentional killing might occur when someone pushes another into a body of water infested with alligators and the killer did not know of the presence of danger or he have done so playfully. The consequence of such action is sin and expiation, and there is no retaliation for it. Compensation in this form of killing consists of extensive blood-money (compensatory payment) or pardon by the victim's family. According to traditional Hanafi fiqh, severe compensatory payment from those who are legally responsible may amount to a hundred camels delivered over a three-year period.[498] Usually, blood-money may consist of pecuniary payments of various amounts which was to be determined through a process of mediation.

Other three forms of homicide differ from the two previously analysed in the absence of intention. The third type known as unintentional or accidental homicide is divided into two sub-types. On the one hand, when one shoots at a person believing him to be an animal in the time of hunting, this is mistake in purpose due to which a person may be killed in

496 Wael B. Hallaq, *supra note*, 2: 311.

497 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 522.

498 *Ibid*., 504, 512.

unintentional form. Mistake in act, on the other hand, is when one shoots towards a target and it hits a human. According to al-Quduri, the consequence of such action is expiation, and a compensatory payment by the legally responsible person, but there is no sin for it.[499] In this case the compensatory payment is lesser amounting to a thousand gold dinars, ten thousand silver dirhams or a hundred camels of a lower quality that that required for the quasi-intentional homicide. Additionally, the fourth type of homicide which resembles unintentional homicide. For instance, when a sleeping person who turns over in his sleep into a person and kills him. The legal ruling for this type is the same ruling as that for unintentional homicide. The last type of homicide is indirect killing, best exemplified by someone digging a well, in search of gold or water for instance, into which the other person falls and dies. Emphasis should be put on the fiqh rule that whoever digs a well in his own property and a person perishes in it, the owner is not liable.[500] The consequence for such action outside his private territory, when a human perishes on account of it, is compensatory payment less when in the case of other types of homicide, and there is no expiation for it. In addition to this, if an animal perishes due to the human act, then compensation comes from the property of the offender. As noticed by W. Hallaq, this last type is deemed qualitatively different from all the preceding types, as evidenced in the legal stipulation that, except in indirect killing, the murderers in all the former types are barred from inheriting from their victims.[501]

In the period before Islam usually relatives of the killer were also punished but this is not a case in the times of Islam. Islamic criminal law is based on the principle of individual responsibility, thus, the persons are punished for their own acts. Hanafi fiqh text at least in several instances explicitly notes that whoever inherits retaliation against his own father, it lapses; against whomsoever retaliation is obligatory to be executed and he dies, the retaliation lapses.[502] Obviously, all this stems from the Quran (verse 35:18) according to which "nobody shall bear the burden of another". Collective punishments are not allowed, although there exceptional cases of collective liability, such as in Hanafite *qasama* doctrine, where the inhabitants of a house or village can be held liable for the financial consequences of a homicide with an unknown killer, committed in the house or village.[503] For example, if the slain person is found in a locality's mosque, then inhabitants of that locality will be obligated to experience the procedure of qasama. Victim's heirs were able to introduce a claim against the whole village in which homicide was made and there is no evidence of the identity of the killer. If the claim is denied, the heirs may start the *qasama* procedure and demand fifty oaths of denial to be sworn by the inhabitants of the village. According to al-Quduri, when someone is found slain in a locality and it is now known who killed him, fifty men, whom the heir of the slain man chooses, are made to swear an

499 The Mukhtasar of Imam Abu'l Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 505.

500 *Ibid.,* 523.

501 Wael B. Hallaq, *supra note*, 2: 321.

502 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 506, 511.

503 Rudolph Peters, *supra note*, 493: 20.

oath: "By Allah! We did not kill him and neither do we know of his killer."[504] After they have sworn, the people of the locality are required to make compensatory payment.

The principle of retaliation (qisas) is obligatory for the killing of everyone the bloodshed of whom is to be prevented forever, when someone kills him deliberately. Al-Quduri acknowledged that this principle also applies to the deliberate bodily harm, where the offender may be subjected to the same injury he inflicted on the victim.[505] Just as in the case of homicide, pardon or compensatory payment stands as a distinct possibility alongside the principle of an eye for an eye in the cases of bodily harm. Bodily harm falls into three categories: wounds, amputation of dismemberment of organs, or functional incapacitation of bodily organs. In terms of their depth and location in the body, wounds are awarded different damages. Not all wounds require compensational payment, for instance, according to the Hanafi fiqh when one breaks the tooth of a man and another one grows in its place, the right of compensation lapses. Regarding the second category of bodily harm, the general rule in the loss of bodily members is that, where there is only one, full payment is required, but where they come in pairs, only half is paid for each. From the Hanafi text of al-Quduri is evident that loss of the nose, tongue or sex organ, for example, entails full compensatory payment, but an eye or a hand is worth half of the established payment.

Any offense not classified under hudud or qisas (retaliation) punishments is deemed to fall within the category of tazir. The punishments for the hudud offenses are fixed in the Quran or hadith, qisas allow equal retaliation (or monetary compensation) in cases such as killing or bodily harm, however tazir refers to punishments applied to the other offenses for which no punishment is specified in divine sources. In tazir cases, the punishment is at the discretion of the state, the ruler or the qadi. Alongside the decision of, for instance, the qadi in the court, the relatives of the victim obtains the right to demand pecuniary damages. In practice, tazir appears as the most common of all punishments. Examples of tazir offenses include thefts among relatives, acts that threaten or damage the public order or Muslim community or Islam.

The aforementioned cases on the law of marriage and offenses do not pretend to be comprehensive in the area of family law or criminal law, let alone to reflect the whole corpus of Hanafi fiqh law. The aim was to demonstrate some rules of traditional Hanafi fiqh law written in the classical fiqh textbooks and selected branches of law. In addition to this, the last task in this chapter would be to find out whether Hanafi fiqh rules makes any impact on the modern state-made civil law. As an example, some classical Hanafi fiqh rules in the field of law of contracts will be taken from the texts of eleventh and twelfth centuries. These rules will be compared with modern civil codes of Ottoman Empire and of contemporary Jordanian state. The comparative study between Hanafi fiqh principles and civil law of the current state of Jordan will be prolonged in the Chapter Six.

504 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note,* 462: 529.

505 *Ibid.,* 507.

4.4.2. Hanafi fiqh rules within modern Muslim state-made law

For short introduction of the civil code of Ottoman Empire (Mejelle), it is necessary to say that sixteen books making up the Mejelle with 1,851 articles in Turkish language were published between 1870 and 1877. One may wonder how this text of modern times relates to classical fiqh rules. From the first pages of the code everything becomes evident. In the beginning, the text of Mejelle speaks about the fiqh that deals with the devotional matters and worldly matters. As noted, worldly matters are divided into three parts: marriage, dealings between people and their relations with and conduct towards one another, punishments. The Mejelle deals with the second sub-division of the law relating to worldly matters and starts with the books of sales. In general, the Mejelle deals with civil law and procedure. Thus, the aim of this code was to provide clear and systematic law for the Sharia and secular courts which operated in the Ottoman Empire. Regarding the question of role Hanafi fiqh law played in the Mejelle, the very fact that the fiqh principles of Hanafi School were incorporated in the primary chapters of the Code speaks for itself. According to W. Hallaq, not all articles of the Mejelle reflects the authoritative doctrines of the Hanafi School.[506] From our point of view, the fact of placing ninety nine fiqh maxims in the beginning of the code speaks for itself that there was irrefutable intention to reflect the spirit of the Hanafi fiqh in the totality of articles. Fiqh maxims or principles may be compared to the significance of the constitutional principles in Western states.

Naturally enough that the majority of modern Muslim states which lived under the Ottoman rule over five hundred years experienced huge influence. This is why the decision of contemporary Jordanian state to make Hanafi fiqh law a basis of law is perfectly understandable. Both Ottoman Civil Code of nineteenth and Jordanian code of twentieth centuries will be investigated in the following pages of the chapter to understand to what degree classical Hanafi fiqh doctrine made impact on the enumerated modern law texts. To paraphrase one fiqh maxima[507], whether intentionally or not the creators of the Mejelle were acted, they are responsible for the attribution of Hanafi law spirit to the code. The very degree of impact will be more evident just after the short research of the content of the codes.

To begin with the law of contracts, in contrast to the Maliki, Shafii and Hanbali fiqh, the followers of Hanafi doctrine insist on the form as the main element in the contract, because the acts of offer and acceptance presuppose the presence of both parties and the object of the contract. As stipulated in Hanafi fiqh text written by al-Quduri, sale is concluded by making an offer and its acceptance when they are both enacted with words of the past tense.[508] Equally so the contracts of sale are introduced by the articles of the civil code of Ottomans and Jordanian civil code. It is important to note that Hanafi followers place greater importance on the order of occurrence, declaring the first proposition seeking to

506 Wael B. Hallaq, *supra note*, 2: 411.

507 The Mejelle, *supra note,* 391: 15.

508 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 155.

contract to be the offer, and the second in chronological order to be the acceptance. If one of the parties stands and leaves the session before the acceptance of the offer, the offer is void.[509] Regarding the object, parties, form and additional conditions of the contract, here a number of stipulations are to be given as exemplary because in one or another way they are established in all the texts that are taken for our study here.

According to all the texts, the object of the contract must be known to both parties. Classical fiqh textbook states that if a sale was made without having viewed the object, upon seeing it, it does not appear to match the description made by the seller, then the buyer has the right to revoke the sale.[510] Furthermore, by saying, that it is not permitted to sell fish in water before they have been caught, or birds in the air[511], Hanafi fiqh doctrine clarifies that to know the object also means that delivery of it must be possible. The text of the Mejelle notes that the sale of a non-existing thing is invalid. Accordingly, it is necessary that the thing to be sold should be known to buyer and the delivery of which must be possible.[512] The Jordanian civil code repeats the norm by noting that the object must be known to the parties and if the object is impossible at the time of contracting, the contract is void.[513]

Apparently from the classical fiqh manual that in the case of defect, the buyer has the right to revoke the sale.[514] The textual injunction of the Mejelle clarifies definition and the conditions. Accordingly, anything wrong, which reduced the value of the property, in the opinion of persons competent to judge of the property, is called defect. As noted, the defect may be of several sorts, namely, ancient defect and defect arising while in hands of seller. In the former case, a defect is a fault, which existed in the thing sold, when it was in the hands of the seller. And a defect coming recently into existence after the sale and before the delivery, while the thing is in the hands of the seller, is like an ancient defect, and is a ground for rescission. But if the seller, at the time of the sale, shows a defect in the thing sold, and the buyer accepts with that defect, he cannot have an option on account of that defect. Eventually, when a seller sells a property with a condition that he is to be free from claims for all defects, there is no option for defect for the buyer.[515] The Jordanian code repeats the majority of the stipulations regarding the sale of the object with the defect by adding that the rescission of the contract for a defect shall result in the return of its object to its owner and the taking back of what was paid, or it is also possible to keep the contracted object and apply for a price rebate.[516]

509 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 155.

510 *Ibid.,* 156.

511 *Ibid.,* 170.

512 The Mejelle, *supra note,* 391: 27.

513 The Civil Code of the Hashemite Kingdom of Jordan, (1976).

514 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note,* 462: 156.

515 The Mejelle, *supra note,* 391: 49.

516 The Civil Code of the Hashemite Kingdom of Jordan, (1976).

It is necessary that the price should be named at the time of the sale. The giving of a pledge or surety by the buyer cannot destroy the seller's right to retain.[517] More precisely, the payment of deposit at the time of making the contract means that each of the two parties shall have the right to withdraw from it unless it is otherwise agreed and if the person who paid the deposit withdraws, he shall lose it and if its receiver withdraws he shall repay it together with its match.[518] One more peculiarity stemming from the texts is that the sale of the object is permitted with deferred payment when the period of deferment is known. According to the textbook of al-Quduri, immediate payment is the general case which is always the better method of concluding a sale, however, a deferred payment is permitted when the period of deferment or the exact date of payment is known.[519] As stated in the Mejelle, a sale is good if it is agreed for any fixed delay for payment, which is fixed and known in the minds of the two contracting parties, such as, so many days, or months, or years and sale is bad, if the bargain is made for payment at a time not fixed. Here, a bad contract (al-fasid) is the contract which is lawful in its base but not in its description, and if the reason for its invalidity shall be abated it shall become valid. If no time fixed, the time for payment expires in one month. By the way, the time agreed upon is calculated from the delivery of the thing sold.[520] In addition to what was mentioned, all the texts speak of the contracts that a payment may be made in advance. All the texts state that these contracts are permitted only in respect of things the quantity and quality of which, for instance the best and the worst, can be fixed.[521]

Concerning the persons who may be parties of the contract, the major age and capacity to behave in a responsible and constructive manner are obligatory conditions. The civil code of Jordan states that every person has capacity to contract unless his capacity is lost or limited by virtue of the law.[522] The texts of Mejelle and classical fiqh manuals devote particular attention to blind people and their right to be the party of the contract. According to classical fiqh rule, selling and buying by a blind person are allowed. A blind person has the choice to rescind when he buys and his right of choice ceases when he handles the commodity – if it becomes known through handling, or he smells it – if it becomes known through smelling, or he tastes it – if it becomes known through tasting.[523] The Mejelle adds that the buying and selling of a blind man is good, but when he buys a property, whose description he does not know, he has the option to rescind. In other case, if a blind man buys when there has been a description of the thing sold, made to him before the sale, he cannot have an option to rescind the contract.[524]

517 The Mejelle, *supra note,* 391: 41.

518 The Civil Code of the HashemiteKingdom of Jordan, (1976).

519 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 156.

520 The Mejelle*, supra note*, 35-36.

521 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note,* 462: 188; The Mejelle, *supra note,* 391: 56.

522 The Civil Code of the Hashemite Kingdom of Jordan, (1976).

523 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note,* 462: 165.

524 The Mejelle*, supra note,* 391: 48.

Speaking about the contracts which because of one or another reason are invalid, the differences among three texts are apparent in the details. Classical fiqh manual written by al-Quduri mentions that sale is invalid when the object of the sale is forbidden under the Quran and the Sunna of the Prophet. The contract also is invalid when it is made on special days if neither party knows the beginning, end, the dates or even the existence of special days. The special days are mentioned explicitly, namely, Persian New Year's Day, Persian Autumn Festival, the fasting of the Christians and the festival of the Jews. In addition to this, according to traditional Hanafi fiqh, whoever sells property on the condition that he will not submit it to the buyer until the new month then that sale is invalid.[525] Almost all these stipulations are somehow expressed in the Jordanian Civil Code: in the case when the legislator prohibits dealing in a thing or if it shall be contrary to public order or morals, the contract shall be void.[526] Without doubts, all these rules should be read in the light of the principles of fiqh which are represented in one or another way both in classical and modern texts of law. The most suitable fiqh maxim which can be found either in classic Hanafi fiqh or in modern texts of Muslim states is: "Necessities make forbidden things canonically harmless".[527] More on the role of fiqh maxims to the current Jordanian Civil Code, we will talk in Chapter Six.

4.5. Summary

The concept of ijtihad underwent two stages of development in Islam. Till the emergence of the theory of usul al-fiqh, the concept of ijtihad was widely utilized by the judges and scholar jurists. After the theory of sources began to play a decisive role in the construction of law on the ground, the recognized four Sunni schools of fiqh came into agreement to restrict the concept of ijtihad. In spite of the fact that ijtihad as a method of Islamic legal reasoning does not rely on the traditional schools of fiqh in its essence, the phenomenon of "the closure of the doors of ijtihad" emerged on the scene. The restriction lied in the scholarly premise that fiqh rules as the only source need no further addition as they encompass all the possible social issues. Paradigmatic shift from ijtihad to taqlid conditioned stagnation in the field of Islamic law and the scholarly community is responsible for making Islamic law rigid and invariable. How scholar jurists without power became the sole keepers of the Islamic religious law and the only meaningful check regarding the power of the rulers? They divinized man-made fiqh law and by doing so they guaranteed such a prominent status. Gradually, the agreement on the closure of the doors of ijtihad moved attention and centre of human legal reasoning from the very primary sources to the fiqh doctrines. This is how it became achievable to replace ijtihad by the taqlid. However, taqlid is not based on the Quran or the Sunna of the Prophet, also, the concept was not recognized by the Companions of the Prophet. Despite that, throughout the whole post-formative period

525 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note*, 462: 172.

526 The Civil Code of the Hashemte Kingdom of Jordan (1976).

527 The Mejelle, *supra note*, 391: 6.

taqlid was the dominant paradigmatic approach towards Islamic law. Such 'state of coma' continued to prevail until the beginning of modern period.

Islamic law is expressed through scholarly made fiqh law which is the result of ijtihadic activities. Our research showed that ijtihad as the idea of development proves to be the main source of openness of Islamic law. Regarding fiqh law, the very historical fact that Islamic law might be fixed in the different Sunni fiqh doctrines shows its flexibility. In terms of our study of Hanafi fiqh law, the core feature flexibility of specific fiqh rules was also proved. As shows the following comparative study of classical Hanafi law manuals, modern texts of Ottoman civil code and present-day Jordanian Civil code, specific fiqh rules are capable to be adapted, albeit sometimes mechanically, in the legal documents of totally different time. All this proved that adaptability is the core feature of Islamic law.

5. ISLAMIC SCHOLARLY DISCOURSE IN CONTEMPORARY TIME

To reveal the whole picture of the phenomenon of Islamic law, we have already researched a number of themes. Three meanings of the Sharia were explored in order to clarify the very definition of Islamic law. The historical development of Islamic law till modern era was analysed in order to prove that adaptability of Islamic law is a historical fact. Also, the research of Islamic law as it is written in the sources showed that the very message written in the sources by no means can be regarded as the obstacle to the openness and flexibility of Islamic law. Eventually, the process through which the Sharia law becomes fiqh law also showed that through ijtihad Islamic law is adaptable in the changing time and under the changing social circumstances. Hence, four previous chapters gave us a clue to find out whether and to what extent Islamic law might be adaptable in the light of its historical path and in terms of its substantial basis. In contrast, Chapter Five turns our attention to the scholarly discourse on the subject of Islamic law and its sources in the contemporary time. The task here is to summarize the most prevailing and not rarely rival hermeneutical approaches towards the sources of Islamic law. Of course, the problem of adaptability of Islamic law cannot be fully realized without a comprehensive study of a current state of affairs on the ground. This is why the Chapter Six will be dedicated for the research of Islamic law as it is applied in the present context in the Middle East as well as within the communities of Muslims in the West.

The purpose of the Chapter Five is to provide an understanding of what the leading Islamic scholars and ideologues think of interpretation of Islamic law in the modern world. To follow the changing scholarly discourse is of particular importance in order to realize the directions towards which Muslim social, political and legal thought is heading. To keep an eye on the battlefield of ideas means the possibility to understand and to predict the state of affairs on the ground. Undoubtedly, the literature on the subject is too extensive to be reviewed in detail here. Thus, the following survey has no claim to cover each and every significant Muslim personality and Islamic movement from all parts of the world in a comprehensive manner. It is sufficient for our study to distinguish and highlight the main hermeneutical scholarly approaches towards Islamic law, also, to mention their strengths and possible threats. After summarizing prevailing approaches, our attention will be turned to the case study of the particular reform proposal designed to transform Islamic law in its most controversial questions.

The reformative theory suggested in the end of the twentieth century by Mahmoud M. Taha and Abdullahi An-Na'im will be tested in the second part of this chapter. It is very likely that a set of Islamic legal rules concerning criminal law, international law, the position of women and non-Muslims are incompatible with present time realities. According to the authors of the reformative theory, even most controversial areas of Islamic law might be revised and reformulated. As was showed in the previous four chapters, Islamic law in its essence gives no reason to doubt about its capability to be adaptive in the changing time. It seems, at least on the level of the scholarly discourse, that even in its most controversial issues, Islamic law might undergo a profound reform. To find out if it is true, the purposed theory of Islamic legal reform will be explored in the light of a number of problematic issues.

5.1. Three interpretative approaches towards Islamic law

Before discussion there is a need to mention that Muslim scholars convey various classifications of prevailing interpretive models how to construct Islamic law in the contemporary time. For instance, W. Hallaq divides prevailing hermeneutical discourse into secularist and traditionalist. In the middle of these two extremes, he sees the following two camps, namely, religious utilitarians and religious liberals.[528] N. Coulson distinguishes traditionalist and secularist approaches by noting that neither is suitable to combine religious principles and practical social needs because the former is wholly unrealistic and the latter is un-Islamic in its essence.[529] T. al-Alwani mentions traditional, modernistic and "eclectic" approaches. Traditional approach is based on the fiqh law which, according to the author, is accountable for a state of decline and failure from which Islamic law and the whole Muslim community is still suffering. The modernist approach is based on the secularist in its essence by treating western thought supreme and universal, thus, inappropriate for Muslims. The "eclectic" approach combines the most sound traditional thought and modern thought. However, in the words of T. al-Alwani, such blend has not been presented officially and even has not been tried yet to be discussed at the great length. Interestingly, the other author thinks that indispensable pragmatism in Islamic law lies namely in the eclectic way of reading Islamic legal sources and renewed ijtihad.[530] Despite that, T. al-Alwani suggests to refrain from all these three approaches and to reform Islamic law and the whole Muslim umma by the means of renewed ijtihad.[531] In contrast, A. Muhammad states that there could be distinguished three hermeneutical approaches in modern Islam, namely, traditionalist, liberal and literalist. From our point of view, although being very general, the classification delivered by A. Muhammad portrays contemporary Muslim scholarly discourse in the most suitable manner. Certainly, none of these three models may be considered independent because all these are complementary and overlapping. Again, such classification reveals only a general picture because there is a huge number of larger and smaller groups of Muslim scholars and jurists having their own hermeneutic approaches towards the sources of Islamic law.

Paradoxically, as in the formative period of Islamic law so today the interpretive approaches to religious texts remain varying and at the same time very similar. They are identical in the way of treating Quran as the key source of Islamic law. Principle attitudes towards all remaining sources and concepts of Islamic law are extremely different. According to D. Vishanoff, there were three camps of Muslim scholars in the formative period of Islamic law, namely, rationalists, traditionists and scripturalists.[532] The first group saw the strength of Islamic law in the concept of ijtihad. Traditionists rejected such human system

528 Wael B. Hallaq, *supra note,* 42: 213-231.

529 Noel J. Coulson, *supra note*, 31: 234.

530 Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: Social and Intellectual History* (New York: Syracuse University Press, 2015), 2.

531 Taha Jabir Al-Alwani, *supra note*, 55: 11-12.

532 David R. Vishanoff, *supra note*, 40: 37.

building and advocated for the primacy of the Prophetic traditions. The last group consisted of scholars who were in favour of restricting Islamic law to the dictates of the Quranic letter. Interestingly, that modern scholarly discourse consists of at least three main hermeneutical approaches towards the sources of Islamic law. The traditionalist faction sees the classical fiqh law as all-encompassing and sufficient for all times. Another faction believes in the golden days of early Islam, thus, in the time of the Prophet, his companions, and the early scholarly community. Here, the main interpretational approach towards the sources is literal. Eventually, the reformists/liberals are those who stand for the inevitable task to reformulate Islamic law in order to make it adaptable in the contemporary life of Muslims.

In the historical path of Islamic law, there were a huge number of calls for a return to the textual reading of Islamic law. The modern era, as A. Ahmad believes, in particular brought about tendencies that are most emphatic on seeing the Quran and the Sunna as the only law's true sources.[533] Literalists hold that everything is written in the sources of divine origins. Thus, from little to no interpretational activities should exist according to this view. Literalists rely on what is written in the sacred sources and, according to them, Muslims must practice their religion as documented in the divine sources. Instead of making any reference to the doctrine of one or another fiqh school, literalists believe that they are free to interpret divine texts directly. In fact, such interpretation is very limited as literalists take into account solely the letter of the texts. K. El Fadl notes that it would be erroneous to assume, as many fundamentalists tend to do, that Islamic law is a literalist explication or enunciation of the text of the Quran and Sunna.[534] As was added by A. Ahmad, God rarely speaks explicitly and God's language requires jurists to figure out its meaning and make it into laws.[535] Literalists refuse to adhere to any of fiqh doctrines at all because ulemas and their restrictions on interpretational activities caused that Islamic law was trapped in the traditional doctrines for a number of centuries. The movements relying on literalist approach on the ground are extremely varying with regard to their stance and actions. For instance, Salafists renounce any new ijtihad, unless it derives directly from the Quran, the Sunna or the ijma of the righteous forefathers.[536] Although the ideologies of the Salafi movement and the Muslim Brotherhood have much in common, however, the Muslim Brotherhood leaves room for a more flexible translation and implementation of Islamic law and thus sometimes adopts a more pragmatic approach towards different aspects of everyday life. Whereas Salafis tend to be less flexible, they believe in dogmatic implementation of Islamic religious law.[537] More extreme camp having literal approach to the divine sources are jihadists or those who encapsulate the faith only in holy war, blood, violent jihad and coercion, whether against non-Muslims or Muslims. Their interpretive

533 Ahmad A. Ahmad, *Islamic Law: Cases, Authorities, and Worldview* (London: Bloomsbury Academic, 2017), 27.

534 Khaled Abou El Fadl, *supra note*, 59: XXXV.

535 Ahmad A. Ahmad, *supra note,* 530: 27.

536 Iyad Zahalka, *supra note*, 221: 19.

537 Avi Melamed, *Inside the Middle East: Making Sense of the Most Dangerous and Complicated Region on Earth* (New York: Skyhorse Publishing, 2016), 31.

understanding of Islamic sources lies in the particularly suitable textual lines or sentences of the Quran, rather than on the whole text and its spirit.[538]

Traditionalist interpretive approach regards Islamic law in the limits of the fiqh doctrines of one or another fiqh law school. The representer of this stance A. Mohammed argues that only traditionalists place God at the centre and derive their structures from the revelation.[539] According to him, Islam is a traditional discourse which must apply its historically tried and tested principles and methodologies in order to ascertain God's will.[540] Obviously, that scholars of fiqh law as the recognized guardians of Islam were those figures who were responsible for the setting boundaries of the human reasoning as such. However, according to us, the ulemas and their fiqh doctrines rather than God lied at the centre in the activities of traditionalists. It is misleading to attribute God's primacy as the exceptional feature in the interpretational approach of traditionalists simply because the Quran as the word of God is the main source for all the scholarly factions. What is indeed inseparable from the traditionalist stance is to hold the traditional doctrines as binding sets of rules in the process of ijtihad. Again, it is crucial that in the very essence of Islam placing God at the centre also means to acknowledge considerable role for human reasoning as a tool for the search of knowledge in the changing time. Al-Shatibi adds to this that human reason is not restrained except in the manner the textual evidence of the Quran itself restrains it.[541]

Muslim reformists/liberals believe that interpretation of the sources cannot be exercised without considering the necessities of the time and place. Society-focused approach is characteristic to Muslim reformists who seek to adapt Islamic law in the light of social demands and requirements. Liberal hermeneutical model suggests to refrain from the long-standing tradition to equate fiqh with Sharia. In such an invitation to return to the

538 Important to mention that almost all factions which tend to read the primary sources of Islamic law on the basis of literalist approach differ not so much on their religious zeal, but how they relate faith and action. Jihadists are not only prepared to use force but also feel personally summoned by God to do so. They tend to relate current events on the ground directly to the text. For them, a conflict with those who have different views is a holy war in which the ends justify almost any means. K. El Fadl adds that a number of their actions find support in a variety of Islamic traditions and precedents what enable them to announce a formal relation between the primary sources and actions on the ground. However, K. El Fadl argues that all their justifications in the name of separate Islamic text provisions are inconsistent with Quranic morality and that other Islamic sources challenge all their actions, at least as much as they lend them support. According to the author, the most striking Divine test and challenge lies in the most fascinating aspects of the Quranic text, namely, in the discourse on the idea of justice. Indeed, such verses as 2: 143; 22:78; 5:8 and others truly stand for the idea of justice. For instance, the verse 5:8 states: "O you who believe, stand firmly for God as witnesses for justice, and let not the hatred of others to you make you swerve to wrong and depart from justice". K. El Fadl concludes that "the test and the challenge to our sense of balance and equanimity is, regardless of socio-historical circumstances, or textual and doctrinal indicators, to try always to pose the questions: is it fair? Is it just? And at the end of every process, to close with, "And God knows best"." Evidently, the very balance to understand the texts for K. El Fadl lies in the balance among the author, the text and the reader. Most important, the author and Islamic history warns, that the reader or, properly speaking, the scholar jurist never put himself into the position of God. More on this read this book: Khaled Abou El Fadl, *supra note*, 48: 270-271.

539 Amjad Mohammed, *supra note*, 438: 32.

540 *Ibid.*, 45.

541 Abu Ishaq Al-Shatibi, *supra note*, 241: 21.

divine sources, literalist and liberal approaches are almost identical. However, nothing else is in common between these two. Muslim reformists go further urging to interpret the sources of Islamic law in accordance to the fresh social requirements. For literalists and traditionalists this course of thinking is at least inappropriate.

In the following pages of this chapter, we seek to reveal reformist hermeneutic approach at the greater length. We made a choice to explore one of the theories of reform suggested by representers of reformist/liberal approach. The authors of a new reformative approach suggest to reverse the very reading of the sources of Islamic law in order to make the most controversial issues of Islamic law compatible with the current day requirements. More exactly, this reformative approach involves the radical revision and reformulation of methodological techniques for deriving Islamic legal rules from basic Islamic sources.[542] Interestingly that after the emergence of the books on these reformative ideas, a number of Islamic ruling elites decided to prohibit production of such books in their states. Despite that, leading scholars and specialists of Islamic law in Muslim world as well as in the West are in the agreement on the fact that the so called "reversed theory of abrogation" is valuable try to revise the most problematic areas of Islamic law.

5.2. A case study of reform proposal to reverse Islamic theory of abrogation

Muslim scholarly discourse consists of several prevailing positions towards the most controversial issues of Islamic law regarding criminal law, international law, human rights and so forth. One side of the scholarly community is assured that there is no inconsistency between the letter of Islamic law and current social requirements. Another side, although agrees on the existence of a number of problematic issues, claims that these are not enforced in practice. A. An-Na'im far more than believes that it is dangerous to maintain a law without intending to enforce it because it leaves too much discretion in the hands of those charged with enforcing the law, enabling them to select cases for enforcement based on selfish and other corrupt purposes.[543] One might believe or not in these words, but the personal experience of A. An-Na'im speaks for itself. He was detained in Khartoum Central Prison for political reasons and personally witnessed what people might experience if one takes a rule and by deliberate choice selects a number of Islamic legal rules to serve as state law, albeit for a short time.

In the second part of the twentieth century Mahmoud M. Taha and later on his disciple Abdullahi Ahmed An-Na'im introduced the revolutionary juridical idea to evolve Islamic law. The authors spoke of a total reinterpretation of the nature and meaning of Islamic public law which, according to the authors, is the least developed aspect of historical Islamic law. By historical Islamic law, they described humanly made interpretations that reflect the particular historical context representing specific approach towards

542 Abdullahi Ahmed An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan", *Religion* 16 (1986): 216.

543 Abdullahi Ahmed An-Na'im, *supra note*, 56: 88.

constitutional order, criminal justice, international relations, and human rights.[544] The fundamental premise on which the reform is grounded is that the message of Islam and its explanation (understanding) must necessarily be distinguished.[545] It is striking to realise that by explanation the authors mean not only the result of interpretational process but also the methodological techniques through which a particular explanation emerges on the ground. All this reflects nothing more than the context and social circumstances within which interpretational activities were made and particular explanation was delivered. As we already know, to maintain particular explanation final and conclusive is in principle alien to the thesis that the Quran can never be fully explained. This is based on the text of the Quran and especially on the verse 16:44.[546] In this light, M. Taha and A. An-Na'im argue that the founding scholars of Islamic law were unjust introducing their understanding as final one. This is why M. Taha is assured that many aspects of present Islamic law are not the original principles or objectives of Islam, because they reflect a descent in accordance with the circumstances of that time and the limitations of human ability in general.[547] What is trying to be said is that a number of public law conceptions were a natural outcome of the interpretation of the sources of Islamic law made in certain historical context, rather than the only valid interpretation of the sources.[548] A. An-Na'im adds that, instead of application of historical Sharia law as detrimental to Muslims and Islam itself because it represents the specific historical context and related legal thought of early scholar jurists what is drastically different from our own context, there is a need to reconsider Islamic law in terms of modern social circumstances.[549] Both authors insist on the alternative interpretation of the fundamental sources of Islam in order to develop a modern version of Islamic law. Modern version of Islamic law which could be compatible with modern standards of constitutionalism, criminal justice, international law and human rights.

Reversed theory of abrogation is based on the teachings of M. Taha, the late Sudanese Muslim reformer who was executed by former President Numeiri of Sudan in 1985. As M. Taha so his follower A. An-Na'im, lawyer and human rights activist from Sudan, underwent what is called forceful Islamic resurgence. The former was announced to be an apostate for his reformative ideas and was hanged, the latter was imprisoned and later was forced to leave Sudan. Immediate shift in political arena in Sudan showed that reality on the ground can change dramatically if the rules of historical Islamic law suddenly become the main legal principles of the state. With the aim to spread the idea of fundamental reform of Islamic law, A. An-Na'im translated the core ideas of M. Taha into English. At the same time, he developed reformative theory of his teacher in order to deliver the practical answers how to avoid further harmful consequences in the future. As clearly stated by

544 Abdullahi Ahmed An-Na'im, *supra note*, 56: 1.

545 Mahmoud Mohamed Taha, supra note, 54: 147.

546 The Quran (16:44): "We have also sent down unto you the Reminder and the advice (i. e. the Quran), that you may explain clearly to men what is sent down to them, and that they may give thought."

547 Mahmoud Mohamed Taha, *supra note*, 54: 137.

548 Abdullahi Ahmed An-Na'im, "Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism". *German Yearbook of International Law* 31 (1989): 322.

549 Abdullahi Ahmed An-Na'im, *supra note*, 56: 187.

John Voll, such a reformative system is a radical departure from both modernist and fundamentalist positions which dominate in the contemporary world; the very task of the theory developed by A. An-Na'im is rather to transform the understanding of the basis of traditional Islamic law than to reform it.[550] In the remainder of this chapter this theory will be researched in order to find out if it is effective and suitable to fulfil the task to transform Islamic law in its most controversial questions.

5.2.1. Methodological basis of the theory

The authors of the reformative theory make a clear division between the primary sources of Islamic law and their interpretations given in one or another historical context claiming that interpretation is just one of the possible manifestations of Islamic law reflecting the circumstances of the particular context. From the first glance, it could seem that what is suggested by reformers is to reconsider a set of historical interpretations of Sharia law. However, the purpose of the reform is not so much designed to bring changes into the field of fiqh rules. Rather, for the authors, the very historical Sharia law as the reflection of the historical context within which it was elaborated is under the urgent need of reform. The authors have no intentions to change the very divine message. Reformative theory suggests to reconsider a set of methodologies and techniques constructed by early religious scholars to understand the Quran in the particular context. According to us, the classic way of reading the Quran which continues to set a motion in the formulation of Islamic law is mostly criticized here. Again, by calling Sharia law "historical" the authors tend to remain clearly understood that their critical attitude is directed towards the Sharia law as the reflection of particular historical context and not the Sharia law as the Quran and Sunna of the Prophet. Thus, from the point of view of reformists, the message of Islam in general and the basics of Islamic law in particular were trapped in the particular historical explanation and this needs to be reconsidered.

While plenty of principles and rules of Islamic public law are written in a clear and definite text of the Quran and the Sunna, one could reasonably doubt about the possibility to deviate from a set of specific rules of the Sharia based on such kind of verses. The Quranic word says clearly that such verses cannot be the object of reinterpretation.[551] In addition to this principle which can hardly be contested, there is a need to take into consideration additional Islamic concept, namely, theory of abrogation. The main idea of this human construction delivered by the founding religious scholars was to concentrate all the attention to the Quranic message revealed in Medina (622-631) and to abrogate the earlier part of revelation received by the Prophet in Mecca (610-622) in case if it stands in contradiction to the Medinan verses. According to A. Hirsi, substantial difference between

550 John Voll, *Foreword* in *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1996), x-xi.

551 The Quranic verse 33:36: "And it is not for a believing man or a believing woman, when God and his Messenger have decreed a matter, to have a choice regarding the matter. Whosoever disobeys God and His Messenger has strayed info manifest error."

Quranic verses revealed in Mecca and Quranic verses revealed in Medina is that the former verses are largely spiritual in nature and the latter are more political and even militaristic; also, there is a difference in the behaviour of the Prophet Muhammad: in Mecca, he was a spiritual preacher, but in Medina he became a political and military figure.[552] More precisely, the Meccan verses, including clear and definitive, that speak about devotional things and give basic principles for the law in Islam were to be abrogated by the Medinan verses, also including clear and definitive ones, which were concerned with the social and legal issues. Both parts of the Quranic message reflect the social environment and political context of the time when it was revealed. According to the authors of the reform, most of Islamic public law rules being the part of the Medinan message became dominant with regard to the related Meccan verses and the theory of abrogation here played a vital role. To sum up, what is suggested is not to reinterpret clear and definitive Quranic verses, but rather to challenge the theory of abrogation which is nothing more than humanly made methodological theory.

One may say that solution lies in the concept of ijtihad to deliver a necessary degree of reform in Islam. The Quran itself speaks of the vehicle of language through which the Quranic message was received and is to be interpreted and re-interpreted by knowledgeable people.[553] However, this is not possible within the framework of the historical Sharia law because ijtihad in matters governed by explicit and clear texts is not permissible in Islam.[554] Ijtihad within the framework of historical Sharia law is inadequate because most of the problematic principles and rules of the Sharia law in the field of constitutional law, criminal justice, international law and human rights are based on clear and definite texts revealed in Medina. Thus, the classical theory of abrogation gave priority to the clear and definitive Medinan verses in the light of which related Meccan verses were abrogated. A. An-Na'im is assured in his thesis that it is hard to imagine any text of divine sources, however clear and definitive it may appear to be, that does not need of ijtihad for its interpretation and application in concrete situations.[555] Certainly, ijtihad is urgently required in the public law issues, however, it can adequately respond to the requirements on the ground solely after the theory of abrogation is somehow revised. However, the majority of Muslim jurists just in the same manner as founding jurists maintain that the theory of abrogation as it was formulated by the early jurists must bind Muslim scholars today

As was mentioned, according to the traditional meaning of the theory of abrogation which was delivered by founding jurists, the later verses abrogate the earlier ones in the related matter. According to M. Taha, the earlier message of Mecca is in fact eternal and fundamental in emphasizing inherent dignity of all human beings regardless gender, religious belief, race and so forth.[556] However, a number of aspects of the message of the

552 Ayaan Hirsi Ali, *The Challenge of Dawa: Political Islam as Ideology and Movement and How to Counter It* (Stanford: Hoover Institution Press, 2017), 11.

553 For instance, the Quranic verses: 12:2; 43:3; 29:49.

554 Abdullahi Ahmed An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan", *Religion* 16 (1986): 216.

555 Abdullahi Ahmed An-Na'im, *supra note*, 56: 27.

556 Mahmoud Mohamed Taha, *supra note*, 54: 147.

Mecca period which were inappropriate for practical implementation within the historical context of the seventh century were suspended and replaced by the more practical principles revealed and implemented during the Medina stage.[557] By more practical, the authors of reform have in mind verses that are related to jihad, inequality between men and women and between Muslims and non-Muslims, criminal justice and so forth. Thus, under abrogation, mainstream Islamic law gave precedence to "Medina Islam" over "Mecca Islam."[558] Whether it means that a number of aspects of Meccan message was lost forever as a source of law? M. Taha and A. An-Na'im argue that they were postponed only for implementation under exceptional circumstances.[559]

For A. An-Na'im, historical context as such can neither be the source of Sharia in the past, nor its source in the future. There is no doubt that for Muslims as in the past, present so in the future Islamic law must be based on the Quran and the Sunna of the Prophet. Thus, it is not suggested that Islamic law should simply follow developments in human history regardless the provisions of divine sources. However, the sources have been the response of the Sharia to the concrete realities of the past, and must be the source of modern Sharia as the Islamic response to the concrete realities of today.[560] According to A. An-Na'im, all the most contested Quranic issues in modern period of time reflect that period of revelation received in Medina. Whereas the verses revealed earlier in Mecca convey universal principals of totally different legal quality. Al-Shatibi also emphasized in his theory the early part of the Quranic revelation. The Meccan verses, according to al-Shatibi, embody the general message of Islam in which the universal sources of law were laid down. Whereas the Medinan verses as well as the Sunna constitute the particulars of the law that specify, qualify or complement the Meccan revelation.[561] The universal sources are certain, particular and probable. Whatever is certain in the Quran is immutable, and whatever is probable is open to the interpretation. According to A. An-Na'im, there were no compulsion in propagating Islamic faith within the message delivered in Mecca, just peaceful persuasion, thus, freedom of choice is exclusively the value of the earlier message of revelation. A. An-Na'im concludes that the essence lies in the methodological theory of abrogation agreed by the founding scholars according to which the verses revealed later abrogate earlier verses. This methodological technique made later verses unquestionable because of their definite and clear nature. The whole theory of reform suggested by M. Taha and developed by A. An-Na'im has a task to reverse the theory of abrogation constructed by the early scholars by making verses revealed in Mecca the methodological ground for the further ijtihadic practices. Thus, the key idea was to ground the reform on the reversed theory of abrogation.

---

557 Abdullahi Ahmed An-Na'im, *supra note*, 56: 53.

558 Ayaan Hirsi Ali, *supra note*, 552: 26.

559 Abdullahi Ahmed An-Na'im, *supra note*, 56: 53.

560 Abdullahi Ahmed An-Na'im, "Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism", *German Yearbook of International Law* 31 (1989): 324.

561 Felicitas Opwis, *Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Legal theory* In *Shari'a: Islamic Law in the Contemporary Context*. Edited by Abbas Amanat and Frank Griffel (Stanford: Stanford University Press, 2007), 69.

The traditional theory of abrogation had already appeared in the very beginning of the formative period of Islam. It was agreed by early religious scholars and constituted the cornerstone of their conception of the Sharia law. The very justification for the theory of abrogation stems from the common idea, sanctioned by the early consensus, that the religion of Islam abrogated many of the laws upheld by the earlier religions. It seems, that the fact that the Prophet repealed his predecessors' laws came to be sufficient to regard abrogation as a valid hermeneutical tool in the following centuries. Also, the Quran in a number of instances speaks about abrogation.[562] Thus, the theory of abrogation became an important tool for the founding scholars to harmonize the message of the Quran when more than one Quranic ruling was pertinent to a single matter. Three elements required to be identified in any instance of abrogation were the following: the divine origin of both injunctions; conflict between two enactments such that it is quite impossible to implement the two texts jointly; knowledge of the relative chronological dates of both revelations. As stated by W. Hallaq, it was the generation of the successors of the Prophet that was closely associated with discussions on abrogation and controversies about the status of particular verses.[563] The whole theory of abrogation developed in a context in which some Quranic prescriptions of Meccan time contradicted the changed reality and practice in Medina.

At least two types of abrogation were accepted by the majority of Muslim scholars, abrogation of both the ruling and wording of the text and abrogation of the ruling but not the wording of the text. The first type relates to a few verses that were at one point stated by the Prophet to be part of the Quran, though later the Prophet himself said that they were not to be considered as such. The second type accepted by the vast majority of scholars claims that the text remains part of the Quran but is perceived inoperative for legal purposes. The other question was whether Quran can abrogate Sunna and whether the Sunna can repeal the Quran. There are some examples of such abrogation. For instance, the Quran commands Muslims to pray in the direction of Mecca instead of Jerusalem, a direction the Prophet had decreed earlier.[564] If to accept the Prophetic hadith on bequests[565] which renders the Quranic verses concerning bequests[566] partially incompatible with those describing inheritance shares[567], it might prove that the Sunna can also abrogate the Quran.

562 The Quranic verse 2:106: "No sign do we abrogate or cause to be forgotten, but that we bring that which is better than it or like unto it. Dost thou not know that God is powerful over all things?" The other verses often mentioned in this respect are: "God effaces what He will and establishes, and with him is the Mother of the Book" (13:39); and "when we replace one sign with another" (16:101); and "if we willed, we could take away that which we revealed unto thee" (17:86).

563 Wael B. Hallaq, *supra note*, 42: 9.

564 The Quranic verses 2:144 and 2:150.

565 The Prophetic hadith says: "No bequest in favour of an heir".

566 The Quranic verse 2:180: "It is prescribed for you, when death approaches any of you, if he leaves property, that he makes a bequest to parents and next to kin, according to reasonable manners".

567 The Quranic verse 4:11: "Allah commands you as regards your childrens' inheritance: to the male, a share equal to that of two females; if there are only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of inheritance to each if the deceased left children; if no children; and the parents are the only heirs, the mother has a third; if the deceased left brothers or sisters, the mother has a sixth. The distribution in all cases is after the payment of legacies he may have bequeathed or debts."

The question raised by M. Taha and later by A. An-Na'im, is whether the abrogation of earlier texts of the Quran by subsequent ones is final and conclusive or whether it is open to re-examination. During the Mecca period the Quran and the Sunna of the Prophet contained primarily religious and moral precepts and did not express specific political and legal norms until Medina period. That message was characterized by equality between men and women and complete freedom of choice in matters of religion and faith. However, as the historical circumstances have dramatically changed, the aspects of the message of the Mecca period, which were inappropriate for practical implementation within the changed historical context of the seventh century, were suspended and replaced by the more practical principles revealed and implemented during Medina stage. Due to the need to respond adequately to the concrete social and political needs of an established community of Medina, the detailed instruction and precision to greater extent was of huge significance. It seems that the suspended aspects of the Mecca message have not been lost forever as a source of law and the traditional theory of abrogation can be re-examined in the light of the suggested scholarly reform of reversed abrogation.

Ordinary circumstances during Mecca revelation became exceptional in Medina. Exceptional circumstances of the time of Medina signified existential threat to Islam and Muslim community itself. Through the process of abrogation the founding scholars gave priority to the verses received in the exceptional circumstances in Medina by holding the texts of the Quran and Sunna of the Medina stage have repeal or abrogate all previously revealed inconsistent texts of the Meccan stage. M. Taha is assured that to deem such kind of abrogation to be permanent is to deny Muslims the best part of their religion.[568] For A. An-Na'im, since the technique of abrogation has been employed in the past to derive rules and principles from the sources of Islamic law which has hitherto been accepted as the authentic Islamic model, the same technique may be employed today to produce an authentic modern Islamic law. By reversing the process of abrogation, A. An-Na'im after his teacher seeks to offer the contemporary version of Islamic law consistent with current requirements of Muslims and, particularly, with contemporary law standards. Thus, what is suggested is to reverse the theory of abrogation in the way that clear and definitive Meccan verses abrogate those revealed in Medinan period. If to try this method in the field of Islamic public law, many Quranic injunctions that are treated incompatible with present-day context could become suspended and abrogated. It is striking to understand, that the very reformative theory of M. Taha and A. An-Na'im suggests not only to apply the reversed theory of abrogation in a formal way. The reversed theory of abrogation might achieve its tasks if at the same time all the Islamic legal provisions are evaluated in conformity with prevailing standards of human rights and justice.

The Quranic verse 4:12: "In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If a man or a woman whose inheritance is in question has left no direct heir, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third, after payment of legacies he or she may have bequeathed or debts, so that no loss is caused to anyone."

568 Mahmoud Mohamed Taha, *supra note*, 54: 137.

One may say that the authors of reformative theory suggesting to withdraw from the later part of the revealed message of Islam are asking for Islamic jurists to ignore more than a thousand years of fiqh doctrine. True that the whole fiqh tradition was built on the traditional methodological techniques, including on the traditional theory of abrogation. From the point of view of A. An-Na'im, this is exactly what in part his reformative theory tends to achieve, because the fiqh doctrine is only the result of the human legal reasoning based on the Medinan message. To oversee direct link between Medinan verses of the Quran and classic fiqh rules as legal conclusions would be mistaken step making the whole reform inoperative. If one wonders about the amount of abrogation, again authors insist on the abrogation of that part of Medinan message which speaks of Islamic law issues related to the equality of women and men, Muslims and non-Muslims, concepts of jihad, also, criminal justice and so forth. How to prevent an abrogation of reversed theory of abrogation in the future? A. An-Na'im gives an answer by saying that evolutionary approach towards historical Sharia law and the whole theory of reversed abrogation can succeed just if Muslims today accept and implement it.[569] The consensus of Muslims must be achieved and this is the main condition that could make this theory alive in practice as today so in the future. To test the theory of reversed abrogation, we are to consider some concrete Quranic issues in the field of public law to find out whether the reform is sufficient enough to make Islamic law adaptable even in most controversial questions.

5.2.2. Some Islamic law issues: a test of reform proposal

The suggested reformative theory, first of all, needs to be tested on the issues of Islamic concept of jihad and of religious freedom. Islamic concept of jihad is that subject which for the majority of people in the West symbolizes Islam and its legal dimension. The jihadists in their public messages and in bloody acts on the ground always highlight that they operate in the name of Islamic holy war. This situation is causing some Muslims – amongst the youth in particular – to fall prey to doubts and reservations, resulting in confusion about the concept of jihad, because those who perpetrate atrocities are self-professed Muslims.[570] From the other side, all atrocities in the minds of non-Muslims become somehow connected with Islam. According to M. Qadri, "this situation has led to damage on two levels: damage to Islam and the Muslims and damage to the Western world. The damage to Islam and the Muslims world is that many Muslim youth, unaware of the normative teachings of Islam, and under the influence of the media, erroneously believe that terrorism and extremism emanate from religious teachings and the attitudes of religious people. On the other hand, the danger threatening the Western world is from the governmental policies and subsequent stereotyping of Muslims, which provoke a negative response amongst some of the Muslim youth, who regard these as attacks against Islam and an organized conspiracy from certain influential circles in the Western world. As a reaction,

569 Abdullahi Ahmed An-Na'im, *supra note*, 56: 34.

570 Muhammad Tahir Al-Qadri, *Fatwa on Terrorism and Suicide Bombings* (London: Minhaj-ul-Quran International, 2010), 3.

some youth are gradually becoming extreme and militant in their outlooks. Consequently, the Muslim umma, as well as humanity, are heading towards catastrophe."[571] For jihadists such state of affairs is very suitable and to deepen degree of confusion they continue to spread their ideology based on the separate Quranic verses which are not consistent with the modern day conditions.

There is a need to mention that jihad is understood in Islam in several senses. Generally, the literal meaning of the word "jihad" is effort and exertion, which includes, but is not necessarily restricted to, effort and exertion in war.[572] The major jihad means to strive to come closer to God in the path of the Sharia, thus, it is closely related to the religious pillars of Islam. Whereas the minor jihad means the use of force. Minor jihad might be the use of force in self-defence and the use of force in propagating Islam. To begin with the major jihad, we need to cite a number of Quranic verses. The Quranic verse (47:31) says: "And we will surely try you until we make manifest those among you who strive and those who are steadfast. And we will make known the truth about you". The emphasis has to be put on the phrase 'those who strive' because striving to control yourself means major jihad.[573] According to Islam, the striving to come closer to yourself permit you to come closer to God and this is the essence of the path of Sharia. On the path a man is struggling and tries to resist by looking a way for a change and eventual liberation. All this is possible just through striving and this is what for Muslim believers means major jihad.

Both verses from Mecca and Medina have used the term jihad in its major sense. Such striving is mentioned in a number of the verses.[574] For instance, the verse 25:52[575] insists on the jihad against non-Muslims what refers to using the force in a form of Quranic arguments and not the force using arms. A. An-Na'im speaks of two sorts of jihad by giving two examples from the Sunna of the Prophet: "In Sunna, there is the well-known statement of the Prophet which describes the use of force in battle as the minor jihad and self-exertion in peaceful and personal compliance with the dictates of Islam as the major jihad; in another Sunna, the Prophet is reported to have said that the best form of jihad is to speak the truth in the face of an oppressive ruler."[576] According to the Quranic verse 49:15, the believers are those who believe in God and his Messenger and who struggle hard with their wealth and their lives in the right path of God.[577] The verse 29:69 adds that those who strive hard in their life will be guided in the right path because God is with these people.[578] Even more, the concept of the major jihad is written in the verse 23:78 and what

571 Muhammad Tahir Al-Qadri, supra note, 570: 5.

572 Abdullahi Ahmed An-Na'im, *supra note*, 56: 145.

573 Mahmoud Mohamed Taha, *supra note*, 54: 131.

574 The Quranic verses which speak about the major jihad: 4:95; 8:72, 74, 75; 9:20, 24, 81; 22:78; 25:52; 47:31; 60:1; 61:11.

575 The Quran (25:52): "So obey not the disbelievers, but strive against them by preaching with the utmost endeavor with the Quran."

576 Abdullahi Ahmed An-Na'im, *supra note*, 56: 145.

577 The verse 49:15: "Only those are believers who have believed in God, and his Messenger, and afterward doubt not but strive with their wealth and their lives for the cause of Allah. They are the truthful."

578 The verse 29:69: "As for those who strive hard in our cause, we will surely guide them to our paths. And verily, Allah is with the doers of good."

is noteworthy is that it is written in conjunction with the pillars of Islam. Thus, the major jihad is a struggle against one's ego and not a struggle against the other.

The minor jihad which signifies the use of force in international relations is mostly related with the verses of Medina stage. Compulsion is very characteristic feature of the verses of Medina period and the verses on the use of force in propagating Islam exclusively belong to the verses from Medina stage.[579] To begin with, the verse 2:216 expressly mentions jihad as holy fighting in the cause of God. The Quranic verses 2:190-193 and 22:39 clearly sanction the use of force against non-Muslims. The whole chapter 9 (especially such verses as 9:5, 12, 13, 29, 36, 73, 123) revealed in around 631 contain the most categorical sanction for the use of force against non-Muslims and, what is more important, are generally taken to have abrogated all previous verses that prohibit or restrict the use of force. The ninth chapter of the Quran is principal material on jihad and it speaks of jihad as offensive warfare against idolaters, polytheists, and infidels (9:5), but also as defensive warfare against those who fight against Muhammad, his followers, and right religion in general (9:13-14).[580] As noticed by A. An-Na'im the Quranic verse 9:5 has repealed, abrogated over one hundred preceding verses of the Quran which instruct Muslims to use peaceful means and arguments to convince unbeliever to embrace Islam.[581]

According to A. An-Na'im, Islam would probably not have survived if the Muslims were denied the use of force in propagating the faith and maintaining the cohesion and stability of the community in the period of Medina and after it. It was impracticable to maintain a non-violent society at a time when violent force was the law.[582] The verses of Medina period were suitable because that period was transitional and the circumstances were exceptional. As a result of the agreement of the Muslim religious scholars, the interpretation of divine sources that was appropriate to the exceptional circumstances remained untouched for more than a thousand years. However, the context within which the sources of Islam were interpreted has changed dramatically. Without doubts, in contemporary time such historical concept of jihad cannot be consistent with legal standards of international relations. This is why the theory of abrogation is to be reversed in order to make the verses of Mecca period superior in content to those of Medina in any further interpretations of the concept of jihad. In this way, the Meccan verses would receive priority in the interpretation of the concept of jihad and those of the Medina stage, especially the whole ninth chapter of the Quran could be suspended and abrogated.

Another issue which needs to be taken into consideration is freedom of religion. It is generally believed that one who decides to change religion from Islam to the other necessarily will be punished for the crime of apostasy which is prescribed by Islam. Despite the fact that the Quran does not prescribe any punishment for apostasy, many scholars incorporated this offense among hudud offenses. The main argument stems from the

579 We may mention a number of verses expressly mentioning the duty of the minor jihad, for instance, 2:190-193, 244; 4:76; 4:84, 95; 9:12-16, 20, 24, 36, 123; 9:123; 47:4; 61:11.

580 James E. Lindsay, *Daily Life in the Medieval Islamic World* (London: Greenwood Press, 2005), 58.

581 Abdullahi Ahmed An-Na'im, *supra note*, 56: 147.

582 *Ibid.,* 158.

Sunna of the Prophet which prescribes death penalty for apostasy.[583] Obviously, it violates the right of freedom of religion which is established in a number of verses of the Quran. Important to note that all the verses establishing the right of freedom of religion are of Mecca stage. Such verses as 10:99; 16:125; 29:46; 88:21-24 speak of freedom of choice in religious belief. These verses mirror what was said in the Quranic verse 2:256: "there is no compulsion in religion". To take but several concrete examples to clarify the essence, the verse 18:29 here perfectly fits: "And say: "The truth is from your God". Then whosoever wills, let him believe; and whosoever wills, let him disbelieve." Additionally, the verses of the Quran 88:21-24 say: "So remind them (O, Muhammad) – you are only one who reminds. You are not dictator over them – save the one who turns away and disbelieves". Apparently, the freedom of belief is expressed in the verses of the revelation of Mecca stage. The concept of apostasy formulated by the founding jurists is incompatible with the Islamic principle of freedom of religion written in the verses of Mecca stage. Again, reversed theory of abrogation could be helpful to give priority to the principles revealed in Mecca stage and to suspend those which were delivered in Medina.

Additionally, talking about the status of non-Muslims, the change of the audience to which the message of Islam was addressed in Mecca and Medina stage verses is to be noticed. From "O, humankind" in the verses of Meccan period to "O, believers" in Medina period, this was that considerable change which must be taken into consideration. The very fact of change states that the message of Islam can be (because it was) adjusted to the needs and capabilities of the audience. The message of Mecca stage is clear on the equality between Muslims and non-Muslims. Whereas the second stage of the message delivered in Medina attributed different status to non-Muslims. During the Medina stage, when hostile and violent social environment mainly prevailed, the Quran repeatedly instructed Muslims to support each other and disassociate themselves from non-Muslims and warned against taking non-Muslims as friends or allies. Such verses in Quran as 3:28, 4:144; 8:72-73, 9:23 and 71, 60:1 prohibited the Muslims from taking unbelievers as friends or supporters. Additionally, verse 5:51 instructs the Muslims not to take people of the Book or Jews and

583 There is a disagreement on the question whether apostasy is a capital crime. From one side we take into account the fatwa delivered by the scholars of the Fiqh Council of North America. Accordingly, there are no evidences from both the Quran and Sunna which would indicate that there is a firm ground for the claim that apostasy is in itself a mandatory fixed punishment, namely capital punishment. It was also said: "As religious opinions (Fatwas) change with a changing time, place, custom and circumstances, this issue should be re-examined within the basic boundaries of Islamic jurisprudence and not simply of pressures of others. No Muslim is required to change the indisputable stable and fixed aspects of Shari'ah for the sake of pleasing others or earning the title "moderate" or "open minded". In the meantime, fiqh rulings and interpretations in the non-fixed area need not be permanent either." (Fatwa is available at: www.fiqhcouncil.org (last visited March 10, 2017)). In contrast, on the Internet page moderated by Salafi scholar we find a fatwa which states cardinally different conclusion. "Execution of the apostate is something that is commanded by Allah, when he commanded us to obey the Messenger on the verse 4:59. And the Messenger has commanded us to execute the apostate as in the hadith: "Whoever changes his religion, execute him"." (The fatwa No. 20327 is available at: www.islamqa.info (last visited March 10, 2017)). It is striking to see that the first fatwa see no direct evidences on the issue neither in the Quran nor in the Prophetic hadith. It was only mentioned that there are some hadith that are weak and unreliable. The second fatwa states that if the Prophetic hadith are mentioned in the books of authentic hadith of al-Bukhari and Muslim, than there is no ground to doubt on them.

Christians as friends and any Muslim who turns to them becomes one of them. Besides that, inequality before the law was apparent from the comparison of status of Muslim and non-Muslim. The status of *dhimmi* was offered to the people of the other revealed scriptures. Those who were granted this status of dhimmi is entitled under Sharia to protection of her or his person and property and to practice her or his religion in private in exchange for payment of tax. Even if these conditions are fulfilled, non-Muslims were not treated equally in comparison to the status of Muslims. In the case of killing, the compensation of dhimmi is less than for killing a Muslim male. All these and other problematic principles of Sharia are based on texts of the Quran and Sunna of the Medina stage.

The historical conception of the Islamic state was developed during the Medina period, since the Muslims were not a political community and did not establish a state during the Mecca period. As concluded by A. An-Na'im, if we are to take the Medina model as one that was dictated by the political and social realities of the seventh century in accordance with the suggestion of M. Taha, we would not be bound to implement it under radically different modern conditions[584]. The interpretation and explanation of the message in particular historical context may vary and this is the very idea of the Quran that explanation from any of period of time cannot pretend to be final.

5.3. Summary

The text of the chapter showed how different in hermeneutical approach is Muslim scholarly discourse. There could be distinguished three main methodological approaches towards Islamic law in modern era, namely, literal, traditional and reformist/liberal. The literalists insist on the return to the Quran and the Sunna of the Prophet because, for literalists, these two divine sources comprise all the answers to the questions of any period of time. The ideologues of political Islam take this position as their primary purpose. The reformist/liberal approach also invites the scholar jurists to interpret and to derive legal rules directly from the divine sources but only with one condition. The interpreter must look at the sources through the requirements of the time and place. Thus, society-based approach is different from the literalist approach. These two see no possibility to ground the process of interpretation on the traditional fiqh law. Meanwhile traditionalists are more than assured that fiqh doctrines provide the tested and verified answers to all the legal issues.

While all the mentioned approaches are overlapping and not strictly separate, the literalist approach is not sufficient in modern time. At the same time, traditional interpretive approach according to which fiqh doctrines of one or another school must remain the main source of Islamic legal interpretation cannot respond adequately to the pressing issues of present time. Reformist/liberal approach insisting on the interpretation of divine sources according to the necessities of present time and place is most suitable to construct the modern Islamic law. A. An-Na'im, the disciple of M. Taha, suggests evolutionary approach in order to reconsider the most controversial parts of Islamic law. The reversed theory of

584 Abdullahi Ahmed An-Na'im, *supra note*, 56: 99.

abrogation is that fundamental reform whereby the least developed Islamic law issues may be reformulated.

The heart of the theory lies in the theory of abrogation which was formulated by the early jurists. According to the traditional theory of abrogation, the verses of Medina stage in the similar or identical legal issue abrogate those revealed in Mecca stage. For M. Taha, to deem the traditional theory of abrogation to be permanent is to deny the Muslims the best part of their religion. As stated by A. An-Na'im, it is now both logical and necessary to reverse the process of abrogation[585]. The main idea to make the earlier texts of Mecca superior in content to those in Medina. Reversed theory of abrogation as methodological starting point in the process of Islamic legal interpretation in modern time could enable contemporary Muslim jurists to challenge all the legal inconsistencies.

To stay satisfied with saying that all contested verses revealed in transitional period in Medina are out of use and that they might remain in the primary sources of Islamic law is unreasonable and even dangerous. It cannot be denied that what Sharia has to say on any subject, can be taken into account by official policy makers. The weight given to the Sharia position varies with the individual person or group of people and it was differently treated from one period in history to another. Sharia is very much present in the hearts and minds of Muslims throughout the world and, even where it is not the formal legal system, it has significant influence on Muslim attitudes. In the period when the world faces the threat of international terrorism, when Islamist ideology continues to spread political Islam among Muslims worldwide, the suggested ideas of reformation of Islamic law have to be seriously taken into consideration. Another question is whether Muslim scholars from around the world are ready to unanimously agree to implement such fundamental reform.

585 Abdullahi Ahmed An-Na'im, *supra note*, 56: 159.

6. ISLAMIC LAW IN ACTION TODAY: TRENDS, CONCEPTS, CASE ANALYSIS

From more theoretical analysis Chapter Six turns our attention into a relevant practice. To prove the fact of adaptability of Islamic law, the text of this chapter is divided into three sections. The first section discusses two trends in the field of Islamic law, namely, a worldwide phenomenon of issuing digital fatwas and the emergence of the methodological theory of fiqh law for Muslim minorities living in non-Muslim majority states. Emphasis on the scope of research here must be kept in mind. Namely, the research of the former subject takes into account a global landscape and the study of the latter covers non-Muslim countries having a considerable Muslim minority. The second section pays attention exclusively to the Western states. It investigates independent Muslim organizations legally operating in the West and a state legal apparatus (statutory law and court judgments) of the selected Western countries. The thesis to be proved is that Sharia norms are partially implemented through the mentioned two channels in the West. The question of adaptability of Islamic law in the context of the contemporary Middle East is the subject which is explored in the third section. The Kingdom of Jordan and its legal system is taken as a case analysis to find out whether Islamic legal rules as the consisting part of official Jordanian law are sufficiently flexible in the light of amendments of state law and open enough to adapt to the present realities of the region.

6.1. Islamic law and neo-ijtihad: new trends and concepts

As in the West so in the Muslim world[586] people simultaneously live local and global life. Expanding migration around the world and internet capabilities make this combination easily achievable. However, everything has its price. For instance, rapidly growing Muslim communities in the West face a dual crisis of identity. From one side, not rarely they struggle to assimilate into non-Muslim societies. From another, their sense of belonging to the universal umma of Muslims becomes weaker to such a degree that the scholars started to ring alarm bells. For example, Y. al-Qaradawi warned that the true Muslim community that adopts Islam as a creed, Sharia, concepts, traditions, morals and a comprehensive civilization does not exist today.[587] Even more, Muslims pose more and more questions regarding religious sources and their openness to the changing requirements of time. In fact, this is not a question of sources but rather of scholars and how they are ready to deal with the contemporary issues. In legal terms, if Islamic scholars wish to maintain Islamic law relevant, they must adapt it to the changing needs of global as well as local Muslim community.

586 By the term 'Muslim world' we are not to say that it is a unified body of people. Muslim world as well as Christian world is very different in terms of very diverse views, faiths and lifestyles. Despite that, such term helps us to distinct the area where majority of living people are Muslims.

587 Yusuf Al-Qaradawi, *supra note*, 84: 77.

Our premise is that one of the most influential forms through which Islamic religious law remains applicable among Muslims around the world lies in the prevailing practice of issuing fatwas (non-binding Islamic legal opinions of the religious scholars and jurists) on Internet. Here, the process of issuing fatwas is not only, as T. al-Alwani states, a mere duty of giving formal fatwa what was inherited from an era when traditional adherence to established doctrine was reinforced by illiterate members of society who found it easier to follow and imitate their teachers and predecessors.[588] Rather, contemporary process of issuing digital fatwas is based on a fresh evaluation of divine sources, traditional fiqh and of current social requirements on the ground. Internet makes all these fatwas accessible for a vast majority of Muslims. Certainly, this is not to say that all digital fatwas reflect contemporary realities. Contrary, a huge number of fatwas of our day represent various ideologies based on a very selective reading of Islamic sources. Furthermore, by the means of fatwas the scholars encourage other Muslims to explain Islamic law issues merely in the light of pure letter of the Quran or exclusively according to the realities of the time of the Prophet. K. El. Fadl is particularly critical with regard to the very process of issuing contemporary fatwas by saying that various Muslim ideological factions in the form of fatwas impose a virtual slavery on ordinary Muslims and especially on women. According to the scholar, "To claim that a woman visiting her husband's grave, a woman raising her voice in prayer, a woman driving a car, or a woman traveling unaccompanied by a male is bound to create intolerable seductions that are morally problematic because all such conclusions are inconsistent with Quranic morality and with the other sources of Islamic law[589]. Interestingly, that Y. al-Qaradawi, a very popular scholarly figure among Muslims who issued many fatwas which have nothing in common with a living time, also affirmed that a process of issuing fatwas and relevant conclusions are effective only if the old-fashioned thinking that rulings of a past period are entitled to handle future unforeseen disputes were dismissed.[590] All this shows that the process of issuing fatwas cannot be regarded as panacea and that each digital fatwa requires to be read with a close eye.

Generally speaking, through fatwas Sharia in general and Islamic law in particular is able to undergo a transformational stage in at least two levels, namely, individual and collective. First, the process of issuing digital fatwas tends to resolve individual Muslims' daily issues. In this sense, a scholar or a jurist issues a fatwa to solve a specific problem for an individual Muslim just after receiving his or her question on Internet. Such kind of personal guidance which combines Islamic religious law and burning issues of ordinary Muslims makes Islamic law a guide of actions in daily Muslims' life. In the light of the contemporary issues and through the channel of individual fatwas, Islamic religious law undergoes a process of mutation. However, this is far from being consistent and systematic process because a huge variety of scholars delivers very different answers to the same questions. Much more important role of individual fatwas lies in the fact that it is regarded as the starting point for the creation of the specific methodological doctrine making the process of Islamic legal evolution even more matured. In other words, the process of issuing fatwas serves as a basis

588 Taha Jabir Al-Alwani, *supra note*, 228: 4.

589 Khaled Abou El Fadl, *supra note*, 47: 269-270.

590 Yusuf Al-Qaradawi, *supra note*, 84: 3.

for the creation of a methodological doctrine of fiqh law for Muslim minorities living in non-Muslim states. A fatwa may raise several other questions that might go beyond personal cases. A particular issue which is widely discussed in a huge number of fatwas might inspire Muslim scholars to construct the whole fiqh for Muslim minorities on that question. In both levels, internet as a platform facilitates the spread of such a new transformational wave.

The body of individual digital fatwas is a growing set of ad-hoc decisions. From the first glance, it is not likely that a substantial theory based on a specific methodology with the aim to resolve a variety of issues in a consistent and predictable way could emerge from such a diversity of legal opinions worldwide. Despite that, the scholars of the Islamic Fiqh Academy in India insists that on the sensitive issues it is more preferable to resort to the collective deliberations rather than giving out fatwas individually.[591] In a gradual fashion, a methodological construction aimed at reconciling religion's demands with the challenges of reality emerged on the ground in the end of the twentieth century. The fiqh for Muslim minorities (*fiqh al-aqalliyyat*) in non-Muslim countries is widely regarded as a new branch of Muslim fiqh law aimed at adapting Islamic religious law to Muslim minorities. Generally speaking, a new branch of fiqh was founded in order to safeguard Islamic identity of Muslims living in Europe, India, North America, Australia and so forth. At the same time, the aim was to reformulate a number of traditional Islamic fiqh rulings as well. In this light, a number of local and international institutions was created to construct and develop the doctrine of fiqh for Muslim minorities. The creation of one or another collective body provides more consistency and predictability with regard to the process of reformulation of Islamic religious law. Muslim scholarly figures operating as the members of such bodies provide more reliability. Moving in such a direction could help to reinforce and to concentrate Islamic religious authority in the hands of such collective bodies.

If in the first part of this section we discuss the process of issuing individual fatwas, in the second part our aim is to examine a new concept of fiqh for minorities as theoretically so in the light of concrete issues which were settled by it. This is to show that the concept of fiqh for minorities proves not only the ability of Islamic law to respond to new realities in changing times and that it might be perfectly adaptable to and compatible with Western social and legal environment. What is also striking to understand is that the doctrine gives considerable ground to see how Islamic religious law derived from the divine sources and/or constructed by the scholars might provide the permission to deviate from the religious decrees in case of necessity.[592] In this sense, Islamic religious law becomes an assistant in providing an infrastructure that alleviates some of decrees of religious law in order to safeguard the religious identity. If to agree, it is very likely that religious law and its tools are the potential source of transformation of religion itself enabling it to respond to the changing time conditions. If to prove this, an old-fashioned assertion that Islamic religious law is the main obstacle for the change in Islam could be contested. Certainly, this statement must be grounded on one or another methodological basis. J. Auda, with whom we tend to agree, claims that only if the function of ijtihad were to reveal the purposes of Islamic law, Islamic religious law could be developed and reformulated according to the changing

591 *Juristic Decisions on some Contemporary Issues*. (New Delhi: Islamic Fiqh Academy (India), 2014), 23.
592 Iyad Zahalka, *supra note*, 221: 19, 55.

conditions of life[593]. Whether or not the theory of maqasid al-Sharia can be regarded as the basis to transform religious law which, on its part, could bring development to Islam itself, we will realise in the following study. To sum up, the research of individual digital fatwas and the survey of the doctrine of fiqh for minorities as well is designed to prove that in the light of these trends Islamic law might be regarded as a present day phenomenon which is compatible enough to coexist with Western legal values.

Paradoxically, the age of internet keeps alive traditional Islamic law and, at the same time, adapts it in a reformed form to the current needs through the ijtihadic activities. At least as a result of previously mentioned two trends, our assertion is that the doors of ijtihad has been already opened and that the ijtihad as the very idea of development in Islam is more than ever alive in the contemporary time. In all probability, nostalgia of the golden past in the minds of a scholarly community might gradually become (if not yet became) nostalgia for the future. If digital Islam is able to unite the umma through the new and emerging means, the future might seem not less golden then its past. The only one question is how to balance the memory of the past with the memory of the future, the memory of conservative thinkers with the memory of reformist scholars, and, ultimately, the scholarly community's memory with that of Muslims living around the world.

6.1.1. The role of fatwas in the age of Internet

Traditionally, Muslims followed the opinions of the scholars within their local communities. For instance, individuals in one or another Middle Eastern village were guided by the interpretation of divine sources which was delivered by the mufti of their village. It was rarely possible to deliver a question on the specific issue to a number of scholars. Usually communities had one leading scholar who was responsible for delivering fatwas. Thus, advice seeking was very local practice. Certainly, Islamic educational centres in the capitals of Islamic empire were that place where one had an opportunity to study or even to go there for a fatwa. In the age of internet, this practice was reversed dramatically. From the very end of the twentieth century the first Internet pages aimed at giving fatwas were created and achieved incredible success. Today we may find a large number of internet pages where scholars give their legal opinions. Such services as "e-fatwa" or "fatwas on the phone" is nothing but a current reality. As it is announced on one of the Internet pages, their centre receives inquiries and offers fatwas via SMS as well.[594]

Contemporary social requirements provoked new questions to be answered by possessors of knowledge. Internet came to be the most suitable place for ordinary Muslims to ask opinions and advice. It became usual practice to seek online fatwas from more than one legal scholar. For instance, an individual may ask for the online fatwa on a specific question from the scholar in Indonesia, from a scholar in Saudi Arabia and from the Muslim scholar living in Germany. Muslim women might also choose to ask for a fatwa from a scholar

593 Jasser Auda, *supra note*, 41: 258.

594 More information on the sevices is available at: www.awqaf.ae

woman via internet call. Such fatwa hotline based in the United Arab Emirates (UAE) and funded by the UAE government. Although it was launched very recently, it has seen a rapid increase in the number of women callers in the past two years owing to the rise of jihadist groups such as Islamic State.

From a variety of answers, individual may choose one which makes sense to him or which was produced by a scholar he likes most. How one might decide which opinion is worth to be followed? We may quote the answer from the Internet page which is supervised by Salafi scholar Muhammad Saalih al-Munajjid: "The one who has knowledge of evidences of divine sources is required to follow the evidences, even if it goes against some of the imams, if it does not go against the consensus of umma. The one who does not have any knowledge should ask the scholars, because God says so in the verse 16:43. He should ask one who thinks has more knowledge and is more religiously committed, but that does not mean that doing so obligatory, because the one who is better may make a mistake with regard to a particular issue, and the one who is regarded as less knowledgeable may be right with regard to it. But priority should be given to following the one who is more knowledgeable and more religiously committed."[595] Mufti Faisal al-Mahmudi adds that "if one has access to multiple scholars then there is nothing wrong with seeking a scholar of expertise in the particular field. But it is not recommended to confuse this with the issue of following only one Fiqh School. There are four Sunni fiqh schools and it is best to restrict oneself in following one of these schools and not mix and match."[596]

Naturally, traditional interpretations of Islamic law had to be reinterpreted in order to give answers to the fresh modern issues. A variety of different interpretations of Islamic law became accessible. Internet came to be the territory where traditional, liberal and very controversial ideas on Islamic law became the object of discussion. From a number of opinions on the specific issue, one might choose the most suitable fatwa as a ground to justify or acknowledge one or another action compatible with Islamic law. Some scholars on Internet become extremely popular. The growing influence is noticeable from millions of followers on Facebook or Twitter. To illustrate how Internet affects the further development of Islamic law, we need to take into account a number of fatwas of current time. In this way, it can become clearer whether traditional interpretation of Islamic law has any other option than to be reconsidered and transformed in the light of contemporary challenges. How all this affects Islamic legal tradition as such? Is it a natural development through which Islamic law remains the law in action? Could we regard online fatwas as the major option to respond swiftly to the requirements of each Muslim and Muslim umma as a whole? Or maybe, conversely, digital fatwas threaten to dismantle Islamic legal tradition into a huge number of different pieces to the degree that the very tradition as a ground might be lost? These and other questions will receive considerable attention just after the short word on the concept of fatwa and the requirements mufti should correspond to in order to give legal opinions for ordinary Muslims.

595 The fatwa no. 68152 is available at: www.islamqa.info (last visited Feb. 10, 2017).

596 The fatwa is available at: www.fatwa.ca (last visited Feb. 10, 2017).

6.1.1.1. Fatwas: definition, classification, actors.

The meaning of the term "fatwa" is a response that makes something clear. It is a non-binding religious opinion or religious-legal ruling by a scholar or a person trained in Islamic law. More exactly, fatwa means to answer a question pertaining to the religious ruling of a particular action.[597] All actions in Islamic jurisprudence were divided into five categories, namely, mandatory, preferable, permissible, not preferable and forbidden. Usually, an individual wonders whether his or her action contradicts or not to guidelines of divine scriptures and fiqh rules that were set by scholars in the course of formative and post-formative periods. The scholar answers by saying to which category of actions belongs the act about which the questioner applied for fatwa. As a basis to answer whether a particular action belongs to one or another category, the scholar delivers evidences from sources of Islamic law in the form of specific rules or principles.

The methodology concerning the hierarchy of evidences should be always kept in mind by the scholar as it is not permissible to resort on the Sunna of the Prophet without firstly exploring the Quranic source. Truth, not all Muslim scholars put evidences found in one or another source of Islamic law in the text of fatwa. Usually, a scholar briefly comments the question on the basis of found evidences in one or another source of Islamic law. This is why not rarely we may find a fatwa consisting of one or two sentences. According to Sheikh Ali Gomaa, the former Grand Mufti of Egypt, it is contrary to the expression of the fatwa which should follow a particular etiquette.[598] Despite all the requirements fatwa needs to comply, there is a number of contemporary internet pages saying that fatwas through internet may be delivered in oral form. Accordingly, an oral fatwa is as credible as a written one.[599] Usually, Muslims are suggested to receive oral fatwa via Skype or Viber. All this shows that although fatwa most frequently retains its traditional structure, it also reflects modern day realities as in its form so in its content.

One may question the religious authority of the concept of fatwa. Here, there is a need to find out whether the Quran and the Sunna gives us a clue on this subject. The Quran speaks of the concept of fatwa in several instances. The verse 12:43 says: "O notables, explain to me my dream, if it be that you can interpret dreams." The other meaning of fatwa is giving suggestion and guidance as follows from the verse 27:32: "O chiefs, advise me in this case of mine." Alongside the mentioned two Quranic verses, again the verse 16:43 perfectly fits here as it invites those who need consultation or knowledge to apply to the most qualified scholars. As K. El Fadl reminded, only the fatwas issued by legal

---

597 Moustafa Kassem, *Fatwa in the Era of Globalization*. In *Ifta' & Fatwa in the Muslim World and the West*. Edited by Zulfiqar Ali Shah (London: The International Institute of Islamic Thought, 2014), 90.

598 "The expression of the fatwa should follow a particular etiquette: 1) The fatwa should be in written form; 2) Unclear phrases that carry multiple meanings should be avoided; 3) Evidence should be provided; and 4) The fatwa may not assert that it represents God's ruling with unwavering certainty." Sheikh Ali Gomaa, *Reponding from the Tradition: One Hundred Contemporary Fatwas by the Grand Mufti of Egypt*. Translated by Tarek Elgawhary and Nuri Friedlander (Louisville: Fons Vitae, 2011), 21.

599 Mohammad Hossein Sabouri, "Iran's Nuclear Fatwa: Analysis of a Debate", *Journal of Military Ethics* 15, 3 (2016): 231.

scholars and systematic writings by law professors (and not the regulations issued by the rulers) were always considered to be legitimate articulations of the divine will.[600] Thus, the possessors of knowledge or Muslim scholarly community members hold a special position because their mission is to report to ordinary Muslims how God views a particular issue. By spreading divine guidance written in the Quran and the Sunna of the Prophet among each and every Muslim what concerns their daily requirements, the learned Muslims preserves it.[601] Exceptional status of ulemas is acknowledged by the Prophet himself in his saying that "Indeed the scholars are inheritors of the prophets and, verily, the prophets have not left behind gold or silver. Verily, they have left behind knowledge".

When we know the definition of the fatwa and that the scriptures confirm it as a form to spread the knowledge, the task ahead us is to discuss the main actors in the hands of whom fatwas turns into a tool to share knowledge with ordinary Muslims. The function to give fatwas belong to a mufti. As was pointed out by the former Grand Mufti of Egypt, the main goal of the mufti is to create a legal tool that aids in the actualization of the Islamic juristic tradition without departing from the tradition or making it a barrier to contemporary Muslims.[602] Traditionally, a position of mufti can be taken by: (1) a mujtahid, one who is qualified to engage in original legal thought and issue fatwas, based on his reasoning, derived from the sources of Islamic law, and (2) a muqallid, who is not qualified to that extent, but who is well-versed in the analysis of the earlier mujtahids and thus must cite the sources for his fatwa.[603] In other words, the former figure would have a right to make ijtihad to deal with a question at hand and the latter's function would be limited to the following of the other scholars and their tradition. However, this distinction is rather theoretical than real in the current time because there is no united position on the qualification of one who wish to resort on issuing fatwas. Generally, if one wishes to perform the duties of the mufti, he must be a Muslim, sane, mature, knowledgeable, specialized, and just. The Grand Mufti of Egypt adds that also one must have a status of "mujtahid", which characterizes those possessing advanced ability in independent legal reasoning.[604] By the way, according to the consensus among scholars, being a male is not a condition for issuing fatwas. That women becomes more influential in the process of issuing fatwas and, at the same time, in the transformative path which Islamic religious law experiences now, is evident at least from the previous Islamic women conference held in Indonesia. This was the first Muslim world's congress of women scholars.[605] Female Islamic clerics issued fatwas forbidding child marriage and rape in marriage, arguing that contextual interpretations of the scriptures show both are forbidden.

600 Khaled Abou El Fadl, *supra note*, 47: 15.

601 The Quranic verse: "Verily we, it is we who have sent down the Remnder and surely, we will guard it."

602 Sheikh Ali Gomaa, *supra note*, 598: 20.

603 I. D. Ahmad, *Shuratic Ifta: The Challenge of Fatwa Collectivization*. In *Ifta' & Fatwa in the Muslim World and the West*. Edited by Zulfiqar Ali Shah (London: The International Institute of Islamic Throught, 2014), 34-35.

604 Sheikh Ali Gomaa, *supra note*, 598: 20.

605 More about this event: www.kupi-cirebon.net

There is a very diverse practice how scholars become muftis in one or another contemporary Muslim state or within the community in the West. For instance, in Saudi Arabia, the Grand Mufti is responsible for the appointment of muftis in the state. Besides, the Kingdom's Senior Council of scholars has sole responsibility for issuing fatwas. More precisely, from August 2010 royal edict, only clerics associated with the Senior Council of scholars are authorized to issue fatwas.[606] In Jordan and other Muslim countries the Grand Mufti also nominates Muslim scholars as muftis and collective organs consisting of Muslim religious scholars usually operates as a part of the state apparatus. In contrast, if one looks at a variety of fatwas of Muslim scholars in the West, an impression that there is no unanimous agreement on obligatory requirements to become a mufti can only increase. Not without reason the former grand Mufti of Egypt argued that "Charlatans abound in the public sphere who discuss and give advice on everything from medical matters to fatwas, without having the least bit of relevant knowledge and having memorized but a few verses of the short chapters of the Quran. These people have held public offices; some of them want us to separate ourselves from our religion and history; some of them practice intellectual terrorism".[607] It is very likely that the main reason why there are many unqualified, uneducated and unknown people, in the terms of A. Ahmad 'pseudo-Shari'a experts'[608], who give lessons, advice, and rulings on issues that misleads and misinforms many people, is that there is no united religious authority among Muslim scholars in the West.

What is apparent is that, besides knowledge that is required to have for those who might embark on ijtihadic activities, muftis must be aware of current events on the ground. Only combining classical and contemporary understandings can equip muftis to issue rulings that will truly reflect and uphold the Sharia's deeper goals and objectives.[609] Following this way, the muftis are able to respond adequately to the exigencies of Muslims living in totally different contexts comparing to that on which traditional fiqh law constructed. As clearly stated Y. al-Qaradawi, in many cases the wrong opinion of a jurist is not the result of misunderstanding the texts and the legal norms, but of inability to understand the reality of the matter being dealt with.[610] Certainly, to be well aware of fresh developments cannot mean that traditional fiqh lost its ground. To keep in the line of fiqh tradition, scholarly camps identify themselves with one or another traditional fiqh school. Although there are positions that the reliance on the single school of fiqh and exclusion of others no longer suit the needs of time,[611] there are many indications that show different reality. Sometimes official internet pages confirm that in the process of issuing fatwas the muftis follow particular fiqh doctrine. For example, if one looks at the official page of the Fatwa Centre aimed at unifying and regulating Fatwa practice in the UAE, he will find such statement: "The centre follows the Maliki Madhhab (the official school of Islamic law in UAE) in all issues relating to the matters of worship, and consider the said school a priority in other Fatwas depending on

606 More information is available at: www.carnegieendowment.org/sada/?fa=41824

607 Sheikh Ali Gomaa, *supra note*, 598: 23-24.

608 Ahmad A. Ahmad, *supra note*, 533: 23.

609 Moustafa Kassem, *supra note*, 597: 93.

610 Yusuf Al-Qaradawi, *supra note*, 84: 156.

611 Moustafa Kassem, *supra note*, 597: 96-97.

each case in question."[612] From the point of view of I. Zahalka, the former director of the Sharia Court in Israel, Muslim scholarly leadership is divided into four groups and biggest of them tend to base their understanding on the Hanafi or Hanbali traditions.[613]

6.1.1.2. Case analysis of online fatwas

The digital fatwas encourage a two-side transformation, an extent of which might vary according to the society and to the state. From social perspective, the participation in the online debates makes Muslims' daily life somehow dependent on Islamic law decrees which as a factor of unity strengthens Muslim community and their religious identity as well. As in a house in Egypt so in the rent flat in London talking or chatting on the actions and their compliance to Islamic law becomes a part of current virtual as well as real life. At the same time, religious scriptures occur at the heart of online debates and, as a result, Islam as religion receives a growing interest. From the pure legal sense, such movement might be viewed as the cause of rebirth of the reformulated Islamic law. Through fatwas traditional Islamic law begins to speak in contemporary, thus, more understandable and simple language. What does it mean? Apparently, as in the past so today the question of openness of Islamic law depends not so much on the sources but rather on the scholars in the hands of whom Islamic law is always ready to be adapted to changing time and requirements. The pressure of society which might be expressed in various ways can be an influential factor. Paradoxically, if in the beginning of age of internet technologies were regarded by the scholarly community to be alien to the religious essence, today it becomes a major means to spread Islamic law around the world. All in all, to prove our premise that Islamic law undergoes transformative stage partly as a result of the process of issuing individual digital fatwas in our time, we need to take into account concrete online fatwas.

The question whether a Muslim can inherit from a non-Muslim receives attention in a number of online fatwas. For instance, British Muslim who converted to Islam questions for the fatwa in the issue of inheritance from his Christian father who left a great inheritance to him as the only inheritor in the family. Y. al-Qaradawi, a religious scholar and jurist issued a fatwa. Regarding the text of the sources, two Prophetic hadith state in a clear fashion that "There is no interfaith inheritance in Islam" and that "Neither a Muslim should inherit from a non-Muslim nor should a non-Muslim inherit from a Muslim". This opinion was supported by main schools of fiqh law including Hanafi doctrine according to which Muslim does not inherit from the non-Muslim not the non-Muslim from the Muslim[614]. At the same time, Y. al-Qaradawi acknowledged that this is one of the pressing issues among

612 More about this, see: www.awqaf.ae

613 The scholar researched the differences of Muslim scholars in the West towards the modern concept of fiqh for Muslim minorities. Here, he distinguished the following groups of scholars: wasati faction which represents a set of positions of Muslim brotherhood; Salafi camp which grounds its narrative on Hanbali fiqh tradition; Muslims who are mainly from the Indian Peninsula base their opinions on the Hanafi School; and liberals. Iyad Zahalka, *supra note,* 221: 139-144.

614 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Hamdan Al-Quduri, *supra note*, 462: 716.

Muslims in the West.[615] In order to balance Islamic traditional law with contemporary conditions, the mufti argued that in this case an interfaith inheritance might be regarded as a kind of bequest from a father to son. From the point of view of fiqh law, such bequest is permissible. According to the classical manual of Hanafi fiqh, it is permissible for a Muslim to make a bequest to a non-Muslim, and a non-Muslim to a Muslim[616]. As was concluded, the property can be taken but a man cannot retain any for himself except what he needs to spend on family and the rest must be given to charity.[617] This was a middle position between a pure letter of the hadith and the necessities of the time living in non-Muslim state.

Another question which was sent to the mufti concerned a student loan from bank.[618] According to mufti M. al-Munajjid, it is not permissible for Muslim to pay interest (riba). To evidence it, he mentions Prophetic hadith. "The Prophet cursed the one who consumes riba, the one who pays it, the one who records it and the two who witness it. He said they are all the same." From the point of view of the mufti, if a Muslim takes out a riba-based loan, not knowing of the prohibition on doing so, there is no sin on him regarding what has passed of that. Here the basis of such mufti's statement is grounded on the Quranic verses 33:5[619] and 2:275[620]. According to the mufti, after finding out about the prohibition, a person must put an end to any riba-based transactions that he is currently engaged in, in whatever way he can, and he must refrain from entering into any new transactions on that basis. The mufti ends by saying that "If one cannot avoid paying the interest, then he pays it because he is forced to do so. Allah does not burden anyone beyond what he is able to bear. It is sufficient for such person to repent and to regret what he did."[621]

However, everybody would agree that the prohibition for Muslim to take bank loan for the studies or for a house is nothing but unimaginable thing in the contemporary life in the West. If one does not have financial capabilities, he takes a loan from bank. This is a part of current life. Justification in the case of taking a loan from bank lies in the principle of necessity (darura) which is derived from the Quran and constructed as one of the fiqh law principles. This universally accepted principal states that if a Muslim is in dire exigencies then he is allowed to commit an unlawful act to survive. Thus, for example, since housing is a necessity of life without which there can be little doubt of life being extremely difficult and it is not possible through lawful means for a Muslim to purchase a house either by cash or interest free loan, one may resort to an interest-based bank loan[622]. Analogically, the concept of darura might be suitable to the case of loan for studies. The question of taking

615 Yusuf Al-Qaradawi, *supra note*, 84: 122.

616 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Hamdan Al-Quduri, *supra note*, 462: 695.

617 Yusuf Al-Qaradawi, *supra note*, 84: 124.

618 The fatwa's no. 218894 and it is available at: www.islamqa.info (last visited Feb. 15, 2017).

619 "And there is no sin on you if you make a mistake therein, except in regard to what your hearts deliberately intend. And Allah is ever Oft-Forgiving, Most Merciful."

620 "So whosoever receives an admonition from his Lord and stops consuming Riba (usury) shall not be punished for the past."

621 The fatwa's no. 9700 is available at: www.islamqa.info (last visited Feb. 15, 2017).

622 Shahrul Hussain, "Riba-Based Mortgages in Dar al-Harb: An Issue of Modernist Application of Fiqh al-Aqalliyat for Muslim Minorities", *Journal of Muslim Minority Affairs* 36, 3 (2016), 372-373.

loan to buy a house became a pressing issue in the West and a huge variety of different fatwas on this issue forced leading Muslim scholars to formulate the fiqh for Muslim minorities on this specific question what will be discussed in the second part of this section.

Let's take one more contemporary issue which was discussed in the fatwa. The soldier of Muslim religion who served in the United States Army wished to know if a Muslim could serve in a non-Muslim military that may fight against Muslims, and whether he should request to be reassigned to a non-combative role. The question was directly related to the context emerged after the September 11 attacks. The question discussed by the muftis was whether the loyalty of a Muslim soldier lies in the great Muslim umma or in his country of residence. The fatwa acknowledged the legitimacy of the modern state and prioritized a Muslim's loyalty to his country during a time of war, when he is expected to actively demonstrate his allegiance.[623] The basis on which such opinion was expressed was two Islamic law principles. The first, the lesser of two evils, according to which Muslims should fight for their country's army because, in case of refusing service, reputation of entire Muslim community of the country would be harmed. The second principle was related to the intention, namely, if the intention behind the action is worthy, the deed itself is worthy regardless of consequences. According to I. Zahalka, because the case had not precedent in traditional sharia's literature, the authors of the fatwa accepted a certain degree of novelty and adopted a principle of intention, which relies on the intention of the actor rather than the nature of the act or its consequences.[624] Certainly, the basis on which this fatwa might be built also can be an Islamic principle of necessity. After all, the reactions to this fatwa, especially from Salafi branch and from Muslim Brotherhood, was very critical. Despite that, the question and how it was dealt with proves that a fatwa might combine Islamic principles and contemporary requirements.

Another contemporary issue is related to the case of divorce expressed on phone. The woman asked for the fatwa by saying that: "My husband said me talaq word three times on phone while he was in a great anger. Later he involved a Sheikh of Musjid who declared that it should be considered one talaq. Still I am confused and I need more clarity." The mufti Ikram al-Haq from the Fatwa Centre of America had different opinion when the mentioned scholar in the question: "If you know certainly that your husband gave you Talaq three times over the phone and he was in control of his mind and senses, then the Talaq is given three times, then it is effective as three times. 3 will not be considered 1."[625] In terms of the same subject, a man wondered the same mufti whether a text message could be appropriate form to divorce. Also, he doubts if there is any kind of certain template to be followed in order to be assured that it is valid form for divorce. The answer was: "Divorce in writing is as effective and valid as it is in verbal pronunciation. There is no specific template for divorce in writing. In old days the writing would occur on paper but in modern days, this could be achieved by email, or text message as well. As long as the husband admits

623 Iyad Zahalka, *supra note,* 221: 76.

624 *Ibid*., 77.

625 The fatwa is available at: www.askamufti.com (last visited Feb. 16, 2017).

giving divorcing through text message or email and it is indisputably directed towards his wife, then it will be effective."[626]

The General Fatwa Department of Jordan received a question of whether it is permissible for someone to break their fast in order to study for exams. The answer is as follows: "Fasting is a pillar of Islam that Allah has prescribed to all Muslims. He says in this regard (what means): "O ye who believe! Fasting is prescribed to you as it was prescribed to those before you, that ye may learn self-restraint," (2:183) The Quran has clearly stated the excuses which allow someone to break their fast in Ramadan: "Fasting for a fixed number of days; but if any of you is ill, or on a journey, the prescribed number should be made up from days later. For those who can do it with hardship, is a ransom, the feeding of one that is indigent. But he that will give more, of his own free will, - it is better for him. And is better for you that ye fast, if ye only knew." (2:184). In conclusion, studying for exams in Ramadan isn't valid excuse for a student to break their fast. It is imperative that he/she starts their fast and do their best studying for exams. However, if they experience extreme hardship during day time, then they may break their fast. We pray that Allah grants success to all students. And Allah knows best."[627]

Regarding the question of a position of women in Islam, the former Grand Mufti of Egypt received such two questions: "Does Islam give a father the right to force his daughter to marry? Can a woman terminate a marriage in Islam or is that solely the right of the man?" Concerning the first question, the mufti stated that parents do not have the authority to compel their children of either gender to marry someone they do not want to marry. According to the scholar, the parents' role in the marriage process involves giving advice, direction, and guidance, but the final say belongs to the children themselves.[628] From the point of view of the mufti, a number of Islamic law rules and principles indicate that marriage is one of a person's private affairs and that contemporary time further reinforces the rulings of Islamic law. With regard to the second question, the mufti assures that Islamic law gives women the right to end a marriage just as it gives that right to men.[629] He mentioned a number of ways founded in the sources of Islamic law of how a woman might terminate her marriage: a woman has the right to include a condition in the initial marital contract giving herself the right to pronounce divorce unilaterally whenever she likes; a woman might apply to the court with a request to separate her due to a number of reasons; eventually, a married woman may also seek khul or the separation in the absence of reason. To sum up, in the light of both answers, the mufti added that oppressive customary practices that still prevail in some regions and a lack of ability to understand Islamic religious law lead to the tendency to misunderstand Islam and its law.

Although a huge number of fatwas reflects contemporary social needs of Muslims, however, there is no possibility to affirm that the contemporary process of issuing fatwas necessarily transform the whole corpus of Islamic law. The main threat is related to the

626 The fatwa is available at: www.askamufti.com (last visited Feb. 16, 2017).

627 The fatwa number 3198 on the subject "Breaking Fast to Study for Exams isn't Permissible" is available at: www.aliftaa.jo (last visited March 12, 2017).

628 Sheikh Ali Gomaa, *supra note,* 598: 70.

629 *Ibid.*, 73.

scholars and their readiness to interpret Islamic legal sources in the lights of contemporary time. In the essence of Islam, divine will is expressed in the sacred texts. Those with knowledge or Muslim scholarly community must be rightfully equipped to understand the texts and to mediate between God and humanity. The heart of the matter, as accurately points out K. El Fadl, lies in the continuous balance of power between the author, reader, and text: the dominance of one over the other two components might lead to stagnation.[630] According to the scholar, it has become common in the modern age to use the authority of the author (God) to justify the despotism of the reader.[631] A number of fatwas proves that the reader or the scholars representing particular Islamic legal factions tend to set themselves as the sole voice of authority. Such tendency negates not only divine authority of the sacred texts but also makes the core principle of Islamic openness and flexibility ineffective. All this proves that the very tendencies in the process of issuing fatwas must be carefully observed in order to understand the directions of evolution of the whole Islamic legal tradition.

In conclusion, there is a need to mention that alongside the fatwas devoted to deal with personal issues, the fatwas might be devoted to general public. Questions that are discussed in such fatwas receive particular attention from the community as a whole and because of this reason a mufti or a number of muftis make a decision to issue religious opinion. It is necessary to highlight that the content of the fatwa devoted to general public might be relevant to Muslim community and non-Muslims as well. For example, the Fatwa on joining ISIS issued by Islamic Supreme Council of Canada in 2015 was expressly addressed to Muslims as well as non-Muslims. The Press announcement of the Council was delivered in such words: "This fatwa has been issued in order to help Muslims especially youth to understand what Islamic laws and ethics stand for and how ISIS/ISIL is violating those laws and ethics. The consistent and constant misinterpretation and misuse of the verses of Holy Quran and Hadith of Prophet Muhammad (peace be upon him) by the ISIS/ISIL to control Muslim lands and people should be exposed and condemned. We hope this fatwa will help Muslims and non-Muslims to understand what Islam requires from its followers."[632] The length of the fatwa does not depend on the number of its authors and supporting signatures. For instance, the above mentioned fatwa was signed by thirty eight leading Muslim scholars and jurists from different cities of Canada and it was composed in four pages. The text of fatwa provides a pretty clear religious and legal guidance on the concept of jihad, on the principles of commanding right and forbidding wrong, on the actions that are forbidden under Islamic divine scriptures and so forth[633]. Meanwhile, the Fatwa on

630 Khaled Abou El Fadl, *supra note*, 47: 264.

631 *Ibid*., 47: 264-265.

632 The fatwa is available at: www.iscc.ca (last visited Feb. 20, 2017).

633 As this fatwa concerns the events of current time, it is worth explaining the essence of it. At first the fatwa delivers three Quranic verses which speak of the obligation to command right and forbid wrong (3:104; 9:71; 22:41). Under this subject the authors of fatwa adds the Prophetic saying which states that: "When people see a wrongdoer and do nothing to stop him, God may well visit them with a punishment." Later on, the text provides ground for argument that Muslims must not trust anyone he or she is not sure of (49:6; 63:1). Again, the Quranic verses are combined with the Prophetic hadith: "There will be dissension and division in my nation and a people will come with beautiful words but evil deeds. They recite the Quran but it will not pass beyond their throats. They will leave the religion as an

Terrorism and Suicide Bombings issued in 2010 by Muhammad Tahir al-Qadri was written in more than five hundred pages.[634] One might safely state that it is rather a book than a traditional fatwa.

6.1.2. The doctrine of fiqh for Muslim minorities and its development

The emergence and development of the doctrine of fiqh for Muslim minorities is a direct sign that neo-ijtihad is a modern-day phenomenon. Also, that the individual fatwas might provoke the establishment of the fiqh for Muslim minorities on the specific case. Such ijtihad opens a way for the process of reinterpretation of Islamic religious laws according to the time, place and new circumstances what is necessary in case of Muslim minorities living in non-Muslim states. In this sense, Islamic religious law in a way of alleviating some of the religious decrees for Muslim minorities takes a role of assistant in upholding religion itself. More exactly, on the methodological ground of darura or maqasid al-Sharia, it provides a permission to somehow deviate from the religious path in order to safeguard Islamic

arrow leaves its target and they will not return. They are the worst of the creation." Further, by saying that such entities as ISIL or ISIS are strangers in Islam and its history, one more Quranic verse (49:6) is quoted: "O you who believe! If a wicked person comes to you with any news, ascertain the truth, lest you harm people unwittingly, and afterwards become full of repentance for what you have done." The comparison is made in fatwa between the sect of Kharijit and current terrorist group ISIS. The Kharijit or the outsiders were guilty for murder of many of the family and companions of the Prophet. Their aim was to destroy Muslim umma and this is what ISIS in current times, according to the authors of the fatwa, are doing. "The Kharijit wanted to establish a "Caliphate" based upon their own political agenda. Today, ISIS/ISIL is using the same words, "Caliphate", to misguide and to manipulate Muslims. In our opinion, theses aforementioned terrorist organizations are planted in Muslim countries to serve anti-Islam interests by deceiving Muslims in the name of Islam." Eventually, the authors of fatwa enumerates ten actions that were encouraged by ISIS and that are un-Islamic, thus, completely forbidden: "Capturing opponents; Muslim or non-Muslim civilians and beheading them; killing Muslims who disagree with beliefs and actions of ISIS/ISIL; destroying mosques; demolishing the graves of Prophets, Saint sand ordinary people; forcing out Muslims or non-Muslims from their houses and making them refugees; murdering Islamic scholars who oppose ISIS/ISIL; encouraging Muslim girls and facilitating their travel secretly to Syria and Iraq to fight for organization like ISIS/ISIL; burning enemy soldiers alive; mutilating a human body alive or dead; throwing enemy combatants or civilians from a height to kill them." In addition to this, the authors clarify two points on the concept of jihad which is exposed by ISIS. First: "During jihad, a Muslim army cannot do the following. These are the jihad ethics of Islam that no one has the authority to change. These are also the Sharia laws about jihad that no one can change: a) do not kill children, even if they belong to the enemy; b) do not kill non-combatant men or women, even if they are from the ranks of the enemy; c) do not kill elderly, sick or weak people, even if they are from the ranks of enemy; d) do not cut trees; e) do not contaminate water; f) do not destroy the places of worship of any religion; g) do not force people against their will to convert to Islam." And second: "War cannot be declared by individuals or groups of people. Only an Islamic government with its authority on a state can declare war if the state is being attacked." In conclusion, it is said that "ISIS/ISIL has violated all of the above prohibitions of Islam. They have disobeyed the Quran and the guidance of the Prophet Muhammad (peace be upon him) therefore, their struggle cannot be an Islamic struggle and their war cannot be called "Jihad". Rather, it is pure terrorism and Haram. The behavior and the actions of ISIS/ISIL has consistently proven that they are not Muslims and they cannot be trusted by the Muslims". The fatwa is available at: www.iscc.ca (last visited Feb. 20, 2017).

634 Muhammad Tahir Al-Qadri, *supra note*, 570.

identity, to uphold religious decrees and to avoid any type of confrontation with adoptive state's law and social customs. Mortgage, army service, inheritance from a non-Muslim, participation in the politics or divorce contracts are only some of the issues to illustrate why Muslim minorities in non-Muslims countries are under an urgent need to receive a religious and legal solution. Here, the doctrine of fiqh for minorities grounded on the maqasid al-Sharia paved a way for a number of scholarly decisions. It is very likely that the methodological theory of maqasid al-Sharia on the basis of which the fiqh for minorities is established might be expanded to the extent that it could become a methodological platform for neo-ijtihadic activities to reconsider the whole Islamic fiqh law.

The premise of this part of dissertation is that the doctrine of fiqh for Muslim minorities is rather a well-organized theory capable to deal with current-day issues than a localised solution to the temporary problems. A number of arguments will show that it requires to be transformed on the basis of a reformulated methodology of maqasid al-Sharia in order to become a framework for the further issues. Neo-ijtihad based on such methodology could be significant in the task to reconsider the whole Islamic fiqh law. To prove all this, we tend to examine the development of the doctrine of fiqh for minorities, its position on a number of religious laws, and how profoundly the views of its founding fathers vary regarding the very essence of the doctrine. Then, our research will take into consideration methodology of the doctrine and the tools it utilizes to create religious and legal rulings. As is already evident, regarding the methodology of the fiqh for minorities, a particular attention will be paid to the maqasid al-Sharia as the main pillar of the doctrine. Moreover, the task is to suggest how the fiqh for Muslim minorities might be reformulated from traditional to modern one in order to respond to the current needs. In the end, a number of issues from different spheres will illustrate how the doctrine operates in reality. If our study showed that the methodology provides a religious framework to deal with pressing issues, it would be kind of testimony that the fiqh for minorities is indeed an all-encompassing and consistent religious theory of Islamic law.

6.1.2.1. Fiqh for minorities: history and divergent opinions

The necessity of the fiqh for minorities emanated first of all from the absence of clarity on how a pious Muslim needs to uphold traditional religious rulings while living in a non-Muslim state. Stark differences in the positions of scholars regarding current social requirements of Muslims in non-Muslims states made ordinary Muslims confused. As was noticed by T. al-Alwani, "confusion stemmed from the differences of scholars: some jurists – to varying degrees of strictness – citing differences between life in Muslim and non-Muslim societies (the so called dar al-Islam and dar al-harb), and others comparing the present with the past and ignoring the huge social and historic change that have occurred"[635]. Inconsistent or even conflicting scholarly discourse and a growing amount of new issues concerning various spheres of Muslims' life in the non-Muslim states required a new juristic solution.

635 Taha Jabir Al-Alwani, *supra note*, 228: 6.

The jinn was in the bottle until the 1990s. Regarding an issue of participation in the politics, a number of Muslims living in America asked for a fatwa from the Fiqh Council of North America. The question was whether participation in the American politics means alliance with non-Muslims and whether it leads to submission to non-Islamic system. Such claims were dismissed and in the answer the term "fiqh for minorities" was mentioned. When the Council under T. al-Alwani's presidency in 1994 issued a fatwa allowing American Muslims to vote in American elections, the concept of fiqh for minorities was explored at a greater length. T. al-Alwani then introduced the "fiqh for minorities" as a specific discipline which takes into account the relationship between a religious ruling, the conditions of the community, and the location where it exists. It is a fiqh that applies to a specific group of people living under particular conditions with special needs that may not be appropriate for other communities.[636] Thus, the fiqh for minorities was very likely to become a promising approach to Islamic religious laws providing solutions for Muslims in non-Muslim states.

The Muslim scholarly community in the West became a driving force to open a new page in the history of development of Islamic law. The fiqh for Muslim minorities as a legal concept to revise a number of traditional Islamic religious decrees was introduced by two scholars, Taha Jabir al-Alwani and Yusuf al-Qaradawi. In 1988, T. al-Alwani founded The Fiqh Council of North America and in 1997 he participated in the founding of the European Council for Fatwa and Research (ECFR), headed by Yusuf al-Qaradawi from Qatar.[637] Their aim was to spread among Muslims in non-Muslim countries the concept of fiqh for minorities through the institutional entities. The enumerated institutions emerged as an exclusive legal authority for Muslim minorities to unite Muslim umma in non-Muslim states politically. The purpose of all this was twofold: to call more members of Muslim minorities to follow Islamic religious law hoping that it might become a uniting factor for Muslims in the West and to suggest a contemporary Islamic legal method aimed at supporting the peaceful coexistence between Muslims and non-Muslim in the non-Muslim countries. Generally speaking, the doctrine was established as a framework for political and social interaction between the majority and the minority populations in the non-Muslim lands, as well as within the Muslim minority itself.[638] It can be said that although a newly formulated doctrine opened the doors for a shift in the scholarly discourse, a principal divergence in a vision of the doctrine's founding fathers and controversial reactions from the other scholarly camps reveals how widely diffused is the discourse of Muslim scholarly community regarding the future of Islamic religious law.

636 Taha Jabir Al-Alwani, *supra note*, 228: 3.

637 The official internet page (in Arabic) of European Council for Fatwa and Research is www.e-cfr.org. The official page (in English) of the Fiqh Council of North America is www.fiqhcouncil.org. Both councils with the Islamic Fiqh Academy in India (www.ifa-india.org) are connected to the Organization of Islamic Cooperation (www.oic-oci.org) through the International Islamic Fiqh Academy (www.islamopediaonline.org). The International Islamic Fiqh Academy is an institution for the advanced study of Islam based in Jeddah, Saudi Arabia. It was created at the decision of the second summit of the Organization of Islamic Cooperation in 1974 and inaugurated in 1988.

638 Tauseef Ahmad Parray, "The Legal Methodology of "Fiqh al-Aqalliyyat" and its Critics: An Analytical Study", *Journal of Muslim Minority Affairs* 32, 1 (2012): 92.

Founding fathers of the doctrine of fiqh for minorities principally differ in vision of how far substantially the doctrine can be developed. The fundamental difference which remains the source of the other deep concerns lies in the fact that Y. al-Qaradawi holds the circumstances within which Muslims occur in non-Muslim states as temporary ones. According to D. Taha, Y. al-Qaradawi calls for a permanent presence, implicitly believing that eventual and normal place for Muslims to be is where the Muslim majorities are.[639] Meanwhile T. al-Alwani sees the presence of Muslim communities in the West as a permanent reality. For the former scholar and his followers the doctrine of fiqh for minorities is a mere tool for another purposes, whereas for the supporters of the latter's approach, legal doctrine of fiqh for minorities is the end in itself. Obviously the former group would not call for the Muslims' integration whereas the latter holds it as the main seeking point. From here, it might probably become more certain the following stances. For Y. al-Qaradawi, the fiqh for minorities is a religious law solution to individual cases. Meanwhile, T. al-Alwani's approach is more reformist as he treats it as a comprehensive methodological doctrine aimed at renewing an overall Islamic religious law tradition. The former regards it as a specialised branch of fiqh law while the latter sees it not so much as an outcome of traditional fiqh law but rather as a new Islamic religious law.

There is a need to look at the decision on mortgage issue made by ECFR which is hugely influenced by its founder Y. al-Qaradawi in order to illustrate the point. Regarding mortgage issue, one of the sources on which the decision was grounded by ECFR was classical Hanafi fiqh that allowed Muslims to deal in usury outside the land of Islam. 'The land of Islam' and 'the land of war' are historical terms to describe a divided world into two fighting camps. In contrast, from the point of view of T. al-Alwani, these categories are no longer relevant today.[640] As was concluded by J. Auda, basing a contemporary decision on such concept is highly counter-productive because of many reasons, and goes against the Muslim-integration mission stated in the list of tasks of ECFR itself.[641] This reminds the Muslim Brotherhood's "doublespeak" when the content of the message varies depending on whether the message is in English or Arabic.[642] Bearing in mind that Y. al-Qaradawi is a very influential figure among the members of the Muslim Brotherhood and that his role in the creation of the ECFR was decisive, the given comparison sounds even more seriously. Evidently, the founders' visions on the fiqh for minorities are too different to become a

639 Dina Taha, "Muslim Minorities in the West: Between Fiqh of Minorities and Integration", *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 1 (2013): 35.

640 For T. al-Alwani, Islam knows no geographic boundaries. 'The land of Islam' is anywhere a Muslim can live in peace and security, even if he lives among a non-Muslim majority. Likewise, 'the land of war' is wherever Muslims live under threat, even if the majority there adhere to Islam and Islamic culture. More on this: Taha Jabir Al-Alwani, *supra note*, 228: 28.

641 Jasser Auda, *supra note*, 41: 165.

642 One of examples of such variation in message took place in 2012 when the US Embassy in Cairo was breached by a crowd outside. The crowd was demonstrating against a film made in the US that they regarded as insulting Islam. Articles in the Egyptian media suggested that the Arabic-language Twitter feed of the Muslim Brotherhood was encouraging and praising the protests, while the English-language feed issued conciliatory messages of concern for the welfare of embassy staff. More on this: Foreign Affairs Committee, *'Political Islam', and the Muslim Brotherhood Review.* Sixth Report of Sessions 2016, HC 118. P. 24.

religious and legal authority in community's life and too vague to make a rapid shift in the system of law.

Strictly speaking, the whole Muslim discourse in non-Muslim countries might be divided into the following set of groups according to their approach towards the fiqh for minorities. Salafis and their followers, for instance, oppose to any form of revision in Islamic religious law. Fiqh for minorities here is regarded as an innovation that manipulates religion of Islam.[643] Those Muslim scholars who continue to adhere to the traditional fiqh schools reject the doctrine as redundant one. For example, a huge number of Muslim scholars from Indian Peninsula embody a traditional religious approach with a distinct religious doctrine that is based on the Hanafi School.[644] As was pointed out by Asif Khan, there is no need to embark on forbidden actions to divide Islam, Sharia and fiqh because a traditional fiqh includes all answers and because the issues facing Muslims in non-Muslim states are common challenges that Muslims face around the world.[645] A number of Muslim scholars in the West including supporters of Muslim Brotherhood and independent reformist scholars hold that the fiqh for minorities is to be treated as a necessity of a time. They hold that Muslims face a number of challenges that are not common for Muslims living in Muslim-majority countries and that the doctrine can be particularly beneficial in safeguarding Islamic identity, in adapting Islamic religious decrees and in permitting to live in the light of non-Muslim states' laws and social customs. Muslim liberals view the doctrine in a too conservative manner. Eventually, there is a huge number of Muslims who are unaware of or not interested in the doctrine of fiqh for minorities. A hugely divided Muslim discourse concerning the fiqh for minorities proves to be the cause of why in the nearest future it is not very likely that the doctrine might become a truly uniting factor in religious and legal terms.

6.1.2.2. Methodological basis of fiqh for minorities and its analysis

Fiqh for minorities is far more than a simple process of issuing individual fatwas. However, the relationship between institution of fatwa and the doctrine of fiqh for minorities is very close. Again, how? Through individual fatwas a doctrine of the fiqh for minorities is able to emerge on the scene. In other words, a fatwa may solve a specific or short-term difficulty for some individuals, but raise several others that go beyond individual cases to affect the current and future state of the community as a whole.[646] When the particular issue becomes widely disputable, a number of questions reaches the offices and internet pages of muftis. Such issues of public significance might become an object of institutional discussions. Islamic institutional body working in one or another non-Muslim

643 More on the issue of the concept of fiqh for minorities look at the fatwa named "Is the Fiqh of Minorities an Innovation?" which is available at various internet pages. For instance: www.virtualmosque.com (last visited Feb. 22, 2017).

644 Iyad Zahalka, *supra note*, 221: 141.

645 Asif Khan, *The Fiqh of Minorities – the New Fiqh to Subvert Islam* (London: Khilafah Publications, 2004).

646 Taha Jabir Al-Alwani, *supra note*, 228: 36.

state or region might launch a number of meetings aimed at issuing a general opinion. As in the case of a pressing issue of Islamic marriage by telephone, video conferencing and internet on which a number of fatwas was pronounced in India, Islamic Fiqh Academy launched a discussion with the aim to deliver the fiqh for Muslim minority. According to Indian scholars, Islamic marriage made in the mentioned way will be valid only if an attorney is appointed for Islamic marriage proceeding on these electronic media and if the two parties make proposal and pronounce consent before their witnesses on behalf of the attorney. The witnesses should have been familiar with the person appointed as attorney or his name along with his father's name and residential address should be mentioned at the time of proposal and consent.[647] Therefore, individual fatwas serves as a pretext to construct a concrete fiqh for Muslim minorities, whereas the latter, if constructed in a systematic way, can become a new fiqh law for Muslim minorities.

To construct a concrete fiqh for minorities, a number of steps must be made by one or another Islamic institutional body operating in non-Muslim countries. According to Dina Taha, five stages in the formulation of the fiqh of minorities are essential.[648] Each stage and its purpose can be better understood if to enumerate them alongside an exemplary issue. Everybody would agree that an issue of purchasing a house in the West using a mortgage is of particular importance for Muslim minorities in any Western state. Thus, everything starts by studying the context of the matter in question and its prevailing dimension. In the question of interest-based mortgage, advantages and disadvantages of owning the house in a non-Muslim system must be considered. In the second stage, there is a need to formulate the question that expresses the realities of Muslims and that reflects the purposes of Islamic law (maqasid al-Sharia). In the case of mortgage in a non-Muslim state the issues might be the following: the contract between the individual and the bank is a pure interest-based contract or it is not. Whether such interest-based mortgage fulfils the need of protecting Muslims' money and property what is directly related to one of five purposes of Islamic law, namely, to safeguard the wealth of Muslims? The third stage is related to the search of existing alternatives. Here, one could mention loans without interest from Islamic financial institutions operating in the West. Also, the negotiations with Western banks for loans that abide by religious constraints, such as establishing an instalment plan with a fee for a past-due payment.[649] In the case when there are no alternatives, there is a need to search for the answer within the manuals of traditional fiqh. In the case of interest-based mortgage Hanafi fiqh law says that if a Muslim is allowed to live and work peacefully outside the land of Islam, then it is permissible for him to interact using their own economic system, even if forbidden in the land of Islam like usury.[650] In the last stage, the scholars recognize the facts and implications of the issue in order to identify the objectives and how it relates to the Muslim minorities' context. The whole process shows that modern Muslim scholars must be fully aware of both Islamic tradition and current living realities of Muslims in non-Muslim states.

---

647 *Juristic Decisions on some Contemporary Issues* (New Delhi: Islamic Fiqh Academy (India), 2014), 124.

648 Dina Taha, *supra note*, 639: 31.

649 Iyad Zahalka, *supra note*, 221: 80.

650 Dina Taha, *supra note*, 639: 32.

The methodological basis of the doctrine of fiqh for minorities enables to combine two realities which, at first glance, might be seen incompatible. The first reality is textual. According to the letter of the Quran, a Muslim must follow Islamic decrees and uphold Islamic law regardless of his living place and time.[651] The second reality is that within which ordinary Muslim takes part on the ground. If to believe in numbers, presently, more than one-fifth of the Muslim population of the world is living as minorities in non-Muslim countries. The framework of the fiqh for minorities takes all this into account and suggests the way how it is possible to safeguard Islamic identity and to uphold Sharia rulings without finding yourself in contradiction with the law and social customs of adoptive non-Muslim states. The methodological basis of fiqh for minorities is grounded on the territorial principle of universality of Islam and on the juristic principle of ruling according to the purposes of Islamic law. The former provides the rationale for permitting the very existence of permanent Muslim communities in non-Islamic lands.[652] Whereas the latter provides a ground to study the unique requirements of Muslims in the light of the objectives of Islamic religious law. As a result, the classical division between the land of Islam and the land of war becomes a history[653] and a combined reading of Islamic primary sources and current realities takes a key role, in the words of J. Auda, in order "to contemporalize Islamic religious law"[654].

There are positions that one more principle belongs to the basis of which the concept of fiqh for minorities is constructed. According to A. Muhammed, the principle of immutability of the Quran is to be perceived as the absolute criterion and final reference.[655] From our point of view, this addition is redundant as there is no dispute over the central role of the Quran in

651 The Quranic verse 2:115 says: "And to Allah belongs the East and the West, so wherever you turn yourselves or your faces there is the Face of Allah." Further, the verse 33:36 adds that: "It is not for a believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Messenger, he has indeed strayed in a plain error."

652 Tauseef Ahmad Parray, *supra note*, 638: 90.

653 The tradition of relations between the land of Islam and the land of war were real during the times when two types of the state were acknowledged by Muslims, namely, Muslim community of Medina, surrounding enemies and a state of war between them. Truth, according to Hanafi fiqh, the land of treaty might be seen as one more option. The question might arise what if the laws of the state where Muslims is minority impose the restrictions with regard to their religious beliefs. The Quran speaks of such situation. The Quranic verse 8:72 explains it in the context of the concrete event: "Indeed those who have believed and have migrated and have striven with their wealth and selves in the Path of God and those who shelter and assist them: these all are the protectors of each other. As for those who believe and have not migrated to you then it is not incumbent upon you to protect them until they migrate. However if they request help from you with respect to matters of religion then it is necessary upon you to assist except if it is regarding a people with whom you have a covenant." This verse concerns the Islamic state of Medina following the migration of Muslims from Mecca in 622. The verse brings about an understanding that it is not the responsibility of a Muslim state, which has an agreement with a non-Muslim state, to protect or take care of the Muslim citizens living in the non-Muslim state. In general, Muslim state must offer and give assistance to a Muslim community in a non-Muslim country which is persecuted because of their faith. However, as was noticed by A. Muhammed, if there is an agreement or treaty then the assistance cannot be offered, as it would be in direct violation of the existing treaty. More about this: Amjad Mohammed, *supra note*, 438: 134.

654 Jasser Auda, *supra note*, 41: 22.

655 Amjad Mohammed, *supra note*, 438: 135.

the construction of fiqh, whether traditional or newly emerging one. In all probability, the essence of this addition lies in the second principal pillar of the fiqh for minorities which is based on the exceptional role of maqasid al-Sharia. As a result of the preference of literalist approach over the systematic approach in the interpretation of Islamic scriptures or, more precisely, usul al-fiqh over maqasid al-Sharia, the mentioned scholar suggests the third principle to be enlisted alongside the other two. However, the doctrine of fiqh for minorities is not about the abandonment of Islamic tradition but rather for a renewed approach based on a current day requirements. Ijtihad, rather than a practice of imitation, conducted in the light of purposes of Islamic law is capable to combine immutability of the Quran and the context. If immutability of the Quran means closing eyes before the change on the ground and before the letter of the Quran which states that ijtihad maintains its openness, then such an assumption is inadequate and even dangerous. To sum up, the doctrine of fiqh for minorities rests on the two principal pillars which enable it to emerge as a new fiqh law to address unique requirements of Muslims in non-Muslim countries.

The doctrine of fiqh for minorities combines a number of Islamic principles and techniques through which a modernist ijtihad breaks the gap between Islamic scriptures and changing human conditions. In terms of the methodology of fiqh for minorities, such neo-ijtihad needs to be designed to realise Muslim public interest (maslaha) in the light of the purposes of Islamic law. Here, ijtihad as the very idea of development in Islam combines the fulfilment of human interest with the realisation of a divine intent written in the purposes of Islamic law. Further, the dialectical relation between a changing human context and Islamic scriptural texts remains compatible because the doctrine fiqh for minorities encompasses the principle that Islamic laws change according to place, time and circumstances. Also, such Islamic principles as elimination of hardship and establishing religious rules that in case of necessity revoke a prohibition play significant role in the process of constructing fiqh for minorities.

In all probability, one might pose a doubt of whether the doctrine of fiqh for minorities does not suggest to refrain from the textual ground and usul al-fiqh. Certainly, the texts of the primary sources and traditional Islamic legal theory continue to play fundamental role in this process. What is changing in our eyes is an approach towards interpretation of Islamic law and traditional fiqh law. Interpretational process ceases to be grounded solely on the literalist approach and puts far more weight on the systematic or holistic approach towards the texts. Holistic approach does not restrict itself to one narration or partial ruling, but rather refers to general principles and the whole content. Instead of the subjectivity in selecting one or another Quranic verse as a finished law project, the holistic approach takes into account the whole Quranic text which, for instance, in a number of verses states that God commands people to establish justice, it dictates that the Prophet or Muslims implement God's law by enforcing the principle of justice[656]. By interpreting the texts in a holistic manner, one is always able to pose the questions "Is it fair?" or "Is it just?" regardless of socio-historical circumstances, or textual and doctrinal indications.[657]

656 The following Quranic verses speaks of the principle of justice in Islam: 5:42; 5:58; 4:58; 5:8; 6:125; 16:90.

657 Khaled Abou El Fadl, *supra note*, 47: 271.

With regard to the traditional fiqh law, its re-evaluation in the light of the requirements of Muslim minorities and in the sense of the primary sources is inevitable. Overall, it seems that the doctrine of fiqh for minorities is indeed well-equipped to deal not only with aims that it is designed to achieve regarding Muslim minorities, but also, in case of being newly reformulated, is probably capable to bring a paradigmatic change into the whole process of reconsideration of traditional fiqh.

Here we are to test the doctrine of fiqh for minorities by taking into consideration two pressing issues of Muslims in the West. Adoption of minors and mortgages are those two issues which are to be explored here in order to answer whether and how fiqh for minorities is able to deal with current realities of Muslims in non-Muslim states. Regarding adoption, the Quran explicitly prohibits the adoption of children.[658] In Islam, the child retains the status of the offspring of his or her biological father and bears his name. Whereas in the case of adoption in the West, the child must be officially registered with the name of adopting parents. As a number of Muslim families who live in non-Muslim states expressed their wish to adopt Muslim children, the scholarly community was forced to consider the question. Despite the strict prohibition in the Quran, T. al-Alwani stated that Muslims are allowed to adopt children if there is no other way to preserve Islamic identity of children who immigrated to non-Muslim countries. His decision was grounded on Islamic principle that the lesser damage should be preferred to the greater one.[659] The scholar on this issue implemented the framework of the fiqh for minorities combining the purpose of Islamic law to preserve religion and the context of Muslim minorities in USA. Accordingly, for Muslim minorities in non-Muslim states, fulfilling the objective of preserving the religion outweighs the prohibition against adopting.

The purchase of a house involving a mortgage with interest in the West became a part of life and Muslims living here according to the letter of Islamic religious law were prohibited from taking such mortgages. The long-waited decision regarding the mortgages was delivered by the European Council of Fatwa and Research. The Council under the influence of Y. al-Qaradawi recognized the prohibition on mortgages as valid because bank interest is considered as riba which is forbidden in Islam. Muslims were encouraged to search for the alternatives which are not in variance with religious decrees. For instance, it was suggested to apply for the loans without interest from Islamic banks operating in the West or to negotiate Western banks for loans that would not contradict to religious law requirements. According to the decision, if there is no any of such possibilities, a Muslim is permitted to take a mortgage with the aim to purchase a house. Three further conditions must be met in order to have a possibility to take a mortgage: there is no sufficient amount of money to buy a house; a Muslim does not own another house; and, the house will serve as a residence only.[660] In this case, the fiqh for minorities took into account a pressing issue in Muslims' life in the West, the principle of Islamic law which states that necessity revokes a prohibition and that the ownership of the house is a pressing Muslims' interest which directly connected to the objective of preservation of Muslims' wealth. As additional source

658 The Quranic verse 33:5: "Call them by the names of their fathers: that is more equitable before God."

659 Iyad Zahalka, *supra note*, 221: 107.

660 *Ibid*., 80.

for ruling on mortgage, the hanafi fiqh rule that allows Muslims to deal in usury outside the 'land of Islam' was also taken into account. As was clearly pointed out, the very basing a contemporary decision in Europe on such classical concept which has nothing in common with current reality is not only highly counter-productive for a number of reasons, but also goes against the 'Muslim-integration' mission of the Council itself.[661]

To conclude, both solutions of the doctrine of fiqh for minorities show that it is capable to shape Islamic traditional fiqh law in order to respond adequately to the pressing issues of Muslims. Neo-ijtihad based on a variety of Islamic legal principles and techniques can make considerable shift in the system of Islamic religious law at least regarding Muslims' minorities in non-Muslim countries. Most importantly, maqasid al-Sharia here is to be viewed as a key element on the basis of which the whole fiqh for minorities is constructed. Without methodology of maqasid al-Sharia, fiqh for minorities would be too narrow to respond adequately to the reality and would lack instruments to grasp all what is written in the content of Islamic scriptures. What is required in order to make the doctrine of fiqh for minorities more influential, is that Islamic institutional bodies ceased to reproduce old fatwas in contemporary language. To become more effective as the methodological framework and for Islamic institutional bodies to gain more religious and legal authority in the eyes of Muslim scholarly community and ordinary Muslims, the attention must be shifted from developing a Western fiqh for minorities to developing Western Muslim scholars.[662] Indeed, the change of rulings and, more generally, the change of the tradition to read what is written in the scriptural texts of Sharia might come with the change of the jurists' worldview. D. Taha puts it in a straight way by saying that it is a time for scholars coming from Muslim majority states to leave the floor to "Western-Muslim" scholars who have clear and direct exposure and comprehension of the Western society.[663]

6.1.2.2.1. A paradigmatic shift in the system of Islamic law

A purpose-oriented approach to the Islamic texts is capable to bring a paradigmatic change into the whole Islamic law. We agree with J. Auda, who affirmed that the theory of maqasid should be viewed as a contemporary project for development and reform in the Islamic law.[664] Till the contemporary time, maqasid al-Sharia as it was formulated by al-Shatibi[665], played a secondary role within the framework of usul al-fiqh. According to M.

661 Jasser Auda, *supra note*, 41: 165.

662 Dina Taha, *supra note*, 639: 36.

663 *Ibid*., 34.

664 Jasser Auda, *supra note*, 41: 228.

665 Before al-Shatibi, the theory of maqasid al-Sharia was discussed by a number of scholars, however, al-Shatibi it developed in such a way that it reached its mature stage with his ideas. As the theme of neo-ijtihad became widely explored in modern times, al-Shatibi's book on the subject of maqasid al-Sharia became the standard textbook to look for the evidences for and against the possibility of emerging for a modernist ijtihad on the ground. Important to notice that his proposal to treat purposes as fundamentals of the Islamic religious law was far from being widely accepted. A set of key ways of how al-Shatibi developed the theory of al-maqasid here need to be remembered: a) He considered al-maqasid to be the

Kamali, this is in part due to the fact that the maqasid as a theme is largely concerned with the philosophy of the law, its outlooks and objectives, and as such, did not blend well with the textualist doctrines and approaches of usul al-fiqh.[666] Today, after more than six hundred years when it was finally elaborated by al-Shatibi, maqasid al-Sharia might contribute to the fundamental theory of usul al-fiqh itself. The question remains how maqasid al-Sharia could become a true contemporary source of a paradigmatic change in Islamic legal system. Perhaps the first step ahead of the scholarly community is to agree that the methodology of reading the sources of Islamic religious law must be based on the maqasid al-Sharia. This is not to suggest to refrain from the textual ground which, according to us, remains the fundamental basis in the construction of Islamic religious law. On the contrary, the seeking point is to link a textual ground to the changing context. Here, neo-ijtihad would become a process of realising purposes of Islamic law written in the letter and spirit of the scriptures. If to agree with J. Auda that it is necessary to express Islamic public interest (maslaha) in our time as human development, maqasid al-Sharia should aim to realise the essence of human development through the Islamic law. In this case, the openness and flexibility of the system of Islamic law even on the most controversial issues could be assured.

If to achieve general scholarly consensus on the maqasid al-Sharia as the methodological framework of Islamic law, then the other step would be to reformulate traditional theory of maqasid al-Sharia. Traditional classification of five necessities reflects the points that need to be improved because of a number of reasons, including: that it does not include the most basic values, such as freedom or dignity; that it is more concerned with individuals than with societies and humanity in general; that it is derived from studying fiqh law manuals and not the primary sources and so forth. It might be suggested, that instead of classifying maqasid into the preservation and protection of five necessities, namely, of religion, life, family, intellect and property, the attention should be turned to the development of a number of contemporarily important purposes. Freedom of belief, development of family life, human dignity, economic development, development of intellect and rights to education are only a handful of exemplary categories how could a list of necessities be reformulated in the current context.

Providing ground for the development of the fiqh for Muslim minorities in non-Muslim states, the traditional maqasid al-Sharia undergoes transformational stage, albeit in a very slow fashion. Being modified in the light of the contemporary time, it is capable to bring a paradigm-shift in the field of Islamic religious law transforming it into a purpose-based Islamic religious law. One of the fundamental assertion of this dissertation is that if to hold human dignity as one of the objectives of the theory of maqasid al-Sharia, this methodology could become perfectly suitable in order to reformulate a number of controversial issues of Islamic law. Truth, that Islamic law has changed a lot over time, and across geographic areas, and that it is hard, as Ahmad A. Ahmad affirmed, to make a persuasive argument that

'fundamentals of religion' instead of regarding it as non-restricted interests; b) for al-Shatibi, knowledge of maqasid was a condition for the correct and truly just ijtihad, thus, it was viewed as a base for rulings and rather than 'wisdoms behind the rulings'; c) he gave for the purposes of Islamic law a status of certainty in order to place them alongside the fundamentals of traditional Islamic legal theory.

666 Mohammad Hashim Kamali, *supra note*, 258: 92.

the borders of modernity must be more important than any other borders this tradition crossed.[667] However, crossing any border also requires to be ready to somehow adapt to the new realities. With the methodology of maqasid al-Sharia revived by the objective of human dignity, the whole corpus of Islamic law could pretend to be revised and, thus, adapted to the realities of the XXI century.

6.2. Sharia in the West

The thesis that needs to be proved in the second section is that the Sharia is partly implemented in the West through (a) independent Islamic institutions operating in the West and through (b) Western state legal apparatus, namely, through statutory law and court judgments. This is what A. Ahmad had in mind by saying that "when we talk about the relevance of Islamic law today, we do not have to limit ourselves to 50+ countries, because Islamic law has a presence in majority-Muslim countries as well as in countries where Muslim religious beliefs are accommodated".[668] The mentioned two channels through which a set of accommodated elements of the Sharia and Islamic religious law are legally practiced in the West will be explored in this section just after some general remarks. By providing some general remarks, the introductory part attempts to reveal what the Sharia is in the West from different perspectives. To understand this, the section breaks down this subject into several questions. First, the question to be asked is what Muslims in the West think of the Sharia and what they do regarding the Sharia. Simultaneously, the Western position towards what Muslims think and do in the West in terms of the Sharia is to be discussed. Interaction between these two dimensions could give a clue trying to understand the concept of the Sharia in the West. The further discussion in this part will focus on what Muslim social-legal entities want and do in the West and to what extent it is allowed under a dominating Western normative system. Here, attention will be turned to the state legislative apparatus through which the Sharia-based norms are accommodated and to the local social-customary order which either accepts or no the Sharia practices. These questions will be researched in terms of the burning social issues.

After introductory part, the research moves on the case analysis of the particular Muslim social-legal entity in the West. One of the Islamic institutions operating in UK on the basis of English law and delivering its decisions grounded on the Islamic legal provisions was chosen for our study. More exactly, "The Muslim Law Shariah Council UK" which have been established in the late 1990s became our object of research. The thesis to be proved is that Sharia is partly implemented among Muslims through the Sharia councils in the West. To illustrate this, we will consider its activities, the basis on which rulings are issued and a number of Islamic legal issues that are usually delivered at the Council. Although Sharia councils do not possess an ultimate religious and legal authority to rule Muslim disputes in the West, a large number of community members seek religious guidance and rulings in these institutions. Additional premise to be discussed here might be stated in such a

667 Ahmad A. Ahmad, *supra note*, 533: 3.

668 *Ibid.*, 7.

way: if these institutions received more attention from local authorities in a way of a more accurate regulation, respectable surveillance and financial assistant, they could emerge as a meaningful player capable to build bridges between ordinary Muslims, their religious practices and Western values. This could help to assure the coexistence of Islam and the West in a way that activities contrary to Western order and Islam itself were identified in time. All in all, a number of internships at The Muslim Law Shariah Council UK gave considerable results concerning the role such institutions play among Muslims. The meetings with local scholars, participation in the proceedings of the Council, discussions with ordinary Muslims and the members of the Council permitted to draw a comprehensive picture which, we expect, will give a clue for the further studies on the subject.

The section culminates with the study of the state legal apparatus of the selected Western states. Alongside the study of statutory law of Greece, the research of a number of court judgments is designed to prove that the Sharia is partly implemented through Western state legal apparatus. The statutory law of Greece influenced by the historical circumstances and related international treaties which, according to Konstantinos Tsitselikis, to the present constitutes the legal basis for the application of Islamic law in personal matters in Greek Thrace,[669] is taken as a concrete case for the analysis. Further, the judgments of the European Court of Human Rights (ECHR) and of national courts of England and Canada are explored at a great length. Our premise here is that the principle of freedom of expression is perfectly sufficient to accommodate Sharia-based religious practices. Through the Western court judgments one or another Islamic religious practice has a chance to be tested in the light of the principle of freedom of religious expression. In this context, the ECHR's statement on the incompatibility of the Sharia and the Convention's values deserves closer attention. The premise to be proved is that a statement of the Court is inconsistent with the current situation on the ground.

6.2.1. Some general remarks

The opinions of ordinary Muslims about the term "Sharia" vary dramatically. Muslims differ widely as to whether Sharia should be open to multiple understandings. Also, they have different opinions on the elements that encompass the concept of Sharia. Eventually, the very definition of the Sharia receives very different descriptions. This is partly because of the fact that Muslims living in the West come from a multitude of different countries, regions, and places, and are of disparate sectarian and ethnic backgrounds, they have divergent views of what exactly constitutes proper Sharia.[670] Confusion also stems from a variety of contradicted positions of local scholar jurists and religious figures in the West. This gives rise for mistrust and disappointment. According to American professor Azizah Y.

669 Konstantinos Tsitselikis, *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcommers* (Leiden: Martinus Nijhoff Publishers, 2011), 393.

670 Erich Kolig, *To Shari'aticize or not to Shari'aticize: Islamic and Secular Law in Liberal Democratic Society*. In *Shari'a in the West*, edited by Rex Ahdar and Nicholas Aroney (Oxford: Oxford University Press, 2010), 268.

al-Hibri, Muslim men in the West, whether imams of mosques or professors of religion, are not sufficiently familiar with Sharia and Islamic law in particular; often they confuse their cultural beliefs and practices with Islam itself.[671] All scholarly disagreements or misleading statements on the core Islamic concepts potentially exclude the possibility to have exemplary figures. In the absence of a clear religious guidance, Muslim youth tries to find out its religious identity individually. According to Tanveer Ahmed, what begins as an assertion of identity can develop into ideological action and that is what we term political Islam.[672] This does not necessarily provide ground for fear of potential supporters of terrorism. What is important to note is that the vast majority of Muslim youth fall somewhere between extreme interpretations of identity Islam and a complete adoption of Western practices.[673]

In the beginning, a seeking point is to find out *what Muslims think of the Sharia in the West* and the best way to do it is to take a look at the surveys conducted in recent times. Among the questions frequently asked in the surveys, the question about what Muslims think of the Sharia is very popular. For example, the survey which was aimed at evaluating the attitudes of Muslims in Britain was conducted in 2007. According to the survey results, it can be noticeable a desire of younger British Muslim generation to belong to the universal umma: "The rise of religiosity is not really about parental, or even community pressure, but arises spontaneously amongst many in the younger generation."[674] The direct link of this can be seen in the opinions about the Sharia law. The majority of British Muslims does not want to live under Sharia law, whereas younger people are more likely to prefer Sharia law and more reluctant to accept reform. According to the survey results, 59% of Muslims would prefer to live under British law, compared to 28% who would prefer to live under Sharia law; 37% of 16-24 years olds prefer Sharia compared to 17% of 55 and older British Muslims. Although results of survey say that many of younger respondents prefer Sharia because it was seen as an antidote to the corrupting values of the West, the attitudes on the specific aspects of Sharia as well as the definition of the Sharia vary greatly.[675]

According to Gallup survey made in 2009, British, French, and German Muslims are more likely than the general populations in those three countries to identify strongly with their faith. At the same time, Muslims strongly identify themselves with their countries of residence. For instance, British Muslims identify as extremely strongly or as very strongly with their religion (75%) as they do with Britain (77%).[676] Muslims in Canada consider both Islam (84%) and country of residence (81%) to be very important parts of their personal identity. According to the survey of 2016, Canadian Muslims who strongly identify with their religion include women, younger individuals (especially those under 45), those born

671 The full text of professor Azizah Y. al-Hibri is available at: www.minaret.org/azizah.htm (last visited April 11, 2017)

672 Tanveer Ahmed, "The Muslim 'Marginal Man'", *Policy* 21, 1 (2005): 39.

673 *Ibid.,* 40.

674 Munira Mirza, Abi Senthikumaran and Zein Ja'far, "Living apart together: British Muslims and the paradox of multiculturalism", *Think Tank of the Year* (2007): 39.

675 *Ibid.,* 46-47.

676 The Gallup Coexist Index 2009: A Global Study of Interfaith Relatons. With an in-depth analysis of Muslim integration in France, Germany, and the United Kingdom. P. 19

in Canada, and immigrants who have arrived in the past ten years.[677] Where do Canadians personally look for religious guidance as a Muslim? In response to this question, the most common sources are local Muslim organization or mosques (22%), one's own family (11%) or the local Imam or sheikh (10%), followed by national Muslim organizations and the Quran.[678]

The survey of 2016 conducted in Britain can be compared with older surveys. In this survey 55% of British Muslims said that they felt "very strongly" attached to the country, 38% "fairly strongly", and only 7% said that they did not feel a strong sense of belonging to the UK. Such results are perfectly well reflected in one of the respondent's answer: "I am a British Muslim, that's my identity. I wouldn't separate the two."[679] Talking about the question on the Sharia law, we have to note at least several points. First, the respondents were initially asked about the Sharia in the broadest sense and in this sense the most significant thing is that a majority of Muslims did not express a view in support and only 16% "strongly supported" its introduction. When asked whether they would support the introduction of Sharia law, some 43% said they supported this proposition, whereas 22% opposed to it (23% neither supported nor opposed), while 12% said that they did not know. Second thing to note is related to the young Muslim generation in Britain. Only 35% of those aged 18-24 expressed support for introduction of Sharia law, and only 11% expressed "strong support". Conversely, among the two oldest age cohorts (those 55 years old and above) that figure rose to 48-49% (and 17-19% support strong).[680] Contrary to the survey's results in 2007, younger British Muslims are now relatively less likely than their older counterparts to favour Sharia law.

One more survey which was conducted in 2015 for the Centre for security policy in USA shows a number of variations on the meaning of the Sharia among American Muslims. The respondents were asked to describe the Sharia: 25% of Muslims said that it is the Muslim God Allah's law that Muslims must follow and impose worldwide via Jihad; 19% of respondents said that it is a comprehensive program governing all aspects of the faithful Muslim's life; 13% of respondents told that it is a guide to the personal practice of Islam; 39% did not know what is Sharia and 3% gave no answer.[681] From this and other surveys one might make a conclusion that there is no unanimity on the definition of the Sharia among ordinary Muslims in the West. This only proves the thesis that individual or collective entities aimed at representing and at the same time guiding Muslims in the West are of huge necessity. In one or another way, the sole question what Muslims think in terms of the Sharia is insufficient to define the Sharia in the West.

Another question which must be posed if we want to understand the heart of the matter is: *what Muslims do or practice in terms of Sharia in the West?* Here, we need to note that the way Muslims in the West practice Sharia does not encompass or symbolize the whole

677 Survey of Muslims in Canada of 2016. The Final Report. The Environics Institute for Survey Research. P. 15.

678 *Ibid.,* 19.

679 Martyn Frampton, David Goodhart and Khalid Mahmood, *Unsettled Belonging: A Survey of Britain's Muslim Communities* (London: Policy Exchange, 2016), 41.

680 *Ibid.,* 44.

681 The results of survey are available at: www.centerforsecuritypolicy.org/wp-content/uploads/2015/06/CSP-SURVEY-ON-ISLAMIC-SUPREMACISM-6215.pdf (last visited April 4, 2017)

Sharia as such. Their view of correct form of Sharia does not necessarily correspond to that of Muslims in the Middle East or to that expressed in classical fiqh manuals. Strictly speaking, we might distinguish three major areas within which Sharia is practiced by Muslims in the West. Firstly, all what Muslims practice in terms of devotional acts (five daily prayers, fasting, paying of zakat and so forth) constitute the concept of the Sharia to Muslims in the West. Secondly, the rules of family law and Islamic finance law are frequently regarded as the Sharia which is practiced by Muslims in the West. By family law we usually mean Muslim preference to have Islamic marriage and divorce alongside Western type of marriage and divorce. Whereas Islamic banking and finance law in modern times grew out of the Muslims' desire to find out the ways and means to fulfil their financial requirements in view of prohibition of interest.[682] Islamic banking and finance system provides a variety of religiously acceptable financial services to the Muslim communities.[683] What else Muslims do with Sharia in the West? Certainly, the rules of social conduct as within Muslim community (issues of alcohol, pork, shaking hands with an opposite gender or wearing a headscarf) so with non-Muslim environment (participation in the local elections, marriages with non-Muslims, halal food issues and so forth) belongs to the third area which for a huge number of Muslims symbolizes the Sharia to be practiced by them in the West. Although from Western point of view only the second area could be treated as consisting part of law, in Islam all these issues belong to the field of law.

The question of what Sharia is in the West is not only about what Muslims think and what they practice in terms of the Sharia. We have to view here two integral sides, namely, the Sharia and the West. So, we need to understand the term "West" which is not less complex than the Sharia itself. The West consists of at least three huge territories: Americas and Australia; Western Europe; Central and Eastern Europe. Common historical heritage, legacy of Christian presence and shared moral/legal values (individual freedoms, political principles, social democracy, liberal values, legal principles written in the Constitution and so forth) are those factors that unite the West. With regard to the differences, one might mention a number of them, for instance: legal systems are not identical; history with Muslim communities has little in common; and, as a result of the previous factor, prevailing attitudes towards religion are very different. All this shows that western response to what Muslims think and to what they practice in terms of Sharia in the West depends on the particular region and even the state. One thing is to use religious arguments in the public debates in USA and totally another in France. Simply as the reaction towards a Muslim woman wearied in hijab or towards a Muslim praying in the public space in Britain and in Poland. We could just imagine the heat of public debates if one suggested to establish the Sharia Council with the aim to deal with Muslim family issues in Estonia or Lithuania. Whereas in UK or Germany such institutions operate since the second part of twentieth century.

682 Salman Syed Ali, Ausaf Ahmad, *Islamic Banking and Finance: Fundamentals and Contemporary Issues* (Jeddah: Islamic Development Bank, 2007), 1.

683 Kabir Hassan, Mervyn K. Lewis, *Handbook of Islamic Banking* (Cheltenham: Edward Elgar Publishing Limited, 2007), 2.

We have already come to the conclusion that to understand the Sharia in the West, we need to focus on *the interaction between the West and the Sharia.* There is a number of standpoints on which such research might be conducted and, according to us, the most suitable way is to look at the interaction through the relationship between religious law and secular law. What is the nature of both systems of law? Sharia law is religious law of divine nature, whereas Western secular law is a rational creation of humans. While this is true, we need to clarify it more precisely. It is not correct statement that Islamic law as religious one has no rational foundation. This stereotype stems from a deep-rooted tradition to consider Islamic law rigid, inflexible and stable because of its exceptionally divine origins. The European Court of Human Rights judgment in 2003 reminded us that such assertion still prevails in the western legal discourse.[684] However, the truth is that rationality has played

684 Here we have in mind decision in Refah case, firstly pronounced in Chamber decision of 2001 and further confirmed by a unanimous Grand Chamber decision of 2003. In that case, the Court made a generic observation in respect of the Sharia and Islamic law in relation to democracy and human rights as follows: "The Court considers that the shari'a, which faithfully reflects dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the policitical sphere or the constant evolution of public freedoms have no place in it… It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on shari'a, which clearly diverges from Convention values." European Court of Human Rights, upheld by the Grand Chamber (2003).
According to us, two things need to be noted in this decision. As we see, the Sharia and Islamic law are here perceived and used as synonyms. However, they are not synonymous. The Sharia refers to the basic sources of Islam, namely, the Quran and the Sunna of the Prophet, both of which are considered in Islam as being divine and immutable, and from which all sorts of norms, including legal ones, are derived. Meanwhile, Islamic law refers to the rulings or, simply speaking, law that is derived from the Sharia by scholar jurists and applied by judges and muftis. Islamic law stems from a human process (human legal reasoning and interpretation) and its results are fiqh rules. These derived rules, unlike the Sharia itself, are neither divine nor invariable and stable. If to perceive Islamic law, as rulings derived from the Sharia by scholar jurists, in historical terms, Islamic law is often restricted to the traditional fiqh rulings as if those rulings were immutable like the Sharia itself. It was already noticed in the Chapter Two and Four that in all probability to equate the Sharia with fiqh by delivering to the latter the same feature of immutability was a planned task by the classical scholars. By contrast, an evolutionary thinking and application of Islamic law certainly take into account fiqh law tradition, but this also include the continual evolution of Islamic law based on modern fiqh through the very idea of development in Islam, namely, the concept of ijtihad. The ijtihad on the new and fresh methodology and not on the methodology which was suggested in the formative period of Islamic law. As methodology how to derive fiqh rules so the fiqh rules are changeable and cannot pretend to the status of the Sharia. As stated by Mashood A Baderin, "there are, certainly, areas of legitimate concern with regard to historical traditional interpretations of some Sharia provisions, in relation (for example) to women's rights, minority rights and criminal punishments; but these do not necessarily create a fundamental discord between two systems. Such areas of concern are resolvable through an evolutionary approach to Islamic law." To sum up, the rulings derived from the Sharia through fiqh or simply speaking Islamic law has never been inherently immutable and rigid. The factor of time and circumstances is decisive in the construction of Islamic law. Thus, Islamic law with all its fiqh branches cannot be regarded incompatible in totality with human rights. To speak of the Sharia and its incompatibility with Western democracy and human rights is far more misleading. The Sharia as normative system through at least its three meanings that were elaborated in the Chapter One is the cornerstone of Muslim identity which is of huge importance as for Muslims in Muslim countries so for those who are living in the West. It is essential to mention that the Sharia and Islamic law are already operating either formally or informally in the UK and other Western countries. As concluded by M. Baderin, the Islamic banking and finance system does not operate as an imposition of Sharia precepts on anyone, whether Muslims or not, but is a matter of choice – a

a key role in the construction of Islamic law from the very beginning of Islam. The very Islamic principle as in the past so particularly today states that human legal reasoning and interpretation is entitled to transform divinely inspired rules into human laws in the light of changing human interests and living circumstances. According to K. El Fadl, there is no need to overstate the textual dependence because Muslim jurists were often innovative and competent enough to use the text as an enabling device to go beyond the text, while at the same time exalting and honouring the sanctity and value of the text.[685] The scholars only differ on the degree and scope of human interference but the very fact is acknowledged. Again, according to the letter and spirit of divine scriptures and historical precedents, the very notion of development in Islam lies in the concept of ijtihad which is a mere human obligation. Enough to look at the famous encouragement of Malik ibn Anas 'not to emulate him, but to take from where he took' what means that every qualified scholar must embark on the interpretational function in order to grasp divinely inspired rules and to make it human law suitable to the time and place.

Although there is no doubt that secular law is regarded as purely man-made law, however one thing needs to be clarified. If to look at the root of the matter we might see that specific kind of "sacralisation" of the source of law is also enshrined in the basis of positive law. For judges in USA a reference to the foundational fathers of Constitution will always signify something from the unchangeable area. Or, the concept of universal human rights which signifies unchangeable basis on which the whole further human made-law must be constructed. Human rights as norms that protect certain freedoms and entitlements of people provides a guidance which is biding as for the state and its institutions so the society in general. The meta-principle of dignity is to be viewed as the ground for all the other human rights. To sum up, the sanctity of rules makes it more or less undisputable in both religious and positive law.

The purposes of religious and secular law differ. The former is aimed at dealing primarily between God and man, also, among people. Whereas the latter is primarily devoted to structure social order and to provide tools for conflict resolution among people. Also, there is a difference in the outlook towards duties and freedoms. It is generally known that religious law focuses mainly on duties. Here the main questions are: what needs to be done and what ought to be done? Whereas secular law focuses on freedoms and the key question here is: What is allowed to do? To continue our discussion we need to widen our object. The premise which needs to be explored here is that both religious and secular laws are sources of normativity. Normative systems, as religious so secular, encompass far more than law. When we talk about the Sharia in the West we have in mind far more than two systems

choice which is being taken up even by non-Muslims for ethical reasons. There are also a number of Sharia councils and tribunals which provide Islamic mediation to Muslims on a voluntary basis. After the Court's decision the question still remains whether all what is Sharia and Islamic law is incompatible with Western values. More on the subject read: Mashood A. Baderin, *An analysis of the relationship between shari'a and secular democracy and the compatibility of Islamic law with the Eurpean Convention on Human Rights*, In *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*. Edited by Robin Griffith-Jones (New York: Cambridge University Press, 2013), 72-93.

685 Khaled Abou El Fadl, *supra note*, 47: 13.

of laws. Law is just one source of rules and we, in fact, speak of norms Muslims practice in the West, of interaction between western and religious normative systems. Certainly, western law is dominant law and none of religious legal system might reach the status of parallel system in the West. Thus, all the conflicts, clashes in the West with regard to the Sharia arise from norms, and not from law as such. Our aim here is to look into the relation between western and Sharia normative systems, between the dominant normative system and particular minority's normative system. Both normative systems have own set of rules. In fact, human rights written in the international documents, national constitutions and prevailing customary practices play a role of norms in the West. Whereas the Sharia consists of religious norms derived by scholars from the Quran and the Sunna. We are particularly interested in the mechanisms which produce and enforce normative rules in both cases in the West.

What is the mechanism to produce Sharia normative rules in the West? According to Islam, God through sacred texts produces rules for Muslims. While it is true in Islam, there is a huge variety of humanly-made interpretations of divinely inspired rules. Interpretations made by qualified scholars is that body of laws which directs behaviour of ordinary people. Therefore, we need to find out whether there is any further mechanism to produce Sharia rules in the West. Although a number of Muslim social-legal entities are designed to issue Islamic rulings in the West, there is no leading Muslim institution possessing religious and legal authority here. It is more appropriate to talk about individuals, local communities and plenty of organizations that operate on voluntary basis. Regarding Western normative system and its mechanism to produce rules, alongside legislature and judiciary as the means to produce rules from the side of the state system, social-customary norms are produced by the society as a whole.

Another question is related to *the mechanism of enforcement of rules*. Speaking of the Sharia, there is no mechanism of enforcement of Sharia normative rules. Usually it is individual decision to apply one or another rule based on voluntary ground. For instance, a Muslim in Britain avoids to have on the table pork or a bottle of wine. Also, family or community at large might influence one to practice Sharia rules. In other words, if on voluntary basis Muslim does not want to apply one or another Sharia rule, the pressure from the family or local community might force him to do it. Again, all this is enforced on voluntary basis. There are also organized Muslim bodies as tribunals, councils, muftiats and many other that operate in the West with the aim to encourage Muslims to practice Sharia rules. All this means that Sharia norms rests on the voluntary basis exactly like it was the case throughout the history of Islam till the nineteenth century. Colonialism brought absolutely new conception of law, norms and their relationship with people. Voluntary basis was superseded by the state power to enforce the law through administrative-punitive mechanism. Interestingly, that now in the West the situation within Muslim community is very similar to that which existed in Muslim world before the colonialism. The difference lies in the fact that a huge number of Muslims now live in non-Muslim countries. Certainly, with comparison to the authority of state and its courts' system of the West, any Muslim institution in the West has no authority. It depends on the decision of Muslim individual in the West to follow or to ignore one or another Muslim institution and its rulings.

Alongside individuals, communal pressure and a variety of Muslim legal institutions which enforce Sharia rules, there are two other ways how Sharia normative rules might be enforced. Firstly, one or another Sharia rule might be incorporated in official state law apparatus in the West. In this way, it becomes legally enforceable rule of the state. We might enumerate some examples. US Humane Slaughter Act defines religious slaughter by Jews and Muslims as one of two human methods for killing animals for food. The Cemeteries Act 1986 of Western Australia noted that a board may set apart an area of a cemetery to be used only for burials of persons of a particular religious denomination.[686] Secondly, Sharia rules might be applied by Western courts. For example, we might mention a judgment of 2012 at New York Supreme Court of Westchester County which granted a Muslim woman recognition of a divorce decree obtained in Abu Dhabi, including custody of children and a distributive award for $250,000 under a Mahr Agreement.[687]

Regarding *Western normative system*, it is enforceable through the state and its judiciary. Besides, the society at large enforces western values. Western norms which emanate from official level and societal customary practices is that criterion according to which one's religious normative practices might be regarded permissible, acceptable or otherwise. Thus, Muslims who want to adhere to their own rules need to consider Western normative practices as this system is dominant in the West. To manifest one's religion or belief is a qualified right which might be limited according to the law in the West. Whether Muslim is able to manifest his religious practices which appears in a possible state of conflict with the Western norms? The right to freedom of religion often appears on the table of political debates when Muslims or individuals of any other religious minority strive to prove that one or another religious norm or its manifestation in practice complies with the law of the Western country. Of course, religious freedom as understood in the West is never so comprehensive as to span all of Islam and Sharia.[688] However, the principle plays a very important role with regard to the accommodation of religious beliefs and its manifestation in the Western system.

European Convention of Human Rights speaks about the right to freedom of religion in two ways. Article 9 of the Convention states that this right is partly absolute and partly qualified. From one side, freedom to change one's religion or belief is not subject to any limitation. From the other, freedom to manifest one's religion or beliefs is qualified right, thus, subject to limitations set out in the same Article 9. Both sides represent Western conception of law with regard to religion and its manifestation. The scope of the right to manifest of one's religion or belief is most decisive in the judgments regarding, for instance, Muslim manifestations of religious beliefs in the West. Here, two normative systems, the religious and secular, might stand in harmony or to be in contradiction on one or another

686 The full text of The Cemeteries Act 1986 is available at: www.islamiccouncilwa.com.au/wp-content/uploads/2014/05/Cemeteries-Act-1986-02-j0-02.pdf (last visited April 12, 2017)

687 *S.B v W.A*. 2012 NY Slip Op 51875 (U) Decided on September 26, 2012 Supreme Court, Westchester County Connoly. The full text of Court's judgment is available at: www.law.justitia.com/cases/new-york/other-courts/2012/2012-ny-slip-op-51875-u.html (last visited April 11, 2017)

688 Erich Kolig, *supra note*, 670: 264

specific issue. Noteworthy the words of Justice Albie Sachs in the Court of South Africa: "The main problem in any open and democratic society based on human dignity, equality and freedom is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful to the law."[689] To achieve the balance which ensures the fair and proper treatment of people from minorities and the compatibility with basic standards of Western normative system, a number of conceptions might be helpful. On this subject we will return in the following pages when we speak of the European Court of Human Right and the Sharia.

To combine everything what was said, we need to distinguish two final questions which are closely related to the Sharia in the West: *What Muslim social-legal entities want and do? Is it allowed and accepted under the Western normative system*? Let's concentrate mainly on the latter question because the former one will be discussed in the following section. One or another Sharia rule practiced by Muslims in the West can be allowed/accepted or not allowed/accepted from two perspectives. As we have noticed, a state through its legislative/judiciary power and society through prevailing social-cultural customs is able to produce and enforce western normative rules. Thus, we need to look at the Muslim religious practical issues based on the Sharia rules through political-legal and social-cultural dimensions on which western normative system operate. One thing might be allowed or not allowed in terms of political and legal values enshrined in the constitution and other legal acts. Another one might be accepted or not accepted in terms of prevailing social customs. Interestingly that both dimensions can coincide or occur in contradictory position on specific issue. By this analysis we will conclude our introductory study of interaction between the Sharia and the West, between two normative systems operating in the West.

There could be enumerated seven exemplary situations how Sharia rule might be regarded in the West. First situation might occur when Sharia normative rule is allowed explicitly in Western law and is accepted by the society. According to the Greek Civil law and related international treaties, three muftis in Western Thrace are entitled to examine private disputes of inheritance or family matters regarding Muslim Greek citizens living in Western Thrace.[690] Even more, there is no unanimous consensus among Greek courts on the question of whether it is mandatory or not for Muslims in Western Thrace to resolve their personal law issues in the courts of local muftis.[691] Another example might be taken from one more Western country and its legislation. Muslim cemeteries in the West is that issue on which there is no disagreement as from the legal point of view so from the public opinion. One more example is Muslim matrimonial services that are conducted by the

689 *Christian Education South Africa v Minister of Education*, Constitutional Court of South Africa (CCT 4/00) [2001]. Para 35.

690 Konstantinos Tsitselikis, *supra note*, 669: 390.

691 *Ibid*., 403.

Islamic institutions in the West. The Islamic Council of Perth Western Australia offers this kind of services which meet the legal requirements of the Australian Government[692] and is accepted by the Australian local community as well. Regarding Islamic finance and banking rules, they operate under French legal regulations and are acceptable by the society. By 2012, there was seven Shariah-compliant funds in France with total resources under management of USD 69.2 million. Talking about Sharia-compliant banking services, there is one bank, Chaabi Bank,[693] offering Sharia compliant financing operations through its 17 branches across France.[694] There is a large number of such banks in UK, for instance, Al Rayan Bank states in the official page on Internet that it focuses on banking activities which are compliant with Islamic law: "Islamic banking operates without the use of interest and is founded on Islamic finance principles derived from trade, entrepreneurship and risk-sharing."[695] Also, we may mention Islamic schools based on religious teaching that are allowed according to the state law and accepted by the community. One of such schools is Al-Hidayah Islamic school in Western Australia.[696]

Second, Sharia norms might be explicitly allowed by state rules but not accepted by the society at large. As an example, we can hold Sharia councils which are allowed by law but is not accepted by majority of people. This is a case of Britain where the Sharia councils operate under state legal regulations, but British people are far from united in their position on this issue. One more example concerns the construction of a Muslim community centre and mosque near the World Trade Centre site, in Manhattan. The place selected for it was already in use for Muslim worship, however, after 9/11 attacks it was damaged. The project to rebuild it was originally called "Cordoba House", then after disagreements on this name because of its allusions to the historical conquest of Cordoba by Muslims, it was renamed "Park51", in reference to the street address on Park Place. While the media widely described this project as a mosque, and all the protests were against the mosque, the initiative makers portrayed it as a community centre with prayer space. The community of New York was divided between supporters and those who were alien to this idea.

Third, when state law says nothing on the particular Sharia rule and society accepts it. For instance, the issue of wearing headscarf in workplaces on which there are no legal restrictions in many national states and public opinion is not against it. In its first decision

692 The Islamic Council of Perth Western Australia offers mediation services, Muslim matrimonial services, services related to Muslim burials and cemeteries and other type of assistance. The official page of the institution: www.islamiccouncilwa.com.au (last visited April 12, 2017).

693 More information about the services of bank is available at: www.chaabibank.fr (last visited April 12, 2017).

694 Rihab Grassa, Kabir Hassan, "Islamic Finance in France: Current State, Challenges and Opportunities", *International Journal of Islamic Economics and Finance Studies* 1, 1 (2015): 74.

695 More information is available at: www.alrayanbank.co.uk (last visited April 12, 2017).

696 As is said on the official Internet page of the school, "the Al-Hidayah Islamic School is run by: Al-Hidayah Islamic Education Administration Incorporated, formally Al-Hidayah Islamic School Incorporated, which was officially registered in 1993 under the Commissioner of Corporate Affairs as a non-profit Incorporated Association. There are nor shareholders, or private ownership, it is not a "business". All Income received is directed to meeting the operating costs of the school or invested in providing resources or improving the school's facilities." More information is available at: www.islamicschool.com.au (last visited April 12, 2017).

on the headscarf issue the European Court of Justice ruled recently that employers can bar staff wearing visible symbols. The Court also ruled that customers cannot simply demand that workers remove headscarves if the company has no policy barring religious symbols. Thus, the highest court of EU has not established a ban in express terms, it is still allowed by EU law implicitly. At the same time, the employers obtained the right to decide on their own. One more example might be related to the Islamic way of dress in the school about which English statutory law speaks nothing and the society is not against it. Truth, the precedent was established in common law in 2006 by saying that it the rules of each school on the dress code is to be taken into consideration[697].

Fourth, when the state law says nothing but society is not in favour with one or another Sharia rule. The Sharia rule not to shake hands with an opposite gender might be an issue in this instance. Fifth, we have Sharia rules in the West that are explicitly prohibited by state law, but are accepted by societal norms. The government of Kosovo banned the headscarf at public schools in late 2009 what provoked public protests in the capital Pristina in 2010. Sixth, minarets in Switzerland is that Sharia norm which is prohibited under state law and is not accepted by the majority of people. We might take one more example from Ontario. After Toronto lawyer Syed Mumtaz Ali declared in 2004 that an Islamic institute of Civil Justice will begin arbitrating family matters on the basis of Sharia law and that Muslims who did not submit cases to Islamic arbitration panels were not good Muslims, the public of Ontario and local government reacted in a hostile manner. Although since 1991 arbitration decisions made according to religious law were enforceable in Ontario courts, the province of Ontario in 2006 banned arbitration of family law disputes under any body of laws except Ontario law, in part to prohibit arbitration under religious law.

Seventh situation might be when Sharia norm in the West is implicitly prohibited under law and is not accepted in the society. The example can be the issue when a woman as a defendant takes the view that, as a Muslim, she is either not permitted, or chooses not to uncover her face in the presence of men who are not members of her close family in the time of court proceedings. Such case which concerned the wearing of a niqaab while giving evidences in the court took place in England. According to the judge of the Crown Court at Blackfriars Peter Murphy, although there is no statutory provision regarding wearing niqaab in court, the niqaab cannot be permitted in English law to the extent that it derogates to three governing principles underlying the Court's practice, namely, the principle of rule of law, the principle of open justice and the principle of adversial trial.[698] The further quotation of the judgment speaks for itself: "No tradition or practice, whether religious or otherwise, can claim to occupy such a privileged position that the rule of law, open justice, and the adversial trial process are sacrificed to accommodate it. That is not a discrimination against religion. It is a matter of upholding the rule of law in a democratic society."[699] Thus, according to implicit legal regulation of England, if the defendant gives evidences, she must remove the

697 *R (one the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appelants)*, [2006] UKHL 15.

698 *The Queen v. D (R).* Crown Court at Blackfriars of England and Wales, (2013). Para 26-29, 72.

699 *The Queen v. D (R),* Crown Court at Blackfriars of England and Wales, (2013). Para 78.

niqaab throughout her evidence. The reaction of the society was more negative than positive towards the possibility not to remove niqaab while giving evidences in the court.

As is evident from the discussion, there are various perspectives to look at the Sharia in the West. From our point of view, the selected way reflects the clearest picture about the Sharia in the West. Our aim was to study the subject by trying to understand what both sides think and practice as individually so collectively. Also, to find out how Sharia and western normative systems are produced and applied in the West. Apparently, the question of actors or institutions which would be entitled to encourage Muslims to live under the Sharia rules requires more attentive glance. As we understood, today Sharia rules are produced and enforced by individuals on a voluntary basis and under the communal pressure from the Muslim family or local community. Also, through a growing number of Islamic social-legal entities operating in the West. However, there is no single authority or a leading figure with a mission to produce and enforce Sharia rules for Muslim minorities in the West. Without unanimity, none of social or religious policy with the aim to provide guidance might be successfully achieved. To understand more about such Muslim social-legal entities, we made a special research which was carried out at the Muslim Law Shariah Council UK located in London. The following pages will be dedicated to the case analysis of this institution and its activities in UK.

6.2.2. The Muslim law Shariah Council UK: a view from inside

In the light of the dissertation's question of the adaptability of Islamic law, the thesis to be proved here is twofold. First, our task is to show that Islamic religious rules are partly implemented by the Sharia councils within Muslim communities in the West. Second, the Sharia councils in the West, if to become under more accurate regulation and if to be provided by a more significant assistance from local authorities, could become the center capable to build bridges among Muslim minorities, the Sharia and Western values. A number of questions needs to be answered to prove these premises and to arrive at particular conclusions. What was the purpose of creation of such institution? How did local Muslims and British people reacted to the foundation of the Council? Under what exactly English legal acts it was established? How the activities and decisions of the Council correlate with state law? What is Islamic legal basis on which the Council grounds its decisions? What kind of legal disputes might be delivered to the Council? What cases are the most usual in the Council? How popular is the services of the Council within Muslim community? What is the relation between different Islamic institutions in England? What are the predictions for the future of such institutions in England and the Sharia in the West at large? At the first glance, it could seem odd to speak about a need of additional legal services when the British institutions provide effective assistance in perhaps all possible issues. However, there is far more than meets a western eye in the case of Sharia normative requirements within religious communities.

In the late twentieth century, Muslim women in UK appeared in a very vulnerable position when they realised that to achieve Islamic divorce is practically impossible. Islamic

family law issues are particularly sensitive among Muslims and following the letter of the Quran Muslims are obliged to marry and to divorce in Islamic way. Three usual forms of Islamic divorce[700] promised nothing for women seeking to divorce their husbands. Two of the forms granted decisive role to decide on the issue of divorce for the husbands and most frequently Muslim husbands were not in favour to give the permission for the divorce. The third one was possible only if the authoritative collective body or a competent figure issued such a document. However, there were no Islamic institutions entitled to issue Islamic divorce in the UK. The arguments that marriage and divorce under UK civil law could substitute Islamic form take us in a futile direction because in terms of the Sharia norms, it is a religious obligation for a pious Muslim to obtain an Islamic divorce before remarrying. In the light of an increasing Muslim population and problems in the area of Islamic divorce alike, the solution was brought to the public by Muslim scholarly community in UK. As a result of the conference held in 1985, the first Sharia Council named "The Muslim Law Shariah Council UK" was established to fulfil a set of aims and mong the most important one was to assist Muslim women in obtaining Islamic divorce from their husbands.

A social atmosphere in UK was to some extent alien to the establishment of the Sharia Council in UK. Moulana Muhammad Shahid Raza who serves as the Executive Secretary of the Council from the day of the Council's establishment acknowledged in our interview that Muslim men represented the only one group which had hostile attitudes towards the Council. They regarded the Council as the threat which seeks to destroy their domestic relations and welfare of their families, to disintegrate the Muslim community. From accusations of working for British and American agencies to the threatening to be killed in the name of Islam led the members of the Council during the first years of work. As now is evident, there was a need of time to receive recognition from the majority of Muslims in the UK. After ten years of Council's activities, it began to be recognized by more than a half of Muslim people. According to the members of the Council, now they are fully recognized within Muslim community which understands the task and benefit provided by the institution. A growing number of applications and hugely increased number of the councils proves that now social climate is much more favourable than it was in the beginning.

In the current time, there are more than twenty Sharia councils around UK and all of them are busy with applications and inquires for Islamic legal guidance. The Sharia councils are registered at the Charity Commission for England and Wales as public organizations specializing in Islamic marriages and divorces. Each of existing councils receive about 250 applications a year. Two further questions need to be answered here: what are the differences among Councils and what are the most usual issues addressed to the councils? Concerning

700 One is when husband expresses his right to dissolve the marriage (*talaq)* by simply announcing to his wife that he repudiates her. In this case, after the period of three months which is devoted to the reconciliation the marriage is complete. The second possible way (*khula*) is a contractual type of divorce that is initiated by the demand of the wife but in this case a mutual agreement is obligatory. Eventually, an Islamic marriage could be also dissolved by the judicial institution under either of sides' petition and this form of divorce is called *faskh* which means dissolution of marriage done by the third authoritative body (court, council or any institution headed by religious scholar).

the first question, there are councils which work only with Shia Muslim community[701] or solely with people from particular country. There are councils which ground their work on one of the Sunni fiqh doctrine. Also, councils which propagate exclusively one or another Islamic ideology (Salafi, Wahhabi, Sufi). Most frequently, the councils are open to the whole Muslim community and provide services according to various fiqh doctrines.

Regarding the second question, alongside the divorce cases which comprise most of the work at the councils, ordinary Muslims seek to obtain Islamic guidance in a form of consultation on a variety of questions. These might be related to halal food restaurants, banking issues, religious festivals, oral or anal sex and so forth. Additionally, Muslims used to conduct their Islamic marriage at the councils. The marriage contract provided by the Muslim Law Sharia Council UK council complies with all Islamic religious conditions. For instance, contract mentions the agreed amount of dowry. Those who forget to mention, divine scriptures mention a minimum amount of money which automatically belongs to a wife. A groom should pay agreed sum of money or something what has monetary values (land, cars, house and so forth) what becomes the personal property of a bride. Usually, the cultural traditions entitle a groom to pay a specific amount of money. For instance, Libyans must pay mahr in the amount of five kilos of gold, in Pakistan it is just one hundred pounds and within Muslim community of Indians it is five hundred pounds.

At the moment, the Muslim Law Shariah Council consists of twenty-one scholar jurists or experts in the field of Islamic family law. The Council operates through three panels located in three regions of UK. The panel of Northern region is based in Manchester. All the Northern issues would be dealt among the scholars of that regions. There is a panel of scholars in the Midlands. Eventually, the largest number of Muslims live in London.[702] As a result of it the sudden region's panel consists of the largest number of scholar jurists in comparison to the other two panels. Who can be nominated to the position of legal expert at the Council? To be suitably trained in Sharia family law is the main requirement if one wish to suggest his or her candidature. The scholars who work at the Council are not lawyers in terms that they were trained in UK universities. Generally they are the teachers or imams and, at the same time, senior scholars of Sharia law. The work at the Council is not the main in their life. Also, there is an obligation not to work in the other council while being a member of the Muslim Law Shariah Council UK. At each panel of the Council, there is one lawyer or barrister who is not an expert in Muslim family law. He or she participates in the meetings of scholars and is responsible to provide information if Muslim scholars operate against the land law. It is also to be mentioned that at least one woman takes a position of the member of the Council in each of three panels. There is no any specific requirement to represent one or another Islamic school of fiqh. The scholar jurists of the Council are experts in a variety of fiqh schools like Hanafi, Maliki, Shafii or even Shia branch of Islam. Thus, the customers might receive opinion on the fiqh doctrine to which they belong. Truth, that a vast majority of young Muslims do not follow any

701 As was noted by the members of the Sharia Council, Shia community is awakening and not without external influence from Iran.

702 According to the last numbers, around 3 millions Muslims live in UK. 10% of London population is Muslims what is in numbers approximately 180000.

particular fiqh doctrine. According to the members of the Council, the youth just follows what their parents prefer to follow or most frequently there is no distinct identity in terms of fiqh law. Important to highlight that it is a fast disappearing tradition to follow either of particular fiqh law in the West.

A variety of possible doctrinal options helps to look at the particular legal issue from different legal perspectives what facilitates in the process of making decision in the West. For instance, one of the traditional fiqh law requirement for a valid marriage is that the guardian (wali) of a bride must participate in the ceremony. However, it is not always possible in the West to have a possibility to ask one's father, grandfather or brother to become a guardian in the West. It is very probable that relatives live in the place of birth and they have no possibility to arrive to the UK. In such cases the Council applies Hanafi legal doctrine whereby the participation of the guardian in the marriage of adult and sound woman is only recommended. Another example given by the members of the Council concerns the situation when a husband disappears. According to Abu Hanifa, woman should wait for fourteen years in order to marry another man. Shafii, Maliki and Hanbali traditional fiqh law states that in such case woman should wait for a period of four years after which she is granted a possibility to marry. There are also authoritative writings of individual scholars who mentioned the period of six months or one year. M. Raza said that in such cases the Council always applies the most suitable scholarly position in order not to destroy a life of any women. Thus, the possibility to apply either of fiqh school or individual scholarly opinion helps to provide services to anyone within Muslim community despite the Islamic school to which the customer belongs and to pick the most suitable legal norm in order to facilitate Muslims' life in the West.

From our research becomes evident that among all the councils which operate in UK, there are some which in all probability have more tasks than are declared on their official programs or official Internet pages. For instance, some councils opened "divorce shops" and their task is to sell divorces for the highest price. However, it is a far cry in comparison to the possible threat which might be posed from some other entities. As became evident from the conversations with ordinary Muslims and the members of the Council, there are some Sharia councils which are influenced by foreign ideologies. Physically such councils are in UK but ideologically they are somewhere else. There could be in the UK one or two Sharia councils run by Wahhabis or Salafis who work in the West but dictations come from outside the country. As a matter of fact, speaking about the Islamist infrastructure in the West, Ayaan Hirsi Ali also gave a warning conclusion that "over the past thirty years, a vast web of ideological institutions in the West: think tanks, media outfits, educational centres, and Sharia councils has been set up, often with money from Gulf foundations and individuals."[703] From the point of view of M. Raza, there are many colours of Islam and there should be an English brand of Islam in UK. "Islam will not change if it is adapted to the social, cultural norms of behaviour peculiar to the environment where we live. The social factor of country of residence must be always taken into account."

According to us, there are many signs to believe that Islamist ideologues strive at spreading their message within Muslim communities in the West. The message is always

703 Ayaan Hirsi Ali, *supra note*, 552: 47.

delivered both in English and in Arabic. As there are significant differences between political Islam groups' communications in English and in Arabic, it is highly recommended to judge on the basis of both their word and actions.[704] It is very likely that some Sharia Councils are those places where political Islam aims at achieving their purposes: to convert non-Muslims and to instil Islamist views among local Muslims. It was recently reminded by A. Melamed that the Muslim Brotherhood was created as a revolutionary group to restore caliphate through education, preaching, indoctrination, and proselytization, the process which is known as *da'wa* (a "call" or invitation").[705] In this light, A. Hirsi insists on the paradigm shift in Western politics with regard to the Islamists. According to her, there is a need to focus not merely on the results of the ideological tasks as acts of violence or terrorism, but rather to concentrate attention to the Islamist ideology and the network of institution which is aimed at spreading that ideology.[706] Instead of paying the whole attention on the military campaigns in the Middle East or elsewhere, the domestic side of the problem needs to be clearly reconsidered. Moreover, instead of seeking to understand where is the red line between Islam as a religion of peace and violent terrorism, Islamist ideology should become the object of both concern and research. It is very important to stop calling Islamists as representatives of moderate Muslims because this is the message that Islamists want to spread around the Western Muslims. With regard to the network of the Sharia councils in the UK, according to us, the government must create a dialogue with those which have no ties with Islamists. There is a number of measures which need to be taken by Western side, for instance: a reasonable surveillance of the entities that are potential sources of the Islamist ideology; a public discussion with Muslim communities; clearly expressed message to the foreign governments which support Islamist activities financially in the West; eventually, a far greater support of truly progressive Muslim leaders in the West including the Sharia councils which have no interest to propagate Islamist ideology. Only going in this way, the balance between Western ideals of individual liberty and the imperatives of national security might be re-established.

In the light of terrorist acts in the world, the position towards Muslims, Islam, thus, also towards the Sharia councils has dramatically changed in the West. If in the time of establishment of the Council in UK the tensions came solely from Muslim community itself, today the hostile attitudes to the Sharia councils and their presence in UK come from the British society. As was said by M. Raza, "now our beard, colour, face, hijab, Sharia councils became a sign of danger and suspicion: for one group of people our mosques are the shelters for terrorists, from the point of another group, we are hiding weapons and are educating Muslims to become extremists. One hundred people say two hundred things, whereas our aim is only to help Muslim women who are victims of domestic violence, abuse, and physical assault."

In all probability, as a reaction to the growing social concern and as an antidote to the activities of some ideologically influenced councils, the new initiative aimed at bringing

704 Foreign Affairs Committee, *'Political Islam', and the Muslim Brotherhood Review* (Sixth Report of Session 2016-17, HC 118): 23.

705 Avi Melamed, *supra note*, 537: 30

706 Ayaan Hirsi Ali, *supra note*, 552: 62.

more clarity and transparency emerged on the scene. From 2016, ten Sharia councils came under one umbrella which is known as "The Board of Shariah Councils UK". The leading figures of ten Sharia councils which joined the united body agreed to create one single application form for the customers. Moreover, they made a request to put the names of these ten councils on the official websites of all national Muslim organizations. As stated by the members of the Council, "it is necessary to introduce for the Muslim community and British society the approved Sharia councils what could bring some credibility to the work." At the same time, all the other councils are invited to join the club which closely cooperates and has three-four meetings per year. In addition to this, the Board of Shariah Councils UK discussed the idea to establish "The Court of Appeal" or "The Council of Appeal" headed by the most respectable Muslim scholars in UK. According to M. Raza, there must be a possibility for Muslims to challenge the decisions of one or another Sharia council in the democratic society.

As was said, the primary function of the Muslim Law Shariah Council UK is to help Muslim women to obtain Islamic divorce. The customers in such cases are mostly women and only 5% of the whole number of customers regarding divorce issues are men. Men are interested in having official divorce certificate. Additionally, the scholars of the Council provide dispute resolutions with regard to other Islamic legal issues. For instance, the Council suggests the services of mediation when both sides are in agreement on dealing with any of Islamic legal issue. Thus, partly the work of the Council is covered by the Arbitration Act of UK. Consultation on a variety of questions also is possible. If no immediate answer can be provided, the question might be sent to the panel of legal experts. Only 20% of legal issues are raised on the question which is not connected to the issue of Islamic divorce. When the Council receives question regarding child custody or inheritance, the customers are recommended to apply to English civil courts, because the Council has no power to issue such judgments. Certainly, to mediate between spouses on any of these questions is possible, but all legally binding decisions on these questions are covered by the English courts. As is noted on the official Internet page of the Council, "it does not provide a parallel judiciary service and only aims to offer a mechanism for obtaining an Islamic divorce, a religious obligation in Islam, which is not currently obtainable through the English courts and legal system."[707] Thus, the Council issues only one sort of document which proves the fact of Islamic divorce or marriage. Again, the document is binding only within Muslim community. In civil courts of UK, such documents issued by the Council have no legal effect. In other words, Islamic marriages are not recognized by law and require a separate civil registration. Truth, the Marriage Act 1949 determines that some religious communities (Jews and Quakers) are not required to undertake a separate civil registration of marriage, but it did not make specific references to Islamic or any other religions.[708] According to I. Zahalka, several mosques followed the Marriage Act, which enabled religious communities to register a building for the purpose of marriage, a ceremony conducted in such a building must meet several criteria to be considered valid.[709] Islamic divorce issues by the Sharia

707 More information is available at: www.shariahcouncil.org (last visited 14 April, 2017)

708 The Marriage Act 1949 of England.

709 Iyad Zhalka, *supra note*, 221: 115.

councils are not recognized by law. Whereas according to the Divorce Act 2002, Jewish couples seeking divorce must first be referred to a Jewish religious courts, and only afterwards can a civil court rule the case.[710] According to I. Zahalka, although civil court judges do not acknowledge sharia councils' rulings, a few do take them into account, at times even discussing and referring to them directly.[711]

Despite all the limits, Islamic divorces affect the ability of both Muslim partners to remarry in a religious ceremony and this is popular among Muslims in the West to marry in Islamic way. An absence of Islamic marriage contracts establishing equal rights to terminate a marriage, what is allowed by the Sharia, is conditioned by a lack of religious-legal knowledge. This is why educational function of the scholars of the Council is also very important. The main thing is to provide knowledge to Muslim women that they have a right to ask for the divorce on equal grounds. All what is need is to fix such condition in the contract of marriage. In this way, if they become victims in the family, they may activate such contractual provision and divorce themselves. This is the way how Muslim women can leave a failed marriage without applying to either of council. According to M. Raza, "it will take time to educate, to change a mental approach and concepts of the community. It is not a revolution which could be brought over night. Rather, it is a slow process which can took more than twenty years after which councils will probably have much less work."

One might wonder about the difference between the Council and Muslim Arbitration Tribunal[712] established in UK. At the first glance, both deal with the issues of Islamic marriage and divorce. However, Muslim Arbitration Tribunal operates on the basis of Arbitration Act. There is a need that both spouses would find an agreement to apply their case to the Tribunal. Thus, the Tribunal provides a service for women seeking to obtain an Islamic divorce by way of mutual consent (khula) of both spouses. If there is no agreement, then the option of the arbitration is hardly possible. As in a vast majority of cases of Islamic divorce husbands do not operate, the Muslim Arbitration Tribunal is not a very suitable institution to seek for a solution. However, the Tribunal states that even if there is no agreement between spouses, it can provide necessary service: "In the absence of the consent and/or co-operation of the husband, the Tribunal can issue a declaration that the marriage is dissolved (faskh) should the panel of experts be satisfied that the necessary requirements are met."[713] That means, even without a consent from both sides the Tribunal might embark on the dispute resolution if it receives such request. Faskh is annulment of the marriage contract and dissolution of the marital bond completely, as if it never happened, and this can only be done by means of the verdict of scholar jurists.

710 The Divorce Act 2002 of England.

711 Iyad Zhalka, *supra note*, 221: 127.

712 Muslim Arbitration Tribunal was established in 2007 to provide a viable alternative for the British Muslim community seeking to resolve disputes. The Tribunal acts as an alternative dispute resolution organization which deals with Islamic law within the context of the English legal system. The representative of The Tribunal specialize in Islamic divorce, Inheritance law, family mediation, mosque dispute resolution. With regard to the Islamic divorce issues, the Tribunal provides a service for women seeking to obtain an Islamic divorce by way of khula through the consent and co-operation of the husband. As is said on the official Internet page, the Tribunal can issue a khula certificate within 3-4 months.

713 More information is available at www.matribunal.com (last visited 14 April, 2017).

Among the valid grounds of faskh are: absence of husband for a particular time; husband's failure to provide maintenance for the family; severe abuse as physical so the other and so forth.[714] On the same grounds, women might apply for the divorce to the Sharia Council. If a husband agrees to divorce, women do not need to apply to the Council. In this case, what the Council can do is to inform on the content of the document which is necessary to sign for spouses and two witnesses. Such document with signatures perfectly complies with the requirements of the Sharia. If there are conditions that need to be mediated before the termination of the marriage, spouses generally address the issue to the Tribunal. Again, the service of mediation is also suggested by the Council but it is not the main function here. As it is evident from the comparison, as the Tribunal so the Council might be regarded as the possible options to dissolve the marriage contract, but the Council is not a mediation or arbitration institution because in such conditions parties agree to approve a mediator and here the majority of cases involve only women because men disagree to negotiate.

Let's come back to the discussion on the Muslim Law Shariah Council UK to look into the very process of divorce cases. Divorce cases at the Council generally take a time from three to four months. It might take far more time because of the condition which is imposed on customers. Although there are some councils in the UK which are not interested in questions related to civil divorce, the Muslim Law Shariah Council UK will not issue Islamic divorce prior to civil divorce. Marriages that are performed in any Muslim country are recognized in UK. Whereas the marriages conducted at the councils in UK are not legally recognized. If the Council issues Islamic divorce prior to civil, thus, legal divorce, a woman finds herself in a strange situation: she is divorced in Islam, but not according to the state-law. As was mentioned by the members of the Council, some women even offer money for divorcing them without having a document proving civil divorce, however, the Council's position is to avoid creating a conflict between laws. M. Raza explains precisely, that: "if we issue a divorce document before legal one, a woman will be able to conduct Islamic marriage. As this country does not recognize Islamic marriage, a number of Muslim men used to marry with the aim to enjoy sexual life for some time and then to break relations by pronouncing talaq. In such situations women might find themselves in a very uncomfortable and even dangerous situations." To obtain civil divorce can take a time and this is why sometimes such cases at the Sharia Council might take a year or even more.

The easiest divorce cases might be resolved in four or six weeks if civil divorce are obtained and if Muslim husbands cooperate with the Council. Sometimes, after the application to the Council women express their wish to hold a case for a time because the family seeks reconciliation. As stated by M. Raza, the Council can hold a case for maximum six months. Then, if the reconciliation achieved its tasks, the case is being closed. However, such cases are rare. As was mentioned at the Council, their experience shows that only 10% of all husbands are realistic and tend to cooperate. These men after receiving inquiry from the Council, will obviously communicate with us and as a result of this these cases are resolved in a quickest way. 90% of husbands are not in favour with divorce at all and non-cooperation is the most

714 More information about the concept of fash and valid grounds for faskh is available on the internet page of the Muslim Marriages Tribunal operating in South Africa: www.faskh.co.za (last visited April 13, 2017).

usual sign of it. How the Council deals with the cases when men do not cooperate? How the Council tries to reach the husband by informing him about the started procedure of Islamic divorce? Three warning letters might be sent to the husband. After the first letter when the Council invites to provide his arguments on the question of divorce, a man has one month to reply. If there is no reply, the second letter reaches the husband again giving one month to reply. If again no reply, the husband receives a final letter with the warning that if he does not tend to cooperate in the form of reply the Council after one month will dissolve the marriage contract without informing him. There can be situation when a man replies to the last letter by saying that he has not received any letter in previous time. Also, after the second or the third notice, a man might come to the office and to ask for the permission of a period for reconciliation. In such case, after the discussions with a wife, the Council is obliged to convey such possibility as it is the requirement of the Quranic verse 4:35. After all, the waiting of three months is aimed at the reconciliation and also to find out if the wife is not pregnant because in such a case a man would be forced to provide all necessary maintenance as for the woman so for a coming child. If a period for reconciliation gives no results, then the Council dissolves the failed marriage. There are also cases when husband agrees to divorce only if a woman fulfils a condition. Most frequently the condition is not reasonable, for example, to pay him a huge amount of money. Such conditions are not taken into consideration by the Council and if there is no wish to cooperate after receiving three warning letters the Council issues Islamic divorce.

The certificate which proves the fact of Islamic divorce must be written in a form decided by the scholarly community. None of provisions form the divine scriptures or from fiqh manuals are quoted in the text of certificate. According to the members of the Council, there is a need to put all the text in an easily understandable language because ordinary people do not have knowledge of Islamic law. Although ordinary Muslims are aware of the basics about the divorce and marriage requirements in Islam, generally they follow normative message of Islam blindly. Thus, the Council puts three or four grounds of issuing Islamic divorce. The first three are very usual in the declaration and, as a rule, the fourth is often very individual. The first ground often is that a couple lives separately for such and such period. According to the Quran, this is one of the reasons why divorce might be issued. The second is that a husband is not paying maintenance since the separation or even since the first day of marriage. The third usual ground is that all the efforts to divorce without interference of the institutional authority failed. These three grounds to issue Islamic divorce are based on the divine scriptures, but are written in a simple manner. Additionally, the fourth ground which in all the cases depends on the individual circumstances always used in combination with the first three. It might be, for instance: a wife signed that a husband had disappeared and there is no contact with him since a long time; a husband agreed to dedicate the case of divorce to the Council and accepts the decision; the case of divorce is decided in the civil court; a husband used violence; a husband is addicted to alcohol or drugs; he is not physically able to have sexual intercourse with a women; a husband is imprisoned for more than two years or he is mentally disabled; a husband married another woman and a woman does not want to live in such conditions when she needs to share her husband. The certificate with a number of approved grounds is signed

by the representative of the Council and the wife and from that time a woman is divorced in Islamic way. Important to notice that although the British courts do not recognize such divorce as legally binding, all Muslim countries do recognize the decision of the Council.

From all what was said we might conclude the following. Sharia councils might be viewed as the quasi-Islamic courts that apply Islamic rules to deal with the problematic questions facing Muslims as a result of obtaining judgments in their favour from non-Islamic courts in the country, but not having the sanction of the Islamic Sharia. The fact that such institutions operate in the UK under the local legal basis shows that the Sharia is adaptable in the changing place and time. Even more, the questions on which the rulings are issued and the basis on which the verdicts of the councils are delivered also prove the fact of its adaptability. Of course, such Muslim social-legal institution as the Muslim Law Shariah Council UK enforce Sharia norms solely with regard to a small number of Islamic law issues concerning questions of Islamic family and finance law. However, the very fact that such institutions operate in the UK since the end of the twentieth century illustrates that statements on the incompatibility between the Sharia and Western legal values have not much in common with reality on the ground.

6.2.3. Western statutory law and court judgments regarding Sharia

So far this chapter has been exploring the worldwide phenomenon of digital fatwas, the methodological theory of fiqh for Muslim minorities in the West, Islamic institutions operating in the UK in order to prove the core feature of adaptability of the Sharia in the contemporary reality. Also, Western regards towards the Sharia in the West from two perspectives were taken into consideration. From one perspective, the models of reaction from the local society towards the Sharia normative system were explored to show the spectre of attitudes on the question of its accommodation. From another perspective, it was important to look into the state-made law to understand its stance towards the accommodation of a number of practices based on the Sharia. Some examples of Western state-made law showed that a number of religious practices based on the Sharia have been already perfectly accommodated. However, to pretend to the status of a more comprehensive study there is a need to study some additional themes. First, Western statutory law regarding the Sharia needs to be taken into consideration and Greek law example is the most appropriate case for such analysis. Second, the case-law of the Western courts concerning the question of accommodation of religious practices of the minorities must be also discussed here. Several judgments on the most pressing issues concerning the Sharia practices in the West should receive particular attention.

6.2.3.1. Western statutory law and Sharia: a case of Greek law

Western statutory law accommodates a number of Sharia-based norms. This is evident from previously enumerated examples. However, there is one unique case in the European

legal order which serves well to show how and to what a huge extent Sharia and Islamic law might be implemented through the state-made law in the West. Greek case is the closest to the topic of this dissertation because Greek civil law encompasses a great part of Islamic personal status law which serves as an instrument to resolve Muslim minority's issues in a particular region of Greece. The legal identity of Muslims of Western Thrace in Greece is dependent on the historical circumstances, on the international treaties and, as a result of that, on the actual Greek law in place. In the words of K. Tsitselikis, minority Muslims in Western Thrace enjoy a judicial system stemming from the Ottoman legacy and the minority protection status what enable elected three muftis examine private disputes of inheritance and family matters regarding Muslim Greek citizens from Western Thrace.[715] All this pretend to prove not so much the adaptability of Islamic law but the extent to which Western law is able to accommodate the other legal system or, more precisely, the exemplary case of coexistence between Western law and Islamic law.

Islamic law as a special law is incorporated to some extent to the current Greek civil law in order to serve as an instrument in resolving legal issues among Muslims solely in Western Thrace. Such regulation, first of all, stems from a number of international treaties signed in the course of XIX and early XX centuries. Thus, before talking about the current civil law in Greece, it is worth taking a look at the legal provisions enshrined in those international treaties which paved the way for the current legal status of Muslim minority in Greece. At the same time, the research of Greek statutory law would be incomplete if to consider it without paying particular attention to the relevant Greek case-law. Previously delivered Greek court judgments require to be investigated with an attentive glance if one wishes to reveal a paradoxical situation which at the moment of writing this dissertation turned into a case at the European Court of Human Rights (ECHR). It is worth noting that Greek courts have no unanimous position on the question of whether Muslims of Western Thrace have an option to choose between Greek civil law and Islamic law or are forced to apply Islamic personal status law through the offices of Muftis, for instance, with regard to the questions related to inheritance law. According to K. Tsitselikis, the obligation of Muslims litigants to submit a case to the Mufti would amount to a discriminate division between Greek citizens on religious grounds, contradicting to the Constitution, the European Convention of Human rights, and other relevant international instruments.[716]

To begin with international law, it is necessary to mention that four treaties have played and still play a key role regarding Muslim minority in Greece. The long tradition of minority protection under the watchful eye of the Great powers for Muslims in Greece dates to at least 1881.[717] Convention of Constantinople, signed in 1881, declared that Muslims along with all other Greek citizens by birth shall enjoy equal civil and political rights. In the light of the Article 8 of this Treaty, Greece acknowledged as heads of Muslim communities local Muftis who managed properties, schools and other institutions.[718] Later on, the Convention of Athens signed by Greece and Turkey in 1913 declared (Article 11) that Muftis shall

715 Konstantinos Tsitselikis*, supra note*, 669: 390.

716 *Ibid.,* 398-399.

717 *Ibid.*, 9.

718 *Ibid*., 35.

exercise their jurisdiction among Muslims on the questions of marriage, divorce, Islamic testaments and so forth. The same article mentioned that the Muslim parties have a right to deliver their inheritance case to the Mufti if there is such accord between parties. Although the legal validity of the Convention of Athens was debated arguing that later established international agreements abolished it, important to notice that neither the Treaty of Sevres (1920) nor the treaty of Lausanne (1923) did not regulate such issues as legal personality of the Muslim minorities, the vakf or the Mufti. Thus, our position is favourable with Greek courts' stance according to which the Convention of Athens regarding private law disputes is still valid. As K. Tsitselikis added, the later treaties on some questions have amended the Convention of Athenes: for instance, Convention of Athens mentioned the Arch-Mufti as the head of all muftis in Greece who was dependent on the functioning of the Sheih-ul-Islam, the head of Ottoman Islam, which had been abolished in Turkey since the 1920s.[719]

The Treaty of Sevres (1920) and the Convention of Lausanne (1923) as the most important international agreements on the question of minority protection in both Turkey and Greece should be regarded as inseparable parts of the broader legal framework. The Treaty of Sevres has entered into force according to Protocol XVI of the Convention of Lausanne. The Article 14 of the treaty of Sevres emphasized the preservation of Muslim family law and customs in the following words: "Greece shall take all the necessary measures to regulate Muslim affairs preserving Muslim customs, family law and personal status aspects". Later, at the end of Greek-Turkish war, the Lausanne conference established a new era for the two neighbours. The Convention of Lausanne ratified the compulsory exchange of Greek and Muslim populations from Turkey and Greece. Under the agreement made among Greece, Turkey and Allies, the Muslims of Western Thrace and the Greek Orthodox of Constantinople were excluded from the population exchange. The articles 37-45 of the Convention set the legal regime regarding minorities' rights and obligations of the states. According to the Article 42, the Turkish Government undertakes all measures as regards non-Muslim minorities in so far as concerns their family law or personal status permitting the settlement of these questions in accordance with the customs of those minorities.[720] This article must be read in combination with article 45 according to which: "The rights conferred by the provisions of the present section on the non-Muslim minorities of Turkey will be similarly conferred by Greece on the Muslim minority in her territory"[721]. Thus, these stipulations of the Convention of Lausanne as well as the whole regulation of all the mentioned treaties made an obligation to pass relevant national law on the questions of Muslim minority of Western Thrace in Greece.

As was already mentioned, present Greek national legal framework regarding Muslim minority living solely in Western Thrace[722] emanates directly from international agreements

719 Konstantinos Tsitselikis, *supra note*, 669: 62.

720 The Convention of Lausanne. Article 42.

721 The Convention of Lausanne. Article 45.

722 According to K. Tsitselikis, "since 1923, the minority provisions of the Convention of Lausanne have to be implemented only in the area of Western Thrace. The move to limit minority legal protection to Thrace was based on political and ideological reasoning: the Greek state considered Islam to be incompatible component and attempted to avoid and limit Turkey's influence as much as possible, legally and politically". More on this read: Konstantinos Tsitselikis, *supra note*, 669: 100.

with Turkey. To this day, Greek civil law encompasses legal provisions according to which Muslims' family law issues might be resolved by local muftis. As K. Tsitselikis clarified, three muftis of Western Thrace have the right to act as a judges applying Islamic law in the disputes of Muslims[723]. Here, Greek legal act 1920/1991 on Muslim Religious Servants is particularly important. Four articles are most relevant for our research. Article 1 (b) of the Act states the following: "In the position of the Mufti are appointed Greek citizens, holding a diploma of a high Islamic Theological School (of Greece or abroad), or a diploma *itazet name* or having served as an imam at least for a period of 10 years, and having been distinguished for their moral and their theological proficiency and for whose there is no obstacle for appointment as set by articles 21-23 of the code on civil servants". Article 5 (a) is affirmative by saying that: "The Mufti exerts in his region duties provided by the present Act, as well the religious duties according to the Sacred Law of Islam. Appoints, supervises and fires the Muslim religious servants, celebrates or ratifies religious marriages between Muslims and issues legal opinions in matters related to the Sacred Law of Islam". The Article 5 (b) must be particularly emphasised in the light of our research: "The Mufti has jurisdiction among Muslim Greek citizens of his region in matters of marriage, divorce, minors' emancipation, custody, Islamic testaments *ab intestate* succession and as far as these legal relations are governed by the Sacred Law of Islam". Eventually, Article 7 of the Act adds: "The service of Muftis is considered to be a public service. They shall correspond in the official language of the State, in which all deeds and documents published by the Mufti shall be written". All these legal provisions incorporate Sharia norms into Greek civil law providing legal ground for the Sharia courts headed by elected muftis to apply Islamic personal status law to the issues regarding Muslim minority in Western Thrace.

Only from the first glance the question whether Muslims of Western Thrace have a right to choose between Greek civil courts and Sharia courts headed by the Muftis could seem meaningless. On the one hand, K. Tsitselikis is more than assured that Islamic jurisdiction must be voluntary rather than mandatory and the judicial competence of the mufti is to be preferential and supplementary.[724] According to such approach, Muslims should be free to choose between the civil courts and the Sharia courts headed by the local muftis. It is hard to debate on this as the whole Western legal culture is grounded on the right to choose. However, on the other hand, until recently, most of the Greek courts denied the right of Muslims of Western Thrace to bring their cases before the civil courts, as they did not want to be seen as infringing on the minority's rights and autonomy.[725] According to a survey of Greek court judgments made by K. Tsitselikis, the overwhelming majority of Greek courts accepts that the Mufti has exclusive jurisdiction over Thrace.[726] To illustrate all this, we could take one case as an example. The case was analysed by national Greek courts and, finally, in 2014 the application of the Greek Muslim woman was lodged with the ECHR. The final judgment will be delivered in the end of 2018. Our task here is not

723 Konstantinos Tsiteslikis, *supra note*, 669: 396.

724 *Ibid*., 398.

725 *Ibid*.

726 *Ibid*., 400.

only to describe how the case was decided by the Greek courts but also to predict the possible argumentation and conclusions of the ECHR.

The case *Molla Sali v. Greece* in all probability can become a turning point in Greek case-law in the long search of answers whether Muslim minority of Western Thrace is able to choose where to bring their case related to personal status questions.[727] The applicant, Chatitze Molla Sali, a Greek citizen and a member of local Muslim community was born in 1950 and lives in Greek region of Western Thrace. After her husband's Moustafa Molla Sali death in 2008, C. Molla Sali inherited his entire estate under the terms of a will drawn up by her husband before a notary. A testament was written according to the Greek civil law and after Moustafa's death it was officially announced by the court of the first instance of Rhodopes. The applicant C. Molla Sali declared her will to accept all what was left by her husband. Later, in the end of 2009, two sisters of Moustafa contested the will on the grounds that their brother had belonged to the Western Thrace Muslim community and that all issues relating to his estate were subject to Islamic law and to the jurisdiction of the mufti rather than to the provisions of the Greek Civil law. As expected, they based their position on the Treaty of Sevres (1920) and the Convention of Lausanne (1923) according to which for Muslims in Greek Western Thrace Islamic customs and Islamic religious law must be applied. Article 14 of the Treaty of Sevres and articles 42 and 45 of the Convention of Lausanne here serve as the basis for the arguments.

Greek national courts had no unanimous position on this case. The claims of two Muslim sisters were dismissed at first instance and on appeal. The court of first instance of Rhodope stated that the position of sisters was incompatible with four articles of Greek Constitution. Namely, it was inconsistent to principle of equality (Article 4), to free development of the personality (Article 5. 1.), non-discrimination principle (Article 2), and freedom to religious belief (Article 13. 1.). As concluded by the court, the choice of Moustafa Molla Sali to address to the notary and to demand to establish the testament constitute the right prescribed by law to express the last will under the same conditions applied to the other Greek citizens. The Court of Appeal also dismissed the claims of sisters declaring that to express the last will to leave his entire estate to C. Molla Sali was an expression of M. Molla Sali's statutory right to have his estate disposed after his death under the same conditions as other Greek citizens. However, the Court of Cassation in 2013 reversed the judgment delivered by the court of appeal affirming that questions of inheritance within Muslim community should be dealt with by the mufti in accordance with the rules of Islamic law. According to the Court of Cassation the public testament made before the notary must be considered invalid and having no legal effects as it does not comply with Islamic legal provisions. The Court remitted the case to a different bench of the Court of Appeal for fresh consideration. In 2015, the Court of Appeal ruled that the law applicable to the deceased's estate was Islamic religious law and that the public will did not produce any legal effects. In the end, C. Molla Sali brought her case to the ECHR grounding her claims on the following articles of the Convention: Article 6. 1. (Right to fair hearing) and Article 14 (prohibition of discrimination). The applicant relying on the mentioned two articles, complains of the

727 All the necessary facts and information regarding the case *Molla Sali v. Greece* can be found on the ECHR's website and the final verdict is expected to be issued in the end of 2018.

application to her inheritance dispute of Islamic law rather than the ordinary civil law applicable to all Greek citizens, despite the fact that her husband's will was drawn up in accordance with the provisions of the Greek Civil code. Also, the applicant complains that she was subjected to a difference in treatment on grounds of religion. Eventually, C. Molla Sali contends that, by applying Islamic law rather than Greek civil law to her husband's will, the Court of Cassation of Greece deprived her of three-quarters of her inheritance.

All in all, most probably the ECHR's will decide the case *Molla Sali v. Greece* in favour of the applicant. More precisely, it is expected that ECHR will affirm that free choice or a right to choose is of paramount importance for Western (legal) tradition. In any case, the Greek case proves very well that Western statutory law encompasses a number of Sharia norms and Islamic legal rules. Moreover, it shows that the coexistence between Western and Islamic law is possible. Of course, the Greek law case is very unique in the West, thus, the following discussion tends to take into account more case-law examples of national and international courts regarding one or another Sharia-based norm.

6.2.3.2. Western case-law and Sharia: freedom to religious expression

The question of the Sharia in the West is not solely the question of its adaptability. If to regard it solely in this way, the research could pretend at best to the one-way street study. It is imperative to realise that the question of the Sharia in the West is primarily the question of the Western limits within which the Sharia might pretend to be adapted. The limits are directly associated with the Western principle of freedom of religious expression. The courts are entitled to interpret this principle in order to find a balance between the purpose of accommodation and a number of the other Western values. It depends on the majority of factors, including historical, whether the court of one or another state give more reductionist or expansionist interpretations of the right to religious expression. To show how the Western principle of freedom of religious expression is interpreted to accommodate religious practices of minorities, we made a choice to analyse some recent judgments of national courts of England and Canada. In this regard, we will also present some peculiarities of the jurisprudence of the European Court of Human Rights.

The ECHR's assertion regarding Sharia in its relation to democracy and human rights is evident from the following statement declared in one judgment. Here we are to cite the main statement of it: "The Court considers that the shari'a, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. …It is difficult to declare one's respect for the democracy and human rights while at the same time supporting a regime based on shari'a, which clearly diverges from Convention values."[728] Not so much important here whether the ECHR speaks of a regime based on the Sharia or of the Sharia itself. What really matters is a clear position towards the Sharia which first of all consists of the Quran and Sunna of the Prophet which are the sources of religious practices of Muslims.

728 *Refah Partisi (Welfare Party) v Turkey,* European Court of Human Rights (2003), Para 72.

According to us, it is reasonable to state that Western legal values and Convention's spirit can hardly be regarded compatible with a number of particular aspects of historical Sharia law as was already noticed in the Chapter Five. There is a number of Islamic legal provisions in the field of criminal law, international law, human rights law which hardly can be compatible with Western legal values. It was a part of the message written in the judgment of the ECHR that such Islamic provisions particularly contradict to the Western values. However, the conclusion of the ECHR about the inflexibility and rigidity of the whole Sharia and about incompatibility between the whole Sharia and Western legal values poses far more questions than it gives the answers. At least from the very idea of development of Islam enshrined in the Islamic concept of ijtihad through which it evolves as necessary response to the dynamic nature of human life, it is clear that it is capable to respond effectively to the modern concepts of democracy and human rights as well.[729]

According to the ECHR, the freedom of religion is one of the foundations of a democratic society.[730] Freedom to change religion or belief is not subject to any limitation in the West. Whereas freedom to manifest his or her religion or belief is subject to limitation. That means any manifestation of religious belief which, according to the ECHR, may take the form of worship, teaching, practice and observance,[731] may be balanced against the public interest in public safety, public order, health or morals, or the protection of the rights and freedoms of others: as long as any limitation is prescribed by law, necessary in a democratic society, and proportionate. The core thing lies in the question of accommodation which means the search of reasonably available alternative measures to avoid the conflict between the freedom to religion and the other Western legal values. The ECHR and national courts insist that specific legal tests are to be applied in the cases regarding religious beliefs and freedom to express it. Christopher McCrudden states that the ECHR applies two approaches to the interpretation of what constitutes an "interference" in the "manifestation" of a religious belief: human dignity test and restrictive approach.[732] According to him, it is noticeably absent from the Islamic cases that the ECHR would identify dignity as the basis for freedom of religion.[733] While it is a disputable statement, we are to introduce such approaches in the light of C. McCrudden's argumentation. After that, we move on the study of the specific cases in the courts of England and Canada, which suggest the legal framework for resolving the conflicts.

The right to freedom of religion or belief stems from the right to human dignity which stems from man's ability to choose path.[734] In this sense, C. McCrudden speaks in the words

729 M. A. Baderin, *An analysis of the relationship between shari'a and secular democracy and the compatibility of Islamic law with the European Convention on Human Rights*. In *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*, edited by Robin Griffith-Jones (Cambridge: Cambridge University Press, 2013), 76.

730 *Eweida and Others v. United Kingdom*, European Court of Human Rights (2013), Para 79.

731 *Eweida and Others v. United Kingdom*, European Court of Human Rights, (2013), Para 80.

732 Christopher McCrudden, *Dignity and Religion*. In *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*. Edited by Robin Griffith-Jones (Cambridge: Cambridge University Press, 2013), 98-103.

733 *Ibid*., 105.

734 Giovanni Pico della Mirandola, *Oration on the Dignity of Man*.

of Justice Albie Sachs of South African Constitutional Court who stated the following thing: "The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity."[735] Thus, the concept of human dignity is indissociable from the religious norms according to which pious individuals practice their religion. Religious practices emanate from the religious sources what in Islamic case is the Sharia consisting of the Quran and Sunna of the Prophet. Any regulation or negation of the religious practices poses the question of how far the state can interfere with the core concept of religious person's dignity. The question is of the path to be followed by democratic society in order to accommodate religious communities and, at the same time, to preserve the rule of law. In this light, the opinion of Albie Sachs again is worth of attention: "The main problem in any open and democratic society based on human dignity, equality and freedom is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful to the law."[736] This situation is very similar to that one of Antigone's dilemma into which the ECHR's statement on the incompatibility between the Sharia and Western legal values puts Muslim minorities.

The ECHR stated that to be practiced by the Convention, the manifestations of one's religion or belief must be "worthy of respect in a democratic society and not incompatible with human dignity."[737] In this statement C. McCrudden finds the dignity test, which, according to him, "is itself not fully tested."[738] If the dignity test might be the ground to declare that, where a belief or a specific practice is considered to be inconsistent with human dignity, it does not receive protection under the Article 9 of Convention, than the very concept of human dignity must be more clearly formulated. However, the concept is far from being understandable in one or several ways. It is not defined in clear terms, thus, the ECHR and national courts are free to choose the directions of the further interpretation. Generally speaking, the very notion of human dignity underwent significant change in the historical path of Western civilization. It is different in Western society and in non-Western society. Aharon Barak describes the transitional stage in the understanding of human dignity in the West of eighteenth and nineteenth century: "The transition was made from a person's duties toward his creator to a person's rights in society. It was Kant who provided a firm basis for the ideas regarding the rationality of man and his free will. Kant's moral theory is divided into two parts: ethics and rights (jurisprudence). Such moral

735 *Christian Education South Africa v Minister of Education* (CCT 4/00) [2000] ZACC, Constitutional Court of South Africa, Para 36.

736 *Christian Education South Africa v Minister of Education* (CCT 4/00) [2000] ZACC, Constitutional Court of South Africa, Para 35.

737 *Cambel and Cosans v United Kingdom*, European Court of Human Rights (1982), Para 36.

738 Christopher McCrudden, *supra note*, 732: 100.

theory had particular influence on the understanding of the human dignity."[739] After World War II it became a central factor in legal discourse. According to A. Barak, the right of human dignity is seen as a framework right and a mother-right.[740] The ECHR has also held that all rights protected by the ECHR derive from the meta-principle of dignity. In this sense, all rights should be interpreted in the light of what dignity requires. To put it in another way, interpretation of rights enshrined in the Convention must be delivered in the light of the concept of dignity. In this light, according to C. McCrudden, the ECHR should be more active to apply dignity test, however, the ECHR is not always in favour to embark on the conception of dignity in the cases of freedom of religion. C. McCrudden regrets that the concept of dignity is not mentioned in such landmark cases as *Sahin* and *Refah*.[741] There is an opinion that because of incommensurability of rights and values belonging to completely different orders, the religious and secular, the courts avoid to apply proportionality analysis.

Instead of it, the Court tends to employ a more restrictive approach in the interpretation of freedom of religion. What the scholars mean by the restrictive approach? The ECHR interprets of what constitutes an interference in the manifestation of religious belief and in a number of cases denies that the questioned restriction constitutes an interference because the claimant had the opportunity to manifest the belief in circumstances other than the one where he chose to do so.[742] To illustrate this approach, we found some judgments. In the case *Kalac v Turkey*, the ECHR dealt with the situation when Mr Kalac as a military officer participated in the Suleyman sect for what the Supreme Military court stated that he breached military discipline and infringed the principles of secularism. According to the Government of Turkey, Mr Kalac was retired because he had adopted unlawful fundamentalist opinions. The ECHR stated that in choosing to pursue a military career Mr Kalac was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain limitations incapable of being imposed on civilians.[743] Thus, the court denied that state interference with the applicant's religious belief area was unlawful.

Another judgment was associated with the Jewish community in France. A particular group of Jews registered their association and applied to the main body of Jewish community to approve their right to engage in ritual slaughter under their own rules. It was dismissed and the case reached the ECHR. According to the Court, "Since it has not established that Jews belonging to the applicant association cannot obtain "glatt" meat, or that the applicant association could not supply them with it by reaching an agreement with the main body representing Jews in France, in order to be able to engage in ritual slaughter under cover of the approval granted to the main body of community, the Court considers that the refusal of approval complained of did not constitute an interference

739 Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 26.

740 *Ibid*., XX.

741 Christopher McCrudden, *supra note*, 732: 105.

742 *Ibid*., 98.

743 *Kalac v Turkey,* European Court of Human Rights (1997), Paras 27-28.

with the applicant association's right to the freedom to manifest its religion."[744] Those who disagree with the mainstream position of the Court said, that the mere fact that approval has already been granted to one religious body does not absolve the State authorities from the obligation to give careful consideration to any later application made by other religious body professing the same religion. Accordingly, the fact that the applicant association is able to import "glatt" meat from Belgium does not justify in this case the conclusion that there was no interference with the right to the freedom to practice one's religion through performance of the rite of ritual slaughtering; the same applies to the fact that Jews are able to obtain of "glatt" meat, if necessary, from the few shops run by the main body of Jewish community. Both examples provide ground for C. McCrudden to state that the ECHR denies that the questioned restriction constitutes an interference because the claimants had the opportunity to manifest the belief in circumstances other than the one where he chose to do so.

Be that as it may, there is a need to move further to understand the mainstream regard applied by the western courts with regard to freedom of religious expression and its relation to the Western rule of law on the specific issues. For the beginning, the quotation from the ECHR's judgment is worth being mentioned: "While freedom of religion is in the first place a matter of individual conscience, it also implies a freedom to manifest one's religion alone and in private or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms and manifestations which manifestation of a religious belief may take, namely, worship, teaching, practice and observance. Nevertheless, it does not protect every act motivated or influenced by a religion or belief… The obligation for a teacher to observe normal working hours which, he asserts, clash with his attendance at prayers, may be compatible with the freedom of religion… as may be the obligation requiring a motorcyclist to wear a crash helmet, which in his view is incompatible with his religious duties."[745] Following this general principle, the ECHR has upheld necessary and proportionate restrictions on the manifestation of religion or belief in connection with an employee's obligations in the workplace when was found no breach of article 9 involved in employer fining employee for unauthorized taking time off work to attend prayers[746]; in the context of education when was found no breach of article 9 in ordering teacher not to wear Islamic headscarf while teaching in order to protect religious neutrality at school[747]; in the context of education in forbidding wearing Islamic headscarf at University in order to protect principle of secularism in higher education[748]; in the armed forces when was stated that the officer's expression of beliefs lawfully restrained to support government's policy of secularism in the armed forces[749]; And in the professional sphere when was found no violation in prosecuting pharmacists for refusing to honour

744 *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France,* European Court of Human Rights (2000), Paras 82-83.

745 *Refah Partisi (The Welfare Party) v. Turkey,* European Court of Human Rights (2003), Para 92.

746 *Kosteski v. Former Yugoslav Republic of Macedonia,* European Court of Human Rights (2007).

747 *Dahlab v. Switzerland*, European Court of Human Rights (2001).

748 *Leyla Sahin v. Turkey*, European Court of Human Rights (2007).

749 *Kalac v. Turkey*, European Court of Human Rights (2000).

legal obligation to supply contraceptives[750]. All these and the other judgments regarding the question of religious beliefs clearly show that the ECHR deals with cases in which religious practices grounded on the Sharia norms are always seriously taken into consideration in order to accommodate them.

The issues of the religious practices which are based on the Sharia norms might be found in the majority of national courts in the West. It is very interesting to explore not only the judgments in the courts of Western countries belonging to the Convention, but also those of America, Australia or Canada. Our final task here to explore shortly two resent cases from England and Canada regarding the issues of religious beliefs are worth of attention. The Supreme Court of Canada in 2012 dealt with the following question: whether a witness who wears a niqab for religious reasons can be required to remove it while testifying in the court? According to the Court of Canada, two rights are potentially engaged here: the witness's freedom of religion and the accused's fair trial rights.[751] In 2013, the Crown Court of England dealt with the issue when a defendant refused to remove niqab because of her religious beliefs while testifying in the court. Principles of open justice and the adversarial trial process were to be balanced with Muslim woman's the right to freedom of religion. According to the court of England, the niqab has become the "elephant in the courtroom" and the judges urgently need a statement of the law on this issue.[752] At first glance both cases are similar, however there is one fundamental difference which needs to be highlighted here. The right to freedom of conscience and religion under Canadian Charter (2(a)) appears to be a primary constitutional right in Canada.[753] As such, it appears to be entitled to far greater weight in the balance of conflicting interests than the qualified right of manifestation of religious belief under the Convention (article 9)[754], on which the Court of England mainly relied.

The Judge P. Murphy from the court of England claims that although there is no statutory law on the issue at hand, three principles are to be balanced with the right to freedom of religion in his case. The rule of law which means that the law of the land must be the basis of all decisions taken by the Court, and that the law must apply equally to all those who come before the Court, regardless of ethnicity, religion, or any other personal attributes which might otherwise be the object of either prejudice or special favour; the principles of open justice which means that criminal proceedings should be held in open court, in public, and be open to reporting by the press; the principles of adversial trial.[755] While the law permits no derogations from the principle of the rule of law, it does permit derogations from the principles of open justice and the adversarial trial process in limited circumstances.[756] Through the Human Rights Act 1998 the Convention is applied by the judges in England. The Court, according to the judge, must not act in a manner incompatible

750 *Pichon and Sajous v. France*, European Court of Human Rights, (2001).

751 *R v. N. S.*, 2012 SCC 72, Supreme Court of Canada, [2012] 3 S.C.R. 726. Para 7.

752 *The Queen v. D (R).* The Crown Court at Blackfriars of England and Wales (2013), Para 12.

753 Canada Chart

754 European Convention of Human Rights and Fundamental Freedoms.

755 *The Queen v. D (R)*, The Crown Court at Blackfriars of England and Wales (2013), Paras 27-29.

756 *The Queen v. D (R),* The Crown Court at Blackfriars of England and Wales (2013), Para 35.

with a Convention.[757] After saying this, the judge enumerates four legal requirements in conformity with which restrictions on the qualified right of religious manifestation may be imposed. As well-known from the Convention and the ECHR's jurisprudence, the restriction must be prescribed by law, must be legitimate, necessary in a democratic society and proportionate. Due to the fact that no court in England and Wales has considered how these restrictions should apply to the specific case as that regarding the wish of the defendant to wear a niqab in the Court, the judge found some valuable assistance in the case of the Supreme Court of Canada which has considered very similar issue.

In the case of the Supreme Court of Canada, a Muslim woman was the complainant in a criminal case of sexual assault. She wished to testify while wearing her niqab. Based on the fact that she removed her niqab for her driver's license and said she would do so for a security check in the airport, the preliminary inquiry judge seems to have concluded that her beliefs were not sufficiently "strong"[758] and ordered her to remove her niqab. On appeal, the Court of Appeal of Canada held that if the witness's freedom of religion and the accused's fair trial interests were both engaged on the facts and could not be reconciled, the witness may be ordered to remove the niqab, depending on the context. The Court of Appeal returned the matter to the preliminary inquiry judge. A Muslim woman appealed to the Supreme Court of Canada. The majority of the Court allowed the appeal. According to the Supreme Court, an extreme approach that would always require the witness to remove her niqab while testifying, or one that would never do so, is untenable. "The answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on particular case before the court. A witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceedings will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent at risk; and (b) the salutary effects of requiring her to remove the niqab outweighs the deleterious effects of doing so."[759]

The Supreme Court of Canada applied the methodological framework for identifying and resolving rights conflicts. Accordingly, the first task is to determine whether, in the case at hand, allowing the witness to testify in a niqab is necessary to protect her freedom of religion. The second task is to determine whether requiring the witness to testify without the niqab is necessary in order to protect the fairness of trial. Then, to find out whether there are alternative measures for protecting trial fairness that would also allow the witness to exercise her religious practice. Eventually, if there is a true conflict that cannot be avoided, it is necessary to assess the competing harms and determine whether the salutary effects of requiring the witness to remove the niqab (for instance, reducing the risk of a wrongful conviction) outweighs the deleterious effects of doing so (for instance, the harm from interfering with the witness's sincerely held religious belief). In short, applying this framework involves answering four questions: (a) would requiring the witness to remove the niqab while testifying interfere with her religious freedom? (b) Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness? (c) Is

757 *The Queen v. D (R),* The Crown Court at Blackfriars of England and Wales (2013), Para 24.

758 *R v. N. S.*, SCC 72, Supreme Court of Canada, [2012] 3 S.C.R. 726. Para 12.

759 *R v. N. S*, Supreme Court of Canada 2012 SCC 72, 3 S.C.R. 726. Paras 31-57.

there a way to accommodate both rights and avoid the conflict between them? (d) If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweighs the deleterious effects of doing so?[760] The framework is suitable to deal with a number of issues regarding the right of freedom to religion and its relation with one or another competing principles.

The judge P. Murphy of the Crown Court of England and Wales reminds that the Canadian case should be treated with caution in his case because of two reasons: "first, the case is that of prosecution witness, and while a defendant may be a witness, she is before the case on a very different basis and occupies a more significant role in the trial. Second, the majority's analysis clearly treats the right to freedom of religion under the Canadian Charter (2(a)) in a manner which corresponds to the freedom of thought, conscience and religion under article 9 (1) of the Convention. On this approach, for the purpose of balancing the right against any proposed limitation of the right, far greater weight must be given to the right of freedom of religion, compared to balancing involving the right of manifestation of religion or belief under article 9 (2). Indeed the Supreme Court of Canada seems to treat it as equivalent to the right to a fair trial. For those reasons, while the majority opinion offers valuable guidance, it can be applied directly to the case of the court in England."[761]

In this light, the court of England starts the analysis by saying that the defendant is not the only person whose rights and freedoms are engaged by criminal proceedings. He puts emphasis on the rights and interest of victims, jurors and the public at large. Further, by saying that the adversarial trial demands full openness and communication, the judge affirms that he is firmly convinced that the wearing of the niqab necessarily hinders that openness and communication.[762] While accepting that a rule prohibiting the wearing of the niqab in court at any stage would cause a defendant some degree of discomfort, the judge poses the question of the comfort of others whose participation in the trial is essential and express his point of view: "In my view, it is unfair to ask a witness to give evidence against a defendant whom he cannot see. It is unfair to ask a juror to pass a judgment on a person whom she cannot see. It is unfair to expect that juror to try to evaluate the evidence given by a person whom she cannot see, deprived of an essential tool for doing so: namely, being able to observe the demeanour of the witness; her reaction to being questioned; her reaction to other evidence as it is given. These are not trivial or superficial invasions of the procedure of the adversarial trial."[763]

At the same time, the English judge rejects the view that the niqab is somehow incompatible with participation in public life in England. However, the court and especially criminal proceedings is another thing because here the ability of the jury to see that defendant for the purposes of evaluating her evidence is crucial. As was said by the judge, "In other areas of life, accommodations are routinely found, but the same accommodation cannot be made at the Crown Court, both because the rule of law is engaged, and because to do so might well involve a disproportionate allocation of court resources. For example,

760 *R v. N. S*, Supreme Court of Canada 2012 SCC 72, 3 S.C.R. 726. Paras 7-12.

761 *The Queen v. D (R),* The Crown Court at Blackfriars of England and Wales (2013), Para 52.

762 *The Queen v. D (R),* The Crown Court at Blackfriars of England and Wales (2013), Para 58.

763 *The Queen v. D (R),* The Crown Court at Blackfriars of England and Wales (2013), Para 59.

a claim to be tried before a female judge and jurors, with female court staff, and excluding males from the public gallery would probably constitute an unlawful discrimination against male judges, jurors, court staff and members of the public and the press."[764] The conflicts between the manifestation of one's belief or religion and the demands of court proceedings in many other cases are easily resolved in the practice. For instance, witnesses and jurors may be sworn on a book appropriate to their beliefs. Also, the jurors wish to observe a religious festival during which the Court is sitting is often accommodated. Furthermore, the advocates are often permitted to wear a turban or full length dress while appearing professionally in court. Thus, there exists many accommodations, however, when the conflicts cannot be resolved, the Court must balance the right of manifestation of religion against the interests of justice in securing a fair trial for all participants and the strong public interest in the proper administration of criminal justice.[765] Despite the absence of the statutory law, it seems that the principles of open justice and adversial trial have more weight if balancing them with the right of the defendant not to remove a niqab while giving evidences in the court.

In the end, the Crown Court of England considered four principal questions to decide whether some restrictions on the defendant's right to wear the niqab should be imposed for the purpose of the fair trial. Namely, basis in law, legitimacy of aim, necessity in a democratic society and proportionality were to be considered before pronouncing the judgment. For the first question, the Court although has noticed that there is no legal restriction on the wearing of the niqab anywhere in the United Kingdom, however, it is well known for the lawyers and society that such legal principles as open justice and adversarial trial are inseparable from the criminal proceedings in the court. Thus, a proper basis in law for restricting the wearing of the niqab in court is present. Due to the second question, according to the judge P. Murphy, the aim must be to allow the Court in the Western country to function fairly and effectively, and, for this reason, the aim involved in restricting the right to wear the niqab is legitimate.[766] Due to the necessity in a democratic society, the court concluded: "no tradition or practice, whether religious or otherwise, can claim to occupy such a privileged position that the rule of law, open justice, and the adversial trial process are sacrificed to accommodate it. That is not a discrimination against religion. It is a matter of upholding the rule of law in a democratic society."[767] Eventually, it was said that there is a rational connection between the aim and the restriction which tends to maintain the quality and fairness of the trial process. According to the final remarks of the court in England, the defendant is free to wear the niqab during trial, but if the defendant gives evidences, she must remove the niqab throughout testifying in the court. It was added that the Court may use its inherent powers to do what it can to alleviate any discomfort, for instance, by allowing the use of screens or allowing to give evidence by live link.

The task of the West is to strive at achieving accommodation of religious beliefs as far as it does not contradict to the core principles of Western legal tradition. The right to

764 *The Queen v. D (R),* The Crown Court at Blackfriars of England and Wales (2013), Para 71.

765 *The Queen v. D (R),* The Crown Court at Blackfriars of England and Wales (2013), Para 72.

766 *The Queen v. D (R)*, The Crown Court at Blackfriars of England and Wales (2013), Para 77.

767 *The Queen v. D (R)*, The Crown Court at Blackfriars of England and Wales (2013), Para 78.

have differences is protected, however, it does not mean that those differences are always hegemonic. Not all differences are compatible with Western fundamental values and not all barriers to their expression are arbitrary. A mere accommodation or total refusal to accommodate religious beliefs and practices are both incompatible with Western core principles. In this sense, the statement of the ECHR on the incompatibility between the Sharia and the Convention's values seems to be inaccurate and requires to be reconsidered in the future. While there is a number of contradictions, there is no reason to consider the whole Sharia as the source of religious practices which have already become a part of Western societal life inconsistent with Western values written in the Convention. To permit to put religious minorities to the position similar to that of Antigone's dilemma when the choice by Muslim between the Sharia and the land law has to be done is alien to the Western tradition itself and dangerous. This is not a way which keeps on the direction of peaceful coexistence.

6.3. Islamic law in the Middle East: a case of the Kingdom of Jordan

It is symbolic that the place where Islam was born turns to be the object of our final section of dissertation. The question which was kept in mind by us throughout the study on the subject of this chapter was whether Islamic law is adaptable in the contemporary time. Internet became that space which empowered Muslim scholarly community to spread their versions of Islamic legal interpretation in the form of fatwas. Digital fatwas turned to be a key instrument which gave a chance for the Islamic law to start its second life. If to talk solely about the Western community of Muslims, the concept of fiqh for Muslim minorities might be the best example of how Muslim scholars and jurists successfully combined traditional fiqh rules and social requirements of Muslims in the West. It might be said that this methodological theory made Islamic law more adaptable in the life of a Muslims in non-Muslim country. The second section concentrated attention to the Sharia in the West. Here we showed that the Sharia is partly implemented through Islamic institutions operating in the West as well as through the Western state legal apparatus. The case analysis of the Muslim law Shariah Council UK showed that Islamic family law rules are applied within Muslim community in London. Additionally, we talked about the Western case-law and that the Sharia in the West concerns not only the question of the adaptability of Islamic law. Rather, the Sharia practices are viewed in the limits of the Western principle of freedom of religious expression which is to be balanced with the other Western legal values. The study of the several judgments of courts in the West showed that one or another Sharia based practice might be accommodated in Western social life if it does not contradict to the core principles of Western legal tradition.

The status and role of Islamic law in the Middle East is the object of our research in the last section of the dissertation. We agree, that to understand Islam and Islamic law as well one necessarily needs to know the Arabs and their states.[768] Equally by chance and by

768 Frederic-Jerome Pansier, Karim Guellaty, *Le droit musulman* (Paris: Presses Universitaires de France, 2000), 6.

choice the Kingdom of Jordan and its legal system became the case for our analysis. We had an opportunity to carry out the research in such Jordanian institutions like the University of Jordan, the Constitutional Court of Jordan, and the Sharia Appeal Court. Nothing could have happened without suddenly born friendship with Jordanian professor Mohammad al-Majali who became our supervisor in the research and brother in life. Truth, two months was too short time to gain sufficient level of Arabic language to freely read legal acts and to conduct discussions on specific subjects. Regardless of this, our survey gave fruitful results on the main questions of the dissertation. Additionally, we considered whether and to what degree contemporary Jordanian law is influenced by the traditional Islamic law.

The tendency to depict Jordanian law as if it were analogical to the mere letter of traditional Islamic law should be regarded as a nonsense. Just as the claims that it is merely secular. It is important to note that the contemporary Jordanian law is the result of the compromise of the supporters of Western styled state law, Islamic traditional law and customary law. Religious scholars, the leaders of the main tribes and the state establishment headed by the King are in agreement about the Jordanian legal system because it meets their specific requirements. From our point of view, the compromise is the direct cause of why modern Jordanian state remains among those little in number states in the Middle East which is not labelled as "a failed state".[769] The fact that the General Fatwa Department conducted by Islamic legal scholars is established in the Jordanian state legal system and that the rank of the mufti of the Department is equal to the rank of the Minister in Jordan speaks about the place Islamic law takes in Jordan.[770] If one thinks that a development in the region has reduced tribes as a source of social identity, than it is most likely that he is not well aware of the current social fabric of Jordan. By swearing allegiance to the main tribe of the state all tribes provide legitimacy to a ruling elite and, in return, they receive a suitable degree of autonomy in social arena. Customary rules are accommodated in the legal system of the state whether in written or unwritten form. The sheik of the largest tribe in Jordan, DaifAllah al-Qulab, affirmed that the state court almost always waits until tribes have come to an agreement among themselves before sentencing a perpetrator: if money for the deceased is paid, the sentence will be significantly reduced.[771] This is customary and Islamic rule of *diyah* which means the financial compensation paid to the victim or heirs

769 Two books and the article of how Jordan deals with the question of jihadists inside a country.

770 Till 2006 the General Fatwa Department was a part of the Ministry of Religious Endowments. In 2006, a law was passed which declared independence from the General Fatwa Department from the Ministry and other official bodies, and the rank of the Mufti became equal to the rank of Minister in the country. The work in the Department is conducted by Islamic legal scholars and specialists in the sciences of Islamic legislation. According to the law, the tasks and duties of the Department are the following: (a) supervising and organizing of fatwa affairs in the Kingdom; (b) issuing fatwas on general and specific matters in accordance with the provisions of the law; (c) preparing of the required research papers and Islamic studies on important matters and emerging issues; (d) producing a periodic specialist academic research papers in Shari'ah and Islamic sciences and related fields; (e) cooperating with scholars of Islamic law in the Kingdom and outside of it regarding fatwa affairs; (f) offering opinions and advice in matters presented to it by state agencies. More information about institution is available at: www.aliftaa.jo (last visited April 23, 2017).

771 More information is available: www.washingtonpost.com/news/monkey-cage/wp/2015/05/28/do-jordans-tribes-challenge-or-strengthen-the-state/?utm_term=.c92f41b94489 (last visited April 23, 2017)

of a victim in the cases of murder, bodily harm or property damage.[772] Thus, all the major tribes of the Jordan keep cultivating those customary practices which are accommodated by the state.

Our study takes into account some peculiarities of the Jordanian legal system. A number of legal rules, including those from the Constitution, the Criminal and Civil codes, receive our attention. It tends to prove that Jordanian legal system, while being considerably based on Islamic legal framework, undergoes a reasonably slow and sufficiently comprehensive shift. Before that, we tend to deliver a short introductory part about the Middle East. It can be helpful to capture the essence of the question where this region is heading in the twenty-first century and how the Kingdom of Jordan looks like in the whole picture of the Middle East.

6.3.1. The Middle East today: some general remarks

The Middle East of the contemporary time is undergoing tectonic shifts. In fact, the situation in the region can be compared with a particular historical period. One historical comparison that comes to Richard Haass's mind when looking at the current Middle East is that of the Thirty Years War, the political and religious struggle fought by local forces and outsiders alike within and across borders that decimated Europe in the seventeenth century.[773] Very similarly to the present events on the ground, it was not primarily a religious conflict. Although religion was the core component of identity, it had to compete with social, political, gender, linguistic and other distinctions. As all opposing sides were religious, the difference lied in that how they related the faith and action. Here, Peter H. Wilson enumerated moderates and militants, saying that the latter group which saw the conflict as a holy war became especially dangerous when began to interpret the Bible in providential, apocalyptical terms, relating current events directly to the texts.[774] Today's Middle East as the result of local pathologies made worse by foreign policy action and inaction alike is the most unstable part of the world.[775] One might say that this is not our business and that the Middle East must deal with the state on the ground itself. However, at least refugees and terrorism shows that what happens in the Middle East does not stay in the Middle East.[776]

In the context when in the Middle East local identities are more based on the religion, tribe, ideology, customs than on the nationality or state's constitution, the role of Islamic

772 Blood money is an alternative punishment to equal retaliation. The Quran speaks of the blood money in the verse 4:92.

773 Richard Haass, *A World in Disarray: American Foreign Policy and the Crisis of the Old Order* (New York: Penguin Press, 2017), 176.

774 Peter H. Wilson, *The Thirty Years War: Europe's Tragedy* (Massachusetts: Harvard University Press, 2011), 9-10.

775 Richard Haass, *supra note*, 773: 175.

776 House of Lords, Select Committee on International Relations. *The Middle East: Time for New Realism*. 2d Report of Session 2016-17 (HL 159), 3.

religious sources receive new heights of the significance. Those who want to kill not just those coexisting, but rather the idea of coexistence prefer literal reading of a handful of verses to justify their atrocities. Whether these actors will make an impact on the youth is the central question which might change the future of the region. The Middle East is witnessing a youth boom where young people (15-24 years) make up more than a quarter of the population.[777] In their hands will be the question what role the Islamic religious law should play in the future of the Middle East lands.

In most cases in the present Middle East, the feeling is as if Muslims are building the plane as they fly it. Examples of Iraq, Libya, Yemen and other failed states do not need additional explanation. In this light, rare cases of success in the Middle East need to be taken into consideration. The Kingdom of Jordan is treated as one of the most stable states in the Middle East. To understand the strength of the system and the role Islamic religious law plays in the contemporary Jordan can be helpful in the search of the model exemplary to the other Middle East states. To find out the peculiarities of the Jordanian legal system in all probability is to realise to what extent Islamic religious law might impact the successful states of the region. Here, the question of openness and flexibility of Islamic law in the contemporary Muslim country is of paramount importance.

6.3.2. Constitutional system of Jordan and Sharia

Our research of the Jordanian legal system begins with the Constitution of Jordan amended in 2016.[778] The task here is not only to understand the constitutional system but also to focus our discussion on the place Islamic law receives in the constitutional regulation of the state. According to the Constitution (Art. 1) adopted in 1952, the Kingdom of Jordan is a parliamentary constitutional monarchy. It is the Sunni state with the majority of population of Muslims. The Christians today make up about 4-5% of the population. Although Islam is prescribed as the religion of the state (Art. 2), the state guarantees equality before the law to all people despite their race, language or religion (Art. 6 (1)). It is striking to notice that the ground of gender here is not mentioned. It is very likely that such clause would stand in a conflict with customary traditions and partly with a number of Sharia rules as well. With particular regard to religion, the Constitution (Art. 14) states that the freedom to exercise one's rites of religions and creeds must comply with the customs observed in the Kingdom, if such is not inconsistent with public order and morality.

Under the Jordanian Constitution the family is the basis of its society. The essence of the society, according to the Constitutional letter, lies in three components: religion, morals and patriotism (Art. 6 (4)). Three core elements of the society remind us the Quranic verse 4:59 which invites to obey God, the Prophet and those in authority. Patriotism signifies loyalty to the rule of the King who is in authority in Jordan However, this is not to say that religious minorities necessarily feel pressure in Muslim-majority country. The representatives of

777 House of Lords, *supra note*, 776: 8.

778 In the following discussion we will refer to the the Constitution of the Hashemite Kingdom of Jordan amended in 2016.

Christian community see no signs of discrimination provided by the Muslim state-law: "Jordanian Christians have nine seats reserved to them in the House of Representatives and are well represented in local business."[779] Additionally, the Jordanian Constitution guarantees for people all right and public freedoms including the right of the personal life (Art. 7(2)), property rights (Art. 11)), freedom of opinion (Art. 15) and so forth.

In express terms the Jordanian Constitution states that the nation is the source of powers (Art. 24 (1)). In the following articles it becomes evident that there are three types of powers in Jordanian state, namely, legislative, executive and judicial. The legislative power belongs to the Parliament which consist of the Senate and the House of Representatives, and the King (Art. 25). The executive power is vested to the King who exercise it through ministers (Art. 26). The judicial power is described as independent power which issues all judgments in accordance with the law and in the name of the King (Art. 27). Although the Constitution guarantees to the nation the status of the source of powers, the question lies in the ways through which it can exercise. Some observers claim that after the last constitutional amendments, the King retook all the powers in his hands and that the true source of powers in Jordan is the King. The gradual concentration of powers in the hands of one leader enabled to express concern that Jordanian parliamentary system was already replaced in a presidential monarchy, a hybrid of presidential and monarchic systems.[780]

The order in which the Constitution speaks of the powers shows the status of it in the constitutional system of the state. As might be predicted, the executive power takes the first place in the order. The King plays the key role in Jordan and participates in the formation of all three powers. In the very beginning of the Constitution it is stated that Jordan is a hereditary monarchy (Art. 1). Hereditary transmission of political power is more a customary tradition than the requirement of the Sharia as such in Islamic world. N. Coulson said that the theory based on the election of the Caliph with regard to his experience, wisdom and competence was a phenomenon of golden years of Islam which in the time of Ummayad and Abbasid rule was replaced by the rules related to the hereditary power.[781] Since then, it is predominant tradition in the majority of Middle East countries to have a hereditary monarchy. According to the Jordanian constitution, the Royal title shall pass to the holder's eldest son. If the King has no son, then one of his brothers might be selected as the new King (Art. 28 (a, b)). In the absence of brothers and nephews, the title of to the Throne shall pass to the uncles and their descendants (Art. 28 (c)). The person who takes the Throne must be of Islamic religion, mentally sound, born by a legitimate wife, and of Muslim parents (Art. 28 (e)). The King attains his majority on the completion of eighteen years of his age (Art. 28 (g)). Thus, after the oath given before the Parliament, the King becomes the head of the state.

779 "Jordan: The safe haven for Christians fleeing ISIL". The National. Feb 14, 2015. More information is available: www.m.thenational.ae/world/middle-east/jordan-the-safe-haven-for-christians-fleeing-isil (last visited April 19, 2017)

780 "Jordan's 2016 constitutional amendments: A Return to Absolute Monarchy?" Article published in Constitutionnet, 27 May, 2016. More information is available at: www.constitutionnet.org/news/jordans-2016-constitutional-amendments-return-absolute-monarchy (last visited April 20, 2017)

781 Noel J. Coulson, *supra note*, 31: 83.

With regard to the relation to the other powers, the King holds extra-ordinary powers. Concerning the legislative power, he affirms the date of elections to the House of Representatives (Art. 34 (1)). The King may dissolve as the House of Representatives so the Senate (Art. 34 (3-4)). Important to notice that if the House of Representatives is dissolved, the sessions of the Senate are suspended (Art. 66). The King even appoints the members of the Senate and the Head of the Senate from among them and accepts their resignation (Art. 36). According the newest amendment of 2016 of the Constitution, the King exercises his powers alone in the following appointments: Crown Prince, Viceroy, Chairman and members of the Senate, Chairman and members of the Constitutional Court, President of the Judicial Council, Army Commander, Intelligence Chief and Director of Grendarmerie (Art. 40 (2)). Regarding the executive power, the King has the right to appoint and dismiss the Prime Minister and the Ministers (Art. 35) who hold the position in the Council of Ministers with the Prime Minister as the head (Art. 41). The Prime Minister and the Ministers might simultaneously be the members of the Parliament (Art. 52).

Regarding the legislative power, it consists of two Houses: the Senate and the House of Representatives (Art. 62). According to the Constitution, the Senate consists of a number not exceeding one-half of the number of the House of Representatives (Art. 63). The members of Senate must be of the age forty years old and be one of the following classes in order to be appointed by the King for the tem of four years: present or former Prime ministers and ministers; former ambassadors; speakers of the Parliament houses; presidents and judges of the Court of Cassation and of the Civil and Sharia Courts of Appeal; retired military officers and so forth (Art. 64). Speaking about the House of Representatives, here Jordanian people have a right to express the essence of the Constitutional statement that the nation is the source of power. The members of the House of Representatives are elected by general, secret and direct election (Art. 67). Important to mention that after the 2016 amendments of the Constitution, there is no provision according to which Jordanians having two nationalities cannot be the members of either of two Parliament houses. The House of Representatives is elected for the term of four years and the candidates must be not less than thirty years old. Again, the King has a right to prolong the term for a period not more than two years (Art. 68). The election should take place during the four months preceding the end of the term of the House and if the election has not taken place in such period, the House should remain in the office until the election of the new House (Art. 68 (2)).

Regarding the issuing of laws, the Prime Minister refers the draft of every law to the House of Representatives which have the right to accept, amend, or reject the draft; in all cases the draft must be referred to the Senate. To illustrate the procedure we may look at the last legislative initiative from the cabinet of ministers. On 23th April 2017 the Jordanian Government has approved a draft resolution repealing Article 308 of the Penal code that allows rapists to avoid prison by marrying their victims and staying with them for five years.[782] Now the draft needs to be ratified by the Parliament of Jordan and, if agreed, it is to be signed by the King. No law may be promulgated unless passed by both Houses and ratified by the King (Art. 91). If any of two Houses twice rejects the draft of any law

782 More information is available on the official page of state news agency: www.petra.gov.jo (last visited April 20, 2017.

and the other House accepts it, amended or not amended, both houses have a meeting in a joint sitting presided over by the Speaker of the Senate to discuss the articles in dispute. Acceptance of the draft is conditional on the issuance of the resolution of the joint House by a two-thirds majority of the members present (Art. 92). According to the article 84 (3) of the Constitution, if the voting is related to the Constitution or to a motion of no confidence in the Council of Ministers or in one of the Ministers, the votes should be given by calling the members in their names and in a loud voice. Under the letter of the Constitution of Jordan, ten or more members of either the Senate or the House of Representatives may propose laws. Every proposal shall be referred to the concerned committee in the House for opinion. If the House contends to accept the proposal, it refers it to the Government for putting it in the form of draft law, and to submit it to the House in the same session or in the session that follows (Art. 95 (1)).

If to speak of the judicial power, the Constitution of Jordan distinguishes it into two chapters. One is devoted to the regulation of the Constitutional Court and the other to the judicial power. The article related to the Constitutional Court might be found before the chapter devoted to the legislative power of the state. According to the Constitution, the Constitutional Court which was established in June of 2012 is an independent and separate judicial body. Alongside the pronounced independence of the institution, it is stated that the King appoints the members of the Court including its President (Art. 58 (1)). The Court has the constitutional obligation to declare the statement on the constitutionality of the applicable laws and regulations. Both Houses of Parliament and the Council of Ministers have the right to directly challenge the constitutionality of the laws (Art. 60 (1)). Also, the parties of the case may raise the issue of the non-constitutionality and the court, if it finds that the plea is serious, refers it to the Constitutional Court. The Court's judgments are final and binding on all authorities. At the same time it is stated that all the judgments of the Court are to be issued in the name of the King (Art. 59 (1)). According to the Law of the Constitutional Court, in addition to the responsibility of the Court to oversight the constitutionality of the applicable laws and regulations, the Court interprets the provisions of the Constitutions.[783] The Court has this right if such is requested therefrom by a decision issued by the Council of Ministers or by a decision taken by either House of the Parliament by majority (Art. 59 (2)).

Apart from the Constitutional Court, the Constitution states that there are three types of courts in Jordan: civil courts, religious courts and special courts (Art. 99). Civil courts exercise their competences in respect of civil and criminal jurisprudence (Art. 103 (1)). Civil Code and Penal Code of Jordan is applied in the civil courts. Matters of personal status are specified by law and in accordance therewith fall within the sole jurisdiction of the Sharia courts when the parties are Muslims (Art. 103 (2)). The Code of Personal Status is the law according to which judges in Sharia courts deal with personal status issues. The matters of personal status includes all what is family law about: marriage, divorce, custody, inheritance, adoption and other issues. What if Sharia courts' judges cannot find a provision in the Code to deal with concrete legal issue? The Code of Personal Status, more concretely, the article 523 gives a clue: "What have not been mentioned in this code shall be referred to the most

783 Article 4 of The Law of the Constitutional Court. No. 15 of 2012.

preferred rule by the Hanafi Madhhab, it is not found therein, then the court will judge according to the most suitable Islamic juristic rules from the fiqh law texts."[784] Important to highlight that according to the Code of Islamic Jurisdiction providing the guidance about the applicable law in the Sharia court, from the year of 2016 the judges might apply any of official school of fiqh, whether form Sunni or Shia branch.[785] Religious courts are divided into the Sharia courts and the Tribunals of other Religious communities (Art. 104). The Sharia courts decide cases in the following matters: matters of personal status of Muslims; cases of blood money (diya) if the two parties are both Muslims or one of the parties is not a Muslim and the two parties consent to that the right of jurisdiction be for the Sharia courts; matters pertaining to Islamic endowments (Art. 105). The Article 106 states in express terms that Jordanian Sharia courts in their jurisdiction apply the provisions of the Sharia law. By the Sharia law, as was said, first of all the importance of the Hanafi fiqh law must be kept in mind. Meanwhile the Tribunals of Religious communities are the tribunals of the non-Muslim religious communities that have been or will be recognized by the Government as established in Jordan (Art. 108). According to the Constitution, the Tribunals apply the procedures and provisions related to the matters of personal status which are not considered matters of personal status of Muslims within the jurisdiction of the Sharia courts (Art. 109 (2)). Eventually, the third type of courts, the Special courts, exercise their jurisdiction in accordance with the provisions of the laws relevant thereto (Art. 110).

6.3.3. Customary and Islamic law in Jordanian civil and penal codes

Alongside the Constitutional regulation, our study aims at exploring some other legal provisions from the Jordanian Penal Code and the Civil Code. Initially, we focus on the Penal code in order to research two cases, namely, the case of honour killing and the contested issue of pardoning rapists if they marry their victims. Here, we will see how customary law and Sharia law is enshrined in the state-made law. Eventually, the Civil Code, which was already discussed in Chapter Four, will be studied by taking into account some its relationship with Hanafi fiqh law.

The relationship between state law, Islamic law and customs in the case of the crimes of adultery, rape and honour killing needs to be considered here. Under the Penal Code, for the crime of adultery one is to be imprisoned for a period from one to three years (Art (1)). If adultery is committed while being married than the penalty is not less than two years (Art. 282 (2)). Under traditional Islamic law unlawful sexual intercourse of married person is punished by stoning and of the unmarried person who had never consummated a marriage – one hundred lashes.[786] With regard to the evidences, according to the Penal Code of

784 The Hashemite Kingdom of Jordan, Supreme Judge Department, The Code of Personal Status, No. 36, 2010.

785 The Hashemite Kingdom of Jordan, Supreme Judge Department, The Code of Islamic Jurisdiction, No. 31, 1951 with amendments made in 2016.

786 The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *supra note,* 462: 539.

Jordan, evidences to proof adultery are catching the male and female while in action or the judicial confession or the existence of inclusive documents which prove that the crime was committed (Art. 283). Under the Sharia law, one can be punished for such crime if there is a confession of accused or there are four Muslim men witnesses who might prove the fact of the crime. Accordingly, if unlawful sexual intercourse by married or unmarried person is committed, it is an Islamic crime of zina listed in hudud and is mentioned in the Quran (verse 24:2). The term zina denotes all categories of sexual misconduct such as fornication, adultery and rape i. e. the rape of the offender, not that of his victim. Few Prophetic hadith relates to rape in the time of the Prophet. The most popular transmitted hadith indicates the order of stoning for the rapist and no punishment for the raped. To prove such crimes under Islamic religious law is almost impossible because of the requirements of witnessing or of confession of the accused. Whereas, under the Jordanian state law, as we see, there is additional stipulation which talks about inclusive documents which might prove the fact of the crime.

With regard to the crime of rape, such crime is not separately mentioned in the Quran but rape, as was said, belongs to the hudud crime of zina. Rapist will be punished by death if force on the victim is proven in Sharia. The Jordanian Penal Code defines rape as a crime against morality and public ethics and not on the bodily integrity. In terms of Jordanian state-law, the general norm of the Penal Code states that for the sexual intercourse with a female against her will by the use of force or threats or trick or deception is punished with temporary imprisonment with hard labour for a period not less than ten years (Art. 292 (1)). Further, it is clarified that if one rapes a girl who did not reach fifteen years must be punished by the death penalty (Art. 292 (2)). According to the Code, the death penalty is the hanging of the convinced person (Art. 17(1)). Another legal provision states that if one has sexual intercourse with a female who reached fifteen years of age and under eighteen years, he is punished by temporary imprisonment for a period not less than five years (Art. 294). The most controversial provision of Jordanian Penal code which somehow connects adultery and rape is enshrined in the article 308. The article 308 (1) states that "if a correct marriage contract is concluded between the perpetrator of rape and the victim, any pursuit shall be stopped; if a judgment was issued in the case, execution of penalty shall be suspended." Further provision (Art. 308 (2)) adds: "the public prosecution shall regain its right to reinitiate the legal action and implement the penalty if, before the passage of three years of committing the misdemeanour; or five years of committing the felony, such marriage ended by divorcing the woman without a legitimate cause." Very similar provisions might be found in a number of other Muslim countries, for instance, the same regulation is stipulated in the Lebanese code (Art. 552). Such provision is seen as partly a sign of Sharia law and partly as reflection of customary practices in the society.

The essence lies in the problem that it is very problematic to prove the crime of rape in legal terms. If a woman cannot prove the crime of rape, than her testimony becomes a kind of "confession" of adultery what is punishable by state-law and everyone is aware of what the Sharia says on such act. The rapist might provide argument that there was no force in the sexual intercourse and if no one witnesses in the side of a woman than it becomes an issue of a false accusation or, even worse, the question of honour of her family. In extreme cases,

women in Jordan who report rape can be murdered in so called "honour killing". Jordanian lawmakers have often argued that Article 308 prevents rape victims from being outcasted by society. Even more, the Civil Status Law of Jordan does not recognize the new-born as "legitimate" unless there is a legal marriage contract. Usually the victim's family and victim agrees for a possibility of marriage in order to avoid the tarnishing of the victim's reputation. In this light, a victim afraid of the family's decision regarding honour killing because it is old-rooted tradition of the family to avoid any harm to reputation from society. Thus, a victim is forced in such situation to agree having marriage without saying anything about the issue of rape to the family. What remains in such cases for women is to make a marriage contract with her rapist what is lawful under the article 308 of the Penal Code.

According to the figures from the Ministry of Justice, 159 rapists avoided punishment by marrying their victims between the years of 2010 and 2013, and 300 rapes were recorded annually one average during the same period. The feminist campaign group "Equality Now" informed about one of the cases when a young woman (20) became pregnant after being drugged and raped by her employer (50). According to a woman, she could not tell her family because of family's honour and what remained was to sign a marriage contract with a rapist.[787] Reacting to the societal concern, the government of Jordan on 23 April 2017 scrapped a controversial legal provision that pardons rapists if they marry their victims. Now it should be passed by the Parliament and ratified by the King and the old-fashioned legal provision might be removed. This is not only a legal amendment. Also it might be seen as a sign of the further refraining from the customary norms that are incompatible with human rights and contemporary rule of law.

Interestingly, that for a number of observers, the abolishment of the article 308 signify a removal of a possibility to make a solution. According to them, in a number of cases marriage permitted to avoid an honour crime. According to us, it is against the law of the current time to justify unlawful and unhuman legal provision. The victim must be provided necessary protection under the law and the mechanism of implementation of law must be ensured by the state. Eventually, educational programs must be launched in order to eliminate with the roots unlawful practices. Legislative change usually makes no sense to the deep-rooted traditions of community in neither direction, thus, it is not likely that a number of honour crimes would increase because of the absence of the article 308. From one side, the community will continue to seek collective community's or family's justice to restore the honour because such practices cannot be changed in a day. From the other, legislation and legal implementation must find a way protect victim's rights and to implement justice as it is understandable in current time. The latter task needs to be reached immediately by making one more step. The Penal Code is to be challenged because it is very likely that some of its provisions justify honour crimes.

Three articles of the Penal Code of Jordan are closely related to the honour killing. According to the Penal code (Art. 98), "Whoever commits a crime while in a state of rage which is the result of an unjustifiable and dangerous act committed by the victim, benefits

787 More information is available: www.independent.co.uk/news/world/middle-east/jordan-repeal-law-rapists-marry-victims-escape-punishment-loophole-men-women-a7656446.html (last visited April 20, 2017).

from a mitigating excuse." The article 97 delivers two provisions regarding a mitigating excuse. Firstly, if the felony is punishable by the death penalty or by life imprisonment with hard labour or life detention, the penalty might be replaced with imprisonment for a minimum of one year (Art. 97 (1)). Secondly, if the act constitutes any other felony, then the penalty might be imprisonment from six months to two years (Art. 97 (2)). Eventually, the article 340 (1) states: "Whoever surprises his wife or one of his female decedents or ancestors or sisters in the act of adultery or in illegitimate bed and murders her immediately or her lover or both of them or assaulted them and the assault resulted in death or injury or harm or permanent disfiguration, he or she shell benefit from a mitigation excuse." In the same line, the wife who surprises her husband shall benefit from the same excuse under the similar circumstances (Art. 340 (2)). Under these provisions, the perpetrator of honour crime usually is imprisoned for the time from six months to one year. The issue of honour murders has witnessed a huge debate in Jordan over the past sixteen years with activists demanding better protection methods to spare the lives of women, including amending the laws that offer lemency to killers. According to the supporters of movement "No Honour in Crime", there is an urgent need to change legal punishments and the very culture that makes these killings possible. Human Rights Watch researchers also invites the government of Jordan to change the Jordanian law which currently lets perpetrators of these crimes to receive lighter sentences.[788]

The honour crimes is the customary concept which has nothing in common with the Islamic law. The Resolution 1327 (2003) of the Council of Europe states that: "The Assembly notes that whilst so-called "honour crimes" emanate from cultural and not religious roots and are perpetrated worldwide, the majority of reported cases in Europe have been amongst Muslims or migrant Muslim communities (although Islam itself does not support the death penalty for honour-related misconduct)."[789] That there is nothing in the Quran that permits or sanctions honour crimes acknowledges J. Brown: "No Muslim scholar or any time, either medieval or modern, has sanctioned a man killing his wife or sister for tarnishing her or the family's honour."[790] This is customary practice which is strongly rooted in the Arab societies. It was shocking news in 2013 that many 15-years-old Jordanians support honour killings. In total, 33.4% of all respondents either "agreed" or "strongly agreed" with situations depicting honour killings.[791] Knowing that 70% of the Jordanian population are under the age of 30[792], this sounds worrying. In contrast, even religious figures of the state expressed a negative opinion towards honour killing as un-Islamic phenomenon. The Iftaa Department of the

788 More information is available at: www.hrw.org/news/2016/10/27/recorder-honor-killings-rise-jordan (last visited April 20, 2017.

789 More information and the text of the Resolution is available at: www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17106&lang=en (last visited April 20, 2017).

790 Jonathan Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (Oxford: Oneworld publications, 2014), 180.

791 More information is available at: www.cam.ac.uk/research/news/belief-that-honour-killings-are-justified-still-prevalent-among-jordans-next-generation-study-shows (last visited April 20, 2017).

792 Organization for Economic Co-operation and Development, Youth in the MENA: How to bring them in, 2016: www.oecd.org/mena/governance/Youth-in-the-MENA-region.pdf (last visited 20 May, 2017).

Kingdom of Jordan issued a fatwa prohibiting the murder of women in the name of family honour. The question was posed whether so called honour crimes are Islamic. The fatwa stipulates that it is strictly against Sharia law for anyone to kill his female relative claiming family honour.[793] In his interview the mufti at the Iftaa Department Hassan Abu Arqoub said that Islam cherishes life and forbids the killing of any human being without a legal justification.[794] With a growing pressure from society, the clauses of Penal Code which justifies such practices will be soon abandoned.

It is to be noted that the questions regarding criminal law can be often found in the fatwas of the General Fatwa Department of Jordan. Of course, fatwas are based on religious norms and are non-binding. But the very fact of popularity to ask for a guidance from religious scholars proves the significance of Islamic law in the society. Also, the fact that the institution delivering fatwas was established within the system of state institutions proves that the King and the government feels a social pulse very well. One more argument, albeit historical, might be added to understand such cooperation. The classical Muslim balance of powers was not between executive, judicial, and legislative power as is in modern states, but rather between the government as a whole and the non-governmental forces of scholarly community. Neither had absolute power over the law, and each institution recognized the other's presence and role in the system.[795] For N. Feldman, this balance explains why the traditional Islamic system of governance succeeded for as long as it did.[796] In the case of the contemporary Jordan, we see how the government headed by the King accurately conduct the course of the country making scholarly community the consisting part of the state. Contemporary Muslim state is capable to unite actors from different realms and probably it is its biggest strength in the age of terrorism and growing influence of political Islam, whether of Sunni or Shia branch.

In addition to the discussion on the legal provisions of Penal Code, our attention now should be shortly paid to the Civil Code of Jordan (1976). We have already talked on a number of issues regarding Civil Code of Jordan in the Chapter Four and here we are to continue it by delivering only some additional points. As in the case of Penal Code, so here we concentrate on the question of relationship between state-made law and Islamic law in civil law matters. Jordanian Civil Code is mainly based on French Civil Code and Ottoman Civil Code (Mejelle), thus, it is partly influenced by Western law and by Hanafi fiqh law on the basis of which the Mejelle was constructed. The Code in the beginning talks about the hierarchy of the sources. According to the section (2), if the court find no provision in the Civil Code it decides the case by the rules of Muslim jurisprudence "which are more adaptable on the provisions of the Code." It means that if a judge cannot find a suitable rule in the positive law, then he should embark on the search of the Islamic fiqh rule. By "more adaptable on the provisions of the Code", the authors of the Code speaks of the fiqh law of

793 The fatwa is available: www.aliftaa.jo (last visited March 12, 2017).

794 The interviu is available: www.jordantimes.com/news/local/honour-crimes-anti-islamic---fatwa

795 A. Quraishi, *The Separation of Powers in the Tradition of Muslim Governments.* In *Constitutionalism in Islamic Countries: Between Upheaval and Continuity.* Edited by Rainer Grote and Tilmann J. Roder (Oxford: Oxford University Press, 2012), 63.

796 Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 7.

Hanafi branch. The Hanafi fiqh law was official law of Ottoman Empire the part of which the territory of Jordan was for more than five hundred years. The Mejelle stayed in force until the enactment of the Jordanian Civil Code. In general, the Ottoman Civil Code works as the archetype for all codified Middle Eastern civil law and marks the necessary starting point for the analysis of contemporary civil codes.[797] The current Civil Code of Jordan not only enumerates Hanafi law as the primary source of law if state law gives no answer. Even more, the section (3) of the Code notes that the rules of Islamic fiqh might be used as the references to understand one or another Code's provision, its interpretation and meaning.

Further, under the Civil Code, if there is no necessary provision in the Islamic fiqh, then "the principles of the Muslim Sharia" must be applied. Properly speaking, if no fiqh law can be found, than the judge might search for the answer among the Sharia norms and principles as they are expressed in the letter and spirit of the primary sources of Islam. Then, the Civil Code goes further in providing additional sources. The section (2) states that in the case when the judge cannot find suitable rule in the Civil Code, in Islamic fiqh law and even among the Sharia norms and principles, he might take customary law for the basis of his judgments. It is clarified that "Custom shall be general, ancient, stable, applicable and continuous and shall not contravene the provisions of the law, public order and morals." In reality different areas of the Jordanian state are not unique in their customs. This is why the Code adds that "If custom is that of a certain town, it shall be applicable in that town". Emphasis should be put here on the personality of judge who most probably must be aware of the customary practices of the region where he seeks be appointed as a judge. Lastly, the Code adds that if there is no suitable custom to deal with the case at hand, the judge should apply the rules of equity.

From the established hierarchical order of the sources we see that Islamic law as well as customary law play extremely important roles in civil law matters. If to look at the content of the Code, we might find that a number of sections are word by word borrowed from the Ottoman Civil Code. Especially, the Hanafi fiqh maxims, which were enumerated in the beginning of the Mejelle, find place in the Civil Code of Jordan as well. The sections (213-240) speak in the words of the traditional fiqh maxims. For instance, section (222) states that necessity excuse prohibitions; section (214) rules that the fundamental principle in contracts is the intention and meanings and not the words and phrases; section (220) says that custom is an arbiter whether it is general or particular and that the literal meaning shall be discarded if that is supported by custom; section (224) establishes one more principles by saying that "what is recognized by custom shall be like that which is stipulated". All these and other stipulations of Civil Code of Jordan reflect the essential role Islamic fiqh law played in the construction of the Jordanian Civil Code.

As in the case with criminal law, the Civil law issues related to various contractual issues are the object of the research of the religious scholars in Jordan. The General Fatwa Department receives many questions regarding civil law issues. To illustrate the relationship between state-made law and Islamic law, one fatwa and argumentation of religious scholars related to the contract of rent need be taken into account. The questioner asked whether a rent contract ends by the death of the lessor, and whether it is permissible for the heirs to

797 Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007), 245.

terminate it. The answer of the official religious scholars was the following: "A rent contract is among the binding contracts with a specific period of rental during which none of the contracting parties may terminate it, save with the approval of the other. Accordingly, the death of the lessor doesn't affect the validity of the contract because the ownership of the rented property is transferred to his heirs, so the leassee may benefit from it in return for paying the agreed upon sum. Ash-Shirbeeni, a Shafii scholar, said: "The validity of the rent contract isn't nullified by the death of the contracting parties, or one of them; rather, it continues until the specified period at which the rental ends, because it is as binding as a sale contract." Article (709) of the Jordan Civil Code stated, "The rent contract isn't nullified by the death of any of the contracting parties." Accordingly, the aforementioned heirs don't have the right to terminate the rent contract in question because the lessor passed away. And Allah knows best."[798] As we see, the religious scholarly community which take a position as the complementary part of the state government connects the state law and Islamic fiqh law in the way that it is seen as two sides of the same coin.

From the short discussion on the Jordanian state law it become evident that there is a close theoretical, institutional and practical link between state law, Islamic law and customary law. The harmony reflects not only societal picture but also the compromise achieved and retained among the government, tribes and scholarly community. It is not a question whether Islamic law and customary law is alive in Jordan, because Islamic law and customary law is complementary part of Jordanian legal system. What is important is that while being closely connected, they experience equally intensive development. A number of Islamic and customary norms enshrined in state law gradually leave the stage because of their incompatibility with contemporary time and requirements. Truth, if formally or in the way of changing one or another state law transformative wave influences the whole pluralistic content of the Jordan, there is no reason to expect rapid change on the ground. Here, customary practices, obedience to the Sharia rules not rarely take the upper hand in the relation to the state regulations. Paradoxically, the success of Jordanian stability lies also in the fact that the state close the eyes before old-rooted social practices and permit them to be practiced by people. Compromise is achievable only if allowances are permissible. It needs a plenty of time to change something here. While the Kingdom of Jordan knows it pretty well, other states as Libya or Iraq turned to be failed-states because the lesson of Jordan were overseen.

6.4. Summary

Chapter Six consisting of three sections explored the questions related to the Sharia and Islamic law as it is applied and implemented in the present time. The first section took into account both the process of issuing individual digital fatwas and the methodological theory of fiqh for Muslim minorities living in non-Muslim states. Later on, the second

798 The fatwa No. 3246 on the subject "Death of Lessor doesn't Entitle Heirs to Rescind Contract". More information is available at: www.aliftaa.jo (last visited April 24, 217).

section considered two channels through which a number of Sharia norms and Islamic legal rules are implemented in the West. More precisely, this section focused on the Islamic institutions legally operating in the West by investigating a concrete Muslim law Sharia Council in London. Also, Western state legal apparatus (statutory law and court judgments) was analysed by taking into account a number of national laws and court judgments in the national level as well as relevant case-law in the international level. Eventually, the third section turned attention to the Middle East by taking into consideration the case of Jordanian state with the aim to find out whether and to what extent Islamic traditional law influences the current Jordanian state law.

The research permitted to come to a number of conclusions in this chapter. First, the process of issuing digital fatwas makes the Sharia and Islamic law to undergo a twofold mutation. In a considerable part of digital fatwas Islamic traditional law is interpreted in the light of the contemporary time requirements adapting it to the social needs of Muslims, thus, making a shift in the field of Islamic law at least on the individual level. Those issues that receive most of attention in the fatwas addressing to the requirements of Muslims living in non-Muslim states become the objects of a deeper research as a result of which the so called fiqh for Muslim minority in non-Muslim states emerges on the social scene. It is striking to note that the fiqh for Muslim minority intends to make a change in the whole discourse of Islamic law on the doctrinal/methodological level.

Second, Islamic institutions operating in the West and Western state legal apparatus consisting of statutory law and court judgments play a role of the channels through which the Sharia and Islamic law is partly implemented within Muslim communities in the West. The research made at The Muslim Law Shariah Council UK proved that such institutions partly implement Islamic rules mainly in the field of family law. Talking about Western statutory law and relevant case-law, our analysis showed that national legislative acts as well as court judgments partly accommodate a number of Sharia-based rules that do not contradict to the rule of law in the West. Court judgments in England and Canada, which were analysed in this chapter, showed to what extent Western courts can accommodate Islamic rules. At the same time, the analysis of Greek statutory law and relevant case-law proved that Western law and Islamic law can indeed coexist.

Eventually, the research of some Jordanian statutory laws was aimed to reveal the extent to which traditional Islamic law impacts state-made law in the contemporary Jordanian Kingdom. As became evident, the Constitution as well as civil and criminal codes of Jordan encompass a considerable number of provisions borrowed from Islamic traditional law of Hanafi branch. The ongoing debates in the social arena as well as legal amendments of the provisions of Jordanian law make bring a shift in the text of the state-made law in Jordan. All this process gradually transforms Islamic traditional law as a consisting part of Jordanian state-made law as well.

GENERAL CONCLUSIONS

The results obtained during the doctoral research confirmed that openness and flexibility are characteristic to the Sharia norms and Islamic law. For that reason, these normative systems have all the necessary capabilities to be adapted to the changing time and social circumstances. The hypothesis posed in this dissertation was proved by the following conclusions:

1. Reacting to the rapid spread of Sharia norms in the non-Muslim world as well as to the emerging problems related to the question of coexistence between the Sharia and other normative/legal systems, it is suggested to refrain from the still prevailing mistaken tendency to equate Sharia with law in the scholarly discourse and jurisprudence. The research of the Sharia as a threefold notion proved that the Sharia=law approach is insufficient to reveal the concept of the Sharia in its essence. According to the Quranic conception of the Sharia, all the norms of the Sharia stem from God, from the Prophet and those who are in authority, thus, the Sharia has to be understood in its three meanings:
    1.1. The Sharia as a set of purely religious norms enshrined in the text of the Quran and mainly consisting of five pillars of Islamic religion.
    1.2. The Sharia as a common Muslim identity emanating from the normative instructions of the Prophet written in the Sunna and expressed in a form of social and moral principles related to the belonging to the global Muslim community.
    1.3. The Sharia as a set of norms of legal quality which comprise simultaneously a short number of general legal guidelines written in the Quran and Sunna, and a huge amount of man-made Islamic legal rules derived from the mentioned sources by means of human reasoning and interpretation.
2. Mistaken interpretation of the Sharia conception, ignoring its distinction into three meanings, conditioned unreasonable divinization of all the Sharia norms and consequential image as if it were invariable and static in its totality. The analysis of the Sharia conception made in the course of doctoral research revealed that the Sharia can be treated divine and stable solely in its two meanings, i. e. regarding the Sharia as a set of purely religious norms and the Sharia as a set of moral and social norms formulating a common Muslim identity. Whereas, if to acknowledge, that the Sharia as Islamic law is the creation of those who are in authority, it comes to be evident that Sharia in this meaning in no way can be unconditionally and in its totality divinized or sacralised. This is why it is reasonable to pose the question of openness and flexibility of Islamic law including the question of its adaptability.
3. As a result of a research of historical development of Islamic law, it was confirmed that adaptability of Islamic law in the course of the formative (VII-XIII c.) and post-formative (XIII-XIX c.) periods is undisputable fact. It is proved by two fundamental legal theories constructed by the early scholars with the aim to adapt the Sharia and Islamic law to the changing time and social conditions. The theory of sources

(usul al-fiqh) was created by the early religious scholars in the IX century and the legal theory based on the purposes written in the Sharia (maqasid al-Sharia) was formulated in the XIV century:

3.1. The formative period can be described as mainly influenced by the ijdihadic paradigm, when Islamic law was constructed and broadly interpreted on the basis of the theory of sources (usul al-fiqh), by means of which Islamic law was adapted to the living period.

3.2. The period of Islamic legal development was superseded by the period of stagnation in the XIII century when, instead of a direct interpretation of the Quran and Sunna, the scholarly community came into agreement to start grounding their interpretational activities exclusively on the derived fiqh law rules written in the legal manuals of four Sunni law schools. In such a way, the new paradigm of imitation of fiqh law precedents conditioned the disappearance of the line between legal guidelines written in the Quran and Sunna and scholarly made the versions of interpretation of the mentioned sources or between Sharia and its interpretational version. All this permitted to instil in the minds of ordinary people an image of the scholarly made law as if it were divine and invariable.

3.3. Reacting to the widening gap between the fiqh law rules fixed in the manuals of Sunni schools of law and changing social life, a number of independent Muslim scholars of XII-XIV century introduced the methodological theory of law based on the purposes of the Sharia (maqasid al-Sharia) which ensured the possibility to adapt Islamic law to the changing life conditions. In such a way, it was purposed to refrain from the limited and outdated literal way of reading the Quran and Sunna, maintained by the mainstream scholarly community, and to start interpretational activities based on the fundamental purposes of the Sharia, which simultaneously reflected the content of the Quran and Sunna and at the same time complied with fundamental human interests. Despite the fact that it was not permitted to influence the further development of Islamic law on the basis of this methodological theory, the modified version of maqasid al-Sharia came to be regarded as the main tool in the task to adapt the Sharia norms and Islamic law to the new social reality in the modern times.

4. The research of Islamic legal sources proved that none of them can be regarded as an obstacle to adapt Islamic law to the changing time and living conditions, because:

4.1. The analysis of the Quran and Sunna as divine sources of Islamic law shows that the content of these sources, open to the interpretational activities language of the texts, and inevitability of the idea of human reasoning and interpretation (ijtihad) fixed in both sources provide all the necessary capabilities to adapt Islamic law to the changing time and social life requirements.

4.2. The scientific study of such Islamic legal sources and interpretational methods as consensus (ijma) and reasoning based on the analogy (qiyas) permits to conclude the following:

4.2.1. The process of adoption of the Egyptian Civil code (1932-1949) and recently made Amman consensus (2004) on the most crucial Islamic questions prove that ijma as the source of Islamic law has the biggest potentiality to make Islamic law adaptable in the present context.

4.2.2. Meanwhile, the method of qiyas was always the main channel in the efforts to adapt the Sharia and Islamic law to the social transformations. The method of qiyas ensured the feature of adaptability of Islamic law when two primary sources were insufficient to deal adequately with problems of the time and when the strict literal method of legal interpretation promoted in the form of doctrines composed by Sunni fiqh law schools did not allow to connect Islamic law with social realities.

4.3. Depending on the particular place and prevailing tradition, in addition to four basic Islamic legal sources mentioned above, a number of supplementary sources and legal methods were utilized in the process of Islamic legal interpretation in one or another Sunni school of law. Islamic legal rules as the results of the process of scholarly interpretation in one or another Sunni school of fiqh law mainly differed on the choice to hold a particular supplementary source and method of interpretation as an integral part in the formulation of Islamic legal rules. All this also proves that Islamic law is flexible and open in the process of interpretation, i. e. adaptability.

5. The research of scholarly made law (fiqh law) as the result of human legal reasoning and interpretation (ijtihad) revealed that the fact of adaptability of Islamic law can be proved not only by the possibility to ground fiqh law rules in various modern state-made law documents, but also by its capability to undergo the change together with the process of amendment of state made law rules.

5.1. The conception of Islamic ijtihad emanating directly from the primary sources can be held as the main precondition of openness and flexibility of Islamic law in the process of its interpretation, regarding to the changing time and social conditions.

5.2. The analysis of fiqh law revealed that the very historical fact that Islamic law was fixed and frozen in the traditional fiqh law manuals also proves that adaptability is its inner feature. A varying methodological system of legal construction and a set of fiqh law rules created within one or another of four Sunni law schools one more time confirm the capability of Islamic law to be adapted to the different regions and social circumstances. Moreover, as comparative analysis between traditional fiqh rules of Hanafi branch and modern civil codes of Ottoman Empire and of present Jordanian state showed, Islamic fiqh law rules are the consisting part of contemporary legal texts and their content, developing alongside the changing state-made law.

6. The contemporary scientific discourse proves that the further development of Islamic law mainly depends on which approach towards the sources of Islamic law and its interpretation, namely literal/traditional or reformative/liberal, will prevail in the future.

6.1. If literal approach towards the sources of Islamic law becomes the most prevailing one, the question of adaptability of Islamic law could not be posed. In such a case, those scholarly positions whereby Islamic law is static, invariable and alien to the factor of change would have to be confirmed as most reasonable.

6.2. The followers of traditional interpretational theory of Islamic law hold the manuals of fiqh law precedents sufficient enough to deal with contemporary global problems. As a result, they provide a ground to speak the lawyers of the other legal traditions about stagnation of Islamic law and its incompatibility with living time.

6.3. The representers of reformative/liberal approach towards the interpretational process of Islamic legal sources seek to restore ijtihadic tradition (or so called neo-ijtihad) in order to interpret Islamic law according to the present day realities. In such a case, even the most controversial Islamic legal norms, regarding to the need of their adaptability, can become the object of reform. Due to such conclusion, this approach could be regarded as the most suitable to respond adequately to the living period.

7. The research of the selected reform proposal introduced by the contemporary Muslim reformator Abdullahi An'Na-im showed that, in case of a refusal or essential reform of the methodological theory of legal interpretation reflecting nothing more but the historical context, even the least developed Islamic legal aspects could be reformulated according to the present day requirements. More precisely, the proposal of reformulating an old theory of abrogation of the Quranic verses permits not solely to review a huge number of outdated fiqh law rules, but also to recreate the classical methodological theories by means of which Islamic law guidelines written in the Quran and Sunna were interpreted in the course of history of Islam. The reformed theory of abrogation of Quranic verses provides a ground to settle such most controversial issues in Islam as equality between men and women, the doctrine of a use of force, religious freedom or penalties for a number of particular crimes.

8. The research of the contemporary problems regarding the enforcement of Islamic legal norms in the world provides us a possibility to enumerate a number examples of adaptability of the Sharia norms and Islamic law:

8.1. Internet fatwas (religious/legal opinions of Muslim scholars and jurists) and their spread around the world is that contemporary social phenomenon through which the Sharia and Islamic law undergo a twofold process of mutation:

8.1.1. First of all, Islamic legal norms are interpreted and applied in the content of individual fatwas devoted to resolve personal Muslims' problems. By doing this, the Sharia norms and Islamic law undergo the process of adaptation to the present-day needs of Muslims.

8.1.2. Besides that, a number of fatwas on the pressing issues became the point of departure for the creation of the methodological system of fiqh law which gradually turns into a new Islamic fiqh law branch devoted to

adapt the Sharia norms and Islamic law to the current legal realities and social needs of Muslims living in non-Muslim states. The methodological system of fiqh law for Muslim minorities could be developed into even more serious tool for the process of the whole Islamic legal interpretation if the theory of maqasid al-sharia as the main pillar of this system were renewed by the legal criterion of human dignity.

8.2. The Sharia norms and Islamic legal rules are partly implemented both through the Islamic organizations and institutions legally operating in Western states and through the state legal apparatus (statutory law and case-law) of one or another Western country (Greece, Canada, England and so forth):

8.2.1. For example, the institution of the Sharia Council in London implements a number of particular Sharia normative rules in the field of family law adapting it to the social conditions of Muslims living in England.

8.2.2. Besides, the statutory law of Western states accommodates a number of particular Sharia norms which comply with the principle of rule of law as well as with local culture and customs. Western national and international courts test whether one or another Sharia-based religious practice rests in the limits of the principle of religious freedom. Only those Sharia-based norms which are not alien to the Western legal values might expect to be accommodated by the court judgment.

8.2.3. The statutory law and court judgments of Greece in the fields of inheritance and family law prove the possibility of coexistence between Islamic law and Greek state law which is a consisting part of Western legal tradition.

8.3. The research made in the Kingdom of Jordan revealed that Jordanian law is a blend of the state-made law, customary law and traditional religious law confirming the fact of adaptability of Islamic law.

8.3.1. As the research of Jordanian laws showed, their texts as well as their content are mainly influenced by the Islamic fiqh law tradition of Hanafi branch. According to the previously made amendments of Jordanian statutory law, the judges of Jordanian Sharia courts received a right to ground their decisions not only on the Hanafi fiqh law rules but also on the Islamic fiqh rules of the other schools of law.

8.3.2. The research of Jordanian Constitutional text, also of norms written in the criminal and civil codes of Jordan gave a ground to conclude that the fact that Islamic fiqh law rules as consisting part of Jordanian statutory law are capable to be amended in the broader process of amending Jordanian state made law what again proves the adaptability as the core feature of Islamic law. With an involvement of Islamic religious community into the state legal apparatus, all the transformations made by the state are agreed with the religious leaders. It is to be noted that such governance based on the compromise should be treated as exemplary in the context of Muslim majority countries.

BIBLIOGRAPHY

RELIGIOUS SOURCES

1. The Translation of the Noble Qur'an in the English language. Madina: King Fahd Complex for the Printing of the Holy Qur'an, 1980.
2. The Study Quran: A New Translation and Commentary. New York: HarperOne, 2015.
3. Sahih Muslim. Volume I. Translated by Abdul Hamid Siddiqi. New Delhi: Kitab Bhavan, 1978.
4. Sahih Muslim. Volume II. Translated by Abdul Hamid Siddiqi. New Dehli: Kitab Bhavan, 1978.
5. Sahih Muslim. Volume III. Translated by Abdul Hamid Siddiqi. New Dehli: Kitab Bhavan, 1978.
6. Sahih Muslim. Volume IV. Translated by Abdul Hamid Siddiqi. New Dehli: Kitab Bhavan, 1978.
7. Sahih Bukhari. Translator: M. Muhsin Khan.

LITERATURE

8. Abdelaal, Mohamed A. *Taqlid v. Ijtihad: The Rise of Taqlid as the Secondary Judicial Approach in Islamic Jurisprudence*. The Journal Jurisprudence (2012).
9. Abu-Sahlieh, Sami Awad Aldeeb. *Introduction a la societe musulman: fondements, sources et principles.* 2005.
10. Abu-Sahlieh, Sami Awad Aldeeb. *Religion et droit dans les pays arabes.* Bordeaux: Presses Universitaires de Bordeaux, 2008.
11. Ahmad, Ahmad A. *Islamic Law: Cases, Authorities, and Worldview*. London: Bloomsbury Academic, 2017.
12. Ahmed, Shahab. *What Is Islam? The Importance of Being Islamic*. Oxford: Princeton University Press, 2016.
13. Ahmed, Tanveer. *The Muslim 'Marginal Man'*. Policy, vol. 21, no. 1, 2005.
14. Al-Alwani, Taha Jabir. *Towards a Fiqh for Minorities: Some Basic Reflections.* The third edition. Translated by Ashur A. Shamis. London: The International Institute of Islamic Thought, 2010.
15. Al-Alwani, Taha Jabir. *Issues in Contemporary Islamic Thought*. London: The International Institute of Islamic Thought, 2005.
16. Ali, Ayaan Hirsi. *Heretic: Why Islam Needs a Reformation Now*. New York: HarperCollins Publishers, 2015.
17. Ali, Ayaan Hirsi. *The Challenge of Dawa: Political Islam as Ideology and Movement and How to Counter It*. Stanford: Hoover Institution Press, 2017.
18. Al-Azami. *On Schacht's Origins of Muhammadan Jurisprudence*. Cambridge: The Islamic Texts Society, 1996.

19. Ali, Salman Syed; Ahmad, Ausaf. *Islamic Banking and Finance: Fundamentals and Contemporary Issues.* Jeddah: Islamic Development Bank, 2007.
20. *Al-Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law*. Third edition. Translated by Aisha A. Bewley. Norwich: Diwan Press, 2014.
21. Al-Shatibi, Ibrahim Abu Ishaq. *The Reconciliation of the Fundamentals of Islamic Law*. Volume I. Translated by Imran Ahsan Khan Nyazee. Reading: Garnet Publishing Limited, 2011.
22. Al-Shatibi, Ibrahim Abu Ishaq. *The Reconciliation of the Fundamentals of Islamic Law*. Volume II. Translated by Imran Ahsan Khan Nyazee. Reading: Garnet Publishing Limited, 2015.
23. Al-Qaradawi, Yusuf. *Fiqh for Muslim Minorities: Contentious Issues & Recommended Solutions*. Cairo: Al-Falah Foundation, 2003.
24. An-Na'im, Abdullahi Ahmed. *The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan.* Religion (1986) 16. London: Academic Press Inc.
25. An-Na'im, Abdullahi Ahmed. *Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism*. German Yearbook of International Law, Volume 31. Berlin: Duncker & Humblot, 1989.
26. An-N'im, Abdullahi Ahmed. *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law.* New York: Syracuse University Press, 1990.
27. Doi, Abdur Rahman I. *Shari'ah: Islamic Law*. London: Ta-Ha Publishers Ltd, 2008.
28. Sharfif, Abdelmajid. *Islam: Between Divine Message and History*. Budapest: Central European University Press, 2005.
29. An-Na'im, Abdullahi Ahmed. *Islam and Secular State: Negotiating the Future of Sharia*. London: Harvard University Press, 2009.
30. An-Na'im, Abdullahi Ahmed. *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*. The Modern Law Review. Volume 73, No. 1, 2010.
31. Ansary, Tamim. *Destiny Disrupted: A History of the World through Islamic Eyes.* New York: PublicAffairs, 2009.
32. Ashton, Nigel. *King Hussein of Jordan: A Political Life*. New Haven: Yale University Press, 2008.
33. Auda, Jasser. *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach.* London: The International Institute of Islamic Thought, 2008.
34. Barak, Aharon. *Purposive Interpretation in Law*. Translated by Sari Bashi. Princeton: Princeton University Press, 2005.
35. Barak, Aharon. *Human Dignity: The Constitutional Value and the Constitutional Right*. Translated by Daniel Kayros. Cambridge: Cambridge University Press, 2015.
36. Black, Ann; Esmaeili, Hosseini; Hosen, Nadirsyah. *Modern Perspectives of Islamic Law*. Cheltenham: Edward Elgar, 2013.
37. Bechor, Guy. *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*. Leiden: Brill, 2007.

38. Bleuchot, Herve. *Droit Musulman: Histoire*. Tome I. Marseille: Presses universitaires d'Aix-Marseille, 2000.
39. Bleuchot, Herve. *Droit Musulman: Fondements Culte, Droit publice et Mixte*. Tome II. Aixe-en-Provance: Presses Universitaires d'Aix-Marseille, 2002.
40. Bowker, John. *The Oxford dictionary of world religions*. Oxford: Oxford University press, 1997.
41. Brown, Jonathan. *The Canonization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon*. Leiden: Brill, 2007.
42. Brown, Jonathan. *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy*. Oxford: Oneworld publications, 2014.
43. Burton, John. *The Sources of Islamic Law: Islamic Theories of Abrogation*. Edinburgh: Edinburgh University Press, 1990.
44. Campo, Juan E. *Encyclopedia of Islam*. New York: Facts on File, 2009.
45. Charnay, Jean-Paul. *Esprit du droit musulman*. Paris: Editions dalloz, 2008.
46. *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*. Edited by Rainer Grote and Tilmann J. Roder. Oxford: Oxford University Press, 2012.
47. Cook, Michael. *Commanding Rights and Forbidding Wrong in Islamic Thought*. Cambridge: Cambridge University Press, 2001.
48. Cook, Michael. *Forbidding Wrong in Islam: An Introduction*. Cambridge: Cambridge University Press, 2003.
49. Coulson, Noel J. *A History of Islamic Law.* Edinburgh: Edinburgh University Press, 1964.
50. Coulson, Noel J. *Conflicts and Tensions in Islamic Jurisprudence*. Chicago: The University of Chicago Press, 1969.
51. *Diplomacy in the Middle East: The International Relations of Regional and Outside Powers*. Edited by L. Carl Brown. London: I. B. Tauris Publishers, 2001.
52. *Discover Islam*. Edited by Al-Jumuah Staff. Saudi Arabia: Ministry of Islamic Affairs, Endowments, Da'wah and Guidance, 2007.
53. Durant, Will. *The Reformation: A History of European Civilization from Wyclif to Calvin: 1300-1564.* The Story of Civilization: 6. Norwalk, Connecticut: The Easton Press, 1992.
54. Etheredge, Laura. Islamic History. New York: Britannica Educational Publishing, 2010.
55. Fadl, Khaled Abou. *Speaking in God's Name: Islamic Law, Authority and Women*. Oxford: Oneworld Publications Limited, 2001.
56. Fadl, Khaled Abou. *Reasoning with God: Reclaiming Shari'ah in the Modern Age*. London: Rowman & Littlefield, 2014.
57. Feldman, Noah. *The Fall and Rise of the Islamic State*. Princeton: Princeton University Press, 2008.
58. Feldman, Noah. *Rule of Law and Balance of Power in Classical Islam*. The Review of Faith & International Affairs, 2010.
59. Fletcher, Tom. *Naked Diplomacy: Power and Statecraft in the Digital Age*. London: William Collins, 2016.

60. Ghalioun, Burhan. *Islam et Politique: La Modernite trahie*. Paris: Editions La Decouverte & Syros, 1997.
61. Ghobash, Omar Saif. *Letters to a Young Muslim*. New York: Picador, 2017.
62. Glenn, Patrick. *Legal Traditions of the World: Sustainable Diversity in Law*. Third Edition. Oxford: Oxford University Press, 2007.
63. *Global Salafism: Islam's New Religious Movement*. Edited by Roel Meijer. London: Hurst & Company, 2009.
64. Goldziher, Ignaz. *Introduction to Islamic theology and law*. Translated by Andras and Ruth Hamori. New Jersey: Princeton University Press, 1981.
65. Gomaa, Sheikh Ali. *Reponding from the Tradition: One Hundred Contemporary Fatwas by the Grand Mufti of Egypt*. Translated by Tarek Elgawhary and Nuri Friedlander. Louisville: Fons Vitae, 2011.
66. Grassa, Rihab; Hassan, Kabir. *Islamic Finance in France: Current State, Challenges and Opportunities*. International Journal of Islamic Economics and Finance Studies, 2015, Year: 1, Number: 1.
67. Haass, Richard. *A World in Disarray: American Foreign Policy and the Crisis of the Old Order*. New York: Penguin Press, 2017.
68. Hussain, Shahrul. *Riba-Based Mortgages in Dar al-Harb: An Issue of Modernist Application of Fiqh al-Aqalliyat for Muslim Minorities*. Journal of Muslim Minority Affairs, 2016. Vol. 36, No. 3.
69. Haykel, Bernard. *Revival and Reform in Islam*. Cambridge: Cambridge University Press 2003.
70. Hallaq, Wael B. *Sharia: Theory, Practice, Transformations*. Cambridge: Cambridge University Press, 2009.
71. Hallaq, Wael B. *A History of Islamic Theories: An Introduction to Sunni Usul Al-Fiqh*. Cambridge: Cambridge University Press, 1997.
72. Hallaq, Wael B. *The Origins and Evolution of Islamic Law*. Cambridge: Cambridge University Press, 2004.
73. Hallaq, Wael B. *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*. New York: Columbia University Press, 2013.
74. Hassan, Kabir; K. Lewis, Mervyn. *Handbook of Islamic Banking*. Cheltenham: Edward Elgar Publishing Limited, 2007.
75. Hodgson, Marshall G. S. *The Venture of Islam: The Classical Age of Islam*. Volume One. Chicago: The University of Chicago Press, 1974.
76. Hodgson, Marshall G. S. *The Venture of Islam: The Expansion of Islam in the Middle Periods*. Volume Two. Chicago: The University of Chicago Press, 1974.
77. Hodgson, Marshall G. S. *The Venture of Islam: The Gunpowder Empires and Modern Time*. Volume Three. Chicago: The University of Chicago Press, 1974.
78. Hughes, Thomas Patrick. *Dictionary of Islam*. First published in 1885. New Delhi: Munshiram Manoharlal Publishers Pvt. Ltd, 1995.
79. Ibrahim, Ahmed Fekry. *Pragmatism in Islamic Law: Social and Intellectual History*. New York: Syracuse University Press, 2015.
80. Imber, Colin. *Ebu's-su'ud: The Islamic Legal tradition*. Stanford: Stanford University Press, 2009.

81. Ibn Khaldun. *The Muqaddimah: An Introduction to History*. Translated by Franz Rosenthal. Princeton: Princeton University Press, 2015.
82. *Ifta' & Fatwa in the Muslim World and the West*. Edited by Zulfiqar Ali Shah. London: The International Institute of Islamic Thought, 2014.
83. *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*. Edited by Robin Griffith-Jones. Cambridge: Cambridge University Press, 2013.
84. *Islamic Legal Interpretation: Muftis and their Fatwas*. Edited by Muhammad Khalid Masud, Brinkley Messick, David S. Powers. London: Harvard University Press, 1996.
85. Iqbal, Muhammad. *Reconstruction of Religious Thought in Islam*. London: Oxford University Press, 1934.
86. Jackson, Sherman A. *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi*. Leiden: Brill, 1996.
87. Kamali, Mohammad Hashim. *The Dignity of Man: An Islamic Perspective*. Cambridge: The Islamic Texts Society, 2002.
88. Kamali, Mohammad Hashim. *Shari'ah Law: An Introduction*. Oxford: Oneworld, 2008.
89. Kamali, Mohammad Hashim. *A Textbook of Hadith Studies: Authenticity, Compilation, Classification and Criticism of Hadith.* Leicestershire: The Islamic Foundations, 2009.
90. Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge: The Cambridge University Press, 1991.
91. Kelen, Betty. *Muhammad: The Messenger of God.* New York: Thomas Nelson Inc., Publishers, 1975.
92. Khan, Asif. *The Fiqh of Minorities – the New Fiqh to Subvert Islam*. London: Khilafah Publications, 2004.
93. Khadduri, Majid. *War and Peace in the Law of Islam.* Baltimore: John Hopkins Press, 1955.
94. Kurucan, Ahmet; Erol, Mustafa Kasim. *Dialogue in Islam: Quran, Sunnah, History.* London: Dialogue Society, 2012.
95. Lambton, Ann K. S. *State and Government in Medieval Islam. An Introduction to the Study of Islamic Political Theory: The Jurists.* New York: Oxford University Press, 1981.
96. Lewis, Bernard. *The Middle East, A Brief History of the Last 2,000 Years*. New York: Touchstone, 1997.
97. Lewis, Bernard. *A Middle East Mozaic: Fragments of Life, Letters and History*. New York: Random House, 2000.
98. Lindsay, James E. *Daily Life in the Medieval Islamic World*. London: Greenwood Press, 2005.
99. Majali, Mohammad Khazer. *Islamic Culture & Thought*. Fourth edition. Amman: The University of Jordan, 2010.
100. Mallat, Chibli. *Introduction to Middle Eastern Law.* Oxford: Oxford University Press, 2007.

101. Mansfield, Peter. *A History of the Middle East*. Fourth Edition. London: Penguin Books, 2013.
102. Marghinani, Burhan al-Din. *Al-Hidayah: The Guidance.* A Classical Manual of Hanafi Law: Volume One. Translated by Imran Ahsan Khan Nyazee. Bristol: Amal Press, 2006.
103. Marghinani, Burhan al-Din. *Al-Hidayah: The Guidance.* A Classical Manual of Hanafi Law: Volume Two. Translated by Imran Ahsan Khan Nyazee. Islamabad: Center for Excellence in Research, 2016.
104. Marranci, Gabrielle. *The Anthropology of Islam*, Oxford: Berg, 2008.
105. Melamed, Avi. *Inside the Middle East: Making Sense of the Most Dangerous and Complicated Region on Earth*. New York: Skyhorse Publishing, 2016.
106. Menski, Werner. *Comparative law in a Global context. The legal systems of Asia and Africa.* 2 edition. Cambridge: Cambridge University Press, 2006.
107. Mesawi, Mohamed El-Tahir. *From al-Shatibi's legal hermeneutics to thematic exegesis of the Quran.* Intellectual Discourse, Volume 20, No 2, 2012.
108. Milliot, Louis; Blanc, Francois Paul. *Introduction a l'etude du droit musulman*. Paris: Editions Dalloz, 2001.
109. Mirza, Munira; Senthikumaran, Abi; Ja'far, Zein. *Living apart together: British Muslims and the paradox of multiculturalism.* Think Tank of the Year 2006/2007. London: Policy Exchange, 2007.
110. Mohammed, Amjad. *Muslims in Non-Muslim Lands: A Legal Study with Applications*. London: The Islamic Texts Society, 2013.
111. Nigosian, S. A. *Islam: Its History, Teaching, and Practices*. Indiana: Indiana University Press, 2004.
112. Nyazee, Imran Ahsan Khan. *Islamic Jurisprudence (Usul al-Fiqh).* Selangor: The Other Press. 2003.
113. Nyazee, Imran Ahsan Khan. *Islamic Legal Maxims (Qawa'id Fiqhiyyah).* Islamabad: Center for Excellence in Research, 2016.
114. Pansier, Frederic-Jerome; Guellaty, Karim. *Le droit musulman*. Paris: Presses Universitaires de France, 2000.
115. Parray, Tauseef Ahmad. *The Legal Methodology of "Fiqh al-Aqalliyyat" and its Critics: An Analytical Study.* Journal of Muslim Minority Affairs, Vol. 32, No. 1, March 2012.
116. Peters, Rudolph. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. New York: Cambridge University Press, 2005.
117. Qadri, Muhammad Tahir. *Fatwa on Terrorism and Suicide Bombings*. London: Minhaj-ul-Quran International, 2010.
118. Račius, Egdūnas. *Musulmonai ir jų islamai*. Antrasis leidimas. Vilnius: Mokslo ir enciklopedijų leidybos centras, 2016.
119. Rogan, Eugene. *The Arabs: A History.* London: Penguin Books Ltd, 2010.
120. Sabouri, Mohammad Hossein. *Iran's Nuclear Fatwa: Analysis of a Debate*. Journal of Military Ethics, 2016. Vol. 15, No. 3.

121. Shafii, Muhammad ibn Idris. *Al-Risala: Treatise on the Foundations of Islamic Jurisprudence.* Translated by Majid Khadduri. Cambridge: The Islamic Texts Society, 1997.
122. Shabana, Ayman. *Custom in Islamic Law and Legal Theory: The Development of the Concepts of Urf and Adah in the Islamic Legal Tradition*. New York: Palgrave Macmillian, 2010.
123. Schacht, Joseph. *Origins of Muhammadan Jurisprudence*. Oxford: Clarendon Press, 1953.
124. Samir, Samir Khalil. *Islam en Occident*. Saint-Maurice: Editions Saint- Augustin, 2009.
125. *Shari'a in the West.* Edited by Rex Ahdar and Nicholas Aroney. Oxford: Oxford University Press, 2010.
126. *Shari'a: Islamic Law in the Contemporary Context.* Edited by Abbas Amanat and Frank Griffel. Stanford: Stanford University Press, 2007.
127. Shamsy, Ahmed. *The Canonization of Islamic Law: A Social and Intelectual History*. Cambridge: Cambridge University Press, 2013.
128. Taha, Dina. *Muslim Minorities in the West: Between Fiqh of Minorities and Integration.* Electronic Journal of Islamic and Middle Eastern Law (EJIMEL), Vol. 1 (2013).
129. Taha, Mahmoud Mohamed. *The Second Message of Islam*. Translated by Abdullahi Ahmed An-Na'im. New York: Syracuse University Press, 1987.
130. Tsitselikis, Konstantinos. *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers*. Leiden: Martinus Nijhoff Publishers, 2011.
131. *The Islamic School of Law: Evolution, Devolution, and Progress*. Edited by Peri Bearman, Rudolph Peters, Frank E. Vogel. Cambridge: Harvard University Press, 2005.
132. *The Mukhtasar of Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri.* A Manual of Islamic Law According to the Hanafi School. Translated by Tahir Mahmood Kiani. London: Ta-Ha Publishers Ltd, 2015.
133. Turner, Bryan. *Weber and Islam*. London: Routledge, 1974.
134. Vikor, Knut. *Between God and the Sultan: A History of Islamic Law*. New York: Oxford University Press, 2005
135. Vishanoff, David R. *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*. New Haven: American Oriental Society, 2011.
136. Vogel, Frank E. *Islamic Law and Legal System: Studies of Saudi Arabia.* Leiden, Brill, 2000.
137. Weiss, Bernard. *The Spirit of Islamic Law*. Georgia: The University of Georgia Press, 1998.
138. Weiss, Michael; Hassan, Hassan. *ISIS: Inside the Army of Terror*. New York: Regan Arts, 2015.
139. Wilson, Peter H. *The Thirty Years War: Europe's Tragedy.* Massachusetts: Harvard University Press, 2011.

140. Wheeler B. M. *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship*. Albany: State University of New York Press, 1996.
141. Zahalka, Iyad. *Shari'a in the Modern Era: Muslim Minorities Jurisprudence*. Translated by Ohad Stadler and Cecilia Sibony. Cambridge: Cambridge University Press, 2016.
142. Zubaida, Sami. *Law and Power in the Islamic World.* London: I. B. Tauris & Co Ltd, 2003.
143. Zyzow, Aron. *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory*. Atlanta: Lockwood Press, 2013.

JURISPRUDENCE

144. European Court of Human Rights, Eweida and Others v. United Kingdom, app. No. 4842/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.
145. European Court of Human Rights, Refah Partisi (Welfare Party) v Turkey, app. no. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February, 2003.
146. European Court of Human Rights, Cambel and Cosans v United Kingdom, app. no. 7511/76; 7743/76, 25 February 1982.
147. European Court of Human Rights, Kalac v Turkey, app. no. 20704/92, 1 July 1997.
148. European Court of Human Rights, Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France, app. no. 27417/95, 27 June 2000.
149. European Court of Human Rights, Kosteski v. Former Yugoslav Republic of Macedonia, app. no. 55170/00, 13 April 2006.
150. European Court of Human Rights, Dahlab v. Switzerland, app. no. 42393/98, 15 January 2001.
151. European Court of Human Rights, Leyla Sahin v. Turkey, app. no. 44774/98, 10 November 2005.
152. European Court of Human Rights, Pichon and Sajous v. France, app. no. 49853/99, 2 October 2001.
153. Constitutional Court of South Africa, Christian Education South Africa v Minister of Education (CCT 4/00) [2000] ZACC.
154. Supreme Court of Canada. R v. N. S., 2012 SCC 72, [2012] 3 S.C.R. 726.
155. The Crown Court at Blackfriars of England and Wales, The Queen v. D (R). [2013]. 2013.
156. US Supreme Court Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949).

NATIONAL AND INTERNATIONAL LAW

157. The Hashemite Kingdom of Jordan, Supreme Judge Department, The Code of Personal Status, No. 36, 2010

158. The Hashemite Kingdom of Jordan, Supreme Judge Department, The Code of Islamic Jurisdiction, No. 31, 1951.
159. The Hashemite Kingdom of Jordan, The Civil Code of the Kingdom of Jordan.
160. The Hashemite Kingdom of Jordan, Supreme Judge Department, The Penal Code of Jordan.
161. The Mejelle: An English Translation of Majallah El-Ahkam-I-Adliya and A Complete Code On Islamic Civil Law. Kuala Lampur, Malaysia: The Other Press, 2001.
162. The Convention of Lausanne, 1923.
163. Canada Charter of Rights and Freedoms, 1982.
164. European Convention for the Protection of Human Rights and Fundamental Freedoms. 4 November 1950, ETS No. 5.

SPECIAL REPORTS

165. UK Foreign Affairs Committee, 'Political Islam', and the Muslim Brotherhood Review (Sixth Report of Session 2016-17, HC 118).
166. House of Lords, Select Committee on International Relations. The Middle East: Time for New Realism. 2d Report of Session 2016-17 (HL 159).

OTHER SOUCES OF INFORMATION

167. www.oic-oci.org
168. www.lasportal.org
169. www.pewforum.org/2017/04/05/the-changing-global-religious-landscape/global-population-projections-2015-to-2060
170. www.shariahcouncil.org
171. http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/
172. http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-europe/
173. http://www.washingtonpost.com/news/worldviews/wp/2017/01/14/austrias-far-right-party-wants-to-ban-islam/
174. http://www.express.co.uk/news/world/738462/Slovakia-law-Islam-ban-resgistered-religion-Eu-migrant-quota-Muslim-sentiment
175. www.politico.eu/article/far-right-dutch-politician-backs-mosques-koran-ban-islamic-schools/
176. www.bbc.com/news/world-europe-38881349
177. www.the-american-interest.com/2017/11/16/the-rise-of-the-westernists/
178. www.lettertobaghdadi.com
179. www.ammanmessage.com
180. www.turntoislam.com

181. www.leader.ir
182. www.fiqhcouncil.org
183. www.islamqa.info
184. www.awqaf.ae
185. www.fatwa.ca
186. www.kupi-cirebon.net
187. www.carnegieendowment.org/sada/?fa=41824
188. www.askamufti.com
189. www.aliftaa.jo
190. www.iscc.ca
191. www.e-cfr.org
192. www.fiqhcouncil.org
193. www.ifa-india.org
194. www.islamopediaonline.org
195. www.virtualmosque.com
196. www.minaret.org/azizah.htm
197. www.centerforsecuritypolicy.org/wp-content/uploads/2015/06/CSP-SURVEY-ON-ISLAMIC-SUPREMACISM-6215.pdf
198. www.islamiccouncilwa.com.au/wp-content/uploads/2014/05/Cemeteries-Act-1986-02-j0-02.pdf
199. www.law.justitia.com/cases/new-york/other-courts/2012/2012-ny-slip-op-51875-u.html
200. www.faskh.co.za
201. www.matribunal.com
202. www.m.thenational.ae/world/middle-east/jordan-the-safe-haven-for-christians-fleeing-isil
203. www.constitutionnet.org/news/jordans-2016-constitutional-amendments-return-absolute-monarchy
204. www.independent.co.uk/news/world/middle-east/jordan-repeal-law-rapists-marry-victims-escape-punishment-loophole-men-women-a7656446.html
205. www.hrw.org/news/2016/10/27/recorder-honor-killings-rise-jordan
206. www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17106&lang=en
207. www.cam.ac.uk/research/news/belief-that-honour-killings-are-justified-still-prevalent-among-jordans-next-generation-study-shows
208. www.oecd.org/mena/governance/Youth-in-the-MENA-region.pdf
209. www.jordantimes.com/news/local/honour-crimes-anti-islamic---fatwa

MYKOLAS ROMERIS UNIVERSITY

Juozas Valčiukas

ISLAMIC LAW: A QUESTION OF ADAPTABILITY

Summary of Doctoral Thesis
Social Sciences, Law (01 S)

Vilnius, 2018

The doctoral thesis was written during the period of 2011-2017, defended at Mykolas Romeris University according to the right to carry out doctoral studies provided to Mykolas Romeris University and Vytautas Magnus University under the order of the Minister of Education and Science of the Republic of Lithuania, dated 8 June 2011, No. V-1019.

Scientific supervisor:
Prof. Dr. Justinas Žilinskas (Mykolas Romeris University, Social Sciences, Law, 01 S).

The doctoral thesis will be defended at the Law Research Council of Mykolas Romeris University and Vytautas Magnus University:

Chairmain:
Prof. Dr. Gediminas Mesonis (Mykolas Romeris University, Social Sciences, Law, 01 S)

Members:
Prof. Dr. Eglė Bilevičiūtė (Mykolas Romeris Universty, Social Sciences, Law, 01 S);
Assoc. Dr. Adas Jakubauskas (Mykolas Romeris University, Social Sciences, Political Sciences, 02 S);
Dr. Paresh Kathrani (University of Westminster, UK, Social Sciences, Law, 01 S);
Prof. Dr. Egdūnas Račius (Vytautas Magnus University, Social Sciences, Political Sciences, 02 S).

The public defence of the doctoral thesis will take place at the Law Research Council at Mykolas Romeris University on the 23 of March, 2018, 1:00 PM.
Address: Didlaukio str. 55, LT-08303 Vilnius, Lithuania.

The summary of doctoral thesis was sent out on 23 February, 2018.

The doctoral thesis is available at Martynas Mažvydas National Library of Lithuania (Gedimino av. 51, Vilnius) and the libraries of Mykolas Romeris University (Ateities str. 20, Vilnius) and Vytautas Magnus University (K. Donelaičio str. 52, Kaunas).

Juozas Valčiukas

ISLAMIC LAW: A QUESTION OF ADAPTABILITY

SUMMARY

Research problem. To paraphrase Wael B. Hallaq[799], to write a dissertation on the Sharia as the very core of Islam already is far from talking about something unfamiliar or distant. Rather, in the contemporary time such a work testifies intention to strive at attaining more knowledge about Muslims living in non-Muslim countries or even about Western legal tradition itself which, as shows the case of Greek civil law, encompasses a number of Islamic legal rules applied for the members of local Muslim community. In the Quranic sense, the key concept to understand Muslim identity lies in the Sharia which, although continues to be identified with or as the law, symbolizes a normative path to be followed by Muslims, the understanding of which permits to realise many questions related to the Muslim identity. Meanwhile, European Court of Human Rights (ECHR) regarding the issue of the prohibition of Turkish political party which besides else invited to incorporate the Sharia into the Turkish law affirmed that the Sharia as a set of dogmas and divine rules is fixed and invariable, thus, it cannot be reconciled with European Convention's values what should signify that social relations in the secular state cannot be regulated by the Sharia rules.

In such a context, a natural question which needs to be posed is how to explain the thesis of the ECHR in the light of such factual circumstances of the contemporary time as: approximately one fifth of the worldly Muslim population lives outside the Muslim-majority countries; Islamic institutions legally operating in the West provide services related to the implementation of the Sharia rules in non-Muslim states; and particularly the fact that statutory law and case law of one or another Western countries already have incorporated a set of Sharia rules into their legal systems. Despite that, the statement of the ECHR implies that Muslims who live, for example, in Western Europe have not right to follow the Sharia because of its incompatible nature with Western legal values. Whether it means that while living in non-Muslim countries Muslims are obliged to follow exclusively the land law? Does it not look like Muslims living in non-Muslim states appear in something like Antigone's dilemma to choose between two extremes, namely, religious beliefs and non-Muslim (legal) culture?

If to acknowledge without any dispute the ECHR's statement of incompatibility just and reasonable, Muslims living in non-Muslim countries who used to follow Sharia normative rules in their religious life find themselves in a truly complicated situation. In this light, it is possible to enumerate at least several supposed scenarios how to solve such a problematic situation: (1) Muslims cease to live under the normative rules of the Sharia; (2) sooner or later Muslims return to the Muslim-majority countries where they are allowed to live under the Sharia; (3) the Sharia takes a role of an universal legal system; (4) the Sharia

799 Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 1.

normative system becomes a parallel legal system in non-Muslim states with a considerable Muslim minority; (5) Sharia adapts to the other legal systems. Obviously, the first three options make no sense at all and the fourth one is counter-productive and, as is well known from previous experiences in England and elsewhere, it is usually condemned to failure. Although the fifth scenario sounds most realistic, it lies in a clear conflict with the statement of the ECHR.

Our dissertation launches a research in the sense of the fifth scenario. In such a case, the problem of our research becomes adaptability of the Sharia norms and Islamic law in the changing time and living conditions. All the parts of the dissertation directly or indirectly concern the problem of adaptability. If to conclude that the core feature of the Sharia and Islamic law is adaptability, this could matter in at least two regards. For those who seek reformation in the field of Islamic law, this could signify green light in their efforts to formulate and to implement such ideas. Whereas for those who continue viewing the Sharia and Islamic law invariable and stable, such conclusion could challenge solidity of their arguments and encourage the further discussions.

Important to notice that our research is conducted exclusively in the field of Sharia and Islamic law of Sunni Muslim branch. In fact, the Sunni branch is a dominant one among Muslims around the world. Moreover, four traditional Sunni schools of law made decisive impact on the development Islamic law in the whole Muslim world. Important to mention here that having a task to bring clarity in the text of the dissertation, all the dates in the dissertation are written according to the Christian calendar and not according to the Muslim calendar.

The relevance and novelty of the dissertation, and the significance of the research results. The fact that the selected subject of dissertation is relevant in the contemporary context can be proved by a huge number of reasons. Besides the fact that the ECHR is in the final phase of examination in all probability the most prophetic case *Molla Sali vs. Greece* regarding not only Greek court judgment to apply legal norms of Islamic inheritance to the local civil relations of Muslims, but particularly the fundamental question of the coexistence between the Sharia and Western law, there could be mentioned a number of the other factors confirming the relevance of the selected subject. For example: (a) Muslim presence and the growth of Muslim communities in non-Muslim majority countries;[800] (b) the growing number of Muslim institutions which partly implement Sharia normative rules in the Western countries;[801] (c) a variety of conflicts between people and

800 More than one fifth of the world's Muslims live in non-Muslim-majority-states and it is expected the number of Muslim population in non-Muslim states increase in a steady pace. For instance, in the US, there are about 3.35 million Muslims or about 1% of the US. The source: http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/
By 2010 an estimated 44 million Muslims were living in Europe (6%), including an estimated 19 million in the EU (3.8%). It is expected that Muslim population in Europe will increase from 6% to 10% by 2050. The source: http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-europe/

801 With a growing number of Muslims, it is often noticeable tendency to initiate establishment of institutions related to the implementation of the Sharia normative rules. For example, the first such institution in UK was established in 1987. After thirty years, one could count more than twenty five Sharia councils and related institutions in the UK.

communities, for instance, psychological, cultural, social, religious, due to a specific legal regulation and so forth; (d) terrorist attacks in the name of Islam;[802] (e) refugees' crisis;[803] (f) anti-Islamic nationalist rhetoric;[804] (g) political Islam and its expansionist policy to spread an ideology among Muslims in non-Muslim countries;[805] (h) the changing scientific

802 The terrorist attacks in the name of Islam make impact on the growing concern about Muslim presence in the West, the majority of whom follow the Sharia norms in their life. Not rarely, in the eyes of Western people the Sharia norms and particularly Islamic law begin to be somehow equated with terrorist atrocities and crimes. According to us, it comes to be a duty of Western scholarly community in such dangerous atmosphere to spread the scientific knowledge about the Sharia and Islamic law or, in other words, on Muslim identity questions, seeking to avoid any kind of conflicts among different religious communities and their members. Because of all this, the subject related to the Sharia norms and Islamic law with particular emphasis on the adaptability of these normative systems becomes even more relevant as it directly touches the capability of the Sharia to coexist with the other legal systems.

803 The research related to the capability of the Sharia norms and Islamic law rules to adapt to the other legal systems is more than relevant in the light of contemporary process of migration and refugees' crisis. The question of adaptability of the Sharia norms and Islamic law is directly related to the growing refugees' crisis, when the majority of refugees arrive to the West from Muslim states in the Middle East and North Africa, because arriving Muslims come with the practice to follow Sharia norms and principles what is inseparable from their religious identity.

804 In the light of terrorist attacks and refugees' crisis, the right wing politicians seek their political goals by spreading anti-Islamic rethorics which reaches ordinary people in the West through media sources. Here are some examples:
Amanda Erickson, *Austria's far-right party wants to 'ban' Islam*. The Washington Post. January 14, 2017. The text of an article is available at: www.washingtonpost.com/news/worldviews/wp/2017/01/14/austrias-far-right-party-wants-to-ban-islam/ (last visited April 13, 2017).
Rebecca Perring, *EU Migrant Falliout: Slovakia passes law to ban Islam from being registered as a religion*. Sunday Express. December 2, 2016. It is available at:
www.express.co.uk/news/world/738462/Slovakia-law-Islam-ban-resgistered-religion-Eu-migrant-quota-Muslim-sentiment (last visited April 13, 2017).
Hortense Goulard and Cynthia Kroet, *Dutch party wants to outlaw mosques, Islamic schools, Koran*. Politico, August 26, 2016. More it is available at: www.politico.eu/article/far-right-dutch-politician-backs-mosques-koran-ban-islamic-schools/. (last visited April 13, 2017).
Erika Benke, *The village aiming to create a white utopia*. BBC News. 7 Feb, 2017. Available at: www.bbc.com/news/world-europe-38881349 (last visited April 13, 2017).
As Shadi Hamid ir Rashid Dar have recently noticed, "many nationalists see Islam and Muslims not merely a security threat, but as a civilizational one as well". Paradoxically, ant-Islamic political messages of Western politicians usually repeat what the terrorists try to spread in their slogans on the Sharia and Islamic law. In such a way, Western people, who not necessarily know much about Islam and Sharia concept, receive negative information not only from the terrorists but also from more or less popular politicians in the West. Such a negative context encourages to research the themes related to the Sharia and Islamic law in order to destroy such a false discourse by spreading knowledge obtained in the scientific research. More about conservative nationalists in the West and how they are similar with Islamists one can read here: www.the-american-interest.com/2017/11/16/the-rise-of-the-westernists/.

805 Ideology of political Islam most frequently is based on the literal reading of Islam and Islamic legal norms having an aim to idealise Islam of the Medinan time and the fact of the growing Muslim power. Avi Melamed adds that the representers of political Islam are first of all movements of Muslim Brotherhood and of Salafists. The biggest difference between both movements is the fact that Muslim Brothers are more flexible and pragmatic on the question of adaptability of Islamic law in present realities, while Salafists are not o flexible, believing in the dogmatic application of Islamic religious law. Important to emphasize that both ideologies are represented by different parties in the Middle Eastern states about what Avi Melmed speaks at a greater length in his book. More one can read here: Avi Melamed, *Inside the Middle East: Making Sense of the Most Dangerous and Complicated Region on Earth* (New York:

discourse regarding the subject of the Sharia and Islamic law;[806] (i) diverging judgments of the Western national and international courts on the question of the Sharia norms and Islamic law;[807] (j) major transformations in the contemporary Middle East, i. e. in the birth place of Islam, leading to the gradually growing tendency to cease identifying yourself with national state, constitution or citizenship, and, instead of this, to look back to the religion (or even religious fundamentalism), customs, ethnicity, what may somehow affect the shift of the conception of the Sharia and Islamic law.[808]

With regard to the novelty, there has not been conducted any doctoral research on the subject of the Sharia and Sunni Islamic law in Lithuania. It is truth that the subject of the Sharia in general and Islamic law in particular has been researched from different perspectives in the Western European countries. Such themes as historical development of Islamic law, nature and sources, contemporary evolution and tendencies of the Sharia and Islamic law are the most prevailing in the research. However, the question of adaptability of the Sharia norms and Islamic law almost everywhere receives the status of additional subject. In contrast, this problematic question turns to be the main theme in this dissertation.

Skyhorse Publishing, 2016), 29-85.

As doctoral research conducted at one of the Sharia councils in London has showed, a number of similar institutions provide service different from that declared officially in their internet pages. According to some members of the Sharia council in London, the spread of ideologies of political Islam comes from one or another Middle Eastern states in order to instil into the minds of Muslims, living in the West, a particular sort of interpretation of the Sharia and Islamic law based on the specific ideology. It must be noted that scientific research on the subject of the Sharia and Islamic law matters more than ever in the efforts to introduce what indeed lies in the content of the conception of the Sharia and Islamic law written in the letter of primary sources. All this helps to deny all the interpretational theories of Islamic law based on the political aims and on the ideology in neither way compatible with living time. How to counter the spread of political Islam, one can read more here: Ayaan Hirsi Ali, *The Challenge of Dawa: Political Islam as Ideology and Movement and How to Counter It* (Stanford: Hoover Institution Press, 2017).

806 In addition to literalistic, traditional, liberal and secular approaches towards Islamic law and its interpretation, the newly formulated methodological doctrines of law emerge in the contemporary scientific discourse with the aim to adapt the Sharia norms and Islamic law to the social requirements of living time. Our research takes into consideration on of such reformative methodological theories in order to question to what extent it is capable to be sufficient in adapting Islamic law on the most controversial questions.

807 The question of adaptability of the Sharia norms and Islamic law becomes more and more relevant in the light of the judgments of Western national and international courts' judgments and statements on the subject of coexistence between the Sharia and the other legal systems. From one side, in the case of the mentioned judgment of ECHR, it was affirmed that the Sharia is incompatible with Western legal values. Whereas, from the other side, the national courts of England, Canada or Greece speak about the particular norms of the Sharia and Islamic law declaring that a number of them do not contradict to the principle of rule of law and local customary traditions. The relevance of the research becomes even bigger because the ECHR prepares to announce the judgment, in which the whole attention will be devoted to the relationship between Islamic legal rules and Greek law, the part of which Islamic law is for decades. The dissertation analyses not only the past decisions, but also strives at predicting a set of conclusions which will be delivered by ECHR in the second part of 2018.

808 More on the emerging transformations in the Middle East which are directly related to the potential shifts in the conception of the Sharia and Islamic law, one can read here: Avi Melamed, *Inside the Middle East: Making Sense of the Most Dangerous and Complicated Region on Earth* (New York: Skyhorse Publishing, 2016); Richard Haas, *A World in Disarray: American Foreign Policy and the Crisis of the World Order* (New York: Penguin Press, 2017).

In this dissertation, the problem of adaptability of the Sharia and Islamic law was chosen to be analysed in three directions. It is researched (i) in the context of constructed Islamic legal theory and in the context of the historical development of the Sharia and Islamic law; (ii) in the conditions of the contemporary scholarly discourse on the Sharia and Islamic law; (iii) as it is implemented in the realities Muslim communities in the West and in the Middle East. First of all, the results received from the research of the problem of adaptability conducted at the University of Jordan allow us to see traditional Islamic law and its historical development in a totally new light. Second, the conclusions made after the analysis of the contemporary scholarly discourse and of newly introduced reforms provide a ground to try to understand the most prevailing tendencies related to the possibility of reinterpretation of Islamic legal sources in the context of mostly incompatible with a present day questions. Third, the research of presently implemented Sharia norms and Islamic legal rules in the West and in the Middle East permits not only to realise what role currently plays Sharia within Muslim communities in the West and Islamic law in the Middle East, but also enables us to capture the shifting directions related to the issue of adaptability of Islamic law in today's realities. The research and results received while being at the Muslim Law Shariah Council in London, in Jordanian Shariah courts and Jordanian Constitutional Court provide a possibility to look at the whole subject with the new eyes.

Talking about the significance of the research and its results, first of all, the doctoral work might be treated as the contribution to Lithuanian science of law inspiring new and important to the living time researches on the subject of the Sharia and Islamic law. Although the subject of the Sharia and Islamic law receives attention in the science of Western European countries, it is frequently analysed as an additional question. In contrast, this dissertation devotes its main attention to the problematic issue of the adaptability of the Sharia and Islamic law. Thus, in this regard, it might be said that present research of the problem of adaptability also makes a contribution to the Western research on the subject of Islamic law. What is also important to emphasize is that this work and its results might be valuable in fulfilling the raised idea to pass from analysing exclusively Western legal tradition to the studies of non-Western legal systems and traditions in order to find out how Western law is and might be in contact with non-Western law and how common human language of law comes into being.[809]

We see many areas where the results of our research can be beneficial. For a variety of governmental institutions or non-governmental organizations the results of dissertation might become very useful. In the face of refugees' crisis, the findings delivered in the dissertation might be valuable for institutions and persons, who deal with questions related to the integration of Muslims. For diplomats who work with the countries of Middle Eastern region, the results of our doctoral research might give additional information,

809 "Eventually a social legal theory has to make a shift from researching Western legal systems and Western legal traditions to the analysis of non-Western legal systems and traditions; it has to research how Western law and non-Western law toaches and how a common human legal speech appears on the ground. By taking this and only this direction it might be still possible to expect to deal with a crisis in which Western legal tradition occurred in the end of the XX century." Harold J. Berman, *Teisė ir Revoliucija: Vakarų Teisės Tradicijos Formavimasis*. Iš anglų kalbos vertė Arvydas Šliogeris (Vilnius: Pradai, 1999), 71.

which is necessary to develop cultural, economic relations with governmental members and potential business partners. This is particularly relevant for Lithuania in the context of apparently increased number of Lithuanian governmental visits to the Middle Eastern states what prove the growing interest in this region. Intelligence agencies might find the results interesting in terms of their responsibilities as well.

The research object of the dissertation. The study seeks to research the concept of Sharia and Islamic religious law of Sunni branch and its capacity to be adapted in the changing time and living conditions. To achieve the object of the research, the question of adaptability of the Sharia and Islamic law is analysed in three directions: in the context of of constructed Islamic legal theory and in the context of Islamic historical development; in the conditions of the contemporary scholarly discourse; and on the question of how the Sharia and Islamic law is implemented today within Muslim communities in the West and in the current Middle East.

The tasks of the research:

1) To clarify a number of overlapping definitions which are frequently used interchangeably with the Sharia, and to question an old-fashioned tendency to equate Sharia with law;

2) To research the Sharia and Islamic law in the historical context in order to prove that adaptability of Islamic law is a historical fact;

3) To analyse the primary sources of Islamic law with a task to find out whether they are the main obstacle in the human efforts to make the Sharia and Islamic law adaptable; also, to analyse Islamic legal sources of rational nature in order to reveal their strengths in the interpretation of Islamic law in the past and present contexts;

4) As Islamic law does not end with the sources, but rather with scholarly constructed law (fiqh law) through the channel of legal reasoning and interpretation (ijtihad), our primary task here is to study the concept of ijtihad through which fiqh law is derived from the sources of Islamic law. Also, by means of comparative analysis the research takes into account a set of specific legal rules of four Sunni fiqh schools in order to prove that the flexibility might be regarded as inner feature of Islamic fiqh law.

5) To analyse traditional Hanafi fiqh law rules and their place in the selected civil codes of modern Muslim states in order to find out what place and role traditional Islamic law of Hanafi branch plays in modern legal acts;

6) To explore the contemporary scholarly discourse on Islamic law and prevailing methodological approaches towards its sources and their interpretation. Also, to introduce the newly formulated idea of reform suggested by the representer of reformative/liberal approach towards Islamic law to transform the least developed issues of Islamic law;

7) To conduct a threefold research of the Sharia and Islamic law as it is applied in the contemporary practice. First, our task is to analyse the worldwide phenomenon of issuing Islamic religious opinions (fatwas) and to consider the newly formulated methodological theory of fiqh for Muslim minorities living in non-Muslim countries. Second, to analyse independent Islamic institutions operating in the West and the state legal apparatus of the Western countries in order to show how through these two channels the Sharia normative rules and Islamic law are partly implemented in the Western countries. Third, to

research the contemporary state-made law of the Kingdom of Jordan in order to find out to what extent it is influenced by traditional Islamic law, what transformations Islamic law undergoes while being the consisting part of the Jordanian state-made law.

The hypothesis of the dissertation: Openness and flexibility (adaptability) are characteristic to the Sharia norms and Islamic law and, for that reason, these normative systems have all the necessary capabilities to be adapted to the changing time and social circumstances.

The overview of previous research. Although there is none research made in Lithuanian language in the field of Sunni Islamic law, there is a small number of translations on the introduction to Islamic culture and religion. In addition to this, prof. Egdunas Racius, who is the author of various scholarly articles, has written the dictionary of Islamic terms including definitions related to the Sharia and Islamic religious law[810]. Also, his work on the basic questions of Islam provides a couple of answers concerning basic issues of law[811]. Moreover, Egdūnas Račius has very recently published one more book on the Muslim communities and their current situation in Eastern Europe.[812] Talking about the literature in the other Western languages, the literature on Islamic law is extensive in English and other European languages. The question of the adaptability of Islamic law was discussed as an additional question from one or another perspective by a majority of scholars who write on the subject of Islamic law. Here, we are to mention a number of these scholars by giving a couple of directions to their most influential works.

From historical point of view, the development of Islamic law was researched by Ignaz Goldziher[813], Joseph Schacht[814], Norman Calder[815], Noel Coulson[816], Marshal Hodgson[817], Herve Bleuchot[818], Knut Vikor[819], Wael B. Hallaq[820] and many other scholars who besides

---

810 Egdūnas Račius, *Islamo žinynas* (Vilnius: Vilnius University Press, 2007).

811 Egdūnas Račius, *Musulmonai ir jų islamai* (Vilnius: Mokslo ir enciklopedijų leidybos centras, 2016).

812 Egdūnas Račius, *Muslims in Eastern Europe* (Edinburgh: Edinburgh University Press, 2017).

813 Ignaz Goldziher, *Introduction to Islamic Theology and Law* (Princeton: Princeton University Press, 1981).

814 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1953).

815 Norman Calder, *Islamic Jurisprudence in the Classical Era*. Edited by Colin Imber (New York: Cambridge University Press, 2010).

816 Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969).

817 Marshall G. S. Hodgson, *The Venture of Islam: The Classical Age of Islam*. Volume One (Chicago: The University of Chicago Press, 1974); Marshall G. S. Hodgson, *The Venture of Islam: The Expansion of Islam in the Middle Periods*. Volume Two (Chicago: The University of Chicago Press, 1974); Marshal G. S. Hodgson. *The Venture of Islam: The Gunpowder Empires and Modern Times*. Volume Three (Chicago: The University of Chicago Press, 1974).

818 Herve Bleuchot, *Droit Musulman: Histoire*. Tome I (Marseille: Presses universitaires d'Aix-Marseille, 2000);
Herve Bleuchot, *Droit Musulman: Fondements Culte, Droit publice et Mixte*. Tome II (Aixe-en-Provance: Presses Universitaires d'Aix-Marseille, 2002).

819 Knut Vikor, *Between God and the Sultan: A History of Islamic Law*. New York: Oxford University Press, 2005.

820 Wael B. Hallaq, *Law and Theory in Classical and Medieval Islam,* 1995; Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni usul al-fiqh*, 1997. Wael B. Hallaq, *The Origins and*

else touched the question of the adaptability of Islamic law. Noel Coulson and Joseph Schacht, for instance, saw Islamic law system unlikely to be adaptable in the change of time and living conditions. Whereas Norman Calder and Wael Hallaq claimed that Islamic law was not an inflexible system.

The question of the openness of Islamic law was partly explored by the authors who introduced the results of the studies on the sources of Islamic law. Among these, we can mention Mohammad Hashim Kamali[821], Ayman Shabana[822], John Burton[823], Yasin Dutton[824], Jonathan Brown[825] and many others who paid more or less attention to one or another source of Islamic law. Methodological theories how to derive Islamic law from the sources were researched by David R. Vishanoff[826], Jasser Auda[827], Wael B. Hallaq[828], Mohammad Hashim Kamali[829], Imran Ahsan Khan Nyazee[830], Aron Zyzow[831], Ahmed El Shamsy[832] and others. By exploring the methodological theories the authors discussed the question of how one or another scientific construction serves as the channel through which Islamic law is able to undergo a change.

On the subjects of the ijtihad, fiqh law and the positions of qadi and mufti responsible for the formulation and application of Islamic law, there is an extensive amount of books. Among scholars who made a contribution in the research on the mentioned subjects, we can bear in mind Wael B. Hallaq[833], Sami Zubaida[834], Frank Vogel[835], and Imran Ahsan

Evolution of Islamic law (New York: Cambridge University Press, 2005).

821 Mohammad Hashim Kamali, *A Textbook of Hadith Studies: Authenticity, Compilation, Classification and Criticism of Hadith* (Leicestershire: The Islamic Foundations, 2009).

822 Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of 'Urf and 'Adah in the Islamic Legal Tradition* (New York: Palgrave Macmillan, 2010).

823 John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990).

824 Yasin Dutton, *The Origins of Islamic Law: The Quran, the Muwatta, and Madinan Amal* (New Delhi: Lawman (India) Private Limited, 2000).

825 Jonathan Brown, *The Canonization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon* (Leiden: Brill, 2007); Jonathan Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (Oxford: Oneworld publications, 2014).

826 David R. Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (New Haven: American Oriental Society, 2011).

827 Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008).

828 Wael Hallaq, *A History of Islamic theories: an Introduction to Sunni usul al-fiqh* (Cambridge, Cambridge University Press, 1997).

829 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Cambridge University Press, 1991).

830 Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul al-Fiqh)* (Selangor: The Other Press. 2003).

831 Aron Zyzow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013).

832 Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2013).

833 Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (New York: Cambridge University Press, 2004).

834 Sami Zubaida, *Law and Power in the Islamic World* (London: I. B. Tauris, 2003).

835 Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000).

Khan Nyazee[836]. Here, besides else the theme of the adaptability of Islamic law was also somehow touched.

Eventually, those scholars who explored the subject of Islamic legal reformation tended to suggest a number of ways how to make Islamic law more adaptable in the contemporary time. The works of Muhammad Iqbal[837], Taha[838], Taha Jabir al-Alwani[839], Abdullahi An-Na'im[840], Ayaan Hirsi Ali[841], Tariq Ramadan[842], Khaled Abou El Fadl[843] and others need to be researched if one intends to launch a study on the Sharia in modern time and reformative projects in the field of contemporary Islamic law.

To sum up, the mentioned books were written on the specific subject and the question of the adaptability of Islamic law in most instances took a place of an additional theme. In contrast, the problem of the adaptability of Islamic law is the major subject of our dissertation. In the light of the fresh surveys made throughout the internships in the West and in the Middle East, we are to suggest the comprehensive study on the subject of the adaptability of the Sharia in general and of Islamic law in particular. The dissertation will be just the first step in a long way of exploring the phenomenon of Islamic law in the contemporary time.

The methodology of the research. The following traditional theoretical jurisprudence methods have been applied in order to achieve the aim of this dissertation and to draw the conclusions: document analysis, linguistic, systematic analysis, logical-analytical, also, historical and comparative methods. With the aim of achieving comprehensive results of our research, the mentioned methods have been applied in combination with each other throughout the research, and the choice of the particular methods and their combination was determined by the particular issue and its features.

The method of document analysis. A variety of Islamic religious and legal documents are researched in our study. The Quran and the books of the Prophetic traditions as the primary sources of Islamic law are studied in the whole work. At the same time, the object of our study came to be the traditional fiqh law manuals of eleventh and twelfth centuries as

836 Imran A. K. Nyazee, *Islamic Legal Maxims (Qawa'id Fiqhiyyah)* (Islamabad: Center for Excellence in Research, 2016).

837 Muhammad Iqbal, *Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934).

838 Mahmoud Mohamed Taha, *The Second Message of Islam*. Translated by Abdullahi Ahmed An-Na'im (New York: Syracuse University Press, 1987).

839 Taha Jabir Al-Alwani, *Issues in Contemporary Islamic Thought* (London: The International Institute of Islamic Thought, 2005). Taha Jabir Al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections*. The third edition. Translated by Ashur A. Shamis (London: The International Institute of Islamic Thought, 2010).

840 Abdullahi Ahmed An-N'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990); Abdullahi Ahmed An-Na'im, *Islam and Secular State: Negotiating the Future of Sharia* (London: Harvard University Press, 2009).

841 Ayaan Hirsi Ali, *Heretic: Why Islam Needs a Reformation Now* (New York: HarperCollins Publishers, 2015).

842 Tariq Ramadan, *Radical Reform: Islamic Ethics and* Liberation (New York: Oxford University Press, 2009).

843 Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (London: Rowman & Littlefield, 2014).

the oldest documents delivering the first-hand interpretations of the primary sources. Later on, the texts of modern state-mad law documents and court judgments are considered at the great length. The analysis of all these documents is helpful in making conclusions about the capacity of Islamic law to be adaptive in the changing time and circumstances.

The linguistic method. In the research of purely religious texts as the Quran and the Sunna of the Prophet, the method helps us to find out the meaning of a number of words and phrases through which the essence of the text becomes more understandable. At the same time, this method provides assistance in the capturing the essence of the language utilized in a variety of legal texts explored in our study.

The method of systematic analysis. In order to realize what the text, whether of religious or of legal nature, speaks in an explicit or implicit manner, it is necessary to study it in a systematic way. For example, one thing is to explore separate Quranic words and sentences and totally the other is to look at one or another verse in the light of the Quran as a whole. In the same manner, we try to explore Islamic fiqh law manuals. At first, by means of linguistic method our study concentrates attention on the separate fiqh rules on the specific issues. Later on, a set of separate rules are researched in the light of the fiqh doctrine as a whole.

The logical-analytical method. Our study is concerned with a variety of texts which are analysed in twofold manner. The logical ties among inner parts of the texts as well as the logics of connectedness between different sort of texts is taken into account throughout our research.

The historical method. Understanding the concept of Islamic law requires an understanding of its long history. Knowledge of Islamic legal origins can assist us in understanding where it is leading us. First of all, our study is based on religious source texts as Quran and the traditions of the Prophet which are collected in 6 books of the Prophetic traditions. All these texts provide knowledge on the specific issues as well as the historical contexts within which they are delivered. The content of the texts cannot be separated from the historical context within which it was brought. At the same time, our dissertation explores a number of the fiqh manuals of Hanafi, Shafii and Maliki schools of Islamic law. A number of classical texts translated into English had to be studied in order to fully realize intentions of the creators and circumstances within which the texts were formulated. Two exceptional masterpieces that set a course for the development of Islamic classical legal theory, al-Shafii's book on Islamic legal theory and Malik's work on the living law of Medina time, are investigated throughout our study. In the most comprehensive way, our study takes into consideration a number of classical manuals of Hanafi fiqh law. The book of al-Quduri of eleventh century and two volumes of al-Hidaya of al-Marghinani written in the course of the twelfth century serve as the means to realize the very advent of Hanafi law. To understand the influence of Islamic law on the state-made law in modern Muslim states, we consider the law documents written in the nineteenth and twentieth centuries.

The comparative method. In a way of comparative study, our dissertation seeks to find out whether and to what degree traditional Islamic law makes impact on the legal texts of modern Muslim states. Here, traditional fiqh rules written in the classical law manuals are compared on the selected legal issues with the modern texts of Muslim states of the Ottoman Empire and of the contemporary Jordanian state.

In addition to the theoretical methods, the empirical methods are used in this work. The case study conducted at the Muslim Law Shariah Council UK throughout two internships in the time of the years 2015 and 2016 was very fruitful in the results with regard to the question whether the Sharia normative rules are capable to be adaptive within Muslim community in UK. A number of interviews made with the members of the Council were important in understanding far more related issues. Also, our investigation of the legal system of the Kingdom of Jordan conducted in the summer of 2016 in Jordan gave a number of necessary answers on the status of Islamic law in the contemporary Middle East. A number of interviews with Islamic scholars at the University of Jordan, Constitutional Court of Jordan and Sharia Court of Appeals permitted to deepen our understanding on the burning issues in the field of Islamic law. Moreover, the meetings and interviews with the contemporary scholar Abdullahi An-Na'im provided possibility to capture the essence of the reformist theory delivered by him. The perspectives of the Islamic law to be reformulated and revised in the present time were explored throughout our discussions.

The structure of the dissertation. The dissertation consists of the introduction, the overview of the research, the presentation of the methodology of the research, the main part, the conclusions and bibliography.

The object, the tasks and the course of the research predetermined the structure of the main part of dissertation; it consists of six chapters.

Dissertation starts with discussion about the conception of the Sharia. To challenge an old-fashioned Sharia=law approach, the chapter is divided into three sections in order to explore the Sharia in its three different, albeit closely related, meanings. Regarding the Sharia as a set of purely religious prescriptions, the first section takes into consideration five religious pillars of Islam written in the Quran. In terms of the Sharia as Muslims' common identity, the second section explores a number of moral instructions set by the Prophet with the task to preserve a Muslim community. Eventually, the third meaning of the Sharia as law receives our attention in the third section where it is introduced as the concept having two inseparable sides, namely, divine and human.

Chapter Two turns attention to the historical development of Islamic religious law to illustrate its capacity to be adaptive in the changing time and social circumstances. The Chapter divides Islamic legal development into three stages and two of them are explored here at the great length. The formative period and post-formative period are researched here by taking into consideration the main scientific developments in the reading and interpretation of Islamic law.

Chapter Three is devoted to the research of the sources of Islamic law. Broadly speaking, the sources of divine and human origins are explored in this Chapter. In the first section, the Quran and the Sunna of the Prophet are researched. In the following section, two sources of rational nature, ijma and qiyas, are explored how these sources were significant in the past and what role they could play in the present context. Eventually, supplementary sources are explained in the last section.

Chapter Four is divided into two parts. Firstly, the Chapter explores the concept of ijtihad as the very idea of human legal reasoning and interpretation in Islam. With the emergence of four official Sunni schools of fiqh law, for the majority of modern scholars, the doors

of ijtihad were closed and the era of imitation (taqlid) of fiqh law precedents became the main source to construct Islamic law in the following centuries. Thus, the concept of taqlid and the fiqh doctrines of four Sunni schools of law are researched in the second part of the chapter. The special emphasis is turned to the study Sunni Islamic law of Hanafi branch. In the end of the Chapter, the comparative study between Hanafi legal rules elaborated in the manuals of fiqh law of XI-XII centuries and modern state-made law of Ottoman Empire and current Jordanian state tend to show to what degree traditional Islamic fiqh law make impact on the state-made law.

Chapter Five turns our attention from the study of the theoretical basis of Islamic law and its historical development to the research of the Islamic scholarly discourse in the contemporary time. A number of hermeneutic approaches towards the sources of Islamic law which are the most prevailing today are shortly discussed here. After affirming which of the prevailing approaches is the most adequate to explain the sources of Islamic law in the light of present-day conditions, the selected reformative theory to revise the least developed issues of Islamic law is tested.

Chapter Six goes further and suggests to survey Islamic law as it is applied in the contemporary reality. The chapter is divided into three sections. Initially, we are to talk about most recent trends in the field of Islamic law. Here, the contemporary phenomenon of digital fatwas and the newly emerged methodological theory of fiqh for Muslim minorities living in non-Muslim states are researched to show how the Sharia and Islamic law through these trends undergo the transformational process. Sharia in the West is the subject of the following study where we are to prove that Sharia normative rules and Islamic law are partly implemented through the Islamic institutions and organizations operating in the West and through the statutory law and court judgments of one or another Western state. In the end, our research object turns to be the legal system of the selected Middle Eastern country. The question whether and to what degree the present-day legal system in the Kingdom of Jordan is influenced by the traditional Islamic law needs to be answered. The other question is whether with the change of state-made law Islamic law as the consisting part of state law undergoes particular transformations.

The main conclusions of the research

The results obtained during the doctoral research confirmed that openness and flexibility are characteristic to the Sharia norms and Islamic law. For that reason, these normative systems have all the necessary capabilities to be adapted to the changing time and social circumstances. The hypothesis posed in this dissertation was proved by the following conclusions:

1. Reacting to the rapid spread of Sharia norms in the non-Muslim world as well as to the emerging problems related to the question of coexistence between the Sharia and other normative/legal systems, it is suggested to refrain from the still prevailing mistaken tendency to equate Sharia with law in the scholarly discourse and jurisprudence. The research of the Sharia as a threefold notion proved that the Sharia=law approach is insufficient to reveal the concept of the Sharia in its essence. According to the Quranic conception of the Sharia, all the norms of the Sharia stem

from God, from the Prophet and those who are in authority, thus, the Sharia has to be understood in its three meanings:

1.1. The Sharia as a set of purely religious norms enshrined in the text of the Quran and mainly consisting of five pillars of Islamic religion.

1.2. The Sharia as a common Muslim identity emanating from the normative instructions of the Prophet written in the Sunna and expressed in a form of social and moral principles related to the belonging to the global Muslim community.

1.3. The Sharia as a set of norms of legal quality which comprise simultaneously a short number of general legal guidelines written in the Quran and Sunna, and a huge amount of man-made Islamic legal rules derived from the mentioned sources by means of human reasoning and interpretation.

2. Mistaken interpretation of the Sharia conception, ignoring its distinction into three meanings, conditioned unreasonable divinization of all the Sharia norms and consequential image as if it were invariable and static in its totality. The analysis of the Sharia conception made in the course of doctoral research revealed that the Sharia can be treated divine and stable solely in its two meanings, i. e. regarding the Sharia as a set of purely religious norms and the Sharia as a set of moral and social norms formulating a common Muslim identity. Whereas, if to acknowledge, that the Sharia as Islamic law is the creation of those who are in authority, it comes to be evident that Sharia in this meaning in no way can be unconditionally and in its totality divinized or sacralised. This is why it is reasonable to pose the question of openness and flexibility of Islamic law including the question of its adaptability.

3. As a result of a research of historical development of Islamic law, it was confirmed that adaptability of Islamic law in the course of the formative (VII-XIII c.) and post-formative (XIII-XIX c.) periods is undisputable fact. It is proved by two fundamental legal theories constructed by the early scholars with the aim to adapt the Sharia and Islamic law to the changing time and social conditions. The theory of sources (usul al-fiqh) was created by the early religious scholars in the IX century and the legal theory based on the purposes written in the Sharia (maqasid al-Sharia) was formulated in the XIV century:

3.1. The formative period can be described as mainly influenced by the ijdihadic paradigm, when Islamic law was constructed and broadly interpreted on the basis of the theory of sources (usul al-fiqh), by means of which Islamic law was adapted to the living period.

3.2. The period of Islamic legal development was superseded by the period of stagnation in the XIII century when, instead of a direct interpretation of the Quran and Sunna, the scholarly community came into agreement to start grounding their interpretational activities exclusively on the derived fiqh law rules written in the legal manuals of four Sunni law schools. In such a way, the new paradigm of imitation of fiqh law precedents conditioned the disappearance of the line between legal guidelines written in the Quran and

Sunna and scholarly made the versions of interpretation of the mentioned sources or between Sharia and its interpretational version. All this permitted to instil in the minds of ordinary people an image of the scholarly made law as if it were divine and invariable.

3.3. Reacting to the widening gap between the fiqh law rules fixed in the manuals of Sunni schools of law and changing social life, a number of independent Muslim scholars of XII-XIV century introduced the methodological theory of law based on the purposes of the Sharia (maqasid al-Sharia) which ensured the possibility to adapt Islamic law to the changing life conditions. In such a way, it was purposed to refrain from the limited and outdated literal way of reading the Quran and Sunna, maintained by the mainstream scholarly community, and to start interpretational activities based on the fundamental purposes of the Sharia, which simultaneously reflected the content of the Quran and Sunna and at the same time complied with fundamental human interests. Despite the fact that it was not permitted to influence the further development of Islamic law on the basis of this methodological theory, the modified version of maqasid al-Sharia came to be regarded as the main tool in the task to adapt the Sharia norms and Islamic law to the new social reality in the modern times.

4. The research of Islamic legal sources proved that none of them can be regarded as an obstacle to adapt Islamic law to the changing time and living conditions, because:

4.1. The analysis of the Quran and Sunna as divine sources of Islamic law shows that the content of these sources, open to the interpretational activities language of the texts, and inevitability of the idea of human reasoning and interpretation (ijtihad) fixed in both sources provide all the necessary capabilities to adapt Islamic law to the changing time and social life requirements.

4.2. The scientific study of such Islamic legal sources and interpretational methods as consensus (ijma) and reasoning based on the analogy (qiyas) permits to conclude the following:

4.2.1. The process of adoption of the Egyptian Civil code (1932-1949) and recently made Amman consensus (2004) on the most crucial Islamic questions prove that ijma as the source of Islamic law has the biggest potentiality to make Islamic law adaptable in the present context.

4.2.2. Meanwhile, the method of qiyas was always the main channel in the efforts to adapt the Sharia and Islamic law to the social transformations. The method of qiyas ensured the feature of adaptability of Islamic law when two primary sources were insufficient to deal adequately with problems of the time and when the strict literal method of legal interpretation promoted in the form of doctrines composed by Sunni fiqh law schools did not allow to connect Islamic law with social realities.

4.3. Depending on the particular place and prevailing tradition, in addition to four basic Islamic legal sources mentioned above, a number of supplementary sources and legal methods were utilized in the process of Islamic legal interpretation in one or another Sunni school of law. Islamic legal rules

as the results of the process of scholarly interpretation in one or another Sunni school of fiqh law mainly differed on the choice to hold a particular supplementary source and method of interpretation as an integral part in the formulation of Islamic legal rules. All this also proves that Islamic law is flexible and open in the process of interpretation, i. e. adaptability.

5. The research of scholarly made law (fiqh law) as the result of human legal reasoning and interpretation (ijtihad) revealed that the fact of adaptability of Islamic law can be proved not only by the possibility to ground fiqh law rules in various modern state-made law documents, but also by its capability to undergo the change together with the process of amendment of state made law rules.
   5.1. The conception of Islamic ijtihad emanating directly from the primary sources can be held as the main precondition of openness and flexibility of Islamic law in the process of its interpretation, regarding to the changing time and social conditions.
   5.2. The analysis of fiqh law revealed that the very historical fact that Islamic law was fixed and frozen in the traditional fiqh law manuals also proves that adaptability is its inner feature. A varying methodological system of legal construction and a set of fiqh law rules created within one or another of four Sunni law schools one more time confirm the capability of Islamic law to be adapted to the different regions and social circumstances. Moreover, as comparative analysis between traditional fiqh rules of Hanafi branch and modern civil codes of Ottoman Empire and of present Jordanian state showed, Islamic fiqh law rules are the consisting part of contemporary legal texts and their content, developing alongside the changing state-made law.
6. The contemporary scientific discourse proves that the further development of Islamic law mainly depends on which approach towards the sources of Islamic law and its interpretation, namely literal/traditional or reformative/liberal, will prevail in the future.
   6.1. If literal approach towards the sources of Islamic law becomes the most prevailing one, the question of adaptability of Islamic law could not be posed. In such a case, those scholarly positions whereby Islamic law is static, invariable and alien to the factor of change would have to be confirmed as most reasonable.
   6.2. The followers of traditional interpretational theory of Islamic law hold the manuals of fiqh law precedents sufficient enough to deal with contemporary global problems. As a result, they provide a ground to speak the lawyers of the other legal traditions about stagnation of Islamic law and its incompatibility with living time.
   6.3. The representers of reformative/liberal approach towards the interpretational process of Islamic legal sources seek to restore ijtihadic tradition (or so called neo-ijtihad) in order to interpret Islamic law according to the present day realities. In such a case, even the most controversial Islamic legal norms, regarding to the need of their adaptability, can become the object of reform.

Due to such conclusion, this approach could be regarded as the most suitable to respond adequately to the living period.

7. The research of the selected reform proposal introduced by the contemporary Muslim reformator Abullahi An'Na-im showed that, in case of a refusal or essential reform of the methodological theory of legal interpretation reflecting nothing more but the historical context, even the least developed Islamic legal aspects could be reformulated according to the present day requirements. More precisely, the proposal of reformulating an old theory of abrogation of the Quranic verses permits not solely to review a huge number of outdated fiqh law rules, but also to recreate the classical methodological theories by means of which Islamic law guidelines written in the Quran and Sunna were interpreted in the course of history of Islam. The reformed theory of abrogation of Quranic verses provides a ground to settle such most controversial issues in Islam as equality between men and women, the doctrine of a use of force, religious freedom or penalties for a number of particular crimes.
8. The research of the contemporary problems regarding the enforcement of Islamic legal norms in the world provides a possibility to enumerate a number of examples of adaptability of the Sharia norms and Islamic law:
    8.1. Internet fatwas (religious/legal opinions of Muslim scholars and jurists) and their spread around the world is that contemporary social phenomenon through which the Sharia and Islamic law undergo a twofold process of mutation:
        8.1.1. First of all, Islamic legal norms are interpreted and applied in the content of individual fatwas devoted to resolve personal Muslims' problems. By doing this, the Sharia norms and Islamic law undergo the process of adaptation to the present-day needs of Muslims.
        8.1.2. Besides that, a number of fatwas on the pressing issues became the point of departure for the creation of the methodological system of fiqh law which gradually turns into a new Islamic fiqh law branch devoted to adapt the Sharia norms and Islamic law to the current legal realities and social needs of Muslims living in non-Muslim states. The methodological system of fiqh law for Muslim minorities could be developed into even more serious tool for the process of the whole Islamic legal interpretation if the theory of maqasid al-sharia as the main pillar of this system were renewed by the legal criterion of human dignity.
    8.2. The Sharia norms and Islamic legal rules are partly implemented both through the Islamic organizations and institutions legally operating in Western states and through the state legal apparatus (statutory law and case-law) of one or another Western country (Greece, Canada, England and so forth):
        8.2.1. For example, the institution of the Sharia Council in London implements a number of particular Sharia normative rules in the field of family law adapting it to the social conditions of Muslims living in England.

8.2.2. Besides, the statutory law of Western states accommodates a number of particular Sharia norms which comply with the principle of rule of law as well as with local culture and customs. Western national and international courts test whether one or another Sharia-based religious practice rests in the limits of the principle of religious freedom. Only those Sharia-based norms which are not alien to the Western legal values might expect to be accommodated by the court judgment.

8.2.3. The statutory law and court judgments of Greece in the fields of inheritance and family law prove the possibility of coexistence between Islamic law and this state's law which represents Western legal tradition as such.

8.3. The research made in the Kingdom of Jordan revealed that Jordanian law is a blend of the state-made law, customary law and traditional religious law confirming the fact of adaptability of Islamic law.

8.3.1. As the research of Jordanian laws showed, their texts as well as their content are mainly influenced by the Islamic fiqh law tradition of Hanafi branch. According to the previously made amendments of Jordanian statutory law, the judges of Jordanian Sharia courts received a right to ground their decisions not only on the Hanafi fiqh law rules but also on the Islamic fiqh rules of the other schools of law.

8.3.2. The research of Jordanian Constitutional text, also of norms written in the criminal and civil codes of Jordan gave a ground to conclude that the fact that Islamic fiqh law rules as consisting part of Jordanian statutory law are capable to be amended in the broader process of amending Jordanian state made law what again proves the adaptability as the core feature of Islamic law. With an involvement of Islamic religious community into the state legal apparatus, all the transformations made by the state are agreed with the religious leaders. It is to be noted that such governance based on the compromise should be treated as exemplary in the context of Muslim majority countries.

Scientific publications of the author on this topic:

1. Valčiukas J., Konstitucionalizmo samprata Islamo teisės tradicijoje. Logos Nr. 77, 2013. P. 186-194.
2. Džiaukštaitė I., Valčiukas J., Šaryjos samprata Europos Žmogaus Teisių Teismo sprendimuose. KTU Socialinių mokslų doktorantų ir jaunųjų mokslininkų konferencijos „Tarpdisciplininis diskursas socialiniuose moksluose – 4". 2014. P. 105-112.
3. Valčiukas J., Islamo teisė ir modernybė: Faustiškasis kaitos kelias. Logos Nr. 82, 2015. P. 203-215.
4. Valčiukas J., Paprotys kaip teisės šaltinis Islamo teisės tradicijoje (I dalis). Logos Nr. 83, 2015. P. 169-174.

5. Valčiukas J., Paprotys kaip teisės šaltinis Islamo teisės tradicijoje (II dalis). Logos Nr. 84, 2015. P. 152-161.
6. Džiaukštaitė I., Valčiukas J. Islamo teisė Vakaruose: Šariato teisminių institucijų statusas Anglijoje. KTU Konferencijos "Socialiniai ir humanitariniai mokslai: iššūkiai globalizacijos kontekste" straipsnių leidinys "Tiltas į ateitį" Nr. 1 (9), 2015.
7. Valčiukas J., Islamo teisės samprata formavimosi laikotarpiu ir XXI a.: tradicijos ir pokyčio sintezė. Logos Nr. 85, 2015. P. 145-155.

CURRICULUM VITAE

Personal information

valciukas.juozas@gmail.com; vjuozas@mruni.eu

Education

Phd in Law, 2011 – 2017 Mykolas Romeris University
Erasmus studies, 2010 University of Descartes, France
Master in Law 2009 – 2011 Mykolas Romeris University
Bachelor of Law and Management, 2003-2009, Mykolas Romeris University

Work Experience

2018 – till now	Ministry of Justice of the Republic of Lithuania, Adviser to the Minister;
2015 – till now	Public Law Institute at Mykolas Romeris University, Lecturer;
2011 – 2015	Philosophy of Law Department at Mykolas Romeris University, Assistant.

Academic fellowships, internships

Internship at Muslim Law Shariah Council UK, 2016 (one month);

Internship at University of Jordan, The Kingdom of Jordan, 2016 (two months);

Internship at Muslim Law Shariah Council UK, 2015 (one month);

Fellowship at Westminster Law School (University of Westminster), UK, 2013 (three months).

MYKOLO ROMERIO UNIVERSITETAS

Juozas Valčiukas

ISLAMO TEISĖ: ADAPTYVUMO KLAUSIMAS

Daktaro disertacijos santrauka
Socialiniai mokslai, teisė (01 S)

Vilnius, 2018

Daktaro disertacija rengta 2011-2017 metais, ginama Mykolo Romerio universitete pagal Mykolo Romerio uuniversitetui su Vytauto Didžiojo universitetu Lietuvos Respublikos švietimo ir mokslo ministro 2011 m. birželio 8 d. įsakymu Nr. V-1019 suteiktą doktrorantūros teisę.

Mokslinis vadovas:
Prof. dr. Justinas Žilinskas (Mykolo Romerio universitetas, socialiniai mokslai, teisė, 01 S)

Daktaro disertacija ginama Mykolo Romerio universiteto ir Vytauto Didžiojo universiteto teisės mokslo krypties taryboje:

Pirmininkas:
Prof. dr. Gediminas Mesonis (Mykolo Romerio universitetas, socialiniai mokslai, teisė, 01 S)

Nariai:
Prof. dr. Eglė Bilevičiūtė (Mykolo Romerio universitetas, socialiniai mokslai, teisė, 01 S);
Doc. dr. Adas Jakubauskas (Mykolo Romerio universitetas, socialiniai mokslai, politikos mokslai, 02 S);
Dr. Paresh Kathrani (Vestminsterio universitetas, Jungtinė Karalystė, socialiniai mokslai, teisė, 01 S);
Prof. dr. Egdūnas Račius (Vytauto Didžiojo universitetas, socialiniai mokslai, politikos mokslai, 02 S).

Daktaro disertacija bus ginama viešame teisės mokslo krypties tarybos posėdyje 2018 m. kovo 23 d. 13 val. Mykolo Romerio universitete, L-101 aud. (MRU LAB).

Daktaro disertacijos santrauka išsiųsta 2018 m. vasario 23 d.

Daktaro disertaciją galima peržiūrėti Lietuvos nacionalinėje Martyno Mažvydo bibliotekoje (Gedimino pr. 51, Vilnius) bei Mykolo Romerio universiteto bibliotekoje (Ateities g. 20, Vilnius) ir Vytauto Didžiojo universiteto bibliotekoje (K. Donelaičio g. 52, Kaunas).

Juozas Valčiukas

ISLAMO TEISĖ: ADAPTYVUMO KLAUSIMAS

SANTRAUKA

Tiriamoji problema. Perfrazuojant šiuolaikinio Islamo teisės tyrinėtojo Wael B. Hallaq'o teiginį apie šaryją ir jos tyrimus[844], šiandieną rašyti darbą apie šaryją ir Islamo teisę jau toli gražu nereiškia kalbėti apie kažką svetimo ar tolimo. Šiuolaikiniame kontekste toks darbas labiau liudija intenciją pažinti kaimynystėje gyvenančius žmones ar net pačią Vakarų teisės tradiciją, kuri, kaip rodo Graikijos teisės atvejis, savyje talpina ne vieną Islamo teisės taisyklę, taikomą vietos musulmonų bendruomenės nariams. Nors šaryja iki šiol yra dažnai tapatinama išimtinai su teise, pagal koraniškąją šaryjos sampratą ji, pirmiausia, simbolizuoja musulmonų sektiną normatyvinį kelią, kurio supratimas leidžia perprasti daugelį su musulmonų identitetu susijusių klausimų. Tuo tarpu Europos Žmogaus Teisių Teismas (EŽTT) byloje dėl Turkijos politinės partijos uždraudimo, pasiūlius inkorporuoti šaryją į Turkijos valstybės teisę, pareiškė, kad šaryja kaip dieviškųjų taisyklių ir dogmų sistema yra užfiksuota visiems laikams ir yra nekintanti. Taigi ji negali būti suderinama su Europos Žmogaus Teisių ir Pagrindinių Laisvių Konvencija (EŽTK), o tai turėtų reikšti, kad sekuliarioje valstybėje susiklostę socialiniai santykiai negali būti reguliuojami šaryjos taisyklėmis.

Natūraliai kyla klausimas, kaip paaiškinti tokią EŽTT tezę šiandieninių faktinių aplinkybių kontekste: penktadalis visų pasaulio musulmonų gyvena už musulmonų daugumą sudarančių valstybių ribų, jau kuris laikas Islamo institucijos legaliai teikia su šaryjos normų įgyvendinimu susijusias paslaugas nemusulmoniškose valstybėse ir ypač tą faktą, kad kai kurių Vakarų valstybių statutinė teisė ir teismų formuojama praktika tam tikrą skaičių šaryjos normų jau yra inkorporavusi į savo teisines sistemas. Nepaisant to, EŽTT teiginys reiškia tai, kad, pavyzdžiui, Vakarų Europoje gyvenantys musulmonai neturi teisės vadovautis šaryja dėl jos nesuderinamumo su Vakarų teisės vertybėmis. Ar tai taip pat reiškia, kad musulmonai gyvenantys nemusulmoniškose šalyse yra priversti vadovautis vien tik vietos valstybės teise? Ar nepanašu, kad tokiu atveju nemusulmoniškose valstybėse gyvenantys musulmonai atsiduria situacijoje, panašioje į Antigonės dilemą, kai reikia pasirinkti tarp dviejų kraštutinumų: religinių įsitikinimų ir nemusulmoniškos (teisinės) kultūros?

Neginčijamai pripažinus EŽTT tezę dėl šaryjos nesuderinamumo su EŽTK teisinga ir pagrįsta, nemusulmoniškose valstybėse gyvenantys musulmonai, kurie savo religinį gyvenimą sieja su tam tikromis šaryjos norminėmis taisyklėmis, patenka į pakankamai sudėtingą padėtį. Galima būtų įvardinti bent keletą hipotetinių scenarijų, kaip išspręsti tokią situaciją: (1) musulmonai atsisako gyventi pagal šaryjos normines taisykles; (2) anksčiau ar vėliau musulmonai sugrįžta į musulmonų daugumą sudarančias valstybes, kur turi nevaržomą galimybę gyventi pagal šaryją; (3) vieną dieną šaryja tampa universalia teisine

844 Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 1.

sistema; (4) šaryjos norminei sistemai suteikiamas paralelinės teisės statusas tose nemusulmoniškose valstybėse, kuriose gyvena pakankamai didelė musulmonų mažuma; (5) šaryja adaptuojasi prie kitos teisinės sistemos. Žinoma, pirmieji trys variantai prasilenkia ne tik su sveiku protu, bet ir su Islamo religijos esme, o ketvirtasis dažniausiai duoda priešingus rezultatus ir būna pasmerktas nesėkmei. Nors penktasis scenarijus skamba labiausiai realistiškai, jis aiškiai prieštarauja EŽTT išsakytai tezei.

Disertacijoje imamasi tyrimo, susijusio su penktuoju scenarijumi. Tai reiškia, kad disertacinio tyrimo problema yra šaryjos normų ir Islamo teisės adaptyvumas laike ir gyvenamosiose sąlygose. Visos disertacijos dalys yra tiesiogiai arba netiesiogiai susijusios su šaryjos normų ir Islamo teisės adaptyvumo problema. Pripažinus, kad adaptyvumas yra neatsiejama šaryjos ir Islamo teisės savybė, tai galėtų būti svarbu mažiausiai dėl dviejų priežasčių. Tiems, kas siekia Islamo teisės reformos, tai galėtų reikšti žalią šviesą siūlant ir įgyvendinant susijusias idėjas. Tuo pat metu tiems, kas linkę matyti šaryją ir Islamo teisę užfiksuota visiems laikams ir nekintančia, tokia išvada galėtų sudrebinti turimų argumentų tvirtumą ir paskatinti tolimesnes diskusijas. Svarbu pažymėti, kad mūsų tyrimas yra vykdomas išimtinai musulmonų sunitų atšakos Islamo teisės ribose, kadangi sunitų atšaka yra neginčijamai dominuojanti musulmonų tarpe. Siekiant aiškumo, visos disertacijoje minimos datos bus rašomos ne pagal musulmonų kalendorių, bet naudojant krikščioniškąjį kalendorių.

Darbo aktualumas, naujumas, reikšmė. Daugybė priežasčių lemia tai, kad pasirinkta darbo tema yra aktuali šiandieniniame kontekste. Be to, šiuo metu EŽTT baigia nagrinėti bylą *Molla Sali vs. Graikija*, kurioje bus iš esmės sprendžiamas ne tik Graikijos teismų sprendimas taikyti Islamo paveldėjimo teisės normas vietos Musulmonų civiliniuose santykiuose, bet ir tuo pačiu šaryjos bei Vakarų teisės sugyvenimo klausimas. Galima paminėti ir daugybę kitų faktorių, lemiančių pasirinktos temos aktualumą. Pavyzdžiui: (a) musulmonų skaičius ir jo augimas valstybėse, kuriose musulmonai sudaro mažumą;[845] (b) šaryjos normas iš dalies įgyvendinančių musulmonų institucijų skaičiaus augimas Vakarų Europos valstybėse;[846] (c) įvairovė konfliktų tarp žmonių ir bendruomenių, pavyzdžiui, psichologiniai, kultūriniai, socialiniai, religiniai, dėl specifinio teisinio reguliavimo ir pan.;

845 Pagal 2015 metų duomenis pasaulyje gyvena daugiau negu 1.8 milijardo musulmonų, kas sudaro maždaug 24 procentus pasaulio gyvenojų. Šaltinis: http://www.pewforum.org/2017/04/05/the-changing-global-religious-landscape/global-population-projections-2015-to-2060 Daugiau negu vienas penktadalis visų Musulmonų gyvena nemusulmoniškose valstybėse. Pavyzdžiui, Amerikoje gyvena 3.35 milijonų Musulmonų, kas sudaro maždaug 1% visos Amerikos populiacijos. Šaltinis: http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/
Iki 2010 metų maždaug 44 milijonai Musulmonų gyveno Europoje, kas sudaro apie 6 procentus visos Europos gyventojų. Europos Sąjungos šalyse skaičiuojama maždaug 19 milijonų Musulmonų. Šaltinis: http://www.pewforum.org/2011/01/27/future-of-the-global-muslim-population-regional-europe/

846 Su musulmonų skaičiaus augimu dažnai atsiranda vis daugiau iniciatyvų įkurti su šaryjos normų įgyvendinimu susijusias institucijas. Pavyzdžiui, Didžiojje Britanijoje pirmoji šaryjos normas įgyvendinanti institucija buvo įkurta 1987 metais. Po trisdešimties metų priskaičiuojama daugiau negu 25 Šaryjos normas įgyvendinančios institucijos ir organizacijos.

(d) teroristų išpuoliai Islamo vardu;[847] (e) pabėgėlių krizė;[848] (f) anti-Islamiška nacionalistų retorika;[849] (g) politinis Islamas ir jo ekspansinė politika siekiant paskleisti savo ideologiją tarp musulmonų, gyvenančių valstybėse, kuriose jie sudaro mažumą;[850] (h) kintantis mokslinis diskursas šaryjos ir Islamo teisės tematika;[851] (i) Vakarų nacionalinių ir tarptautinių

847 Teroristų išpuoliai Islamo vardu labiausiai prisideda prie augančio nepasitikėjimo musulmonais Vakaruose, kurių dauguma savo gyvenimuose vadovaujasi šaryjos normomis. Šaryjos normos ir ypač Islamo teisė neretai vakariečių pradedama tapatinti su teroristų daroma netvarka ir vykdomais nusikaltimais. Toks šių dienų fonas įpareigoja moksliininkus skleisti moksline analize paremtas objektyvias žinias apie šaryją ir Islamo teisę, tai yra ir apie musulmonų identitetą, siekiant išvengti bet kokių dirbtinai keliamų konfliktų tarp skirtingų religijų atstovų. Visa tai dar labiau aktualina darbo temą šaryjos ir Islamo teisės klausimais ir ypač šių norminių sistemų adaptyvumo aspektu, kadangi tai tiesiogiai susiję su šaryjos gebėjimu koegzistuoti su kitomis teisės sistemomis.

848 Tyrimai susiję su šaryjos normų ir Islamo teisės gebėjimu prisitaikyti prie kitos teisės sistemos yra daugiau negu aktualūs šiuolaikinės migracijos ir pabėgėlių krizės kontekste. Su augančia pabėgėlių krize, kuomet dauguma pabėgėlių atvyksta į Vakarų valstybes iš musulmoniškų Artimųjų Rytų ir Šiaurės Afrikos kraštų, tiesiogiai susijęs šaryjos ir Islamo teisės adaptyvumo klausimas, kadangi atvykstantys musulmonai atsineša ir nuo jų identiteto neatkiriamą praktiką vadovautis šaryjos normomis ir principais.

849 Teroristinių išpuolių ir pabėgėlių krizės fone anti-Islamiška retorika siekiant politinių tikslų, kuri vis dažniau girdima iš Vakarų kraštutinių dešiniųjų politikų lūpų, vienaip ar kitaip pasiekia vakarų pasaulio gyventojų ausis. Kaip rašo Shadi Hamid ir Rashid Dar, "daugybė nacionalistų Vakaruose siekia pateikti Islamą ir musulmonus ne tiek kaip grynai saugumo, bet kaip civilizacinę grėsmę." Paradoksalu, kad anti-Islamiškose Vakarų politikų žinutėse dažniausiai atkartojama tai, kas apie Islamą ir šaryją pateikiama teroristų lozunguose. Tokiu būdu Vakarų žmogus, kuris nebūtinai yra susipažinęs su Islamu ir šaryjos samprata, susiduria su neigiama informacija jau ne tik iš teroristų, bet ir iš daugiau ar mažiau populiarių Vakarų politikų. Šiame kontekste itin svarbu tirti su šaryja ir Islamo teise susijusius klausimus siekiant objektyviais faktais paneigti tai, kas peršama tam tikrų politikų Vakaruose. Daugiau apie Vakarų konservatyvius nacionalistus ir tai, kuo jie panašūs su Islamistais skaityti čia: www.the-american-interest.com/2017/11/16/the-rise-of-the-westernists/

850 Politinio Islamo ideologija paremta dažniausiai pažodiniu Islamo ir Islamo teisės normų skaitymu idealizuojant Medinos laikų Islamą ir musulmonų galios augimo faktą. Kaip papildo Avi Melamed, Politinio Islamo atstovais, pirmiausia, įvardina Musulmonų Broliją ir Salafistų judėjimą, tarp kurių, pasak autoriaus, didžiausias skirtumas yra tai, kad Musulmonų Brolijos atstovai yra labiau lanksčūs ir pragmatiški Islamo teisės adaptyvumo šiandienos realijose klausimu, o Salafistai yra mažiau lanksčūs, tikintys dogmatiniu Islamo religinės teisės taikymu. Svarbu pažymėti, kad abi ideologijos yra atstovaujamos skirtingų partijų Artimųjų Rytų valstybėse, apie ką Avi Melamed kalba savo knygoje. Daugiau skaityti čia: Avi Melamed, *Inside the Middle East: Making Sense of the Most Dangerous and Complicated Region on Earth* (New York: Skyhorse Publishing, 2016), 29-85.
Kaip parodė disertacinis tyrimas, atliktas vienoje iš Londone veikiančių Šaryjos tarybų, tam tikras skaičius panašių institucijų Anglijoje užsiima visai ne tuo, ką oficialiai deklaruoja veikiančios. Pasak kai kurių Šaryjos tarybos Londone narių, Politinio Islamo ideologijos sklaida intensyviai vykdoma iš kai kurių Artimųjų Rytų valstybių siekiant primesti Vakaruose gyvenantiems musulmonams tam tikra ideologija pagrįstą šaryjos ir Islamo teisės interpretaciją. Manytina, kad būtent moksliniai tyrimai Islamo teisės ir šaryjos tematika gali padėti išgryninti, kas iš tikrųjų pagal pirminius šaltinius ir jų aiškinimo istoriją glūdi šaryjos ir Islamo teisės sampratos turinyje, tokiu būdu paneigiant visas politiniais tikslais ir nesuderinama su gyvenamuoju laiku ideologija paremtas Islamo teisės aiškinimo teorijas. Apie tai, kaip suvaldyti politinio Islamo plėtrą Vakaruose, galima skaityti čia: Ayaan Hirsi Ali, *The Challenge of Dawa: Political Islam as Ideology and Movement and How to Counter* It (Stanford: Hoover Institution Press, 2017).

851 Šalia literalistiniu, tradiciniu, liberaliu ir sekuliariu požiūriu grįstos šaryjos ir Islamo teisės aiškinimo teorijų, šiuolaikiniame moksliniame diskurse atsiranda naujos reformatoriškos metodologinės teisės doktrinos, skirtos adaptuoti šaryjos normas ir Islamo teisę prie gyvenamo laikotarpio socialinių poreikių. Viena tokių mūsų tyrime analizuojama nuodugniai siekiant atsakyti, kiek ji gali būti laikoma pakankama adaptuoti Islamo teisę pačiais kontraversiškiausiais klausimais.

teismų sprendimai ir skirtingos išvados kalbant apie šaryjos ir Islamo teisės klausimą;[852] (j) transformacijos šiuolaikiniuose Artimuosiuose Rytuose, t. y. Islamo gimimo centre, kur palaipsniui nustojama save identifikuoti su nacionaline valstybe, konstitucija ar pilietybe ir vis labiau atsigręžiama į religiją (ar net religinį fanatizmą), papročius, etniškumą, kas turi esminės įtakos galimam šaryjos ir Islamo teisės sampratos kitimui[853].

Kalbant apie naujumą, Lietuvoje nėra atlikta disertacinio lygmens darbų šaryjos ir sunitų atšakos Islamo teisės tematika. Tiesa, Vakarų Europos valstybėse šaryjos bendrąja prasme ir ypač Islamo teisės temos buvo ir yra analizuojamos mokslininkų iš skirtingų perspektyvų. Tokios temos kaip Islamo teisės istorinė raida, prigimtis ir šaltiniai, šiuolaikinė evoliucija ir jos tendencijos yra labiausiai vyraujaujančios tyrimuose. Vis dėlto šaryjos ir Islamo teisės adaptyvumo klausimas dažniausiai analizuojamas tik fragmentiškai. Tuo tarpu šioje disertacijoje šaryjos ir Islamo teisės adaptyvumo problemai skiriamas pagrindinis dėmesys.

Šaryjos normų ir Islamo teisės adaptyvumo problema vykdytame tyrime pasirinkta analizuoti trimis kryptimis. Ji tiriama (i) suformuotos Islamo teisės teorijos ir susiklosčiusios Islamo teisės istorijos kontekste; (ii) šiuolaikinio mokslinio diskurso fone, taip pat (iii) šiandieną įgyvendinamų šaryjos normų ir Islamo teisės taisyklių Vakaruose ir Artimuosiuose Rytuose realybėje. Visų pirma, tyrimų, vykdytų Jordanijos universitete, rezultatai leidžia naujai pažvelgti į tradicinę Islamo teisės teoriją ir jos istorinę raidą tiriant adaptyvumo problemą. Antra, šiuolaikinio mokslinio diskurso bei naujausių reformos idėjų analizės rezultatai suteikia galimybę pabandyti suprasti vyraujančias tendencijas, susijusias su Islamo teisės šaltinių reinterpretavimo galimybe labiausiai nesuderinamų su gyvenamuoju laikotarpiu klausimų kontekste. Trečia, šiandieną Vakaruose ir Artimuosiuose Rytuose įgyvendinamos šaryjos normų ir Islamo teisės tyrimas bei jo rezultatai leidžia ne tik suvokti, kokį vaidmenį dabartiniu laiku šaryja vaidina musulmonų bendruomenėse Vakaruose ir Islamo teisė Artimuosiuose Rytuose, bet ir įžvelgti su Islamo teisės adaptyvumu realybėje susijusias transformacijų kryptis. Londone kelis dešimtmečius veikiančioje Šaryjos Tarybos (*The Muslim Law Shariah Council UK*), Jordanijos Karalystės Šaryjos teismuose bei Jordanijos Konstituciniame Teisme vykdyti tyrimai ir jų rezultatai suteikia galimybę pažvelgti į visa tai naujomis akimis.

852 Šaryjos normų ir Islamo teisės adaptyvumo klausimas tampa vis labiau aktualus po Vakarų nacionalinių ir tarptautinių teismų sprendimų ir pasisakymų šaryjos ir Islamo teisės sugyvenimo su kitomis teisės sistemomis klausimais. Iš vienos pusės Europos Žmogaus Teisių teismas viename iš sprendimų paskelbė tezę, kad šaryja visa savo apimtimi negali būti suderinama su Vakarų teisės vertybėmis. Iš kitos pusės Anglijos, Kanados ar Graikijos nacionalinių teismų sprendimai tam tikras šaryja paremtas normas ir Islamo teisės taisykles patvirtino kaip atitinkančias vietos teisės normoms ir principams. Tyrimo problemos aktualumą didina ir tai, kad Europos Žmogaus Teisių Teismas metų bėgyje ketina paskelbti teismo sprendimą, kuriame visas dėmesys bus skirtas Islamo teisės taisyklių santykiui su Graikijos teise, kurios dalimi ji yra jau daugybė metų. Darbe ne tik analizuojami iki šiols priimti ir pakankamai skirting savo išvadomis teismų sprendimai, bet ir stengiamasi nuspėti Europos Žmogaus Teisių teismo kitų metų verdiktą paminėtu klausimu.

853 Daugiau apie vykstančias transformacijas Artimuosiuose Rytuose, kurios betarpiškai susijusios ir su potencialiais šaryjos ir Islamo teisės sampratos pokyčiais Islamo gimimo centre galima skaityti čia: Avi Melamed, *Inside the Middle East: Making Sense of the Most Dangerous and Complicated Region on Earth* (New York: Skyhorse Publishing, 2016); Richard Haas, *A World in Disarray: American Foreign Policy and the Crisis of the World Order* (New York: Penguin Press, 2017).

Kalbant apie tyrimą ir jo rezultatų reikšmę, visų pirma, disertacinis darbas gali būti laikomas indėliu į Lietuvos teisės mokslą inspiruojant naujus ir gyvenamajam laikmečiui svarbius mokslinius tyrimus šaryjos ir Islamo teisės tematika. Nors jau kuris laikas Vakarų Europos valstybių moksle šaryjos ir Islamo teisės temoms skiriamas nemažas dėmesys, adaptyvumo problema, kaip jau minėta, dažniausiai nagrinėjama tik kaip papildomas klausimas. Mūsų darbe šaryjos ir Islamo teisės adaptyvumo klausimui skiriamas pagrindinis dėmesys. Taigi galima teigti, kad šaryjos ir Islamo teisės adaptyvumo problemos tyrimas ir jo rezultatai taip pat prisideda prie Vakarų mokslininkų tyrimų Islamo teisės tematikoje. Kas taip pat svarbu pažymėti, kad atliktas darbas ir jo rezultatai prisideda prie iškeltos idėjos pereiti nuo Vakarų teisės tradicijos tyrinėjimo prie nevakarietiškų teisės sistemų ir tradicijų nagrinėjimo įgyvendinimo siekiant ištirti, kaip susiliečia Vakarų teisė ir nevakarietiška teisė ir kaip atsiranda bendra žmonijos teisinė kalba.[854]

Matome daugybę sričių, kur tyrimo rezultatai galėtų pasitarnauti praktikoje kaip žinių šaltinis. Disertacijos rezultatai gali būti naudingi įvairaus lygmens valstybinėms institucijoms arba nevyriausybinėms organizacijoms. Pabėgėlių krizės akivaizdoje, disertacijoje pateikiamos žinios yra svarbios toms institucijoms ir asmenims, kurie sprendžia su musulmonų integracija susijusius klausimus. Diplomatinio korpuso žmonėms, kurie dirba su Artimųjų Rytų regiono valstybėmis, tyrimo rezultatai gali suteikti papildomų žinių, kurios reikalingos plėtojant kultūrinius, ekonominius ryšius su vienos ar kitos regiono valstybės pareigūnais, potencialiais verslo partneriais ir pan. Tai ypač aktualu Lietuvoje, kur augantį suinteresuotumą Artimaisiais Rytais akivaizdžiai įrodo dažnėjantys aukščiausių valstybės pareigūnų vizitai regiono valstybėse. Saugumo tarnybų darbuotojams disertacijos rezultatai gali būti naudingi jų atsakomybių ribose. Galiausiai verslininkai, galvojantys apie verslo ryšius su musulmonais, disertacijoje gali atrasti svarbios informacijos, kuri liečia musulmonų identiteto klausimus, kas galimai padėtų bendraujant su potencialiais verslo partneriais.

Disertacijos tyrimo objektas: Disertacinio tyrimo objektas yra musulmonų sunitų atšakos Islamo teisė ir jos adaptyvumo problematika.

Darbo tikslas: Disertacinio darbo tikslas yra kompleksiškai ištirti šaryją ir Islamo teisę bei jos adaptyvumo galimybes. Tyrimo tikslui pasiekti, Islamo teisės adaptyvumo klausimas analizuojamas trimis kryptimis: suformuotos Islamo teisės teorijos ir susiklosčiusios Islamo teisės istorijos kontekste, šiuolaikinio mokslinio diskurso fone, šiandieną įgyvendinamų šaryjos normų ir Islamo teisės taisyklių Vakaruose ir Artimuosiuose Rytuose realybėje.

Disertacinio darbo uždaviniai:

1) Patikslinti ir išgryninti su šaryja painiojamus terminus; kritiškai išanalizuoti iki šiol vyraujančią tendenciją tapatinti šaryją su Islamo teise;

2) Ištirti Islamo teisę istoriniame kontekste ir įrodyti, kad šaryjos ir Islamo teisės adaptyvumas yra istorinis faktas;

---

854 „Galiausiai socialinė teisės teorija turi pereiti nuo Vakarų teisės sistemų ir Vakarų teisės tradicijų tyrinėjimo prie nevakarietiškų teisės sistemų ir tradicijų tyrinėjimo; ji turi ištirti, kaip susiliečia Vakarų teisė ir nevakarietiška teisė ir kaip atsiranda bendra žmonijos teisinė kalba. Juk tik einant šia kryptimi galima tikėtis įveikti krizę, XX a. pabaigoje ištikusią Vakarų teisės tradiciją." Harold J. Berman, *Teisė ir Revoliucija: Vakarų Teisės Tradicijos Formavimasis*. Iš anglų kalbos vertė Arvydas Šliogeris (Vilnius: Pradai, 1999), 71.

3) Išnagrinėti pirminius Islamo teisės šaltinius – Koraną ir Suną – siekiant išsiaiškinti, ar šie šaltiniai nėra pagrindinė kliūtis Islamo teisės adaptyvumo klausimu; išanalizuoti racionalios prigimties Islamo teisės šaltinius ir atskleisti jų reikšmę Islamo teisės interpretavimo procese;

4) Kadangi Islamo teisė neapsiriboja šaltiniais, bet labiau Islamo mokslininkų teisinio samprotavimo ir interpretatcijos būdu (*ijtihad*) suformuota išvestine fikh teise (*fiqh law*), mūsų uždavinys yra išnagrinėti islamiškąją idždihad'o idėją, kuria remiantis musulmonų mokslininkai ir juristai išveda teisę (fiqh law) iš Islamo teisės šaltinių, ir palyginti keturių Sunitų fikh teisės mokyklų teisės taisykles kaip interpretacijos rezultatus specifiniais klausimais siekiant parodyti pačios fikh teisės daugiareikšmiškumą;

5) Išnagrinėti konkrečiai sunitų Hanafi mokyklos fikh teisės taisykles ir jų vietą pasirinktų musulmonų valstybių civiliniuose kodeksuose siekiant nustatyti, kokią vietą tradicinė Hanafi fikh teisė užima ir kaip ji buvo adaptuota šiuolaikinių Islamo valstybių teisės aktuose;

6) Išanalizuoti šiuolaikinį mokslinį diskursą ir vyraujančius metodologinius požiūrius į Islamo teisės šaltinius ir jų interpretaciją bei pristatyti liberalaus/reformacinio požiūrio atstovų neseniai pasiūlytą Islamo teisės reformą labiausiai neišvystytų Islamo teisės aspektų atžvilgiu;

7) Trejopu būdu ištirti šaryjos normas ir Islamo teisę šiuolaikinėje praktikoje. Pirma, išanalizuoti globaliai paplitusį Islamo religinių/teisinių nuomonių (elektroninių fatvų) leidimo fenomeną ir naują metodologinę fikh teisės teoriją, skirtą musulmonų mažumoms gyvenančioms nemusulmoniškose valstybėse. Antra, analizuoti nepriklausomas Islamo institucijas, kurios veikia Vakaruose, ir Vakarų valstybių teisinį aparatą, siekiant parodyti, kaip per šiuo du kanalus šaryjos normatyvinės taisyklės ir Islamo teisė yra iš dalies įgyvendinamos Vakarų valstybėse. Trečia, išnagrinėti šiuolaikinę valstybės kuriamą teisę Jordanijos Karalystėje siekiant išsiaiškinti, kokią įtaką šiuolaikinei Artimųjų Rytų valstybių teisei daro tradicinė Islamo teisė, kokias transformacijas ji patiria būdama valstybės kuriamos teisės dalimi.

Disertacijos hipotezė: Šaryjos normoms ir Islamo teisei yra imanentiškai būdingas atvirumas bei lankstumas (adaptabilumas), todėl šios norminės sistemos turi visas galimybes adaptuotis prie besikeičiančių laiko ir socialinio gyvenimo aplinkybių.

Tyrimų apžvalga. Nors nėra atliktų išsamių tyrimų sunitų Islamo teisės srityje lietuvių kalba, keletas įvadinių knygų į Islamo kultūrą ir religiją yra išverstos į lietuvių kalbą. Šalia to, prof. Egdūnas Račius, kuris yra daugybės mokslinių straipsnių autorius, yra parašęs Islamo terminų žodyną, kuris aiškina ir su šaryja bei Islamo teise susijusius terminus[855]. Kitame autoriaus darbe, skirtame pristatyti Islamo religijos pagrindus, pateikiama informacijos ir Islamo teisės klausimais.[856] Dar daugiau, visai neseniai pasirodė naujausia Egdūno Račiaus knyga apie Musulmonų bendruomenes Rytų Europoje ir jų situacijas šiuolaikiniame kontekste.[857] Kalbant apie darbus Islamo teisės tematika kitomis Vakarų kalbomis, daugybė knygų anglų, prancūzų ir vokiečių kalbomis yra išleista siekiant atskleisti vieną ar kitą dažniausiai nagrinėjamą Islamo teisės klausimą. Pažymėtina, kad šaryjos normų ir Islamo teisės adaptyvumo tema dažniausiai yra aptariama tik kaip papildomas klausimas, analizuojant

855 Egdūnas Račius, *Islamo žinynas* (Vilnius: Vilnius University Press, 2007).

856 Egdūnas Račius, *Musulmonai ir jų islamai* (Vilnius: Mokslo ir enciklopedijų leidybos centras, 2016).

857 Egdūnas Račius, *Muslims in Eastern Europe* (Edinburgh: Edinburgh University Press, 2017).

jį kitų temų kontekste. Šioje vietoje reikia paminėti pagrindinius mokslininkus rašančius Islamo teisės tematika, kurių tyrimų rezultatai vienaip ar kitaip leido pažinti su disertacijos tema susijusius klausimus.

Islamo teisės vystymosi istorijos bėgyje tema buvo tiriama tokių autorių kaip Ignaz Goldziher[858], Joseph Schacht[859], Norman Calder[860], Noel Coulson[861], Marshal Hodgson[862], Herve Bleuchot[863], Knut Vikor[864], Wael B. Hallaq[865] ir daugelio kitų, kurie, be kita ko, savo tyrimų ribose palietė ir Islamo teisės adaptyvumo klausimą. Pavyzdžiui, Noel Coulson ir Joseph Schacht teigė, kad Islamo teisė nėra adaptyvi keičiantis laikui ir gyvenamosioms aplinkybėms. Tuo tarpu Norman Calder ir Wael Hallaq, priešingai, teigė, jog Islamo teisė yra lanksti ir dinamiška sistema.

Islamo teisės atvirumo ir lankstumo klausimas iš dalies buvo analizuotas tų autorių, kurių tyrimai buvo nukreipti išimtinai į Islamo teisės šaltinius. Islamo teisės šaltiniai tapo tyrimų objektu tokių mokslininkų kaip Mohammad Hashim Kamali[866], Ayman Shabana[867], John Burton[868], Yasin Dutton[869], Jonathan Brown[870] ir daugelio kitų. Metodologinės teisės teorijos, skirtos išvesti Islamo teisės taisykles iš pirminių šaltinių, buvo nagrinėtos tokių

858 Ignaz Goldziher, *Introduction to Islamic Theology and* Law (Princeton: Princeton University Press, 1981).

859 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1953).

860 Norman Calder, *Islamic Jurisprudence in the Classical Era*. Edited by Colin Imber (New York: Cambridge University Press, 2010).

861 Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969).

862 Marshall G. S. Hodgson, *The Venture of Islam: The Classical Age of Islam.* Volume One (Chicago: The University of Chicago Press, 1974); Marshall G. S. Hodgson, *The Venture of Islam: The Expansion of Islam in the Middle Periods*. Volume Two (Chicago: The University of Chicago Press, 1974); Marshal G. S. Hodgson. *The Venture of Islam: The Gunpowder Empires and Modern Times.* Volume Three (Chicago: The University of Chicago Press, 1974).

863 Herve Bleuchot, *Droit Musulman: Histoire*. Tome I (Marseille: Presses universitaires d'Aix-Marseille, 2000);
Herve Bleuchot, *Droit Musulman: Fondements Culte, Droit publice et Mixte.* Tome II (Aixe-en-Provance: Presses Universitaires d'Aix-Marseille, 2002).

864 Knut Vikor, *Between God and the Sultan: A History of Islamic Law* (New York: Oxford University Press, 2005).

865 Wael B. Hallaq, *Law and Theory in Classical and Medieval Islam*, 1995; Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni usul al-fiqh*, 1997; Wael B. Hallaq, *The Origins and Evolution of Islamic law* (New York: Cambridge University Press, 2005).

866 Mohammad Hashim Kamali, *A Textbook of Hadith Studies: Authenticity, Compilation, Classification and Criticism of Hadith* (Leicestershire: The Islamic Foundations, 2009).

867 Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of 'Urf and 'Adah in the Islamic Legal Tradition* (New York: Palgrave Macmillan, 2010).

868 John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 199.

869 Yasin Dutton, *The Origins of Islamic Law: The Quran, the Muwatta, and Madinan Amal* (New Delhi: Lawman (India) Private Limited, 2000).

870 Jonathan Brown, *The Canonization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon* (Leiden: Brill, 2007); Jonathan Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (Oxford: Oneworld publications, 2014).

autorių kaip David R. Vishanoff[871], Jasser Auda[872], Wael B. Hallaq[873], Mohammad Hashim Kamali[874], Imran Ahsan Khan Nyazee[875], Aron Zyzow[876], Ahmed El Shamsy[877] ir kitų. Tirdami šiuos klausimus autoriai kėlė klausimą kaip viena ar kita teisės metodologinė teorija įgalino Islamo teisę tapti labiau atvira ir lanksčia.

Taip pat yra daugybė knygų, kuriose analizuojamos temos, susijusios su Islamo fikh teise, teisėjų ir muftijų vaidmenimis formuluojant ir taikant Islamo teisės taisykles. Tarp autorių, kurie iš esmės analizavo šiuos klausimus, galima paminėti tokia pavardes kaip Sami Zubaida[878], Frank Vogel[879], Imran Ahsan Khan Nyazee[880] ir daugelį kitų. Čia, be kitų klausimų, Islamo teisės adaptyvumo klausimas buvo taip pat paliestas.

Tie mokslininkai, kurie studijavo Islamo teisės reformos moderniuoju laiku klausimą, be kita ko, siekė pasiūlyti eilę būdų, kaip šaryjos normas ir Islamo teisę paversti labiau atitinkančiomis šiuolaikinį kontekstą. Tokių mokslininkų darbai kaip Muhammad Iqbal[881], Taha[882], Taha Jabir al-Alwani[883], Abdullahi An-Na'im[884], Ayaan Hirsi Ali[885], Tariq Ramadan[886], Khaled Abou El Fadl[887] ir daugybės kitų yra reikšmingi siekiant analizuoti Šaryją moderniu laikotarpiu ir reformos projektus šiuolaikinės Islamo teisės srityje.

871 David R. Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (New Haven: American Oriental Society, 2011).

872 Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008).

873 Wael Hallaq, *A History of Islamic theories: An Introduction to Sunni usul al-fiqh* (Cambridge, Cambridge University Press, 1997).

874 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Cambridge University Press, 1991).

875 Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul al-Fiqh)* (Selangor: The Other Press, 2003).

876 Aron Zyzow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013).

877 Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2013).

878 Sami Zubaida, *Law and Power in the Islamic World* (London: I. B. Tauris, 2003).

879 Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000).

880 Imran A. K. Nyazee, *Islamic Legal Maxims (Qawa'id Fiqhiyyah)* (Islamabad: Center for Excellence in Research, 2016).

881 Muhammad Iqbal, *Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934).

882 Mahmoud Mohamed Taha, *The Second Message of Islam.* Translated by Abdullahi Ahmed An-Na'im (New York: Syracuse University Press, 1987).

883 Taha Jabir Al-Alwani, *Issues in Contemporary Islamic Thought* (London: The International Institute of Islamic Thought, 2005); Taha Jabir Al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections*. The third edition. Translated by Ashur A. Shamis (London: The International Institute of Islamic Thought, 2010).

884 Abdullahi Ahmed An-N'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990); Abdullahi Ahmed An-Na'im, *Islam and Secular State: Negotiating the Future of* Sharia (London: Harvard University Press, 2009).

885 Ayaan Hirsi Ali, *Heretic: Why Islam Needs a Reformation Now* (New York: HarperCollins Publishers, 2015).

886 Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2009).

887 Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (London: Rowman & Littlefield, 2014).

Visi paminėti autoriai rašė pasirinktų temų ribose, o Islamo teisės adaptyvumo klausimui tebuvo skiriamas antraeilis vaidmuo. Priešingai, šios disertacijos atveju šaryjos normų ir Islamo teisės adaptyvumas yra pagrindinė tema, analizuojama remiantis naujausiais tyrimais, vykdytais stažuočių Vakaruose ir Artimuosiuose Rytuose metu. Galima teigti, kad disertacinio tyrimo, trukusio šešerius metus, rezultatai pristato išsamią studiją šaryjos normų ir Islamo teisės adaptyvumo klausimu, kuris atskleidžiamas suformuotos Islamo teisės teorijos ir susiklosčiusios Islamo teisės istorijos kontekste, šiuolaikinio mokslinio diskurso fone, šiandieną įgyvendinamų šaryjos normų ir Islamo teisės taisyklių Vakaruose ir Artimuosiuose Rytuose realybėje. Visa tai ne tik suteikia galimybę geriau suprasti Islamo teisės fenomeną šiuolaikiniame kontekste, bet ir leidžia tęsti visapusiškas Islamo ir Vakarų teisės suderinamumo studijas.

Darbo metodologija. Atsižvelgiant į disertacinio darbo objektą, siekiant disertacinio darbo tikslo bei formuojant išvadas, buvo pritaikyta eilė tradicinių teisės mokslo metodų: dokumentų analizės, lingvistinis, sisteminės analizės, loginis-analitinis, istorinis ir lyginamasis. Siekiant išsamių, visapusiškų tyrimo rezultatų, šie metodai buvo derinami tarpusavyje ir taikomi kartu. Konkretaus metodo ir/ar jų derinio pasirinkimą nulėmė nagrinėjamas klausimas, jo ypatumai. *Dokumentų analizės metodas* buvo taikomas analizuojant religinius ir teisinius dokumentus. Koranas ir pranašo suna kaip pirminiai Islamo teisės šaltiniai buvo vienaip ar kitaip nagrinėjami visoje disertacijoje. Šalia to, tyrimo objektas buvo tradicinė Islamo mokslininkų išvesta iš šaltinių teisė. Tiksliau, fiqh teisės taisyklių rinkiniai kaip seniausi dokumentai perteikiantys XI-XII amžių rašytinius Islamo teisės šaltinių interpretacijos bandymus. Be to, šiuolaikinių musulmonų valstybių teisės aktai buvo analizuoti siekiant suprasti Islamo teisės įtakos mastus juose įtvirtintam eksplicitiniam ir implicitiniam teisiniam reguliavimui. Galiausiai, Vakarų valstybių teisės aktai ir nacionalinių bei tarptautinių teismų sprendimai buvo analizuoti remiantis šiuo metodu. Visų šių ir kitų dokumentų analizė buvo naudinga pateikiant atitinkamas išvadas apie Islamo teisės galimybes prisitaikyti besikeičiant laikui ir gyvenamosioms sąlygoms. *Lingvistinis metodas* buvo itin svarbus siekiant suprasti paminėtų dokumentų atskirų raktinių žodžių ir frazių reikšmes. Šio metodo pagalba dažnu atveju teksto prasmė ir esmė tapo suprantamesnė, labiau apčiuopiama. *Sisteminės analizės metodas* buvo paraleliai taikomas su tikslu išsiaiškinti, ką religinės ar teisinės reikšmės tekstas kaip visuma implikuoja. *Loginis-analitinis metodas* buvo taikomas nustatant loginius ryšius tarp vidinių tekstų dalių ir tarp skirtingų tekstų, taip pat tikrinant atlikto tyrimo rezultatus ir jų loginį ryšį. *Istorinis metodas* buvo nepamainomas tiriant Islamo teisės atsiradimą ir vystymosi etapus. Islamo teisės istorinės raidos pažinimas gali būti naudingas bandant suprasti, kur link ji gali evoliucionuoti. *Lyginamasis metodas* buvo taikomas siekiant išsiaiškinti, viena vertus, skirtingų Islamo teisės mokyklų skirtumus ir panašumus tam tikrais teisės klausimais. Kita vertus, lyginamoji analizė tarp labiausiai paplitusios Islamo teisės mokyklos (Hanafi) taisyklių, surašytų XI-XII amžiaus rinkiniuose, ir pasirinktų šiuolaikinių musulmonų valstybių teisės aktų suteikė galimybę pažvelgti į tai, ar ir kaip Islamo teisė įtakoja valstybių teisės formavimo ir procesą, kaip ji prisitaiko prie valstybės kuriamos teisės pokyčių.

Šalia teorinių metodų, empiriniai medodai buvo taikomi tyrimo metu. Atvejo analizei buvo pasirinkta konkreti su šaryjos normų įgyvendinimu susijusi institucija Vakaruose.

Tiksliau, kelių stažuočių Šaryjos Taryboje Londone (The Muslim Law Shariah Council UK) metu buvo analizuojama institucijos veiklos specifika, veikimo pagrindai, funkcijos ir pan. Studijuojant šaryjos norminių taisyklių adaptabilumo klausimą musulmonų bendruomenėje Londone, buvo atlikta eilė interviu su Šaryjos Tarybos nariais. Vėliau tyrimas buvo praplėstas pasirenkant analizuoti Jordanijos Karalystės teisinės sistemos atvejį. Daugybė interviu atliktų Jordanijos Universiteto Šaryjos ir kituose fakultetuose, Jordanijos Konstituciniame Teisme ir Šaryjos apylinkės bei apeliaciniame teisme suteikė galimybę pagilinti žinias Šaryjos ir Islamo teisės teorijos ir praktikos klausimais. Galiausiai susitikimai ir diskusijos įvairiuose Europos miestuose su Islamo teisės profesoriumi Abdullahi An-Na'im leido išsigryninti su Islamo teisės reformavimu susijusius klausimus.

Disertacijos struktūra. Disertacija susideda iš įvado, tyrimų apžvalgos, darbo metodologijos, dėstomosios dalies, išvadų ir literatūros sąrašo. Disertacinio tyrimo objektas, tikslai ir tyrimo eiga nulėmė dėstomosios disertacijos dalies struktūrą. Disertacijos dėstomoji dalis susideda iš šešių skyrių.

Pirmame disertacijos skyriuje diskutuojama šaryjos ir su ja susijusių terminų bei reikšmių tematika. Siekiant atmesti iki šiol paplitusią tendenciją tapatinti šaryją su teise, trijuose poskyriuose išskiriamas toks pat skaičius skirtingų ir tuo pačiu persipynusių šaryjos reikšmių. Jos išgrynintos analizuojant Korano tekstą, kuriame įtvirtinta, jog musulmonai vadovaujasi šaryjos normomis, kylančiomis iš trijų šaltinių: Dievo, pranašo Mahometo ir tų, kas yra valdžioje. Atitinkamai, kas liečia šaryją kaip grynai religinių normų visumą, pirmame poskyryje aptariami Korane įtvirtinti penki Islamo religijos ramsčiai. Antrame poskyryje kalbama apie šaryją kaip socialinių ir moralinių normų visumą reguliuojant su musulmonų bendruomene susijusius klausimus. Šie su musulmonų identitetu susiję šaryjos aspektai labiausiai atsiskleidžia skaitant pranašo Mahometo suną. Trečiasis poskyris skiriamas aptarti šaryjos kaip teisės prasmei, kuri apima Islamo pirminiuose šaltiniuose įtvirtintas bendrąsias Islamo teisės gaires ir visumą teisės taisyklių ir principų, teisės mokslininkų interpretacijos būdu išvestų iš pirminių teisės šaltinių. Ši, teisės mokyklų rinkiniuose užrašyta, taisyklių visuma ir yra tai, kas vadinama Islamo teise, kuri adaptyvumo klausimu ir yra tiriama visoje disertacijoje.

Antrame skyriuje analizuojama Islamo teisės istorinė raida. Skyriaus pradžioje pažymima, kad nors Islamo teisės istorinė raida disertacijoje skirstoma į tris stadijas, dviejuose skyriaus poskyriuose išimtinai kalbama apie dvi pirmąsias, tiksliau, formavimosi (VII-XIII amžiais) ir vėlyvesnę (XIII-XIX amžiais) stadijas. Toks skirstymas yra siejamas su tam tikru laikotarpiu vyravusia paradigma formuojant Islamo teisės taisykles. Šalia to, kad abiejuose poskyriuose kalbama apie pagrindinius laikotarpio bruožus, išskirtinis dėmesys skiriamas dviems metodologinėms teisės teorijoms, remiantis kuriomis ankstyvieji musulmonų mokslininkai kūrė Islamo teisės sistemą. Kadangi tiek pirmajame laikotarpyje pasiūlyta teisės šaltinių metodologinė teorija, tiek ir vėlesnia metodologine teisės teorija, paremta šaryjos tikslais, buvo siekiama susieti Islamo teisės šaltinius su socialinėmis transformacijomis, skyriuje siekiama įrodyti, kad istorinė Islamo teisės raida aiškiai rodo, jog Islamo teisės adaptyvumas yra istorinis faktas.

Islamo teisės šaltiniai ir interpretacijos metodai analizuojami trečiame disertacijos skyriuje siekiant parodyti, jog nei vienas iš jų nėra kliūtis adaptuoti Islamo teisę besikeičiant

laikui ir gyvenamosioms sąlygoms. Koranas ir pranašo Suna, kaip pirminiai teisės šaltiniai, yra nagrinėjami pirmuose poskyriuose. Konsensusas (idžma) ir samprotavimas analogijos būdu (kyjas) yra analizuojami tolimesniuose poskyriuose akcentuojant, jog, jei antrasis buvo varomąja jėga adaptuojant Islamo teisę formavimosi ir vėlyvesniu laikotarpiu, tai pirmasis gali tapti svarbiausiu įrankiu pritaikant Islamo teisę šiuolaikiniame kontekste. Idžmos reikšmę disertacijoje stengiamasi įrodyti remiantis XX a. pradžios Egipto civilinio kodekso priėmimo proceso analize, tiek ir 2004 metais priimto pasaulio musulmonų religinių ir teisės mokslininkų konsensuso ir jo rezultatų apžvalga. Priešingai nei dėl Korano, pranašo Sunos, konsensuso ir samprotavimo analogijos būdu, sutarimo dėl papildomų Islamo teisės šaltinių, kurie aptariami skyriaus pabaigoje, tarp musulmonų mokslininkų nebuvo ir iki šiol nėra. Nepaisant to, papildomi teisės šaltiniai ir interpretacijos metodai dažnai tapdavo vienos ar kitos Islamo teisės mokyklos pagrindine Islamo teisės adaptyvumo realybėje priemone.

Islamo teisė nesibaigia šaltiniais. Jai itin svarbios musulmonų mokslininkų suformuluotos (fikh) teisės taisyklės, kurios samprotavimo ir interpretacijos būdu (idžtihad) išvedamos iš Islamo teisės šaltinių. Ketvirtasis skyrius dalinamas į dvi dalis, iš kurių pirmoji skiriama idžtihad'o kaip teisinio samprotavimo ir interpretacijos idėjai atskleisti, o antroji – tam tikrų išvestinės (fikh) teisės taisyklių analizei. T. y., pirmoje dalyje aptarus idžtihad'o sampratos klausimus, toliau diskutuojama socialinio ir teisinio reiškinio vadinamo „idžtihad'o durų uždarymu" klausimu. Būtent taip susiformavusios sunitų teisės mokyklos sukūrė prielaidas įsivyrauti naujai teisės formavimo paradigmai, pagal kurią interpretuojant Islamo teisės taisykles pradėta vadovautis ne Islamo teisės šaltiniais, bet mokslininkų sukurtais fikh teisės taisyklių rinkiniais. Antroje skyriaus dalyje, jo pradžioje, dėmesys skiriamas keturių sunitų teisės mokyklų apžvalgai. Šioje vietoje Hanafi teisės mokykla ir jos teisės sistema, kuri laikoma labiausiai paplitusia tarp sunitų musulmonų, yra lyginama su kitomis trimis mokyklų teisės sistemomis pasirinktais klausimais. Skyriaus pabaigoje tam tikros Hanafi teisės taisyklės, detalizuotos tradiciniuose XI-XII amžių Hanafi mokyklos teisės knygose, lyginamos su XIX a. Osmanų imperijos ir šiandieninės Jordanijos Karalystės teisės aktais siekiant nustatyti, kokiu mastu tradicinė Islamo teisė paveikė šiuolaikinių valstybių kuriamą teisę.

Penktame skyriuje analizuojamas šiuolaikinis mokslinis diskursas Islamo teisės tematika. Pradžioje yra aptariami vyraujantys požiūriai į Islamo teisės šaltinius ir jų interpretaciją. Kadangi reformatyvus/liberalus požiūris laikytinas labiausiai atitinkančiu gyvenamą laikotarpį dėl siekio susieti Islamo teisės šaltinius su šiuolaikinėmis socialinėmis transformacijomis, skyriaus antra dalis skiriama vienai iš šio požiūrio atstovų pasiūlytai Islamo teisės reformos idėjai. Reforma skirta mažiausiai išvystytiems Islamo teisės aspektams performuluoti. kyriaus pabaigoje Islamo teisės reformos idėja yra išbandoma nagrinėjant keletą prieštaringai vertinamų klausimų. Šia analize norima parodyti, kad net labiausiai kontraversiškais ir su Vakarų teisės vertybėmis nesudarinamais klausimais, bent mokslinio diskurso lygmeniu, Islamo teisė turi galimybę tapti atitinkančia gyvenamą laikotarpį, taigi, adaptyvia.

Šeštame skyriuje, padalintame į tris poskyrius, šaryjos normos ir Islamo teisės taisyklės tiriamos tokios, kokios jos yra įgyvendinamos šiandieniniame kontekste. Visais trimis poskyriais siekiama parodyti, jog šaryja bendrąja prasme ir ypač Islamo teisė yra adaptyvi šiandieną. Pirmas poskyris skiriamas elektroninių fatvų (religinių/teisinių mokslininkų

nuomonių) ir naujos metodologinės fikh teisės teorijos, skirtos musulmonų mažumoms nemusulmoniškose valstybėse, tyrimui siekiant parodyti, jog per šiuos du reiškinius šiuolaikinė Islamo teisė ir šaryjos normos išgyvena transformacijos procesą. Šaryjos vietos ir vaidmens Vakaruose tema analizuojama antrame poskyryje. Čia siekiama įrodyti, jog šaryjos normos yra iš dalies įgyvendinamos Vakaruose per Vakarų valstybėse legaliai veikiančias Islamo institucijas ir organizacijas; taip pat per pačią Vakarų valstybių statutinę teisę bei teismų sprendimus, ką įrodo Graikijos statutinės teisės analizė ir Anglijos bei Kanados teismų sprendimai. Šioje dalyje akcentuojama, kad šaryjos įgyvendinimas Vakaruose priklauso nuo to, ar tam tikra šaryjos norma neprieštarauja vietos teisės tradicijai ir visuomenėje susiformavusiai kultūrai bei papročiams. Galiausiai, trečiojo poskyrio objektu tampa pasirinktos Artimųjų Rytų valstybės teisinė sistema. Jordanijos Karalystės teisinės sistemos analize siekiama išsiaiškinti, kokiu mastu tradicinė Islamo teisė daro įtaką Jordanijos valstybės kuriamai teisei. Kitas susijęs klausimas, ar keičiantis valstybės kuriamai teisei tuo pačiu metu kinta ir joje įtvirtinta Islamo teisės dalis.

Pagrindinės tyrimo išvados

Disertacinio tyrimo metu gauti rezultatai patvirtino, kad šaryjos normoms ir Islamo teisei yra imanentiškai būdingas atvirumas bei lankstumas, todėl šios norminės sistemos turi visas galimybes prisitaikyti prie besikeičiančių laiko ir socialinio gyvenimo aplinkybių. Disertacijoje iškeltą hipotezę patvirtina tokie tyrimo metu gauti duomenys:

1. Reaguojant į sparčią šaryjos normų sklaidą nemusulmoniškame pasaulyje bei vis aštriau kylančias šaryjos koegzistavimo su kitomis teisinėmis sistemomis problemas, moksliniame diskurse ir teismų praktikoje turėtų būti atsisakyta tebevyraujančios klaidingos tendencijos tapatinti šaryją su Islamo teise, nes Islamo teisė yra tik vienas iš trijų kur kas platesnės šaryjos sampratos sudedamųjų elementų. Pagal koraniškąją šaryjos sampratą jos normos kildinamos iš Dievo, pranašo Mahometo ir tų, kas yra valdžioje, o tai reiškia, kad šaryja turi būti suprantama trejopai:
    1.1. Kaip grynai religinių normų visuma, įtvirtinta Korano tekste, kurią sudaro penki Islamo religijos ramsčiai.
    1.2. Kaip musulmonų bendras identitetas, kylantis iš Mahometo norminių nurodymų, įtvirtintų pranašo Sunoje ir pasireiškiančių kaip socialinių ir moralinių principų visuma, iš kurios kildinamas priklausymas globaliai musulmonų bendruomenei.
    1.3. Kaip teisės normų visuma, kuri apima tiek bendrąsias teisės gaires, įtvirtintas Korane ir pranašo Sunoje, tiek ir iš šių šaltinių žmogaus samprotavimo ir interpretacijos būdu išvedamas teisės taisykles.
2. Klaidingas šaryjos sampratos interpretavimas, ignoruojant trijų jos elementų distinkciją, sąlygojo nepagrįstą visų šaryjos normų sakralizavimą ir iš to išplaukiantį statiškumo elemento suabsoliutinimą. Disertacinio tyrimo metu atlikta šaryjos sampratos analizė atskleidė, kad šaryja gali būti laikoma sakralia ir nekintančia tik dvejomis reikšmėmis, t. y. laikant ją grynai religinių normų visuma bei musulmonų bendrą identitetą formuojančiomis teisės normomis. Tuo tarpu pripažįstant, kad šaryja, kaip Islamo teisė, yra valdžioje esančių žmonių interpretacijos kūrinys, tam-

pa akivaizdu, kad ji jokiu būdu negali būti besąlygiškai ir visa apimtimi sakralizuota ir todėl visiškai pagrįstai gali būti keliamas Islamo teisės lankstumo, atvirumo ir dinamiškumo, t. y. jos adaptyvumo klausimas.

3. Nagrinėjant Islamo teisės istorinio vystymosi eigą nustatyta, kad jos adaptyvumas formavimosi (VII-XIII a.) ir vėlyvesniuoju (XIII-XIX a.) laikotarpiais yra neginčytinas faktas, kurį patvirtina IX amžiuje sukurta teisės šaltinių teorija (usul al-fikh) ir XIV amžiuje galutinai suformuluota šaryjos tikslais paremta teisės teorija (maqasid al-sharia):
   3.1. Formavimosi laikotarpis gali būti apibūdintas kaip labiausiai paveiktas idždihado paradigmos, kuomet Islamo teisė buvo kuriama ir plačiai interpretuojama remiantis suformuluota šaltinių teorija (usul al-fiqh), tokiu būdu ją adaptuojant prie gyvenamo laikotarpio.
   3.2. Islamo teisės evoliucijos laikotarpį maždaug XIII amžiaus bėgyje pakeitė stagnacijos teisėje laikotarpis, kuomet, vietoje tiesioginės Korano ir Sunos interpretacijos, teisės mokslininkų bendruomenė sutarė aiškinti Islamo teisę išimtinai keturių Sunitų teisės mokyklų išvestų teisės taisyklių (fikh teisės) ribose. Įsivyravusi fikh teisės precedentų imitavimo paradigma lėmė ribos tarp teisės gairių, kylančių iš Korano ir Sunos, bei teisės mokslininkų pateikiamų šių šaltinių aiškinimo versijų ištrynimą, įtvirtinant žmonėse tokios teisės sakralumo ir nekintamumo įvaizdį.
   3.3. Reaguojant į atotrūkį tarp Islamo teisės mokyklų užfiksuotos fikh teisės ir kintančio socialinio gyvenimo, XIII-XIV amžiaus nepriklausomi Musulmonų mokslininkai pristatė šaryjos tikslais paremtą metodologinę teisės teoriją (maqasid al-Sharia), kuri užtikrino galimybę pritaikyti Islamo teisę prie kintančo gyvenimo. Tokiu būdu buvo pasiūlyta Islamo teisę kurti ir interpretuoti remiantis fundamentaliais šaryjos tikslais, kylančiais iš Korano ir Sunos tekstų bei atitinkančiais pagrindinius žmogaus interesus. Nepaisant to, kad šiai metodologinei teorijai nebuvo leista visa apimtimi veikti Islamo teisės vystymąsi, moderniuoju laiku modifikuota šios teorijos versija tapo svarbiausiu įrankiu adaptuojant Šaryjos normas ir Islamo teisę prie naujos socialinės realybės.
4. Nagrinėjant Islamo teisės šaltinius nustatyta, kad jie negali būti laikomi kliūtimi adaptuojant Islamo teisę besikeičiant laikui ir gyvenamosioms sąlygoms, nes:
   4.1. Dieviškųjų šaltinių, t.y. Korano ir pranašo Sunos, analizė rodo, kad tiek šių teisės šaltinių teksto turinys, tiek interpretacijai atvira tekstų kalba, tiek ir abiejuose šaltiniuose užfiksuota žmogaus samprotavimo ir interpretacijos (idžihad'o) neišvengiamumo idėja suteikia visas galimybes adaptuoti Islamo teisę prie kintančių socialinio gyvenimo poreikių.
   4.2. Konsensuso (idžmos) ir samprotavimo analogijos būdu (kiyas) mokslinė analizė leidžia konstatuoti, kad:
      4.2.1. Idžma kaip teisės šaltinis turi didžiausią adaptyvumo potencialą šiuolaikiniame kontekse, ką įrodo Egipto Civilinio kodekso (1932-1949) priėmimo procesas ir Amano konsensusas (2004) labiausiai kontraversiškais Islamo teisės pagrindų klausimais.

4.2.2. Tuo tarpu analogijos metodas (kiyas) visuomet buvo pagrindiniu įrankiu pritaikant šaryją ir Islamo teisę prie socialinių transformacijų. Būtent kiyas garantavo Islamo teisės adaptyvumo savybę, kuomet du pirminiai šaltiniai buvo nepakankami laikmetį atitinkančiam problemos sprendimui ir kuomet griežtas pažodinis teisės interpretavimo būdas, propaguotas susiformavusių keturių teisės mokyklų doktrinose, neleido susieti Islamo teisės ir socalinių realijų.

4.3. Priklausomai nuo vietos ir susiklosčiusių tradicijų, šalia keturių pagrindinių Islamo teisės šaltinių, tam tikras skaičius papildomų šaltinių ir interpretacijos metodų buvo naudojami interpretuojant Islamo teisę vienoje ar kitoje Sunitų teisės mokykloje. Islamo teisės taisyklės kaip mokslininkų interpretacijos rezultatas labiausiai skyrėsi dėl atskirų mokyklų pasirinkimo tam tikrą papildomą teisės šaltinį laikyti neatsiejama Islamo teisės formavimo dalimi. Visa tai rodo Islamo teisės lankstumą ir atvirumą interpretacijai, o taip pat ir adaptyvumą.

5. Nagrinėjant musulmonų mokslininkų sukurtą teisę (fikh teisė), kaip racionalaus samprotavimo ir interpretacijos (idžtihad) rezultatą, nustatyta, kad Islamo teisės adaptyvumo faktą įrodo ne tik pats fikh taisyklių įtvirtinimas teisės dokumentuose, bet ir jų kitimo kartu su valstybės kuriamos teisės pataisomis procesas.

5.1. Islamiška idžtihad'o idėja, kylanti iš pirminių šaltinių, gali būti laikoma pagrindine Islamo teisės atvirumo ir lankstumo prielaida interpretuojant ją, atsižvelgiant į besikeičiantį laiką ir socialines aplinkybes.

5.2. Analizuojant fikh teisę, pats istorinis faktas, kad Islamo teisė buvo užfiksuota ir įšaldyta fikh teisės taisyklių rinkiniuose įrodo jos adaptyvumo savybę. Keturių teisės mokyklų išvystyta labai panaši ir tuo pačiu skirtinga teisės formavimo metodologinė sistema bei pačių teisės taisyklių visuma dar kartą rodo Islamo teisės pritaikomumo galimybę. Dar daugiau, kaip parodė tradicinių Hanafi mokyklos fikh taisyklių ir modernių Osmanų imperijos ir šiandieninės Jordanijos civilinių kodeksų lyginamoji analizė, fikh taisyklės yra šiuolaikinių teisės tekstų ir jų turinio sudedamoji dalis, evoliucionuojanti kartu su valstybės kuriama teise.

6. Šiuolaikinis mokslinis diskursas įrodo, kad tolimesnis Islamo teisės formavimasis iš esmės priklausys nuo to, literalistinis/tradicinis ar reformacinis/liberalus požiūris į Islamo teisės šaltinius ir jų interpretaciją įsivyraus ateityje:

6.1. Literalistinės teisės aiškinimo teorijos įsivyravimo atveju Islamo teisės adaptyvumo klausimas negalėtų būti keliamas. Tokiu atveju pagrįstomis reikėtų pripažinti tokių mokslininkų pozicijas, pagal kurias Islamo teisė yra statiška ir nekintanti.

6.2. Tradicinės teisės aiškinimo teorijos šalininkai laiko fikh teisės precedentų rinkinius pakankamais net ir šiuolaikinėms globalaus pasaulio problemoms spręsti, tuo remiantis kitų teisės tradicijų atstovai kalba apie jos stagnaciją (įšaldymą).

6.3. Reformacinio/liberalaus požiūrio į Islamo teisės šaltinius ir jų interpretaciją atstovai siekia atgaivinti idždihado tradiciją ir, remiantis ja, aiškinti Islamo teisę atsižvelgiant į šios dienos realijas. Tokiu atveju net ir labiausiai kontraversiškos Islamo teisės normos gali tapti reformos objektu, atsižvelgiant į jų adaptyvumo poreikį, todėl būtent šis požiūris galėtų būti laikomas labiausiai atitinkančiu gyvenamąjį laikotarpį.

7. Šio amžiaus musulmonų reformatoriaus Abdullahi An-Na'im pristatytos Islamo teisės reformos analizė parodė, kad atsisakant arba iš esmės pakoreguojant tam tikrą istorinį kontekstą atspindinčias metodologines Islamo teisės aiškinimo teorijas, net mažiausiai išvystyti Islamo teisės aspektai gali būti reformuoti atsižvelgiant į gyvenamo laiko poreikius. Konkrečiai performuluotos Korano eilučių panaikinimo taisyklės siūlymas ne tik leidžia peržiūrėti sukurtas fikh taisykles, bet ir pakeisti ankstyvųjų mokslininkų įtvirtintas metodologines teorijas ir sistemas, kurių pagrindu buvo interpretuojamos Korane ir Sunoje užrašytos Islamo teisės gairės. Performuluota Korano eilučių panaikinimo taisyklė suteikia galimybę išspręsti labiausiai kontraversiškus moterų ir vyrų lygybės, jėgos panaudojimo doktrinos, religijos laisvės ar bausmių už tam tikrus nusikaltimus Islamo teisėje klausimus.

8. Išnagrinėjus šiuolaikinės šaryjos ir Islamo teisės įgyvendinimo problemas, galime išskirti tokius jos adaptyvumo pavyzdžius:

8.1. Elektroninės fatvos (religinės/teisinės mokslininkų ir juristų nuomonės) ir jų paplitimas yra tas šiuolaikinis socialinis reiškinys, per kurį šaryja ir Islamo teisė išgyvena dvejopą mutacijos procesą:

8.1.1. Visų pirma, sprendžiant asmenines musulmonų problemas atskirose fatvose aiškinama ir taikoma šaryja bei tradicinė Islamo teisė yra adaptuojama prie šiandienos musulmonų poreikių.

8.1.2. Be to, fatvos tapo pagrindu sukurti metodologinę fikh teisės sistemą, kuri virsta į naują Islamo fikh teisės atšaką, skirtą adaptuoti šaryjos normas ir Islamo teisę prie nemusulmoniškose šalyse gyvenančių musulmonų socialinių poreikių ir šiandieninės teisės realijų. Metodologinė Islamo fikh teisės sistema musulmonų mažumoms gali tapti dar svarbesne visos Islamo teisės interpretacijos procese, jei šaryjos tikslų teorija (maqasid al-sharia) kaip pagrindinis šios sistemos ramstis būtų atnaujinta žmogaus orumo kategorija.

8.2. Šaryjos normos ir Islamo teisės taisyklės yra iš dalies įgyvendinamos tiek per Vakarų valstybėse veikiančias Islamo institucijas ir organizacijas, tiek ir per vienos ar kitos Vakarų valstybės (Graikijos, Anglijos ir kt.) įstatyminę bazę ir teismų sprendimus:

8.2.1. Pavyzdžiui, Šaryjos Tarybos Londone institucija įgyvendina tam tikras šaryjos normatyvines taisykles šeimos teisės srityje adaptuojant ją prie musulmonų gyvenimo sąlygų Anglijoje.

8.2.2. Be to, pati Vakarų valstybių įstatyminė bazė pritaiko tam tikras šaryjos normas, kurios neprieštarauja teisės viršenybės principui ir vietos kultūrai bei papročiams. Vakarų nacionaliniai ir tarptautiniai teismai

tikrina, ar tam tikra šaryjos pasireiškimo forma neperžengia religinės laisvės principo ribų. Tik tos šaryjos normos, kurios neprieštarauja Vakarų teisės vertybėms, gali būti patvirtintos teismo sprendimu.

8.2.3. Graikijos įstatymai ir teismų sprendimai paveldėjimo ir šeimos teisės srityse įrodo Islamo teisės ir šios valstybės, arba plačiau kalbant, Vakarų teisės tradicijos, koegzistavimo galimybę.

8.3. Jordanijos Karalystėje įvykdytas tyrimas atskleidė, kad Jordanijos teisė yra valstybės kuriamos teisės, paprotinės teisės ir Islamo tradicinės teisės mišinys, patvirtinantis Islamo teisės adaptyvumą.

8.3.1. Kaip parodė Jordanijos įstatymų analizė, tiek jų tekstas, tiek ir turinys yra labiausiai paveikti Hanafi fikh teisės taisyklių. Paskutinių dienų teisės aktų pataisomis buvo įtvirtinta, kad šalia Hanafi fikh mokyklos taisyklių, Jordanijos šaryjos teismų teisėjai gali vadovautis ir kitų tradicinių teisės mokyklų teise.

8.3.2. Nagrinėjant Jordanijos Konstitucijos tekstą, baudžiamojo ir civilinio kodekso normas prieita prie išvados, kad Islamo teisės adaptyvumą įrodo ir tai, kad keičiantis valstybės teisės aktams, keičiasi ir Islamo teisė kaip sudėtinė valstybės teisės dalis. Prie šio proceso prisideda ir tai, kad Islamo religinė bendruomenė yra įtraukta į valstybės valdžios aparatą, kas reiškia, jog bet kokios transformacijos yra derinamos su religinės bendruomenės lyderiais. Būtent toks kompromisu grįstas valstybės valdymas galėtų būti laikomas pavyzdiniu musulmonų daugumą sudarančių valstybių kontekste.

Autoriaus publikacijos disertacijos tema:

1. Valčiukas J., Konstitucionalizmo samprata Islamo teisės tradicijoje. Logos Nr. 77, 2013. P. 186-194.
2. Džiaukštaitė I., Valčiukas J., Šaryjos samprata Europos Žmogaus Teisių Teismo sprendimuose. KTU Socialinių mokslų doktorantų ir jaunųjų mokslininkų konferencijos „Tarpdisciplininis diskursas socialiniuose moksluose – 4". 2014. P. 105-112.
3. Valčiukas J., Islamo teisė ir modernybė: Faustiškasis kaitos kelias. Logos Nr. 82, 2015. P. 203-215.
4. Valčiukas J., Paprotys kaip teisės šaltinis Islamo teisės tradicijoje (I dalis). Logos Nr. 83, 2015. P. 169-174.
5. Valčiukas J., Paprotys kaip teisės šaltinis Islamo teisės tradicijoje (II dalis). Logos Nr. 84, 2015. P. 152-161.
6. Džiaukštaitė I., Valčiukas J. Islamo teisė Vakaruose: Šariato teisminių institucijų statusas Anglijoje. KTU Konferencijos "Socialiniai ir humanitariniai mokslai: iššūkiai globalizacijos kontekste" straipsnių leidinys "Tiltas į ateitį" Nr. 1 (9), 2015.
7. Valčiukas J., Islamo teisės samprata formavimosi laikotarpiu ir XXI a.: tradicijos ir pokyčio sintezė. Logos Nr. 85, 2015. P. 145-155.

CURRICULUM VITAE

Asmeninė informacija	valciukas.juozas@gmail.com; vjuozas@mruni.eu
Išsilavinimas	Doktorantūros studijos, 2011-2017, Mykolo Romerio universitetas;
	Erasmus studijos, 2010, Dekarto universitetas, Prancūzija;
	Teisės magistras, 2009-2011, Mykolo Romerio universitetas;
	Teisės ir valdymo bakalauras, 2003-2009, Mykolo Romerio universitetas.
Profesinė patirtis	
2018 iki dabar	Lietuvos Respublikos Teisingumo ministerija, Ministrės patarėjas;
2015 iki dabar	Mykolo Romerio universiteto Viešosios teisės institutas, lektorius;
2011-2015	Mykolo Romerio universiteto Teisės filosofijos katedra, asistentas.
Akademinės išvykos, stažuotės	Stažuotė Šaryjos Taryboje (*Muslim Law Shariah Council UK*), 2016 (vienas mėnuo);
	Stažuotė Jordanijos universitete, Jordanijos Karalystė, 2016 (du mėnesiai);
	Stažuotė Šaryjos Taryboje (*Muslim Law Shariah Council UK*), 2015 (vienas mėnuo);
	Stažuotė Vestminsterio Teisės mokykoje Vestminsterio universitete, Didžioji Britanija, 2013 (trys mėnesiai).

Valčiukas, Juozas
ISLAMIC LAW: A QUESTION OF ADAPTABILITY: daktaro disertacija. – Vilnius: Mykolo Romerio universitetas, 2018. 292 p.

Bibliogr. 239-248. p.

ISBN 978-9955-19-892-5 (internete)
ISBN 978-9955-19-893-2 (spausdintas)

Disertacija „Islamo teisė: adaptyvumo klausimas“ siekiama kompleksiškai ištirti šaryją ir Islamo teisę bei jos adaptyvumo galimybes. Siekiant užsibrėžto tikslo, Islamo teisės adaptyvumo klausimas darbe, sudarytame iš šešių skyrių, analizuojamas keliomis kryptimis: suformuotos Islamo teisės teorijos ir susiklosčiusios Islamo teisės istorijos kontekste; šiuolaikinio mokslinio diskurso fone; šiandieną įgyvendinamų šaryjos normų ir Islamo teisės taisyklių realybėje Vakaruose bei Artimuosiuose Rytuose. Visų pirma, darbe nagrinėjama šaryjos samprata siekiant patikslinti ir išgryninti su šaryja painiojamus terminus bei kritiškai išanalizuoti tendenciją tapatinti šaryją su Islamo teise. Autorius daro išvadą, kad moksliniame diskurse ir teismų praktikoje turėtų būti atsisakyta tebevyraujančios klaidingos tendencijos tapatinti šaryją su Islamo teise, nes Islamo teisė yra tik vienas iš trijų kur kas platesnės šaryjos sampratos sudedamųjų elementų. Antrame disertacijos skyriuje autorius analizuoja Islamo teisę istoriniame kontekste siekdamas įrodyti šaryjos ir Islamo teisės adaptyvumo faktą. Autorius, išanalizavęs dvi svarbiausias istorines Islamo teisės teorijas, jų metodologinį pagrindą ir taikymo rezultatus, daro išvadą, kad Islamo teisės adaptyvumas yra istorinis faktas. Disertacijos trečiasis skyrius skirtas Islamo teisės šaltinių analizei, kuri aiškiai parodė, kad nei vienas iš pirminių ar antrinių teisės šaltinių pats savaime negali būti laikomas kliūtimi Islamo teisės adaptyvumo klausimu. Toliau autorius nagrinėja Islamo mokslininkų teisinio samprotavimo ir interpretatcijos būdu suformuotą išvestinę Islamo fikh teisę. Sunitų Hanafi mokyklos fikh teisės taisyklių ir jų vietos pasirinktų musulmonų valstybių civiliniuose kodeksuose analizė atskleidė, kokią vietą tradicinė Hanafi fikh teisė užima ir kaip ji yra adaptuota šiuolaikinių Islamo valstybių teisės aktuose. Penktame darbo skyriuje analizuojamas šiuolaikinis mokslinis diskursas Islamo teisės tematika, pristatant vyraujančius metodologinius požiūrius į Islamo teisės šaltinius ir jų interpretaciją. Pasirinktos šiuolaikinės Islamo teisės reformos idėjos analizė atskleidė, kad bent jau moksliniame lygmenyje reforma labiausiai neišvystytų Islamo teisės aspektų atžvilgiu yra įmanoma. Galiausiai, paskutiniame disertacijos skyriuje trejopu būdu analizuojama tokia šaryja ir Islamo teisė, kokia ji yra įgyvendinama šiuolaikinėje praktikoje Musulmonų bendruomenėse Vakaruose ir Artimuosiuose Rytuose. Elektroninių fatvų fenomeno ir naujosios metodologinės Islamo fikh teisės teorijos, skirtos Musulmonų mažumoms, tyrimas parodė akivaizdų šaryjos ir Islamo teisės pritaikomumo besikeičiančiomis socialinėmis sąlygomis potencialą. Be to, Islamo institucijose, kurios legaliai veikia Vakaruose, atliktas tyrimas ir Vakarų valstybių statutinės teisės bei teismų sprendimų analizė parodė kaip per šiuos du kanalus šaryjos normatyvinės taisyklės ir Islamo teisės taisyklės yra iš dalies įgyvendinamos Vakarų valstybėse gyvenančių Musulmonų atžvilgiu. Pabaigoje, išnagrinėjus šiuolaikinę valstybės kuriamą teisę Jordanijos Karalystėje išsiaiškinta, kokią įtaką šiuolaikinei

Artimųjų Rytų valstybės teisei daro tradicinė Islamo teisė, kokias transformacijas ji patiria būdama valstybės kuriamos teisės dalimi.

The thesis "Islamic Law: A Question of Adaptability" seeks to research the concept of Sharia and Islamic religious law of Sunni branch and its capacity to be adapted in the changing time and living conditions. To achieve the object of the research, the question of adaptability of the Sharia and Islamic law is analysed in three directions: in the context of Islamic legal theory and Islamic historical development; in the conditions of the contemporary scholarly discourse on the subject of Islamic law; and on the question of how the Sharia and Islamic law is implemented today within Muslim communities in the West and in the current Middle East. First of all, the thesis focuses on the concept of the Sharia with the aim to clarify a number of overlapping definitions which are frequently used interchangeably with the Sharia, and to question an old-fashioned tendency to equate Sharia with law. The author suggests to refrain from the still prevailing mistaken tendency to equate Sharia with law in the scholarly discourse and jurisprudence because the Sharia=law approach is insufficient to reveal the concept of the Sharia in its essence. The second chapter of the dissertation analyses Islamic law in the historical context with the aim to prove the fact of adaptability of the Sharia and Islamic law. After the research of historical Islamic legal theories, their methodological basis and the results of implementation, the author concludes that the adaptability of Islamic law is a historical fact. The third chapter is devoted to the analysis of Islamic legal sources which shows that neither the sources of divine origins nor the sources of rational nature might be regarded as the obstacle in the human efforts to make the Sharia and Islamic law adaptable. Further, the author studies the concept of ijtihad through which Islamic fiqh law is derived from the sources of Islamic law. By means of comparative analysis the research takes into account a set of specific Islamic legal rules of four Sunni fiqh schools. Also, the author analyses traditional Hanafi fiqh law rules and their place in the selected civil codes of modern Muslim states in order to find out what place and role traditional Islamic law of Hanafi branch plays in modern legal acts. The fifth chapter explores the contemporary scholarly discourse on Islamic law and prevailing methodological approaches towards its sources and their interpretation. As the research of the newly formulated idea of reform suggested by the representer of reformative/liberal approach showed, the least developed questions of Islamic law, albeit solely on the scientific level, might be fully reformed. Eventually, the last chapter of the dissertation makes a threefold research of the Sharia and Islamic law as it is applied in the contemporary practice. The analysis of the worldwide phenomenon of issuing Islamic religious opinions (fatwas) as well as the research of the newly formulated methodological theory of fiqh for Muslim minorities living in non-Muslim countries proved well the potentiality of the Sharia and Islamic law to be adapted in the changing time and social circumstances. In addition to this, the research made in the chosen Islamic institution operating in the West and the analysis of the Western statutory law and court judgments showed how through these two channels the Sharia normative rules and Islamic law are partly implemented in the Western countries. In the end, the research of the contemporary state-made law of the Kingdom of Jordan revealed to what extent it is influenced by traditional Islamic law, what transformations Islamic law undergoes while being the consisting part of the Jordanian state-made law.

Juozas Valčiukas
ISLAMIC LAW: A QUESTION OF ADAPTABILITY
Doctoral dissertation
Social Sciences, Law (01 S)

ISBN 978-9955-19-892-5 (online)
ISBN 978-9955-19-893-2 (print)

Mykolas Romeris University
Ateities str. 20, Vilnius
E-mail: roffice@mruni.eu
www.mruni.eu

Number of copies published 20. Order 16486.
Layout by Laura Tekorienė

Issued by JSC „Baltic Printing House“
Svajones str. 40, LT-94101, Klaipeda
E-mail: info@balticprinting.com
www.balticprinting.com

Printed by JSC „Baltijos kopija“
Kareivių str. 13B, Vilnius
E-mail: info@kopija.lt
www.kopija.lt

ISBN 978-9955-19-893-2