

## Updating the Religious Decree: Its Scope, Possibility and Reasons\*

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Since it depends on the orders and specifications of Allah Almighty, the issue of updating religious decrees and fiqh that consists of collection of decrees should be handled carefully due to its academic and emotional dimensions. Along with the two troubled approaches on this issue, one of which can be considered as negligence (tafrıt) and the other extremeness (İfrat), there is a third approach proposing a more balanced theory of change in a methodical framework. The negligence (tafrıt) approach, which defends that the religious decrees will never change, regards the classical fiqh doctrine as a collection of decisions that puts an end to the issue. According to the extremeness approach, which opposes this, all religious-legal decrees, including those directly in the Quran and Sunnah, are conditional to the historical and social conditions in which they were produced. Therefore, these decrees should also change in parallel with the changes in society and conditions. According to the third approach, which is more balanced and methodologically more consistent, legal decrees, except in the matters where change is not possible in principle, may be subject to change in terms of their bases and purposes. In this article some determinations will be made around this last approach.

**Keywords:** Islamic Law (Fiqh), Religious Decree (Hukm), Nass, Historicity, İjma (consensus), İjtihad (Jurisprudence), Wasail (Means), Change.

Abstract

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**Dinî Hükümün Güncellenmesi: Alanı, İmkânı ve Gerekçeleri**

Yüce Allah'ın buyruk ve belirlemelerine bağlı olduğu için dinî hükümün ve bunların bir araya gelmesiyle oluşan fikhin güncellenmesi meselesi hem akademik hem de duygusal boyutları olan ve bu sebeple de dikkatle ele alınması gereken bir konudur. Bu mesele etrafında birisi tefrit diğeri ifrat sayılabilecek iki sağlıklı tavır yanında, metodik çerçevede daha dengeli bir değişim teorisi öneren üçüncü bir tutum bulunmaktadır. Dinî hükümün asla değişmeyeceğini savunan tefrit yaklaşımı, klasik fikh doktrinini, meseleye son noktayı koyan hükümler mecmuası olarak görmektedir. Bunun karşısında konumlanan ifrat görüşüne göre ise doğrudan Kitap ve Sünnet'te bulunanlar da dâhil olmak üzere dinî-fikhî hükümlerin tamamı, üretildiği tarihsel ve toplumsal şartlarla kayıtlıdır. Dolayısıyla toplum ve şartların değişimine paralel olarak bu hükümler de değişmelidir. Daha dengeli ve yöntemsel olarak daha tutarlı olan üçüncü yaklaşıma göre ise değişimin ilkesel olarak mümkün olmadığı alanlar dışında kalan fikhî hükümler, dayanakları ve amaçları itibarıyla değişime konu olabilirler. Bu yazı, işte bu son yaklaşım etrafında bazı saptamalar yapacaktır.

**Anahtar Kelimeler:** Fıkıh, Dinî Hüküm, Nas, Tarihsellik, İcmâ, İctihad, Vesâil, Değişim.

**Özet****Introduction**

Whether the religious/shar'i decree is open to change or it is possible to update the answers given to it is a delicate issue that has always attracted attention. The fact that religion has a dogmatic character in one aspect and therefore, it is necessary to take a proper attitude to pure belief without being discussed and reasoned; on the other hand, it sets rules to regulate the society with a dynamic character and for this reason, it has the flexibility to manage the changing conditions of life which has created the necessity to examine the subject from different angles. In this regard, the issue has come to the fore considering both kalam and fiqh principles in the tradition of Muslim science.

This article based on a paper presented in "*the Current Religious Issues Consultation Meeting*" held by High Council of Religious Affairs on the subject titled "*Understanding Religion: Constants and Variables*" in Istanbul on 11-12 May 2018 will analyse the issue within the frame of the fiqh acquis. Although the term "religious decree" is used in many disciplines of Islamic sciences, especially kalam, practical legitimate decree comes primarily to mind due to both its predominant currency in the literature and its references in daily life. In other words, "religious decree" generally evokes fiqhi verdicts and fatwa.

Therefore, the possibility, limits, and justifications of change in fiqh and fatwa will be discussed here under the title of "Updating Religious decree". In this regard, firstly, the nature of the religious decree will be emphasized, then the change in Islamic law based on nass with its definite (qat'i) and presumptive (zanni) qualities and in this regard whether historicity can be at stake or not will be discussed and then, the possibility of change in nass will be questioned in the provision of "purpose and occasion". After then, the nature of

the consensus of scholars (ijma) and whether it is open to change will be discussed and finally the reasons for the change of final jurisprudence (ijtihad) or fatwa will be handled.

## 1. Religious Decree and Its Nature

As it is known, "decree", which is one of the key terms of fiqh and usool (method) of fiqh, is defined with relation to Shari' al-Hakim. No matter it is defined as "orders of Shari' related with the actions/behaviours of liable people" by Islamic theologians (Mutakallim) or defined as "the thing that is fixed with the way of addressing on the actions/people's behaviour, that is, the result of this address" by the Fuqaha/Hanafi jurists (Hanafi fuqaha), it is accepted that the judgment is based on a source, Allah, who makes laws/shari'a. As a matter of fact, a believer who reads the following verses believes that Allah has the authority to govern and make rules just as He has the authority to create and that the rules set must be approved by Him:

*His is all creation and all command. Blessed be Allah, the sustainer of all the worlds.*<sup>1</sup>

*"Indeed, We did reveal the Torah, containing guidance and light, by which the prophets, who submitted themselves to Allah, made judgments for Jews. So did the rabbis and the scholars, as they were required to protect Allah's Book, and were witnesses to it. So do not fear the people; fear Me! And do not sell My revelations for a cheap price. Those who do not rule according to what God revealed are the unbelievers... In their footsteps, We sent Jesus son of Mary, fulfilling the Torah that preceded him; and We gave him the Gospel, wherein is guidance and light, and confirming the Torah that preceded him, and guidance and counsel for the righteous. So let the people of the Gospel rule according to what God revealed in it. Those who do not rule according to what God revealed are the sinners. And We revealed to you the Book, with truth, confirming the Scripture that preceded it, and superseding it. So, judge between them according to what God revealed, and do not follow their desires if they differ from the truth that has come to you. For each of you, We have assigned a law and a method. Had God willed, He could have made you a single nation, but He tests you through what He has given you. So, compete in righteousness. To God is your return, all of you; then He will inform you of what you had disputed."*<sup>2</sup>

*"Now We have set You (O Prophet) on the clear way of faith. So, follow it, and do not follow the desires of those who do not know the truth."*<sup>3</sup>

*"Say, "Have you considered the sustenance God has sent down for you, some of which you made halal (lawful) and some haram (unlawful)?" "Say, "Did Allah give you permission, or do you fabricate lies and attribute them to Allah?"<sup>4</sup>*

*"They ask You (O Prophet) for a ruling about women. Say, "Allah gives you a ruling (fatwa) about them."<sup>5</sup>*

<sup>1</sup> al-A'rāf 7/54.

<sup>2</sup> al-Mā'ida 5/44-48.

<sup>3</sup> al-Jāthiya 45/18.

<sup>4</sup> Yûnus 10/59.

<sup>5</sup> al-Nisā' 4/127.

For him, when it comes to regulating life by law, the role attributed to him is "Shari'" which means a legislator (law maker). However, Shari' Ta'ala gives his prophets the authority to make law too:

*"They are the ones who follow the Messenger, the unlettered Prophet, whose description they find in their Torah and the Gospel. He commands them to do good and forbids them from evil, permits for them what is halal (lawful) and forbids to them what is haram (unlawful), and relieves them from their burdens and the shackles that bound them. Only those who believe in him, honour and support him, and follow the light sent down to him will be successful."*<sup>6</sup>

*"We have revealed to you the Scripture, with the truth, so that you judge between people in accordance with what God has shown you. And do not be an advocate for the traitors!"*<sup>7</sup>

*"But no, by your Lord, they will not believe until they call you to arbitrate in their disputes, and then find within themselves no resentment regarding your decisions and submit themselves completely."*<sup>8</sup>

*"The response of the believers, when they are called to God and His Messenger in order to judge between them, is to say, "We hear and we obey." These are the successful."*<sup>9</sup>

*"It is not for any believer, man or woman, when God and His Messenger have decided a matter, to have liberty of choice in their decision. Whoever disobeys God and His Messenger has gone far astray."*<sup>10</sup>

As it is understood, since the Prophet (pbuh) has the power to make judgments, the word "shari'" is also used for him metaphorically.<sup>11</sup>

Since it is out of question for both the scriptures that are revealed and the prophets who have declared them to meet the need for norms word by word that will continue until the Day of Judgment, in accordance with the nature of divine revelation (wahy), wisdom and prophecy,<sup>12</sup> the task of establishing judgment has been assigned to scholars and jurists who know these two heritages very well in both words and spirit as new needs arise:

*"It is not advisable for the believers to march out altogether. Of every division that marches out, let a group remain behind, to gain understanding of the religion, and to notify their people when they have returned to them, that they may beware."*<sup>13</sup>

*"When some news of security or alarm comes their way, they broadcast it. But had they referred it to the Messenger, and to those in authority among them, those who can draw conclusions from it would have comprehended it..."*<sup>14</sup>

*"...Therefore, take a lesson, O you who have insight."*<sup>15</sup>

<sup>6</sup> al-A'rāf 7/157.

<sup>7</sup> al-Nisā' 4/105.

<sup>8</sup> al-Nisā' 4/65.

<sup>9</sup> al-Nūr 24/51.

<sup>10</sup> al-Ahẓāb 33/36.

<sup>11</sup> See Talip Türkan. "Şeriat". *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Accessed 15.11.2020).

<sup>12</sup> إن الحوادث لا تنقطع والنوازل لا تنتهي: Abu al-Layth as-Samarqandi, an-Nawāzil (al-Fatawa), (İstanbul: Süleymaniye Kütüphanesi., Fatih, nu. 2414), 2b.

<sup>13</sup> al-Tawba 9/122.

<sup>14</sup> al-Nisā' 4/83.

<sup>15</sup> al-Ḥaşr 59/2.

*When Muâz said, "Whenever I cannot find a verdict in the book of Allah and the Sunnah of His Messenger (pbuh), I will make decision on my own (ijtihad)", The Prophet (pbuh) appreciated him and stated that this method was suitable for Allah's approval.<sup>16</sup>*

With this authorization, mujtahid-fiqh scholars bring judgments in religion by putting forth all their scientific efforts with complete sincerity. Ijtihad, which is an effort to determine what Shari' Ta'ala can say on matters related to human behavior but whose decrees are not clearly included in religious texts/nass, is described as speaking on His behalf in the final analysis. As a matter of fact, the result reached by the mujtahid/mufti has been considered as Allah's decree both in his own eyes and in the eyes of the person who asks for fatwa about an issue.<sup>17</sup>

In that case, a religious decree is based either on a qat'i (definite) nass, on a zanni (presumptive) nass, ijtihad or ijma. The qat'i nass and zanni nass do not cause doubts in our minds in determining the religious decree, as they are both nass. However, there may be a question whether ijma and ijtihad are institutions that give the judgment the qualification of "lawfulness/shar'iyyah" as a result.

As it is known, both ijma and ijtihad are scientific activities carried out based on detailed evidence, that is, revelation in the final analysis. Essentially, ijma is a consensus of opinion that consists of ijtihads coming together at one point. As both ijtihad and ijma are based on revelation, its comprehension and interpretation, and are deeds within the framework that they draw; the judgments put forward by ijma and ijtihad are also religious-shar'i decrees. Actually, the fact that Almighty Allah himself determined this framework and ordered to make judgements in the way He showed<sup>18</sup> and to order to gain Islamic scholarship (tafaqquh) in the frame of His religion and then to declare that some people have a duty to uncover an issue through deep investigation<sup>19</sup> shows us that the judgment is also religious-shar'i.<sup>20</sup> Likewise, it can easily be deduced from some of the Prophet's expressions (pbuh) that the conclusions are reached by ijtihad are religious decrees although they are human activities. His words urging to ijtihad, his encouragement on the issue, his emphasis on the importance of being Islamic scholar, his expressions informing that the scholar attains a reward even if he is mistaken in the ijtihad<sup>21</sup> are important in terms of showing that all the religious decrees are included in religion.

<sup>16</sup> Abu Dawud, "Akdiye", 11; Tirmidhi, "Ahkâm", 3.

<sup>17</sup> Badr ad-Dîn Muhammad b. Bahâdir Zarkashi, *al-Bahru al-muhith fî usûl fiqh* (Kahire/Ġardeka: 1992) 6/317: *وَإِذَا غَلَبَ عَلَى ظَنِّهِ شَيْءٌ فَهُوَ حُكْمُ اللَّهِ فِي حَقِّهِ وَحَقٌّ مِنْ قَلْدِهِ*; Amer Padesah, *Taysir al-Tahrir* (Kahire 1351) 4/229: *وَجُوبُ اتِّبَاعِ مَا هُوَ الْأَرْجَحُ مِنْ حَيْثُ كَوْنَهُ حُكْمَ اللَّهِ تَعَالَى فِي نَظَرِهِ*.

<sup>18</sup> al-Nisâ' 4/65, 105; al-Mâ'ida 5/44-49; Surah an-Nûr 24/5; Surah al-Ahzâb 33/36.

<sup>19</sup> Surah at-Tawbah 9/122; al-Nûr 4/83.

<sup>20</sup> See about the concept "shariyyah": Ahmet Yaman, "İslâm Hukukunda Şer'îlik Kavramı Başlıklı Bildirinin Müzakeresi", *1. İslâmî İlimlerde Terminoloji Sorunu Sempozyumu*, Ankara 2006, p. 269-275.

<sup>21</sup> See Bukhari, "İlim", 9, 10, 37; "Vudû", 10; "İ'tisâm", 13, 21; Müslim, "Hac", 446; "Kasâme", 29; "İmâra", 175; "Fedâilü's-Sahâbe", 138; "Akdiye", 15; Abû Dawud, "Akdiye", 2, 11; Tirmidhi, "İlim", 4; "Ahkâm", 3.

What is meant by shari'a and religiosity here is either to state that the decree (hukm) is included in the nass, which are the main sources of religion or to emphasize the jurist (faqih) who obtained the provisions by making ijtihad did this by referring to the main sources of the religion. Of these two decrees constituting the shari'a, the one that is explained directly in the nas is called *munazzal sari'ah* (sent down shari'a), and the one determined by mujtahids is called *muawwal shari'a* (interpreted shari'a).<sup>22</sup> The sentence "Shari'a is either tawqif or qiyās"<sup>23</sup> uttered by some scholars summarizes what has been said up to this point.

In fact, our scientific tradition is based on this acceptance. As a matter of fact, even citing a sentence from Imam-i A'zam Abu Hanifa (d. 150/767) can be sufficient in this matter. In *al-Fiqhul-Akbar*, he stated that the term "religion" includes all practical provisions besides belief and Islam in terms of content, with the expression "wa'sh-sharâ'i kullihâ". The rest of his words on the subject is as follows:

"The term 'Islam' means submitting to the orders of Allah. Although the words Islam and faith (iman) are defined differently in terms of language, there cannot be faith without Islam and Islam without faith. These two terms cannot be separated from each other. Therefore, the term religion includes faith, Islam and all shar'i decrees."<sup>24</sup>

The determinations we have made so far regarding the nature of the shar'i/religious decree is clearly summarized by the following sentences by Imam Shafî (d. 204/820) under the heading "The Manner of the Religious Explanation (Declaration)":

Almighty Allah explains how the creatures he created will fulfil the acts of worship in one of the following ways:

a. Allah declares in Quran the necessity of performing basic obligations such as wudu, prayer, zakat, pilgrimage, and fast, and avoiding overt and

<sup>22</sup> See Türcan, "Şeriat".

<sup>23</sup> Muhammad al-Ghazali, *Asas al-qiyas* (Riyad: 1993), 103-104. إن لفظ القياس مشترك. فقد يفهم منه الرأي. المحض الذي يقابل التوقيف حتى يقال: الشرع إما توقيف وإما قياس وهذا الذي ننكره وهو الذي يتعرض لتشنيع الظاهرية والتعليمية. أما إذا لم يُرد به هذا المعنى فلا ننكره. وهو أن يقال: الأحكام الشرعية تنقسم إلى تعبدات وتحكمات جامدة لا تعقل معانيها - كرمي الأحجار إلى الجمرات في الحج - وإلى ما تُعقل معانيها ومقاصد الشرع منها كما يُعقل من إستعمال الأحجار في الاستنجاء وأن المقصود منه تخفيف النجاسة وكما يعقل من صرف المال إلى الفقراء إذ المقصود إزالة حاجاتهم وفاقاتهم وهذا توقيف كما أن الرمي في الحج توقيف ولكن ذلك توقيف مجرد لا يقترن به فهم مقصود الشرع من ذلك التوقيف وهذا يقترن به فهم مقصود معقول فيسمى في الحج توقيف ولكن ذلك توقيف مجرد لا يقترن به فهم مقصود الشرع من ذلك التوقيف وهذا يقترن به فهم مقصود معقول فيسمى. See Zerkeşi, *al-Bahru'l-muħit*, 7/12. It should be noted that al-Ghazali opposes the qiyas in the sense of "al-ra'y al-mahd/pure personal view", it should not be taabbudî (the rules whose wisdom is unknown, completely look at Allah's orders and prohibitions) / Tahakkumî (the rules without evidence) and therefore he evaluates it within the "tawqif" which is based on the meaning and purpose of the qiyas that can be known the meaning and purpose of nass. However, as al-Ghazali also points out in the same place, the word "tawqif" has been used in the literature for taabbudî/tahakkumî decrees whose reasons can not be understood. When it is used in this narrow/special meaning, the sentence "shari'a is either tawqif or qiyās" will not be wrong.

<sup>24</sup> Abu Hanifa, Nu'mān b. Thābit, *Al-Fiqh al-Akbar* (Īmārât: 1999), 57: والإسلام هُوَ التَّسْلِيمُ والانتقاد لأوامر الله: 57: تَعَالَى فَمَنْ طَرِيقَ اللُّغَةِ فَرَّقَ بَيْنَ الإِسْلَامِ وَالإِيمَانِ وَلَكِنْ لَا يَكُونُ إِيْمَانٌ بِلَا إِسْلَامٍ وَلَا يُوجَدُ إِسْلَامٌ بِلَا إِيْمَانٍ وَهُمَا كَالظَّهْرِ مَعَ الْبَطْنِ. وَالَّذِينَ اسْمُهُمْ وَقَعَ عَلَى الإِيْمَانِ وَالإِسْلَامِ وَالشَّرَائِعِ كَلَّمَهَا.

hidden major sins (jumul al-faraid) such as committing adultery, drinking, carcass and eating pork.

b. Explains how to fulfil the fards declared in the Kuran such as the number of prayers and how to perform them, when and how to pay zakat, by referring to the Prophet (pbuh) He sent.

c. In the matters not found in the Book (Quran), the decree is explained with the sunnah of the Prophet (pbuh). Since Allah considers the obedience to the Prophet and to his decrees put forward by him as obedience to Himself, whoever obeys his sunnah, obeys the farḍ of Allah.

d. One form of the declaration takes place by Almighty Allah's orders to the believers (scholars) to make all the efforts to find out the decree (ijtihad). He tests them in terms of whether they obey the other farḍs or not, as well as whether they obey his orders to make ijtihad and whether they behave according to the result they attained.<sup>25</sup>

It will be useful to note here, because of its similar content, the following statement of Muhammad bin Hasan Shaybanî (d. 189/805), Abu Hanifa's disciple and an imam teaching his sect:

Ilm (knowledge) is four kinds:

a. The one in the Book (Quran) and similar to it,

b. The Sunnah reported from the Prophet (Pbuh) with a valid evidence and similar to it,

c. The knowledge defined through the consensus of the Prophet's ashah (ijma) and similar to it. The decrees the ashah disagree are also in this group. These are not abandoned altogether; if one of them is preferred, the similar one is compared to it.

d. Those approved by most of the Muslim jurists and the ones similar to them. Knowledge never extends beyond these four types."<sup>26</sup>

## 2. Ijtihad in Decrees Based on Qat'i (Definitive) Nass

So far, a lot have been said around the precept "Ijtihad is never allowed when a nass is present." to summarize in a single sentence, the rule "ijtihad cannot be made in the decrees based on definite nass"<sup>27</sup> has been reached as a result of these negotiations. At this point, I think that the rule "ijtihad cannot be

<sup>25</sup> Muhammad ibn Idris ash-Shafi'i, *al-Risala* (Kahire 1940), 21-22: مما أبان الله لخلقه في كتابه، مما تعبدهم به، لما مضى من حكمه جل ثناؤه من وجوه فمنها ما أبانه لخلقه نصاً. مثل جمل فرائضه، في أن عليهم صلاةً وزكاةً وحجاً وصوماً وأنه حرّم الفواحش، ما ظهر منها، وما بطن، ونقض الزنا والخمر، وأكل الميتة والدم، ولحم الخنزير، وبين لهم كيف فُرض الوضوء، مع غير ذلك مما بين نصاً. ومنه: ما أحكم فرضه بكتابه، وبين كيف هو على لسان نبيه؛ مثل عدد الصلاة، والزكاة، ووقتها، وغير ذلك من فرائضه التي أنزل من كتاب ومنه: ما سنّ رسول الله صلى الله عليه وسلم مما ليس الله فيه نصّ حكم، وقد فرض الله في كتابه طاعة رسوله صلى الله عليه وسلم، والانتهاه إلى حكمه، فننّ قبل عن رسول الله فيفرض الله قبل ومنه: ما فرض الله على خلقه الاجتهاد في طلبه، وابتلى طاعتهم في الاجتهاد، كما ابتلى طاعتهم في غيره مما فرض عليهم.

<sup>26</sup> Ibn 'Abd al-Barr, *Jami' Bayan al-'ilm wa-fadlih* (Kahire: 1982), 315: العِلْمُ أَرْبَعَةٌ أَوْجُهُ: مَا كَانَ فِي كِتَابِ اللَّهِ: 315: العِلْمُ أَرْبَعَةٌ أَوْجُهُ: مَا كَانَ فِي كِتَابِ اللَّهِ عَالِمٌ وَنَسَلَهُ الْمَأْتُورَةُ وَمَا أُشْبِهَتْهَا وَمَا كَانَ فِيمَا أَجْمَعَ عَلَيْهِ الصَّحَابَةُ وَمَا أُشْبِهَتْهَا النَّاطِقُ وَمَا أُشْبِهَتْهَا وَمَا كَانَ فِي سُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الْمَأْتُورَةُ وَمَا أُشْبِهَتْهَا وَمَا كَانَ فِيمَا أَجْمَعَ عَلَيْهِ الصَّحَابَةُ وَمَا أُشْبِهَتْهَا وَكَذَلِكَ مَا اخْتَلَفُوا فِيهِ لَا يُخْرَجُ عَنْ جَمِيعِهِ، فَإِذَا وَقَعَ الْإِحْتِيَازُ فِيهِ عَلَى قَوْلٍ فَهَوَّ عِلْمٌ يُقَاسُ عَلَيْهِ مَا أُشْبِهَتْهُ وَمَا اسْتَحْسَنَتْهُ عَائِمَةُ فَهَيَّاهُ الْمُسْلِمِينَ وَمَا أُشْبِهَتْهُ وَكَانَ نَظِيرًا لَهُ قَالَ وَلَا يُخْرَجُ الْعِلْمُ عَنْ هَذِهِ الْوُجُوهِ الْأَرْبَعَةِ.

<sup>27</sup> *Mecelle*, md. 14; Ali Haydar Efendi, *Düreru'l-hukkâm şerhu Mecelleti'l-ahkâm* (Istanbul 1330) 1/65-66.

made in decrees based on definite nass" can be stretched and this can be manifested in three points. Therefore, my answer to the question "Is ijthihad in a judgment based on definite nass?" will be "yes". This ijthihad is not in the direction of dismissing it or revealing the opposite of what he said. However, the possibility of ijthihad may arise in the following three points:

a. If a qat'i nass puts forward a decree and bases it on a reason (illat), it means that it transfers the authority to the mujtahids to decide that it is inapplicable in cases when there is no reason (illat). Therefore, an opportunity for ijthihad arises in this regard. For example, not giving zakat to al-mu'allafah qulubuhum, one of the places where zakat is given, at certain intervals starting from the time of Abu Bakr (mabpwh) is not an act of making a decree contrary to the verse.<sup>28</sup> It is a situation determination in terms of not implementing the decree due to the disappearance of its justification. Therefore, if the cause (illat) gains a concrete existence again later, the decree will come back accordingly. He stated that the wisdom (hikmat), reason, need and reason of the nass should be stated and accepted that zakat can be given to the al-mu'allafah qulubuhum when necessary.<sup>29</sup>

b. The second opportunity for ijthihad in qat'i nass may arise in the direction of putting temporary restraints on the permissible field.<sup>30</sup> As a matter of fact, while the related verse<sup>31</sup> "Chaste women among the believing women and those who were given the Book (Scripture) before you, on the condition that they marry in a legitimate marriage, and not in the form of having an illegitimate relationship (adultery) or keeping secret friends (mistresses), are halal to you if you give them their dowries." opens a wide area of permissibility for marrying women of the Ahl al-Kitab (people of the book), which was restricted in the period of Caliph Omar; *It would not be very correct to use the term "prohibition", but we also know that there is an application that can be perceived as such by the public.*<sup>32</sup> This practice can be remembered here as an example of the ijthihad of making temporary restrictions in the permissible field.<sup>33</sup>

c. The third stage of ijthihad in the qat'i nass can be seen as adding to the quantitative expressions called "muqadderât" in our tradition of usool. The fact that the punishment for consumption of alcohol was around forty flogs in the period of the Prophet (pbuh) while it was increased later at the request of Caliph Ali (Ali ibn Abî Talib),<sup>34</sup> the increase in the money's worth over dinars-

<sup>28</sup> al-Tawba 9/60.

<sup>29</sup> Abu Bakr ibn al-Arabi, *Aridhat al-Ahwazi* (Beyrut: Dâru'l-Kütübî'l-İlmiyye, n.d.), 3/172: فوجب ان السبب والحاجة إذا ارتفعت أن يرتفع الحكم وإذا عادت ان يعود ذلك  
*Jamî' li-'Aḥkām al-Kur'ān* (Kahire: 1964), 8/181.

<sup>30</sup> Shatibi, Abū Ishāq Ibrāhīm ibn Mūsā, *Al-Muwafaqaat fi Usool al-Sharia* (Beyrut: 1991) 1/130 etc.; Ahmad b. İdrīs al-Qarāfi, *al-Furūq* (Beyrut: Âlemü'l-Kütüb, n.d.), 2/33; also see 2/122-131.

<sup>31</sup> al-Mā'ida 5/5.

<sup>32</sup> Abu Bekr Ahmad b. Alī al-Jassas, *Aḥkām al-Qur'ān* (Beyrut: 1993), 2/459; Bayhaqi, *Sunan al-Kubra* (Beyrut: 2003), 7/280.

<sup>33</sup> See for details and other examples: İbrahim Yılmaz, *İslâm Hukukunda Kamu Otoritesinin Mübahı Sınırlandırması* (Ankara: 2020).

<sup>34</sup> See Bukhari, "Hudûd", 4; Abu Dawud, "Hudûd", 35-37; Muhammad b. Ahmad b. Abi Sahl Abu Bakr al-Sarakhsi, *al-Mabsûṭ*. (İstanbul: 1983), 24/30; Muhammad b. Alī as-Shawkani, *Nayl al-Awtar* (Kahire: 1971), 7/156-157.



dirhams for the penalty in parallel with the increase in camel prices, and moreover, the ratio of 1 to 10 was increased up to 12000 in dirhams as a result of deterioration over time<sup>35</sup> shows that an addition can be made in the field of muqadderât and therefore an ijihad can be made in this field. On the other hand, because the numbers are in the group of particular (has) words and they indicate definite decrees,<sup>36</sup> the nass containing muqadderât are qat'i nass.<sup>37</sup>

### 3. Ijtihad in the Decrees Based on Zanni (Presumptive) Nass

It will be appropriate to consider ijihad which may come to the fore when the nass is zanni (presumptive) in two stages as certainty (*thuboot*) and indication al-zanniyyat (presumption).

*Zanniyat at thuboot*, that is, the doubt, according to the criteria of the mujtahid, in the stages of the nass being carried into next generations, may result for mujtahid not to consider the nass in the result of some methodological preferences. Deciding on this is an ijihad by nature, and this ijihad may have manifested that nass should not be taken as a source of degree. In this case, the nass whose *thuboot* is zann itself becomes the subject of ijihad with regard the acceptability before the decree it puts forward. In this context, Hanafi and Malikis attitudes towards khabar-i wahids which do not meet the conditions they seek to practice according to it can be recalled.

The second ijihad, which can come to the fore when nass is supposed to be zanni, emerges when there is an issue about *zanni al-dalalah*. In this case, there may be different interpretation possibilities with methodological preferences and depending on that different interpretation; zanni al-dalalah may lead the emergence of different decrees. The evidence of not accepting the precept "*Ijtihad is never allowed when there is a nass*" in general is the saying "*the ijihad and disagreement is allowed when there is a nass*"<sup>38</sup> can be remembered as a determination confirming my idea. As a matter of fact, although the thuboots of the order "إِنْحَزْ"<sup>39</sup> in the Surah Kawthar or "وَأَسْأَلُوا"<sup>40</sup> in the verse of ablution (wudu) are qat'i nass, it gives way to more than one decree due to the fact that its dalalah is zanni.<sup>41</sup> Moreover, it is known that although the hadith<sup>42</sup> "*No prayer is valid unless 'Fâtihat al-Kitab' is recited*"

<sup>35</sup> See Malik b. Enes, *Muvatta'*, "Ukûl", 1-2; Abu Dawud, "Diyât", 18, 20; Ibn Majah, "Diyât", 6; Sarakhsi, *al-Mabsût* 26/75 et al.; Shawkani, *Nayl al-Awtar*, 7/68-70; Halil Sahillioğlu, "Dinar", *TDV İslâm Ansiklopedisi*, (Access 12.04.2018); Ali Bardakoğlu, "Diyet", *TDV İslâm Ansiklopedisi*, (Accessed 12.04.2018).

<sup>36</sup> See Mehmet Erdoğan, *İslâm Hukukunda Ahkâmın Değişmesi* (İstanbul: 1990), 135-139.

<sup>37</sup> Abd al-Aziz al-Bukhari, *Kashf al-asrar sharh al-usul al-Bazdawi*, (Dârul-Kitâbi'l-İslâmî: n.d.), 1/80.

<sup>38</sup> Hayreddin Karaman, "Dinin Anlaşılması Meselesi: Sabiteler ve Değişkenler" Opening conference given at the Current Religious Affairs Consultation Meeting VIII (İstanbul 2018).

<sup>39</sup> al-Kawthar 108/2.

<sup>40</sup> al-Mâ'ida 5/6.

<sup>41</sup> Qurtubî, *al-Jamî' li-'Ahkâm al-Kur'ân*, 20/219 etc.

<sup>42</sup> Tirmidhi, "Mevâkîf", 69, 115, 116; Ibn Majah, "İkâme", 11.

is described in terms of thuboot as *mashhoor*, it is subject to different decrees<sup>43</sup> due to the fact that its dalalah is zanni.

If I am asked whether the possibility of making ijthihad based on zanni nass still continues today, I will, on principle, reply that the competent jurists are authorized on this issue, and they can make new interpretations on nass whose dalalah are zanni. That is, such an ijthihad is possible in principle. But could there be anything unspoken from the past to present on zanni nass? Is it "Mâ taraka al-awwalûn li al-âkhirîn " or "Kam taraka al-awwalûn li al-âkhirîn"? The conclusion reached from my research is that it is possible to choose between the necessity of ijthihad or takhrij in new issues and the old ijthihad. In terms of ensuring the survival of fiqh by these means, the second statement that the previous ones leave much to be done to the next is correct; however, the first one, that is, the statement that nothing is left to the next, seems more correct at the point of understanding the texts. that is, there is nothing left that has not been said about the meaning frames of zanni nass. To express it in a more concrete example, the commandments in the verse<sup>44</sup> " وَلَا يُبَدِّلِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا " *وَلَا يُبَدِّلِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا* " and the word "qadhaa" in the hadith<sup>45</sup> " كَانَ يُصَيِّبُنَا " *كَانَ يُصَيِّبُنَا* " cannot be subject to new meanings today.

Here I will proceed to another point regarding change, the question of historicity:

#### 4. Historicity in Qat'i (Definitive) Nass

Are the qat'i nass restricted to a certain society and time? I agree that it is not possible to change them, but I wonder if new decrees can be made by considering them as belonging to history with regard to their current/original words and leaving the words on that time and to transfer their principle aspects to present time and establish new decrees?

In the face of these questions, my opinion is that the decrees of shari'a based on definite texts are historical and supra-social. I am not expressing this as an emotional or ideological judgment; on the contrary, I have this opinion based on the declaration of Almighty Allah, the owner of these nass; namely:

Approximately 2000 years after the Torah was sent down to Prophet Moses, Almighty Allah still says, "But why do they come to you to appoint you as an arbitrator, when they have the Torah, which contains Allah's Law?" Then, they turn away from you. They are not believers."<sup>46</sup> Approximately 600 years after the Bible was sent down to Prophet Isa (Jesus), Allah commands "So let the people of the Gospel rule according to what Allah revealed in it. Those who do not rule according to what Allah revealed are the sinners."<sup>47</sup> He warns "those who do not judge by what Allah sent down..." all the thousand years after the holy

<sup>43</sup> Serahsî, *al-Mebsût*, 1/18-19; *İbnü'l-Arabî*, *Âridatü'l-ahvezi*, 2/46-48.

<sup>44</sup> al-Nisâ'4/34.

<sup>45</sup> Bukhari, "Hayız", 20; Müslim, "Hayız", 69; Abu Dawud, "Tahâret", 105.

<sup>46</sup> al-Mâ'ida 5/43.

<sup>47</sup> al-Mâ'ida 5/47.

scriptures and brings some sanctions in a manner that will encompass them;<sup>48</sup> then, He says, *"We have revealed you the scripture, with the truth, so that you judge between people in accordance with what Allah has shown you. And do not be an advocate for the traitors"*,<sup>49</sup> and *"These are the limits set by Allah, so do not transgress them. Those who transgress Allah's limits are the unjust."*<sup>50</sup> From all these, it can easily and by all means be inferred that the Shari'/legislator Himself has not limited the revelation he sent down to a history and geography.

If I am asked whether there are any qat'i nass limited to the history and geography, I will say "Yes, there are also some nass bearing historicity," and I anticipate they can be grouped into two:

a. These are related to either directly the Prophet (pbuh) or his family; therefore, they automatically carry a historical identity. In this context, for example, I can remind you of the prohibition of marriage to the "wives of the Prophet (ummahat al-mu'minin)" after the death of the Prophet Muhammad (pbuh) by the najwa verse *"O believers, Whenever you would like to have private talk with the Prophet, give something in charity before it..."*<sup>51</sup> and the verse *"...You must never offend the Messenger of Allah, nor must you ever marry his wives after him, for that would be a great mistake with Allah."*<sup>52</sup>

b. On the other hand, these nass may have made a decree parallel to periodic possibilities, experiences and technologies. As in the example of "ribât al-khayl (war horses)" in the verse *"And prepare against them all the power you can afford, and all the cavalry you can mobilize, to terrify thereby Allah's enemies and your enemies, and others besides them whom you do not know, but Allah knows them..."*,<sup>53</sup> and the procedure of cleaning a bowl besmirched with impurities after washing it with water seven times and then rubbing it with soil for the eighth time.<sup>54</sup> These are some examples to be included in the group of qat'i nass, but we know, can determine with our mind very easily, and infer, due to the fact that our scientific tradition makes us understand in this way, that they are historical. However, the nass in this category are rather few and they seem to be limited to these two areas.

## 5. Historicity in Zanni Nass

I am of the opinion that this category is also beyond history and society. As I have stated above, I do not come to the conclusion that the gate of ijthad based on zanni nass is now completely closed. I reiterate that declaration ijthad, qiyas ijthad, and istislah ijthad can widely be used and it has already been used by people throughout history. They are not issues that relate to historicity and take each other away. For example, although the Prophet (pbuh)

<sup>48</sup> al-Mā'ida 5/44, 45, 47.

<sup>49</sup> al-Nisā'4/105.

<sup>50</sup> al-Baqara 2/229.

<sup>51</sup> al-Mujādala 58/12-13.

<sup>52</sup> al-Aḥzāb 33/53.

<sup>53</sup> al-Anfāl 8/60.

<sup>54</sup> Bukhari, "Vudû", 33; Müslim, "Tahâret", 93. For discussions about whether 'illa is understandable in mind or not, see: al-Juwayni, *al-Burhan fi usûli'l-fiqh* (Kahire 1400), 2/911, 943; Mahmoud b. Ahmad ez-Zencânî, *Tahrîj al-furû ala al-usûl* (Beyrut 1987), 38 etc.

had a negative attitude to the system of narkh (tas'ir),<sup>55</sup> the companions (ashab) designed a different system after his death. While certain interpretations were made around the concept of "fi sabilillah" which has a wide expansion as a group to give zakat, some other inter interpretations were added to it based on old interpretations throughout history.<sup>56</sup> Since the main reason behind the prohibition of receiving zakat disappeared for the clan of Hashim after a while, it gained another identity.<sup>57</sup>

I will also end the matter here to proceed to another subject, the issue of purpose-means:

## 6. Change in the "Maqsad and Wasila" Type of Decrees in Nass

The purpose of the religious-legal regulations in the last analysis is to establish the social order by making the idea of justice prevailing and to ensure the soul-body integrity of the people. A number of wasails are foreseen in order to achieve this goal. The ability of these wasails to get the person to achieve the relevant purpose may decrease or end completely over time. In such cases, the ways through which decrees of fiqh will progress will be handled in three stages:

a. If both the zanni and qat'i types of the nass are not the target, that is, the main purpose and purpose of the decree but a means for the achievement of that purpose, the specified occasion and reasons are discredited when they lose their effectiveness.<sup>58</sup> In this case, new wasails (means) compatible with the purpose of the decrees are substituted for such wasâils. Therefore, the absence of the wasail (means) does not necessitate the absence of the maqasid (purposes). The Prophet (pbuh) himself showed that such an expansion was possible. In the long narration, also known as the Dajjal hadith, the Prophet (pbuh) substituted a new wasail suitable for the time, by answering the question whether only five-time prayers would be enough for a day that would be as long as a year. He said, "No. You determine (taqdeer) your own times yourselves!" for the prayer is the main purpose, and time is a wasail (means). It cannot be said that prayer will not be obligatory in a place where the time does not come.

b. Although it is possible to fulfill the decrees of the wasail exactly the same way, they leave their place to new wasails that will fulfil the purpose fully, if the relevant purpose is no longer sufficient as the social conditions have changed. For example, the Prophet (pbuh) found it sufficient to have two

<sup>55</sup> Abu Dawud, "Büyü" 49; Tirmidhi, "Büyü" 73; Ibn Majah, "Ticârât" 27.

<sup>56</sup> "Contemporary Islamic scholars such as Cemâleddin al-Kasimi, Mahmud Şeltût, Hasaneyn Muhammad Mahlûf and Muhammad Hamîdullah have understood the term fi sabilillah in the verse as all kinds of activities that benefit Muslims." Mehmet Erkal, "Zekât", *TDV İslâm Ansiklopedisi*, (Accessed 12.04.2018). At this point, I should note that I find it more appropriate to interpret the expression "fi sabilillah" in the verse to include those who set out on a pilgrimage by obeying the command of Allah, soldiers who strived for the sake of Islam and Muslims, and people who set out for knowledge.

<sup>57</sup> Zayla'i, Uthman bin Ali, *Tabyin al-Haqa'iq sharh Kanz al-Daqa'iq* (Bulâk: 1313), 1/303.

<sup>58</sup> See Qarâfi, *al-Furûq*, 2/33,153; Shatibi, *al-Muwafaqaat*, 2/11.

witnesses in the narrow neighbourhood of Medina<sup>59</sup> in order to ensure the marriage contract and to prove and protect the rights of the parties. But in today's crowded societies, making the marriage contract bound to only two witnesses also bring misuses. Since the point aimed by the legal order will be reached more effectively today with announcement and registration, wasila (means) together with the witness turns into announcement and registration.<sup>60</sup>

The following examples also confirm the existence of such an opportunity:

In the incidents of unintentional killing and injuring, the sensible family member involved in the payment of the wergild (diyât) in the early period including the Age of happiness in Islam, was initially a paternal male relative (asabah) of a person to participate in the payment. However, when social relations changed over time and other administrative categories such as the divan organization and other social clusters such as profession groups emerged, it was thought that the sensible family member would be re-evaluated in the case of this new situation and they were composed of different people-segments. As a matter of fact, Hanafis concluded as a result of such an interpretation that the sensible person to pay was the one who lived in the same region with the criminal performing the same art or profession.<sup>61</sup> Similarly, it is recommended to take a pledge in the Quran to secure the debt during the journey.<sup>62</sup> The registration may be substituted due to the transportation burden and taking of the pledge during the journey.

c. In some cases, new scientific developments may allow for the establishment of more effective and more easily applicable wasail decrees. In such cases, the old wasail decrees may be replaced by new ones. The Prophet's (pbuh) wasila for cleaning the bowl licked by the dog by washing it for seven times with water and in the eighth time scrubbing with soil can be replaced by detergent and his wasila of stone used for removing dirt from body for istinja can be replaced by cloth, paper, etc.<sup>63</sup>

## 7. The Consensus (Ijma) and Change

What I deliberately prefer here is the companions' consensus (ijma al-ashâb) as it is a less controversial issue. As it is known, after the first years of the caliphate of Uthman, when political debates started to occupy the agenda and they clouded some realities, the companions of Prophet Muhammad (pbuh) migrated to different parts of the Islamic world. So the functionality and possibility of consensus (ijma) became debatable.

Therefore, restricting to the aforementioned period, I express that the ijma that occurred before the emergence of conflicts in the period of companions did not change either. Because that ijma set forth the provisions regarding the

<sup>59</sup> Bukhari, "Nikah" 36; Ebu Davud, "Nikah" 19; Tirmidhi, "Nikah" 14; Ibn Majah, "Nikah" 15.

<sup>60</sup> See Ahmet Yaman, *İslâm Aile Hukuku* (İstanbul: 2018), 49.

<sup>61</sup> Sarakhshi, *al-Mabsût*, 26/66, 110; 27/125; Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (İstanbul: 1986) 4/225. See for detailed information Kâşif Hamdi Okur, *İslâm Hukukunda Sosyal Sorumluluk: Âkile Örneği* (İstanbul: 2017).

<sup>62</sup> al-Baqara 2/283.

<sup>63</sup> See İbn al-Qayyim, *l'laam ul Muwaqqi'een 'an Rabb il 'Aalameen* (Beyrut: 1991) 3/19.

symbols of religion or *jumal al-faraid*,<sup>64</sup> a statement by Imam as-Shafii mentioned above, that is, the definite orders and prohibitions that constitute the identity elements and main dynamics of the religion. When these are removed and changed, for the fact that the religion will not be understood in its original form, and one step later, it will be misunderstood and open the door to new interpretations beyond the "completed"<sup>65</sup> form of religion, we are faced with a situation that the religion seems to be understood "right" by some people for the first time. This result has no explanation in terms of either reason or history and science. Therefore, the companions' consensus (ijma) is closed to change. The following decree was adopted with the words of the Hanafi scholar Fahrulislam al-Bazdawi (d. 482/1089) in the tradition of fiqh: *The companions' consensus is like the verse and mutawatir khabar (news whose accuracy is certain.)*<sup>66</sup>

The decrees such as the prohibition of a Muslim woman to marry a non-Muslim, the legality of the taraweeh prayer (not the decree belonging to it and not the number of rak'ahs but the existence), prolonging the time of night prayer (ishaa) until dawn, the fact that the azan is made up of the known words, the obligation for a menstruating woman to complete the abandoned fasts later but not the abandoned prayers, the necessity of kaffarah for intentional violation of fast by engaging in sexual intercourse can be remembered as examples in this context.

In addition to this reality, which is the basic principle, we should also state that an ijma, whose basis is based on maslahat or custom (orf), becomes open to change depending on the change of maslahat or orf. The possibility of such a change is a known and reiterated issue, especially in the Hanafi usûl al-fiqh. As a matter of fact, Isa b. Abân (d. 221/836), a disciple of Imam Muhammad ash-Shaybani (d. 189/805), a classical period scholar Fahrulislâm al-Pazdavî, and Ottoman period scholars Farişteoğlu İbn Melek (d. After 821/1418), Mustafa Hulûsî Güzelihsârî (d. 1253/1837), and Mahmud Esad Seydişehrî (d.1917) discussed this issue.<sup>67</sup>

Having presented these, I have come to the last issue of "change in religious decree". From this point, I will touch upon the intellectual ground and reasons of change in ijtiḥad and fatwa.

## 8. Change in Ijtiḥad

Ijtiḥad is a human activity. Therefore, like every human activity, ijtiḥad is a scientific activity that is always intertwined and interacts with the knowledge of the mujtahid, his understanding of method, environmental factors, sociality

<sup>64</sup> Shafii, *al-Risala*, 21-22, 157, 213.

<sup>65</sup> Al-Ma'ida 5/3.

<sup>66</sup> Abd al-Aziz al-Bukhari, *Kashf al-asrar*, 3/261: إجماع الصحابة مثل الآية والخبر المتواتر.

<sup>67</sup> Abd al-Aziz al-Bukhari, *Kashf al-asrar*, 3/176: وَيَتَصَوَّرُ أَنْ يَتَعَقَّدَ إِجْمَاعٌ لِمَضْلَحَةٍ ثُمَّ تَتَبَدَّلُ بِتِلْكَ الْمَضْلَحَةِ فَيُنْتَعَقَدُ: إجماع الصحابة مثل الآية والخبر المتواتر; İbn Melek Farişteoğlu, *Şerhu Menâri'l-envâr* (İstanbul: 1308), 245; Mustafa Hulûsî Güzelihsârî, *Menâfi'u'd-dekâik fi şerhi Mecâmi'i'l-hakâik* (İstanbul: 1303), 187; See for the view of İsa b. Ebân. Mahmud Esad Seydişehrî, *Telhis-i Usûl-i Fikah* (İzmir: 1313), 293

and the phenomenon he is dealing with. Fact, knowledge, opportunity and environment directly affect the mujtahid and determine his ijthihad. As it is, it would not be correct to claim that the analysis of ijthihad in the doctrine of fiqh never changes and it is the only thing that can be said until the morning of doom. Such a claim is neither fundamentally reasonable, nor is it a reality. Therefore, there is an opportunity to change ijthihad.

So, what are the reasons for this change? Some reasons such as change of time, change of place, change of situation, change of customs, change of knowledge, change of need and umum al-balwa have given the scholars and those are responsible for making ijthihad the opportunity to change ijthihads. I will present them very briefly and with an example for each.<sup>68</sup>

What the jurists and fiqh traditions mean by the change of time is the manifestation called '*fasâd al-zamân*'. That is, the negative change in people and their understanding over time, the deterioration of general morality, the weakening of the sense of taqwa, and the loss of consciousness of justice. Accordingly, the decrees put in accordance with the understanding of justice, which once had a certain standard and the understanding of taqwa, which was once again a certain quality, will be subject to a change due to the negative loss of quality, change and deterioration of these standards of justice and taqwa. Such interventions have always been made by the jurists throughout history. As a matter of fact, the disagreement between the founding imam and the next ones in Hanafis is not actually an evidence-burhan dispute; Instead, it is expressed in a poetic way with the expression<sup>69</sup> "اختلاف عصر وزمان، لا اختلاف حجة" "و برهان" that there is a conflict of time.

For example, due to the weakening of the sense of responsibility and trust of the craftsmen, it was decided that they were responsible for indemnifying the goods delivered to them, the witnessing of close relatives in favor of each other was no longer accepted due to the loss of justice and trust, three talaqs (granting of divorce by the husband) given at one time were counted as three for the purpose of disciplining and chastening men whose religious feelings were weakened. As Omar bin Abdulaziz (d. 101/720) said, "decrees have also changed and multiplied due to the deterioration of people".

The change of place also affects in the change of ijthihad. Because the situations of the countryside and city are different from each other; hot zone is different from cold zone; and the Muslim society is different from non-Muslim society. Then, the decree put due to the characteristics of a place may be open to change when the place changes. The changes in ijthihad after Imam Shafii's migration from Baghdad to Egypt may be the beautiful example for this in our history of fiqh. Undoubtedly, some events such as the loss of the shadow of his master, Imam Malik, he had felt on his head before, his attainment to new sources of information, as well as the events in his methodology are of course more effective in these changes, but we can never ignore that natural,

<sup>68</sup> See for details Ahmet Yaman, *Fetva Usûlü ve Âdâbı* (İstanbul: 2017), 199-226.

<sup>69</sup> Sarakhsi, *al-Mabsût*, 8/178; 19/166; Marghinani, *al-Hidayah*, 3/275; Zayla'î, *Tabyin al-Haqa'iq*, 1/43; 3/185.

environmental and social characteristics of Egypt were also partially effective in that change.<sup>70</sup>

A fatwa of Imam Abu Yusuf (d. 182/798) about mosques (masjids) is really noteworthy in this context: While he was at the head of the circle of lessons after his teacher Abu Hanifa in Kufa, when a place was determined as a mosque, Abu Yusuf regarded the down and upstairs of it as a mosque and did not allow the use of those places for other purposes. However, after he migrated to Baghdad and started to work as a qadi'l-kudat in addition to his scientific activities, he changed his ijtihad in Kufa when he saw that people were obliged to make a mosque and use each part in a different way within the narrow possibilities of the city.<sup>71</sup>

Change of situation; for example, situations such as livelihood difficulties, abundance, travel, residence, illness, health, fear, security are also effective in changing the decrees. As it is known, in our fiqh tradition, there are very strict decrees regarding long-term residence in dar al-harb (non-muslim country), acquiring the citizenship in dar al-harb and taking the Mus'haf (Quran) with them. However, this situation has changed considerably today and the main reasons behind such restrictive decrees put in the old times seem to be no longer there. As such, to insist on the continuation of the old rule means to struggle against the usual flow of life and to contradict with it, which is not considered a very reasonable attitude; On the contrary, it would be a behaviour that contradicts the thought of fiqh, which is based on fine understanding and deep understanding.

As it is an obvious reality that the customary decrees change with the change of custom, I will not dwell on it separately.<sup>72</sup>

This is how knowledge changes. A decree once made depending on the prevailing and accepted scientific knowledge of the time will naturally change with the new knowledge when the scientific information is proved to be wrong. Nothing could be more natural than that. In the past, in accordance with the scientific knowledge of the period, our jurists made a judgment on whether a woman who had a miscarriage would be puerpera or there would be an indemnity (ghurra) according to the condition of that miscarriage based on whether the falling entity's organs and body parts became apparent. Based on today's scientific data, we know that we are faced with a living being from the zygote stage in the first moment of fertilization. Therefore, regardless of the stage of pregnancy, puerperium will be the case when the embryo falls off or is removed. Jurisprudents (fuqaha) have the opportunity to establish new decrees based on new scientific knowledge about previously unknown or different known subjects such as the longest duration of pregnancy, the time of the fetus's coming to life, the detection of the crescent, and some other

<sup>70</sup> See for a different interpretation. Lemîn, "Kadiyyetu teessüri'sh-Shafii bi'l-bîeti'l-Misriyye", *al-Vâdha*/1 (Rabat: 1424/2003), 189-209.

<sup>71</sup> Marghinani, *al-Hidayah*, 3/19; Ibn al-Humam, *Fath al-Qadîr* (Kahire: 1970), 6/235; Erdoğan, *İslâm Hukukunda Ahkâmın Değişmesi*, 251-252.

<sup>72</sup> The following tract (risala) of Ibn Abidin on this subject includes many examples besides very valuable methodological analyzes. "Neşru'l-arf fi binâi ba'di'l-ahkâm ale'l-urf", *Mecmûatü'r-Resâil* (İstanbul: 1320), 2/114-147.



astronomical calculations, as well as when death occurred depending on the possibilities that medicine gives us, surrogacy etc.

Change in needs also has such an effect. Things that were considered as *tahsîniyyat* in the past may now be considered as *hâjiyyât* or even *dharuriyyat* in certain places. Naturally, depending on this, change in fatwa will be inevitable. For example, refrigerator, telephone, computer, air conditioner in hot regions, heating system in cold regions, compulsory education expenses, insurance, expenses related to the measures that can be taken against theft can now be included in the framework of *the basic needs* while calculating the zakat.

Umûm al-balwâ (widespread hardship) and change constitutes the last reason I will touch on. As it is known in the tradition of *fiqh*, "Umûm al-balwâ" is generally defined as the things that everyone is exposed to, difficult to avoid, that finds everybody in one way and happens a lot. Such developments may make it necessary to change the decree when it is no longer possible to get rid of it. Otherwise, the legal system may face the danger of staying out of life. So what do people do in such a danger? Either they behave hypocritically or if the phrase is right, they say "I both cry and go". If the latter happens, all difficulties and deprivation are left in their lap. Since it will not be possible for this situation to be sustainable, a solution is sought in other legal areas after a while.

Some conditions are required for the *umûm al-balwâ* to be effective. First of all, it is imperative that this situation (*balwa*) which concerns everyone in some way should not be a fantasy fact; that is, it should be real. Other conditions to be sought are that it should not directly contradict a *nass*, and that the event itself stems from the nature of the event rather than the insusceptibility of people. The anxiety of whether a change is sought for the sake of somewhat arbitrarily and self-righteous in order to get rid of the established ruling, has required these conditions to be put into effect by the jurists. I will conclude my words on the subject of *balwâ* by giving an example from our classical literature. Imam Muhammad al-Shaybani (d. 189/804) regarded *cowpat* as light *najasad* and, with the foresight that it was possible to avoid it, he said that if it covers more than a quarter of a piece of the cloth, it prevents one from performing *salah* (prayer); however, he changed this opinion after his trip to the city of Rey. Because he saw that the inhabitants of Rey could not protect themselves from cattle droppings since they have a great number of cattles and lived together with them, which was a general problem. Thereupon, he gave up his old view and like Imam Malik's fatwa, he said that cattle droppings on clothes would not prevent prayer.<sup>73</sup>

## Conclusion

In this article, in which I have tried to present the scope, possibility, justification and limits of the change of religious decree, that is, *fiqh*, the following points were underlined:

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<sup>73</sup> Ibn al-Humam, *Fath al-Qadir*, 1/204; Mehmet Erdoğan, *İslâm Hukukunda Ahkâmın Değişmesi*, 251.

A religious/shar'i decree, which is defined as "the thing that is substantiated via Shari's address, that is, the result of the address, is based either on qat'i nass or zanni nass. Since both ijihad and ijma are based on the understanding and interpretation of revelation and revelation, and they are prosedures within the framework that they draw, the decrees they put forward are religious and shar'i decrees.

The rule "*Ijtihad is never allowed when there is a nass*" is generally understood as "ijihad cannot be made in judgments based on unconditional nass. However, it is seen that it is clear that it is open to ijihad in three aspects: determining whether the reason of the definite nass is found and accordingly, whether the provision continues or not, in terms of making limitations in the permissible field and making additions to the mukaddarât.

Shar'i decrees based on both qat'i nass and zanni nass have historical and supra-social character.

The decree of the wasail (means) which is put with nass, but can no longer fulfill its function, is open to change.

The ijma occured in the period of the companions (sahabah) is closed to change. However, the ijmâs whose base is maslahah or custom (orf) are not closed to change.

The ijihad of the Mujtahids is open to change in principle. Justifications such as umum al-balwa are effective in this change with the change of time, place, situation, customs, knowledge and needs.

And finally, Almighty Allah knows the best of everything, and He is the one bestowing success.

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