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Scholarship and Education in Islamic Law and Economics: The Challenges of Comparative Law (Fiqh al-Muqāran)*

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Abstract: The method, which is commonly acknowledged in Islamic studies and education of Islamic sciences, is to examine knowledge through inter-madhhab approach. This approach traces its origins to the mid-19th century and became widespread in the 20th century. A critique of this method, which is almost undisputed today, needs to be done and what it has gained or lost should be examined. The disciplines, which have successfully guided the culture of Islamic civilization in a wide range of areas from law to politics, from economics to literature, and from art to philosophy, cannot provide solutions to the problems of humanity today, a fact that should be addressed. This consequence leads us to the question of how the education of Islamic law is practiced, or how knowledge of Islamic law is produced. So, my point of departure will be this question. Since Islamic economics is also taught or practiced through Islamic law, I will use it as my sample. I will deal with the current situation, and then I focus on the question of what happened in the 20th century that led Muslim scholars to adopt a new method to study and teach Islamic sciences and economics. In doing so, I will question whether there has been such an approach in past centuries, and I will examine whether this new method has been successful or not. Finally, I will focus on an alternative method. Although it is difficult to do all of these in a short paper, I will try to emphasize the crucial points of the issue.

Keywords: Comparative law (*Fiqh al-Muqāran*), Madhhab, Modernity, Methodology of Islamic economics, Salafism

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Introduction

An extensive number of studies in the field of Islamic economics and finance have been produced lately. Although these studies are relatively large in quantity, I be-

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lieve that their quality has not been discussed adequately in the literature.[1] Since the discussions on this subject will determine how economics and finance will be shaped in terms of both theory and practice, it is essential for researchers interested in this field to question the quality of the contemporary literature and efficacy of its implementation current situation because Islamic economics and finance literature shapes the perception of new researchers who study in this field. As a matter of fact, today's Islamic economics and finance view, developed under the influence of the approach that emerged in the 19th and early 20th centuries.

The main element that distinguishes the Islamic economics and finance from the conventional economics is that it is based on principles emanating from the foundational sources of Islam. The scholarly examination of these principles was done in the discipline of Islamic law. Islamic economics and finance develops its theories based on the basic principles and assumptions of Islamic law. Islamic finance is the field where these theories are most concretely observed. Islamic financial institutions refer to Islamic law because their operations have to be *sharia* compliant. Therefore, ethics and normative rules of Islamic law form the basis of Islamic economics and finance. As such, the understanding of Islamic law prevailing today and the knowledge created within this framework shape the activities of Islamic financial institutions. Therefore, Islamic law and Islamic economics and finance are intertwined in such a way that they cannot be separated from each other. For this reason, the process that the Islamic world has entered since the 19th century influenced not only all sciences but also the knowledge and education provided in the field of Islamic economics and finance. Therefore, it is important to look briefly at what happened in the Muslim world in the 19th century.

The tendencies that emerged in the Muslim world in the 19th century differed significantly from the previous periods. This change, which was a big divergence, was related to the new relationship that the Muslim world entered with the institutions and knowledge emerging in the West. The institutions, forms of knowledge and new approaches to the human, life and universe that emerged as a result of the historical narratives and facts of the Western civilization started to be perceived as a common truth for the rest of world by the arrival of modernity. In the lands under the influence of modernity, which imposed itself as a colonial power and cultural hegemony, new ideas and lifestyles were acknowledged while Islamic past

1 For a detailed discussion of the method in Islamic economics and finance studies and the problems of this method see Kizilkaya (2019a).

was criticized by the intellectuals. As modernity influenced non-Western societies, Muslim societies began to question their own traditions, means of producing knowledge, and their social lifestyles. Although it was problematic for Muslims to question their own traditions in favour of modernity, the requirements of modernity were believed as an absolute truth and the past was dubbed flawed by some thinkers. They animadverted on law, economics, institutions, and lifestyles of the past. In the previous centuries, Muslim scholars were making such criticism, but there was a very important difference that distinguished this period from the previous ones: abandoning the knowledge and the methods of the past while recognizing the knowledge and methods of another civilization. This is the main matter that distinguishes the 19th century reform *(iṣlāḥ)*, revival (*iḥyā'*) and renewal (*tajdīd*) movements from the previous centuries.

While the 19th century reformist thinkers criticized the past, they entered into a serious reckoning with the Islamic law, that guided the activities of Muslim societies in many fields, especially in law, economics and international relations (ʿAbduh, 1993, p. 3: 312). There were two main reasons for reckoning with Islamic law. The first reason was based on the fact that the Islamic law in the classical period included all fields of today's social sciences.[2] The issues addressed by the social sciences today were being studied within the discipline of Islamic law in the pre-modern Muslim societies. All disciplines such as economics, political science, sociology, law, and international relations were examined under the discipline of Islamic law. Therefore, the discipline, which is wrongly expressed as Islamic law today, is only devoted to the field of law.[3] Therefore, *fiqh* is a more accurate preference for its more accurate comprehension of various fields within social sciences.

The second reason for reckoning with Islamic law was that it was the main field that dealt with the behaviour of the Muslim community. Muslim societies, which came under the dominance of modernity, naturally started to compare their contemporary situations with the Western societies. As a result of comparison in certain areas, stagnation and backwardness were accepted as a fact. Islamic law, the core discipline that shaped the actions of Muslims, was recognized as the main reason for this backwardness. In this context, three attitudes have emerged on this issue: maintaining the existing knowledge and the means of its production as they were; considering the past as a humpback and abandoning it completely; since the-

2 For this function of *fiqh* see Şentürk (2001, pp. 93-129).

3 For a detailed discussion of the use of Islamic law see Bedir (2004, pp. 378-401).

re was deterioration due to the degeneration, returning back to the formation period of Islam which was considered ideal and good. I will not mention the first two approaches here, but will briefly focus on the third one, which became dominant in the late 19th and entire 20th centuries.

Advocates of reforming Islamic law rejected the knowledge produced within a legal school (*madhhab*) in the past. They argued that evidence-based knowledge should be produced instead. According to this, legal knowledge should be produced from the Qur'ān and the Sunnah, which are the foundational texts of Islam, rather than the knowledge produced by any legal school and the methods they relied on. Or the knowledge to be produced by following the method of a certain *madhhab* should be tested by consulting with the foundational texts (al-Shawkānī, 2013, pp. 2253-2278). Thereafter, the school-based knowledge that did not comply with the requirements of the new age would be rejected based on the Qur'ānic verses or the Prophetic traditions and instead a new knowledge would be produced departing from the foundational texts. This approach disabled intra-*madhhab* legal knowledge developed cumulatively throughout the history. And instead offered to build a new type of knowledge that can be called as hybrid. This paved the way for intensive discussion of *ijtihād* (independent reasoning), *takhayyur* (selecting a juristic opinion from any of the legal schools) and *talfīq* (patching together a ruling by combining various juristic opinions/conclusions), to generate the new knowledge through them.

Ijtihād was one of the most emphasized concepts in discussions of the Muslim thinkers throughout the 19th and the 20th centuries. According to this, Muslims achieved great success in knowledge, politics, international relations etc. in the first centuries of Islam because of independent reasoning. Therefore, it was claimed that Muslim scholars must make *ijtihād* in the process of producing knowledge in order to get rid of the defeats against the West and revive the old golden age of Islam. Otherwise, Muslims would not be able to avoid the process of decline and backwardness. Here, the whole history of Islamic law was examined through the *ijtihād-taqlīd* (imitation of a legal school of law) dichotomy and, *taqlīd* was discredited whereas *ijtihād* was glorified. In addition, *ijtihād* was taken to the center of the entire Islamic law history and its development was examined within the framework of the concepts of progress and decline.[4]

Their main argument was that responsibility for the situation that Muslims were in was because of the ways of producing knowledge in the past. Yet those

4 For one of the first books that has such periodization see Khuḍarī (1967).

who hold that the problem was due to the past methods still stated that there was a golden age, which started after the demise of the Prophet Muḥammad and continued until the 4th/10th century with the endeavours in the line of independent *ijtihād*. They believed that after this period, *taqlīd* became widespread and as a result, the Muslims became more backward with each passing day such that by the 19th century a collapse was imminent (ʻAbduh, 1993, pp. 3: 214-215). The arrival of backwardness was addressed under the dichotomy of *ijtihād-taqlīd*, and the concept of the *madhhab* was expressed as the beginning of this backwardness (Khuḍarī, 1967**,** p. 312). That is to say, the crystallization of the legal schools brought about a stagnation in thought, and Muslims could not create new rulings, which was the cause of their stagnation and regression.

The advocates of reform in the 19th century proposed abandoning the dogmatism of the legal schools and practicing independent *ijtihād* by referring to the foundational sources of Islam, i.e. the Qur'ān and the Sunnah in order to prevent the backwardness. In other words, instead of school-based legal rulings, emphasis was laid upon deriving rulings from the foundational texts of Islam while considering the contemporary conditions of the society.[5] This at first began as the *hadīth*-centered thought but later turned more into a Qur'ān focused movement.[6] Later, scholars who studied *madrasah* curriculum and also continued their education in the newly established schools like al-Azhar University where its curriculum was prepared under the influence of the 19th century reformist thinkers, have adopted comparative law (*fiqh al-muqāran*) as a method of research and the way of teaching in the 20th century.[7] The emphasis again was given to the new type of *ijtihād*. However, the concept of *ijtihād* here underwent a meaning shift and was redefined and interpreted as the production of knowledge from the foundational texts of Islam.

In the shade of these *ijtihād* controversies, the methodology of Islamic law (*uṣūl al-fiqh*) has also been subjected to a new interpretation. *Uṣūl al-fiqh*, which had the function of evaluating the reliability of knowledge produced within a *madhhab*, is a discipline to ensure the consistency of this knowledge. *Uṣūl al-fiqh*, which was the process of justification for the stands of different *madhhab*s, explaining the legal rules that they have derived from the sources, and establishing the consistency

5 For a detailed discussion see Shawkānī (1347).

6 For a detailed discussion of this transformation see Necmettin Kizilkaya (2019b, pp. 317-352).

7 For the reform of al-Azhar University see ʻAbduh (1993, pp. 3, 191-215). For a detailed discussion see Wood (2016, pp. 151-227).

between these rulings and the Qur'ānic verses, the Prophetic traditions, and the views of the Companions of the Prophet, and the Successor, was discussed in a different context in the 19th and 20th centuries. Accordingly, methodology of Islamic law was perceived as a tool for producing knowledge from the foundational texts of Islam. In other words, anyone who wanted to make *ijtihād* in legal issues could use his/her knowledge of *uṣūl al-fiqh* to produce solutions from the Qur'ān and the Sunnah for the problems encountered. Therefore, the emphasis on *ijtihād* in the 19th century led to the reinterpretation of the discipline of *uṣūl al-fiqh* to serve this new type of *ijtihād* (Bedir, 2019, pp. 19-50).

As a result of these discussions, it was agreed that the production of knowledge through a *madhhab* was impossible and did not meet the needs of the time. Because, in order to serve the purpose of the time, either the bounds of *madhhab*s would be overstepped, or the knowledge had to be produced by patching together the rulings through combining various juristic opinions of the schools/mujtahids. If such a method was followed, it would be possible to find solutions to a wide range of problems encountered. As a matter of fact, the Ottoman *Majallah*, which was prepared departing from the opinion of a single *madhhab* in 1876, soon became the subject of numerous amendments. As a result of the view that a single *madhhab* was not adequate to satisfy the needs of the time, the 1917 Ottoman Family Code was penned based on the views of various *madhhab*s and scholars. The works in the field of Islamic law in the 20th century were largely written according to this approach.

Just as Islamic law books were written based on the comparative law method, education of Islamic law has also been shaped under the influence of this method. Legal education, which was previously given under a particular *madhhab*, started being given by comparing the opinion of various schools in the 20th century. Advocates of providing legal education in this way assumed that the comparative law method had the potential of producing solutions to the problems that Muslims encountered because such an education allowed the student to choose the most suitable one for the conditions of their time within the numerous of opinions put forward for long centuries. This was explained by the pharmacy metaphor: When patients go to a pharmacy, they can choose from a set of drugs that are useful for their own disease, which would be useful to cure their illness. Comparative law, founded on a similar point of view, was acknowledged, as the common method in the books written in the field of Islamic law throughout the 20th century, as well as an undisputed approach applied in the education of Islamic law. This tendency affe-

cted the Islamic economics discipline in the same way and comparative law method was adopted in both studies and education in the field of Islamic economics and finance. The main goal of this study is to discuss this method and the problems it poses through examining its role in Islamic law and economics.

The Concept of *Fiqh al-Muqāran* (Comparative Law) and its Evaluation

To start with explaining what the concept of comparative law (*fiqh al-muqāran*) means and how it is grounded by its advocates makes the subject clearer. It is defined as a discipline that examines and discusses the views of jurists (*fuqahā'*) and the sources of these views and selects one of these opinions with neither ascribing to any *madhhab* nor relying on their methods (Muḥammad Abū Al- Ḥajj, 2017, p. 436). However, I think that *fiqh al-muqāran* is an approach rather than a discipline. When the concept is considered in this usage, comparative law means to examine any legal, economic, or political issue by utilizing the four schools of jurisprudence, in particular, and the other schools and jurists, in general. It has been emphasized that all the knowledge presented in the past Muslim societies can be utilized in the same manner and can be explored in order to overcome the problems Muslims are facing today.

One of the contemporary scholars who defined comparative law is Muḥammad Fatḥī al-Duraynī. Duraynī states that the classical period jurists did not use this concept, but they used comparative law method in their works. Listing the jurists who wrote their legal manuals based on this method, Duraynī interestingly mentions works from different *madhhab*s and states that they were written according to the comparative law method (al-Duraynī, 1991-1992, p. 5; al-Duraynī, 2008, p. 22). I will touch upon his opinion on this subject below, but instead of quoting his long definition here, I will discuss some issues about how the advocates of the comparative law method understand this technique based on some expressions mentioned in his definition.

Duraynī defines comparative law as the determination of the views of the schools of Islamic law on a particular issue after specifying the dispute points on that subject. However, in order for this to happen, the proofs/evidences (*dalīl*),[8] put forward by the parties who had a dispute on the subject should be compared

8 Although there are several literal meanings of *dalīl* such as proof, source, and guide, it is used for the main sources of *fiqh* i.e. Qur'ān, the Sunnah, consensus and analogy (Khādimī, 1318, pp. 12-13). But in the modern context it refers to the two main foundational texts of Islam, i.e. Qur'ān and the Sunnah.

(al-Duraynī, 2008 p. 23). Duraynī here refers to a comparison between different *madhhab*s. Such comparisons were also made in the classical period legal books. However, there was a distinct difference between the method he proposed here and the classical period. While making comparisons in the classical period, jurists were referring to the approach of their attached legal schools and tried to prove its consistency. In doing so, they were comparing their position with other schools. As for the modern period, the jurists make this comparison between legal schools without standing on the views of a certain school and by standing at the same distance to all schools. In classical legal books, the aim was to demonstrate the consistency of an opinion of a *madhhab* and to explain the methodological problems of other approaches. However, in modern studies, this comparison is made with a result-oriented approach in order to choose which school's view is more suitable for the issues encountered (al-Duraynī , 2008, p. 5).

Duraynī states that examining the evidence on a specific subject addressed by *madhhab*s and determining how they inferred rules (*istidlāl*) in the related issue is one of the important features of the comparative law method. However, he states that the efforts of the modern scholars should not be only limited to the determination, but rather to finding the basis for the deduction of jurists of legal schools. He thinks that this is necessary to explain the legislative strategies and the sources of the controversy in the subject on hand. After this stage, it is essential to discuss the proofs of the issue according to the discipline of *uṣūl al-fiqh*. After that it remains to choose the strongest or the most robust method among the proofs and this selection provides the opportunity to elevate one of the views of the schools on the issues encountered today. Although these steps catalyse to choose one of their views, comparing the evidences through a fine filter can often lead to a new view on the same issue. This is possible by determining the evidence of the preferred opinion (al-Duraynī , 2008, p. 23).

What is noteworthy here is that *fiqh al-muqāran* is a combination of different views and does not rely on any particular school or method. This often appears as a proof-based preference by examining the evidence used by the legal schools, as the scholars using this method neither follow a *madhhab* nor comply to its legal theory, but rather take the rulings or the proofs used by it based on their preferences.

Here, three main features of the comparative law method emerge: the evidence centred approach, *takhayyur,* and *talfīq*. What I mean by taking the evidence to the centre of the reasoning is to examine the evidences of the views of the *madhhab*s and adopt the most suitable one among the opinions provided by theses proofs in

the light of the new conditions of the day. In fact, in such an approach the *madhhab* becomes worthless. Because, the ultimate concern of the modern scholar is the evidences that the *madhhab*s rely on in their rulings; therefore, the legal theories and knowledge developed by schools in the course of time are either insignificant or have a secondary importance. This means ignoring the scholarly experience of the past and producing knowledge by taking the foundational sources of Islam in every single case as a reference. This approach, which I have referred to as Salafism, is one of the primary features of the contemporary Islamic thought.[9]

Takhayyur and *talfīq* are two principal methods in the field of Islamic law and economics. In these two methods, a choice is made among the opinions of jurists and schools of law (*takhayyur*) or a new ruling is obtained by combining these opinions (*talfīq*). While choosing a view among the opinions of jurists, *madhhab*s are instrumentalized and an opinion that can fulfil the needs of the time is selected. However, the approach of a school, which has the opposite view, can be chosen later on in another matter. Such a selective approach reveals opinions that contradict each other over time and contain rules that have been formed without considering methodological consistency. This is a fact that is frequently observed in Islamic economics and finance literature and is one of the key issues that should be the subject of criticism. The same problems occur in the *talfīq* approach. In this approach, the opinions of different schools on the same subject are compiled and a patch conclusion is made. Here, too, a utilitarian approach is adopted and the methodology and consistency of legal opinions are ignored and these opinions are instrumentalized in order to find a solution to a problem. This leads to the emergence of an inconsistent, conflicting discipline of Islamic law and economics.[10]

Said Ramaḍān al-Būṭī in the first chapter of his book *Muḥāḍarāt fī al-fiqh al-muqāran* (Lectures in Comparative Jurisprudence) focuses on the importance of comparative law. Since his opinion in that chapter reflects the general tendencies of those who acknowledge and advocate *fiqh al-muqāran*, I will deal with his main arguments here briefly. Būṭī states that *fiqh al-muqāran* is one of the most important core courses of the College of Sharia at the University of Damascus and is an essential principle for understanding the discipline of *fiqh*. He bases this argument on the relevance of the *fiqh al-muqāran* to the Qur'ān, the Sunnah, the consensus (*ijmā'*), and the analogy (*qiyās*) (al- Būṭī , 1970, p. 5). What is important here is

9 Kizilkaya (2019c, pp. 199-217).

10 For a detailed discussion see Kizilkaya, (2015, pp. 1-11).

that comparative law is seen as an instrument of evidence-based *fiqh*. The views of the various schools are compared in this approach, but the opinion that is more in accordance with the scriptures is selected. Although Būṭī claims that the most appropriate opinion in accordance with the four main sources of Islamic law is taken, practically the most compatible to the conditions of the day is selected because all the schools of law and the opinions of the jurists must rely on the four sources. These sources are a compulsory condition for an opinion to be legitimized within the Islamic worldview. Therefore, although the views of all law schools are based on these sources, it is not consistent to claim that the most appropriate one is chosen.

Būṭī also establishes a relationship between *fiqh al-muqāran* and *uṣūl al-fiqh* and states that using the method of *fiqh al-muqāran*, a student will be able to understand the importance and necessity of *uṣūl al-fiqh* and, of teaching it, which provides the opportunity to obtain *shar'ī* rules from the Qur'ān and the Sunnah. Thus, the student understands the importance of learning subjects of *uṣūl al-fiqh* for *ijtihād* and inference (*istinbāṭ*) (al- Būṭī, 1970, pp. 5-6). Here, the point emphasized by Būṭī sheds light on another function of *fiqh al-muqāran*. According to this, a student who learned *fiqh al-muqāran* can understand the reasoning of the legal schools and will be able to make *ijtihād* based on the foundational texts i.e. the Qur'ān and the Sunnah. Of course, Būṭī here also explains what he means by *ijtihād*. According to him, *ijtihād* is not to obtain the rulings in the legal manuals, but to obtain the legal rules from the scriptures, namely the Qur'ān and Sunnah (al- Būṭī , 1970, pp. 6-7).

Būṭī establishes a relationship between comparative law and *uṣūl al-fiqh*, *ijtihād* and *istinbāṭ*. This relationship also explains that comparative law advocates also focus on the discipline of *uṣūl al-fiqh* because in the modern period, *ijtihād* has been proposed as a solution to many problems faced by Muslim societies. However, here *ijtihād* is a concept that has shifted meaning when compared to the classical period. In the modern sense, *ijtihād* does not mean to produce knowledge within a school's own methodology. On the contrary, it is understood as producing rulings from the foundational texts of Islam and adapting them to the need of time. For this reason, it has been acknowledged as an important tool to reform the society and integrate it into other cultures. If the new type of *ijtihād* is used to obtain rulings, it must have a method, which is *uṣūl al-fiqh*. Therefore, the discipline of *uṣūl al-fiqh* was believed as a means of producing knowledge from the foundational texts of Islam and had a vital role in the modern Islamic law scholarship. Therefore, Būṭī emphasizes the importance of teaching this discipline at higher level education.

Comparative Law and Evidence Theory: A Salafi Approach

Whether it is *fiqh al-muqāran* or the Qur'ān and Sunnah centred attitude to the knowledge, it is the Salafi approach by character. Yet, the concept of *dalīl,* which is the main emphasis of this approach, leads us to a conclusion that the *dalīl* is the basic criterion of knowledge for both the text-centred approach and *fiqh al-muqaran*, as it has been emphasized by Ramadan al-Būṭī. However, the function of *dalīl* is not clear in *fiqh al-muqāran*. Therefore, although the opinions of the legal schools are taken in the *fiqh al-muqāran* approach, because of the emphasis of the *dalīl* as a main standard of selecting opinions, there is no difference between *fiqh al-muqāran* and the Salafist understanding that derives rules from the Qur'ān and the Sunnah. In this case, the legal culture of Muslim societies is not utilized due to the fact that it is not subjected to systematic reading. I think that the *dalīl* remains determined not a determiner, passive but not active in this approach, because the *dalīl* that is subjected to an interpretation within the framework of each individual's own understanding, is not a source that dictates something to the interlocutor after all.

The method of *fiqh al-muqāran* is modern and traces its origins to the 20th century Egyptian scholar Aḥmad Ibrāhīm (d. 1945) that is considered the first to address the legal issues in a comparative style similar to the conventional comparative law, hence credited with remodelling Islamic law (Muḥammad Abū al- Ḥajj, 2017, p. 437). He was a professor at the *Madrasat al-Qadā' al-Shar'ī* then at the Faculty of Law. After that, he became a member of the Academy of Language in Cairo. He is noted for his research in comparing legal schools and religions. He authored around 25 books in *fiqh al-muqāran* such as *al-Qadā' fī al-Islām, al-Ahkām al-Sharī'ah li 'l-Ahwāl al-Shakhsiyyah*, *al-Nafaqāt*, *al-Wasāyā*, and *Turuq al-Ithbāt al-Shar'iyyah fī 'l-Fiqh al-Muqārān* (Kaḥḥālah, 1982, p. 86).

There are many works written based on this approach. Almost all of the works of modern Islamic law and economics are written based on *fiqh al-muqāran* style, but some are prominent in the field and have inspired many other works.[11] 'Abd al-

11 Here are some important works written in that way: Maḥmūd Muḥammad Shaltūt and Muḥammad 'Alī al-Sāyis, *Muqāranat al-madhāhib fī al-fiqh* (Cairo: Maṭba'at Wādiī al-Mulūk, 1936); Mustafa Ahmad al-Zerqā', *al-Madkhal al-fiqhīī al-'āmm: al-Fiqh al-Islāmī fī thawbihi al-jadīd* (Damascus: Maṭba'at Jāmi'at Dimashq, 1959); Muḥammad Sa'īd Ramaḍān al-Būṭī, *Muḥāḍarāt fī al-fiqh al-muqāran, ma'a muqaddimah fī bayān asbāb ikhtilāf al-fuqahā' ahammīyat dirāsat al-fiqh al-muqāran* (Bayrūt: Dār al-Fikr, 1970); Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa-adillatuh: al-shāmil lil-adillah al-shar'īyah wa-al-ārā' al-madhhabīyah* (Dimashq: Dār al-Fikr, 1984); Muḥammad Fatḥī al-Duraynī, *Buḥūth muqāranah fī al-fiqh al-Islāmī wa-uṣūlih* (Bayrūt: Mu'assasat al-Risālah, 1994).

Raḥmān al-Jazīrī's (d. 1882-1941) *Kitāb al-fiqh ʻalā al-madhāhib al-arbaʻah* is one of such works. It is a book of *fiqh al-muqāran* based on the four Sunni schools of law. The story of the book and the spread of its reputation over time shed light on how the concept of *fiqh al-muqāran* was acknowledged in the 20th century. Accordingly, in 1922, the Ministry of Awqāf established a commission formed by the University of al-Azhar to prepare a *fiqh al-muqāran* textbook to be taught. The first volume, which was dealing with worship was published in Cairo in 1928, and drew great attention from students and the academic community. Upon this, the Ministry of Awqāf established a new commission composed of the scholars of four *madhhab*s under the leadership of ʻAbd al-Raḥmān al-Jazīrī, and the work was reviewed and published in 1931. The 2nd-4th volumes of the work were prepared by al-Jazīrī between 1939-1933; and after his death the 5th volume was edited by Ali Hasan al-Arish using al-Jazīrī's compiled notes (Kallek, 1993, p. 512).

Pre-Nineteenth Century Assumption in Islamic Law

As I mentioned, there was a school-based form of construction of knowledge during the period stretching from the formative stage of Islamic law in the 8th century up until the 19th century. The legal judgements of the actions of the *mukallaf*[12] were investigated within a certain school. In this way, the legal schools were important establishments in the standardization of the legal rulings. Due to these establishments, the endeavours to acquire knowledge by following a certain method, the placement of this knowledge into a coherent framework, and the debates of this knowledge in view of this coherency were made possible. Of course, the existence of legal schools within Muslim societies had an important role in this regard.

In the educational institutions, the curriculum was based on the teachings of a particular legal school. This education does not stop at legal education, but also includes Arabic morphology and grammar and other auxiliary sciences, which were taught by preference using the books of authors belonging to the same *madhhab*. In this way, there was an effort to ensure the coherency of knowledge and rulings from the foundations upward. In the field of law, first substantive law (*furūʻ al-fiqh*) was taught, and afterwards the principles of law (*uṣūl al-fiqh*). As a result, the student's knowledge of law was formed by the works of a certain legal school. Later, when further progression was desired, a more complex text from an author of the

12 A person considered accountable for her/his actions and obligated by law to discharge a legal duty. See Tahānawī, (1996, p. 504).

same legal school was studied so that the method of the school was better understood and internalized.[13] The students in this process had the opportunity to learn the views presented within the system of a particular *madhhab*. Thus, the jurists that passed through this form of education would produce books of similar quality. For this reason, there was no comparative (*muqāran*) approach to be found in any of the books written up until the 20th century.

Many scholars view comparative law as the same as disagreements among the legal schools or jurists (*ikhtilāf al-fuqaha'*). Yet in the *ikhtilāf al-fuqahā'* genre, it is a scholar steeped in a particular legal school, who debates the views of other schools and who tries to show the school he belongs to has presented a valid standing. While doing this, the scholar investigates the matter by following to a particular method, and presents his views not according to the results, but rather the method used to derive a ruling or judgement and makes an evaluation following this method. As a result, this scholar does not eclectically selects the given results (*talfīq*) as in *fiqh al-muqāran*. Some of the prominent classical sources are mistakenly counted as adopting *fiqh al-muqāran* approach because of some aspects where today's approach is used to investigate legal matters in these sources (Duraynī, 2008, p. 22). Works such as Ibn Qudāmah's *al-Mughnī*, and Ibn Rushd's *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid* are ones that are frequently mentioned in this way. Ibn Rushd, for instance, studies each matter as a scholar of the Maliki school, and Ibn Qudāmah as a scholar of the Hanbali school. No matter how much exceptional these scholars were in legal cases where they acknowledged the opinions in other schools, yet they defended the methods of their own school. In addition, while investigating a matter, whether they defend the view of their own school or that of another, they follow the same method from the beginning. Thus, they do not consider the matter in relation to the result as is done in comparative law, but rather reach a judgement by investigating the method used.

(Non-)Concluding Remarks

The way the discipline of *fiqh* produced school-oriented knowledge was abandoned with the domination of the modernity. In this process, which has been introduced since the 19th century, the way of producing knowledge out of the methods of *ma-*

13 For example, in the Ottoman madrasah curriculum first the acts of worship in *Nūr al-īḍāḥ* by the Hanafi Shurunbulālī (d. 1659) was taught, and then afterwards works like Aḥmad ibn Muḥammad al-Qudūrī's (d. 1037) *Mukhtaṣar al-Qudūrī*, and Marghīnānī's (d. 1197) *al-Hidāyah* were taught.

*dhhab*s is widely acknowledged without questioning. Although it has been almost a century and a half since this approach is recognized in the fields of Islamic law and economics, there is no indication that it is succeeding in constructing coherent knowledge. However, when looking at the early development of Islamic law, it became a corresponding discipline in one and a half centuries following the demise of the Prophet Muḥammad and reached a maturity to compete with the law of great empires of the time. On the other hand, the dominant approach emerging as a new law-economics is far from being a discipline that has established its own methodology and competing with the mainstream law and economics. It is necessary to think about it and face the problems of the current approach. In this framework, just as the thinkers who were advocates of the 19th century Islamic reform reckoned with the Islamic tradition, the widely accepted comparative law method led by them should be genuinely criticized.

No matter how much the social, political and cultural factors have influenced the general acceptance of the comparative law method in the last century, the question we face today is how successful this approach is? I am of the opinion that this method itself, as well as the Salafi *dalīl*-centered approach that is based on it, are very questionable in solving the problems of the Muslim world today. Moreover, this understanding revealed a result that slanted the knowledge of Islamic sciences and removed their depth. This situation can be clearly observed if the production of knowledge in the Islamic world is examined. This approach has a negative impact on education and the production of knowledge in *fiqh* and economics. I want to deal with this in three stages.

The first stage is the study of Islamic economics. Islamic economics and its direct application, that is Islamic finance, are relied on *dalīl*-based methods and *fiqh al-muqāran*. The approaches focused on the *dalīl* are more likely found to be practiced by researchers who have studied economics and lack a *fiqh* education. In these studies, broad interpretations are made on concepts such as justice, development, timely payment of the wages of employees, taken from the Qur'ān or the Sunnah. Such interpretations do not make a significant contribution to the development of the field when the sub-bases and rules are not taken into consideration. However, it is observed that the comparative law approach is adopted in the studies of scholars who have a background in *fiqh*. According to this, the opinions of the different *madhhab*s given in the matter are dealt with and one of these is selected. However, the same researchers take a view from another *madhhab* that is incompatible with or contradicts the idea of the previous one. There-

fore, a combination is made by taking the conclusions of the *madhhab*s without methodological discussion. This situation is no more than collecting opinions that are contradictory or inconsistent.

One of the concrete problems posed by the comparative law is observed in the field of Islamic finance. Shari'a boards of Islamic financial institutions benefit from the opinions of different *madhhab*s or jurists when issuing *fatwā*s. This attitude seems to be solving the daily problems in a relative way, but two problems arise as a result. The first problem is that since the *fatwā* consistency is not considered in a matter, it may contradict the *fatwā*s given earlier in another matter. The second problem is that a cumulative knowledge of Islamic economics cannot be gained in this field as a result of the first problem. The fact that there are no principles and method that modern Islamic finance is based on, despite its practice for nearly fifty years, is a clear indication of this. As a matter of fact, the most important problem encountered in this field is that there are no consistent *fatwā*s.

In the third stage, the problem is in the field of education. Both *fiqh* and more specifically the Islamic economics education without a certain system given in a comparative way, will prevent the formation of a system in the minds of the students of Islamic economics and finance. Especially when *fiqh* and Islamic economics are taught over the results of different *madhhab*s without relying on a specific school, it leads to the conclusion that everything is permitted or forbidden in the field of Islamic sciences. As a result, two problems arise: The first problem is that a student cannot think within a system when considering a ruling in a matter. In other words, there is no skill to think systematically in the field of Islamic economics and finance. The second problem is that the student does not have a holistic perspective in the Islamic sciences. This eliminates the potential of the Islamic sciences to produce solutions for today's problems.

No matter how much comparative law is used in this way today, it is not successful either in terms of research or education. When transferring knowledge at the educational stage, it is more coherent to do this in light of a single method or school. When the student is at a stage of learning, rather than debates and controversies, it is from a pedagogical viewpoint better for them to learn according to a particular system or school. Also, in modern Islamic law education which focuses more on the results or rulings when presenting a view on a particular legal matter, the methods or principles by which the rulings were derived are set aside. With this in mind, if presentations are made to show that one school on a legal matter states X while another states Y, one says something is permitted while another says it is

forbidden, then in the student's mind jurisprudence emerges as a discipline with contradictions and incoherencies.

In sum, *fiqh al-muqāran* is an obstacle to the production of systematic knowledge and tends to have little potential to produce solutions to the problems Muslims meet today. Its inability to produce systematic knowledge, originates from taking the rulings of the legal schools which have different means of arriving at conclusions, and its regular shift from one of these conclusions to another as the point of departure prevents *fiqh al-muqāran* from producing a culmination of knowledge. And the reason why comparative law cannot solve the problems Muslims face today is that rather than examining any legal matter from its basics and attempting to reach a conclusion according to certain principles, it takes a past view and offers temporary solutions. Hence the solution to today's problems is to address a matter from a specific point of view and coherent method.

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