

## AN EVALUATION OF THE PLACE OF MORALITY AND ETHICS IN ISLAMIC CIVIL LAW AND CONTEMPORARY TURKISH CIVIL LAW

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### ***Abstract***

*Like morality, law as a phenomenon develops in a process along with inevitable radical breaking points. Nevertheless, the phenomenon of law, which is constantly changing and developing, takes into many elements from past events, especially past legal systems. In this regard, the current Turkish law comes in handy as it departed during the Republican era from the Islamic legal system practiced for centuries and transitioned to the modern continental European legal system, nourished by many elements of Islamic law in the process. This article will examine the relationship between law, morality, and ethics by focusing on the similarities between these two legal systems.*

**Keywords:** *Law, Shariah; Legal Ethics Relationship, Law-Morality Relationship, Commercial Morality/Ethics.*

### ***Intisari***

Sama halnya dengan moralitas, hukum sebagai sebuah fenomena berkembang dalam sebuah proses yang disertai dengan titik-titik terobosan radikal yang tak terelakkan. Tak dapat dipungkiri bahwa fenomena hukum yang terus berubah dan berkembang mengambil banyak elemen dari peristiwa masa lalu, terutama sistem hukum masa lalu. Dalam hal ini, hukum Turki saat ini sangat berguna karena berasal pada era Republik dari sistem hukum Islam yang dipraktikkan selama berabad-abad dan yang bertransisi ke sistem hukum Eropa kontinental yang terpengaruhi berbagai elemen hukum Islam dalam prosesnya. Artikel ini akan membahas hubungan antara hukum, moralitas dan etika dengan berfokus pada kesamaan antara kedua sistem hukum ini

**Kata Kunci:** *Hukum, Syariah, Hubungan Etika-Hukum, Hubungan Moral-Hukum, Etika/Moralitas Komersial.*

### **A. Introduction**

One of the paramount subjects of the philosophy of law is the nature of law and the relationship between law and morality that constitutes its extension.<sup>1</sup> Studies in this area forwarded several opinions on whether the two types of rules are unified or separated. To understand the place of morality in Islamic law and Western law-the latter of which is the basis of today's Turkish

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<sup>1</sup> Adnan Güriz, *Hukuk Felsefesi*, 14th Edition (Ankara: Siyasal Publishing, 2019), 15.

law-it is necessary to look at the definition of morality in both legal systems and the basis and source of morality.

Religion-based morality and secular or rational ethics based on reason, intuition, or emotion are two different things<sup>2</sup> The difference is closely related to the fact that, unlike law, moral rules are universally accepted and perform their functions in an absolute and objective manner.<sup>3</sup> However, regardless of their source, there is a unity of purpose between law and morality in the sense that they prescribe rules to ensure, protect, and maintain social order. The subject of this study is an argument that there is a close connection between law and morality in Islamic and contemporary Turkish law. This study shows its importance in terms of comparing these two legal systems that follow each other in the process and analyzing and proving the claim that the connection is at a high level. The main sources of this study consist of classical works in Islamic law and modern Turkish law.

There are many studies on the relationship between law and morality. The views and theories of Hans Kelsen and H.L.A. Hart are the firsts that can be considered in this context. In terms of Islamic law, there are many studies dealing with this relationship. No study dealt with the subject in the context of Turkish law and in a comparative manner with Islamic law before, therefore this study aims to make a new contribution to the literature by addressing the issue from the perspective of Turkish law with a theoretical and practical balance.

The first section of this chapter emphasizes the definitions of the concepts of law and morality in Islamic and contemporary Turkish law along with their relationship. Then, the Islamic legal system will be discussed by considering its historical context and relying on the hypothesis that law develops in the process and is fed by breaking points. In developing the argument, antitheses related to the issue will be presented. Finally, the relations between law and morality in the contemporary Turkish legal system, especially in civil law,

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2 Recep Kılıç, *Ahlâkın Dini Temeli*, 8th Edition (Ankara: Türkiye Diyanet Vakfı Publishing, 2016), 22.

3 Kılıç, *Ahlâkın Dini Temeli*, 125-26, 129-30; Hasan Tahsin Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi* (Istanbul: İz Publishing, 2020), 68.

will be analysed. An example of this analysis is the analysis of the position of the concept of commercial morality/ethics in Turkish law within the scope of the relationship between commercial law and civil law.

## **B. Concepts of Law and Morality**

### **1. General View**

Analyzing the concepts of law and ethics and the relationship between them requires the examination of notions that are closely connected with these concepts or that are inclusive of these factors. Accordingly, in this section, the concept of “fiqh” as a higher item of the concepts of law in terms of Islamic law, and the concept of “morality” as a branch of ethics-which due to the shift in meaning is also a higher aspect of ethics-will be expressed below. Within the framework of the connections of these concepts: the grounding of the influence of moral thought in Islamic law; the unity of religion-ethics-law rules in terms of source and function; the fact that today’s legal rules also take their basic principles from the theory of ethics; the closeness of law and ethics in terms of subject, content, and scope; the common points of law and ethics and their unification in the aim of providing justice; the differences of law and ethics in terms of practical validity; and the complementary relationship between law and ethics are examined.

### **2. Fiqh and Law**

The concept of “fiqh” in the dictionary means thorough understanding, in-depth comprehension, and detailed knowledge.<sup>4</sup> The provisions of Islam are analysed under three headings: belief, deeds, and ethics.<sup>5</sup> Fiqh is the provisions of Islam related to action. These include the provisions of worship

4 Abu al-Fadl Muhammad ibn Mukram ibn al-Mundhir, *Lisan al-‘Arab*, Vol. 13, (Beirut: Dar al-Sadir, 1933), 522; Mevlüt Sarı, *El-Mevarid / Arapça Türkçe Lügat* (Istanbul: Bahar Publications, 1982), 1173-74.

5 Abdul Karim Zaydan, *Al-Madkhal Ilaa al-Shari’ah al-Islamiyyah*, (Beirut: Maysarat Al-Risalah Al-Nashirun, 2019), 56 Hayreddin Karaman, *Mukayeseli İslam Hukuku*, 9th Edition (Istanbul: İz Publishing, 2016), 30; Talip Türcan, ed, *İslam Hukuku*, 8th Edition, Grafiker Publications, publication no: 90 (Ankara: Grafiker Publications, 2019), 33-34; Zekiyüddin Şaban, *İslâm Hukuk İlminin Esasları: (Usûlü’l Fıkh)*, trans. İbrahim Kâfi Dönmez, 35th Edition (Istanbul: Türkiye Diyanet Vakfı Publishing, 2020), 33; Ahmed Hamdi Akseki, *İslâm Dini*, 13th Edition, Presidency of Religious Affairs Publications, no. 31/16 (Ankara: Presidency of Religious Affairs Publications, 1963), 22.

that govern the relations between Allah and human beings; the provisions of muâmalat<sup>6</sup> that regulate the relations between human beings and human beings, human-state, and state-state; and the provisions of ukûbat related to crimes and punishments.<sup>7</sup>

In the period of the formation of Islamic law, fiqh was defined as a branch of science related to the religious and legal provisions of Islam regarding to individual and social life.<sup>8</sup> The concept was used for provisions related to belief, ethics, worship, and transaction.<sup>9</sup> In the following periods, with the classification of the branches of Islamic sciences, changes emerged in the definition of the branch of fiqh.<sup>10</sup> In this context, the ‘practical rulings’ part of Islamic rulings-which includes only the rulings related to worship and treatment-began to be expressed by the concept of fiqh.<sup>11</sup> The concept and branch of the science of “fiqh”-which has gained its current meaning in this way-was defined as “*the totality of sharî’î practical rulings deduced from tafsîl evidence,*”<sup>12</sup> and the definition of fiqh in the Mecelle-i Ahkâm Adliyye, one of the efforts to codify Islamic law, was made in the same direction as “*The science of jurisprudence consists of a knowledge of the precepts of the Divine Legislator in their relation to human affairs.*” (art.1)

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6 Ahmet Yaman and Halit Çalıř, *İslam Hukuku*, 3rd Edition, Bilimsel Arařtırma Publishing 9 (Ankara: Bilimsel Arařtırma Publishing, 2019), 22.

7 Hayreddin Karaman, *Mukayeseli İslam Hukuku*, 9th Edition, vol. 2 (Istanbul: İz Publishing, 2016), 43; Hamdi Döndüren, *Delilleriyle Ticaret ve İktisat İlmihali* (Istanbul: Erkam Publications, 2021), 39; Yaman and Çalıř, *İslam Hukuku*, 32-35; Abdulwehhâb Hallâf, *İslam Hukuk Felsefesi (İlmu Usûli'l-Fıkh)*, trans. Hüseyin Atay, Ankara University Faculty of Theology Publications, CXIII (Ankara: Ankara University Faculty of Theology Publications, 1973), 59; Fahrettin Atar, *Fıkh Usûlü*, 13th Edition, M.Ü. Faculty of Theology Foundation Publications, no: 24 (Istanbul: M.Ü. Faculty of Theology Foundation Publications, 2018), 408.

8 Yaman and Çalıř, *İslam Hukuku*, 20.

9 Abdul Karim Zaydan, *Al-Madkhal İlaa al-Shari’ah al-Islamiyyah*, 56; Yaman and Çalıř, *İslam Hukuku*, 21; Asım Cüneyd Köksal, *Fıkh Usulunun Mahiyeti ve Gayesi*, 122; Nail Okuyucu, ed. *Fıkh İlmine Giriş*, 49.

10 Muhammad Al-Ghazali, *Ihya’ ‘Ulum al-Din*, Vol. 1 (Beirut; Dar al-Ma’arif), 31-33; Abdul Wahhab Khallaf, *İlmi Usul al-Fıkh*, (Beirut; Maysarat al-Risalah Al-Nashirun), 14 et seqq.

11 Zaydan, *Al-Madkhal İlaa al-Shari’ah al-Islamiyyah*, 61; Saffet Köse, *İslâm Hukukuna Giriş*, 6th Edition, Hikmetevi Publications, publication no: 2 (Istanbul: Hikmetevi Publications, 2017), 23-24; Yaman and Çalıř, *İslam Hukuku*, 21; Şaban, *İslâm Hukuk İlminin Esasları: (Usûlü’l Fıkh)*, 33.

12 Yaman and Çalıř, *İslam Hukuku*, 21; Türcan, *İslam Hukuku*, 33; Okuyucu, *İslâm Hukukuna Giriş*, 24; Şaban, *İslâm Hukuk İlminin Esasları: (Usûlü’l Fıkh)*, 31; Abdul Wahhab Khallaf, *İlmi Usul al-Fıkh*, 151; Atar, *Fıkh Usulü*, 22.

When the meaning of the word “huqūq/law” is examined, it is understood that “haqq/law” is the plural form of the Arabic concept of right, which means “truth, the opposite of falsehood, fixed, correct/true, appropriate, established, something the existence of which is certain.”<sup>13</sup> Law, in the literal sense, is expressed as “*the set of rules that are strengthened with material sanctions to ensure social order and realize justice*”.<sup>14</sup>

As an integrated norm order that includes all of the norms classified as religion, morality, and law uniquely in the rules of social order, fiqh covers the law in many respects, such as the area it regulates, the nature of the rules, the means of sanction, and constitutes a broader normative structure.<sup>15</sup>

Since the second half of the 19<sup>th</sup> century, it is seen that the term law/ Islamic law has started to be used instead of fiqh under the influence of Western circles.<sup>16</sup> Although these two concepts do not fully meet each other, the usage of the concept of Islamic law instead of the concept of fiqh has now become widespread-and for this reason-it is used this way in most studies.

The relationship between the concepts of “fiqh” and “Islamic law”-which differ in terms of content, sources, and types of rules-can be described as a “*small circle of law within the big circle of fiqh.*” When the content of Islamic law is examined, it is seen that the provisions of worship, which contain the relations between God and the servant, are not included; only the subjects of mu’alamat and ukubat are included.<sup>17</sup>

13 Abu al-Fadl Muhammad ibn Mukram ibn al-Mundhir, *Lisan al’Arab*, Vol. 14, (Beirut: Dar al-Sadir, 1933), 49; Sarı, *El-Mevarid / Arapça Türkçe Lügat*, 327-28.

14 Karaman, *Mukayeseli İslam Hukuku*, 2016, 2:26; Yaman and Çalış, *İslam Hukuku*, 18; Necip Bilge, *Hukuk Başlangıcı*, 32nd Edition (Ankara: Turhan Publications, 2014), 13; Adnan Güriz, *Hukuk Başlangıcı*, 15. Edition (Ankara: Siyasal Publications, 2013), 17-19; Orhan Münir Çağıl, *Hukuk Başlangıcı Dersleri* (İstanbul: İstanbul University Faculty of Law Publications, 1961), 18-19; Abdülhak Kemal Yörük, *Hukuk Başlangıcı* (İstanbul: İstanbul University Faculty of Law Publications, 1958), 3-6.

15 Güriz, *Hukuk Başlangıcı*, 7-19; Çağıl, *Hukuk Başlangıcı Dersleri*, 43-60; Yörük, *Hukuk Başlangıcı*, 18-29; Bilge, *Hukuk Başlangıcı*, 6-13.

16 Yaman and Çalış, *İslam Hukuku*, 24; Türcan, *İslam Hukuku*, 28; Talip Türcan, ‘Fıkıh ve Hukuk -İslam Hukuku Kavramı Üzerine Bir Değerlendirme-’, *Eskiyeni: Anatolian Academy of Theology Research Journal*, no. 24 (2012): 19; Abdul Wahhab Khallaf, ‘*İlmi Usul al-Fiqh*’, 59; Necmeddin Güney, ‘Toplumsal Hayatı Düzenleyen Kurallar ve Fıkıh İlmi’, *Journal of Islamic Law Research*, no. 33 (2019): 168.

17 Köse, *İslam Hukukuna Giriş*, 25; Abdul Wahhab Khallaf, ‘*İlmi Usul al-Fiqh*’, 59

### 3. Morality and Ethics

The concept of morality has many definitions. The word “ahlaq/morality”, which is the plural of the Arabic word “hulk”, means religion, nature, temperament, and character in the dictionary.<sup>18</sup> In the broadest sense, morality is the field that deals with the voluntary behaviours of individuals, and the world of thought underlying these behaviours.<sup>19</sup> Morality can also be expressed as an established human capacity and behaviour that emerges without coercion.<sup>20</sup>

The concept of morality can be considered from various perspectives, such as the principles adopted and applied by society (social ethics), the principles of behaviour that are considered good or right by a particular group or caste, and the principles applied towards oneself.<sup>21</sup> Moral rules, on the other hand, are a set of rules regulating human behaviour that are accepted, adopted, and applied by society.<sup>22</sup>

In this context, the entirety of morality and moral principles have been classified and analysed at three levels. The first group of principles consists of right-based principles, these are virtues and principles that are inherently universal, related to truth and law, necessarily binding on everyone, and expressed in the language of command. The virtues of goodness in the second group constitute the central principles of morality. These virtues are universal or innately cultural, obligatory or voluntary, and expressed in the language of command or admonition. The third level of virtues are the principles of love which vary culturally and personally, are voluntary, and consist of principles expressed in the language of admonition.<sup>23</sup>

The words “ethics” and “moral” are also frequently used in relation to morality. The word “ethics” is derived from the Greek word “ethos”, meaning

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18 Sarı, *El-Mevarid / Arapça Türkçe Lügat*, 438.

19 Recep Kılıç, “İslam Ahlakının Tanımı ve Kapsamı”, in *İslam Ahlakı: Temel Konular Güncel Yorumlar*, ed. Muhammed Şevki Aydın and Ahmet Hadi Adanalı, 3rd Edition (Ankara: Presidency of Religious Affairs Publications, 2017), 22.

20 Kılıç, 18.

21 Güriz, *Hukuk Felsefesi*, 13-14; Kılıç, ‘İslam Ahlakının Tanımı ve Kapsamı’, 22.

22 Güriz, *Hukuk Felsefesi*, 13.

23 Cafer Sadık Yaran, *Sanat Ahlakı*, ed. Muhammed Şevki Aydın (Ankara: Presidency of Religious Affairs Publications, 2020), 72.

custom, tradition, and character that distinguishes a social community from others and “moral” is derived from the Latin word “moralis” meaning custom, character, attitude, and way of behaving.<sup>24</sup> Although morality, “moral”, and “ethics” are similar in terms of literal meanings, there are differences between them.<sup>25</sup> The term “ethics” is used to analyze abstract concepts such as good, bad, duty, and obligation, while “morality” is used to analyze concrete moral events.<sup>26</sup> In addition, “ethics” has also been defined as a discipline of philosophy that provides or is expected to provide verifiable and/or falsifiable information on the phenomenon of morality or ethical problems.<sup>27</sup> Ethics constitutes the theoretical part of morality by thinking about and philosophizing morality. Accordingly, it is possible to say that ethics determines the value of what is “good”, morality embodies and applies the value through behavioural awareness, and law protects the value.<sup>28</sup>

#### 4. The Relationship Between Law, Morality and Ethics

Islam has laid down many provisions about showing the value of morality in behaviour. One of the foremost purposes of religious rules is to make good morals dominant in every action and deed. Accordingly, the value of morals regarding the character of The Prophet is found in the Qur’an and hadith, including the fact that he was sent to complete good morals (Ahmad b. Hanbal, II, 381), his morals are expressed as the morals of the Qur’an (Muslim, Musafirîn, 139), his superior quality is mentioned (Qalam, 68/4), and that he always demands good morals (Muslim, 201). Similarly, good morals are proclaimed as a tenet for the believers, i.e., the best of the believers are described as the ones with good morals (Abu Dawud, Sunnah, 15) and people are recommended to have good morals in regards of themselves, other peoples, and every element around them (Tirmidhi, 55, 62).

24 Ali Osman Gündoğan “Etik Ya Da Ahlâk Felsefesi”. In *Etik ve Etik Sorunlar*, ed. Celal Türer (Ankara: Nobel Akademik Publishing, 2019); Harun Tepe, ‘Ethics as a Branch of Philosophy’, *Doğu Batı: Journal of Thought* I, no. 4 (1998): 21.

25 Tepe, ‘Bir Felsefe Dalı Olarak Etik’, 12-14.

26 Kılıç, ‘İslam Ahlakının Tanımı ve Kapsamı’, 21.

27 Tepe, ‘Etik Bir Felsefe Dalı Olarak Etik’, 14; Gündoğan, “Etik Ya Da Ahlâk Felsefesi”, 8-9; İsmail Killoğlu, *Ahlak ve Hukuk İlişkisi* (İstanbul: Marmara University Faculty of Theology Foundation (İFAV) Publications, 1988), 155.

28 Yusuf Karakoç, “Hukuk - Etik İlişkisi, *Arkivi of Law Philosophy and Sociology*, no. 24 (n.d.): 94.



According to the Islamic understanding of morality-which consists of universal principles based on the belief in Tawhid and the Hereafter, a person must comply with the principles of morality, not only in relation to other humans, but also in his relations with God, himself and other living and non-living beings.<sup>29</sup> This is because the aim of Islamic ethics is to create a moral person, society, and world (Abu Dawud, Sunnah, 15).

When we look at the development process of Islam in the Meccan period, along with enforcing the principles of faith as the basis of the religion, the ethical rules was focused on justice, goodness, benevolence, forgiveness, compliance with the principles of loyalty to the covenant, avoiding injustice, evil, cheating in measurement, and weighing; while in the Medinan period, legal rules that aimed at regulating social life were put in place.<sup>30</sup> This way, the internalization of legal provisions was ensured and the basis and purposes of prohibitions, sanctions, and rules of behaviour were shown. Thus, a legal order's infrastructure, validity, and power were established to be based on morality.<sup>31</sup> Further, it is asserted that the graduality (gradualism) of the provisions are likewise stated to facilitate the transformation of these provisions into a way of life and implementation of the law.<sup>32</sup>

The phenomenon of value is established by religion, made to be a way of life by morality, and supported by the rule of law with a written rule with sanctions in case of a violation.<sup>33</sup> In Islam, there is a unity of purpose in actions and behaviours between religion, morality, and law. For example, on the one

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29 'Müsamaha', in *Diyanet Hadislerle İslam Ansiklopedisi* (Ankara: Presidency of Religious Affairs, 2015), 17; Kılıç, 'İslam Ahlakının Tanımı ve Kapsamı', 29-47.

30 Abdul Karim Zaydan, *Al Madkhal Ilaa al-Shari'ah al-Islamiyyah*, 103-4; Köse, *İslâm Hukukuna Giriş*, 53; Yaman and Çalış, *İslam Hukuku*, 39; Saffet Köse, "Hukuk Mu Ahlâk Mı?", *Journal of Islamic Law Research*, no. 17, Special Issue on Imam-ı Âzam Abu Hanifa (2011): 33-34; Saffet Köse, *İslâm İş ve Ticaret Ahlâkı*, 3rd ed. *İslam Hukuku*, 43; Atar, *Fıkıh Usûlü*, 30; Feyizli Kur'an'da Hukuk-Ahlâk İlişkisi, 55-61; Wael B. Hallaq, "Groundwork of the Moral Law: A New Look at the Qur'ân and the Genesis of Sharī'a", *Islamic Law and Society* 16 (2009): 268-70, <https://doi.org/10.1163/092893809X12547479392108>; Ahmet Yaman, "Kur'an'da Yasamanın Arka Planı Olarak Ahlak", *Marife: Journal of Religious Studies* VI, no. 1 (2006): 43..

31 Yaman and Çalış, *İslam Hukuku*, 39; Ali Bardakoğlu, "Ahlâkın Fıkıh Kuralları Arasında Buharlaşması", *Eskiye: Anatolian Academy of Theology Research Journal*, no. 35 (2017): 58.

32 Abdul Karim Zaydan, *Al Madkhal Ilaa al-Shari'ah al-Islamiyyah*, 106-7; Köse, *İslam Hukukuna Giriş*, 53; Türcan, *İslam Hukuku*, 45..

33 Köse, *İslam Hukukuna Giriş*, 47, *Ticaret* (Istanbul: İktisat Publishing, 2020), 2-3; Türcan, *İslam Hukuku*, 43.



hand, religion considers undesirable behaviour as a sin and informs that it is subject to ethereal punishment; on the other hand, morality defines it as bad.<sup>34</sup> As a result, society condemns this behaviour by not tolerating it, and finally, the law ties it to material sanctions and<sup>35</sup> all of them are directed towards a common goal. By this, it is crucial to comprehend these three elements as one whole rather than separately.

The effect of legal rule cannot be fully formed if this process of sub-structuring a legal rule is not completed by developing according to its stages.<sup>36</sup> Addressing the inner worlds of people with religious rules and aiming to prevent problems is one of the most functional features of Islam to regulate human behaviour.<sup>37</sup> Addressing the conscience, the inner judgement of a person does not mean that they will not be responsible for their unethical behaviour.<sup>38</sup> It is a fact that as individuals in society reach moral maturity, legal problems decrease, and the implementation of legal rules becomes easier.<sup>39</sup> In this context, it is possible to say that there is a pivotal interaction between religious-moral-legal values and rules and that they are a set supporting each other.<sup>40</sup> Consequently, it is feasible to speak of legal provisions as gaining a moral and religious character in this way; hence, the more the people are connected with matters of religion, the easier their obedience to the law.<sup>41</sup>

The purpose of the rules of law in Islam is to complete morality, which shows the unity of the two concepts. This can be inferred from the fact that both the Qur'an and the Sunnah evidence are the primary sources.<sup>42</sup> Similarly,

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34 Kılıç, *Ahlâkın Dini Temeli*, 143-44.

35 Köse, *İslam Hukukuna Giriş*, 47.

36 Köse, "Hukuk Mu Ahlak Mı?", 16; Köse, *İslam İş ve Ticaret Ahlâkı*, 12.

37 Tevhit Ayengin, "İslâm'da İktisadî Hayatın Ahlâki Boyutu", *Journal of Islamic Research* XVI, no. 4 [Islam and Economics-I-] (2003): 648.

38 Ayengin, 'İslâm'da İktisadî Hayatın Ahlâki Boyutu', 648-49.

39 Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 241.

40 Ayengin, 'İslâm'da İktisadî Hayatın Ahlâki Boyutu', 658.

41 Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 242.

42 Akseki, *İslâm Dini*, 38-39, 227; Kılıç, *Ahlâkın Dini Temeli*, 29-30; Hüseyin Karaman, "İslam Ahlakının Esasları". In *İslam Ahlakı: Temel Konular Güncel Yorumlar*, ed. Muhammed Şevki Aydın and Ahmet Hadi Adanalı, 3rd Edition (Ankara: Presidency of Religious Affairs Publications, 2017), 54-60; Yaran, *Sanat Ahlakı*, 84; Ahmed Na'im Babanzade, *İslâm Ahlakının Esasları*, 2nd Edition (Ankara: Türkiye Diyanet Foundation Publications, 2014), 41; Feyizli *Kur'an'da Hukuk-Ahlâk İlişkisi*, 27-28, 81.

law and morality is united in the form of a person, the Prophet.<sup>43</sup> Moreover, the exposition of the judgement of a prohibited act is put forward first, and then its evil character in the verses of the Qur'an. Furthermore, the mention of the concept of *ihsan*, which expresses moral maturity after justice, shows that the aim is to fulfil morality.

Since law and morality are interconnected in the basic sources of Islamic law, there is no distinction between law and morality. Therefore, it is not possible to discuss about the existence of ethics in Islam contrary to *fiqh*. This is due to the fact that the concept of *fiqh* cannot be reduced to the concept of "law", and many unique features of *fiqh* are underivable.<sup>44</sup>

The imperative and prohibitive provisions in Islamic law are at the same time both legal and moral, i.e., carrying two different aspects.<sup>45</sup> The moral aspect of the legal phenomenon is observed in all commands and prohibitions in Islamic law, due to great importance of the protection of morality; superior morality is considered as one of the foundations of society.<sup>46</sup>

The provisions of Islamic law aim to protect moral values and form legal norms based on them. In reality, morals and legal phenomena as the basic sources of Islamic law are often intertwined.<sup>47</sup> The Qur'an justified most of the acts it commands and prohibits believers by showing the moral consequences of these acts.<sup>48</sup> Failure to comply with legal norms supported by moral rules would be against morality, religion, and law. For this reason, obeying the moral norms is defined not only as a conscientious and moral duty but also as a legal and religious duty.<sup>49</sup> The idea that obeying the law is a moral duty is influential on people's compliance with the law.<sup>50</sup>

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43 Sabri Erturhan, "İslâm Ticaret Hukukuna Vücut Veren Ahlâkî Esaslar", *Journal of Islamic Law Research*, no. 16, Special Issue on Islamic Economics (2010): 218; Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 28.

44 Köksal, *Fıkıh Usulünün Mahiyeti ve Gayesi*, 300, 302; Süleyman Kaya, 'Fıkıh Tarihi Bağlamında Osmanlı Tecrübesini Doğru Anlamak', *Sakarya University Journal of Faculty of Theology* XVIII, no. 33 (2016): 9.

45 Köksal, *Fıkıh Usulünün Mahiyeti ve Gayesi*, 301.

46 Erturhan, "İslâm Ticaret Hukukuna Vücut Veren Ahlâkî Esaslar", 217.

47 Ayengin, "İslâm'da İktisadî Hayatın Ahlâkî Boyutu", 648; Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 99.

48 Erturhan, "İslâm Ticaret Hukukuna Vücut Veren Ahlâkî Esaslar", 219.

49 Erturhan, "İslâm Ticaret Hukukuna Vücut Veren Ahlâkî Esaslar", 246.

50 Güriz, *Hukuk Felsefesi*, 16; Kılloğlu, *Ahlak ve Hukuk İlişkisi*, 314.

### C. Comparison between Islamic Civil Law and Contemporary Turkish Civil Law Systems

After observing the Islamic Legal Tradition for centuries, modern secular law became dominant in Turkey with the transition to the Republic. It is claimed that these two legal systems have differences. This section will first address these claims. Nevertheless, there are similarities between the modern legal system and Islamic law. This is because law progresses as a process and the existing order continues to a certain extent despite radical breaks. This point will be analysed in the second part of this section.

#### 1. Arguments about Differences of Morality and Ethics in Law

Based on the different approaches of rules towards the ultimate goal of justice, it is claimed that although law and morality have similar principles in many aspects, they differ in some points, especially in terms of practical validity regarding their operation and the methods they use.<sup>51</sup>

The first difference is that law regulates only external actions and society, whereas ethics includes rules for the inner world as well as a person's relation with society.<sup>52</sup> In this respect, ethical rules hold the person liable for both subjective and objective moral principles, whereas law holds the person liable only for objective moral principles.<sup>53</sup> The connection of law with morality manifests itself in objective morality<sup>54</sup>.

The fact that the rule of law contains provisions related to the external world does not mean that it completely ignores the aims of the person in the inner world. The primary purpose of the law is to ensure external order; however, in some cases, the law also focuses on the motives that affect the behaviour of the person in the outside world, such as whether the person has

51 Zeki Yaka, "İslâm Hukukunda Ahlâkın Hukuk İçindeki Yeri ve Hukukun Tesir Gücüne Etkisi", 2015, 378; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 354.

52 Çağıl, *Hukuk Başlangıcı Dersleri*, 49 ff.; Vecdi Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 7th Edition (İstanbul: On İki Levha Publishing, 2012), 71 ff.; Vecdi Aral, *Toplum ve Adaletli Yaşam*, 2nd Edition (İstanbul: Legal Yayıncılık, 2012), 166 ff.; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 354 et seq.; Kemal Gözler, *Hukuka Giriş*.

53 Karaman, *Mukayeseli İslam Hukuku*, 2016, 2:27-28; Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 111-12.

54 A. Şeref Gözübüyük, *Hukuka Giriş ve Hukukun Temel Kavramları*, 38th Edition (Ankara: Turhan Publishing, 2016), 12; Karaman, *Mukayeseli İslam Hukuku*, 2016, 2:27; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 138, 355.

good or bad intentions, or whether the act is the result of intent or negligence.<sup>55</sup> In addition, the fact that the “ordinary, reasonable behaviour of a person” is accepted as a measure in legal rules may also show that the internal motive or intention is important.<sup>56</sup>

Accordingly, in law, actions in the external world are of central importance, but actions in the internal world are also paramount. In this regard, a progression from the external realm into the internal realm is followed when evaluating behaviours in legal terms.<sup>57</sup> In ethics, on the other hand, the inner world is at the center and the behaviours are compatible with the mentality and will which is exhibited to the outside world with good behaviour.<sup>58</sup>

The difference between conformity to law and conformity to morality can also be retrieved within this context.<sup>59</sup> While it is sufficient to behave by the rules in terms of compliance with the law, in moral rules, the behaviour in the inner world and the behaviour in the outside world must be compatible with one another.<sup>60</sup>

At this point, it is necessary to mention the relationship between religious and judicial judgement, or between fatwa and taqwa in judgements—a distinction between the rules of morality and law in Islamic law—which is derived from the Prophet’s hadiths. The same hadiths also inform us about the place of conscience in law and morality.

A salient feature of Islamic law is its close connection with morality and its two-way sanction mechanism, which are material and spiritual. This created a binary distinction in the terms of the validity of judgements, which

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55 Vecdi Aral, *Hukuk Felsefesinin Temel Sorunları*, 3rd Edition, On İki Levha Publishing, publication no: 121 (İstanbul: On İki Levha Publishing, 2012), 191; Aral, *Toplum ve Adaletli Yaşam*, 167-68; Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 75; Çağıl, *Hukuk Başlangıcı Dersleri*, 49-50; Kılhoğlu, *Ahlak ve Hukuk İlişkisi*, 356-57.

56 Güriz, *Hukuk Felsefesi*, 17.

57 Aral, *Hukuk Felsefesinin Temel Sorunları*, 192; Aral, *Toplum ve Adaletli Yaşam*, 169; Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 78; Bilge, *Hukuk Başlangıcı Hukuk Başlangıcı*, 9.

58 Aral, *Hukuk Felsefesinin Temel Sorunları*, 192; Aral, *Toplum ve Adaletli Yaşam*, 169; Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 75, 78-79; Bilge, *Hukuk Başlangıcı*, 9.

59 Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 72; Kılhoğlu, *Ahlak ve Hukuk İlişkisi*, 360-62; Çağıl, *Hukuk Başlangıcı Dersleri*, 52.

60 Aral, *Hukuk Felsefesinin Temel Sorunları*, 193-94; Aral, *Toplum ve Adaletli Yaşam*, 169, 172; Bilge, *Hukuk Başlangıcı*, 9.

are known as diyāni/religious and qāḍā'ī/judicial judgements.<sup>61</sup>

In case the external will/behaviour is different from the internal will, to ensure legal expediency and certainty, there will be a formation of a judgement according to the external will/behaviour, which is called qāḍā'ī/judicial judgement. On the other hand, In diyāni/religious judgement, the internal will is taken as the basis. As per this distinction, legal validity and religious validity are separated, and legal validity is taken as the basis in the field of transaction.<sup>62</sup> The distinction between religious judgements and judicial decisions has come into question at the point where morality could not exert its influence in law.<sup>63</sup>

A transaction that does not have any legal deficiencies is considered legally valid and constitutes a judgment; however, in the sight of Allah, who knows the real purpose and intention of the transaction, it will not be considered valid, which constitutes a religious judgment. Here, even if it is a materially valid transaction, there is no problem in terms of accidental judgment, and if there is an invalid transaction in terms of religious judgment, it will lead to hereafter responsibility.<sup>64</sup> With this context, it can be said that religious judgment is related to the rules of religion and ethics, whereas legal judgment is related to the rules of law.<sup>65</sup>

Although the lack of careful use of the distinction between fatwa-takwa and diyāni-kazā'i ruling has led to an understanding that the rules of religion and ethics are excluded from legal rulings<sup>66</sup>, this distinction does not show that law is independent of ethics, but that Islamic rulings and therefore fiqh include both law and ethics in terms of the continuation of the hereafter responsibility, and that behavior should be acted in this way.<sup>67</sup>

The element of conscience, which is the criterion of behavior in terms

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61 Yaman and Çalış, *İslam Hukuku*, 38; Talip Türcan, "İslâm Hukukunda İki Farklı Geçerlilik Alanı: Kazâî ve Diyânî Hüküm Ayırımı", *İslamî Araştırmalar (Journal) XIX*, no. 1 [Terminology Problem in Islamic Sciences-I-] (2006): 160.

62 Bardakoğlu, 'Ahlâkın Fıkıh Kuralları Arasında Buharlaşması', 75.

63 Köse, *İslam Hukukuna Giriş*, 52.

64 Yaman and Çalış, *İslam Hukuku*, 38; Köse, *İslam Hukukuna Giriş*, 62; Güney, "Toplumsal Hayatı Düzenleyen Kurallar ve Fıkıh İlmi", 172.

65 Karaman, *Mukayeseli İslam Hukuku*, 2016, 2:28.

66 Bardakoğlu, "Ahlâkın Fıkıh Kuralları Arasında Buharlaşması", 75-76.

67 Köksal, *Fıkıh Usulünün Mahiyeti ve Gayesi*, 300.

of morality is significant in the understanding of the law.<sup>68</sup> Only when the law is together with morality, its conscientious obligation is fulfilled.<sup>69</sup> To establish the balance between duty and right, the rules of ethics hold the person responsible for duty/obligation, and the rules of law hold the person responsible for rights or obligations.<sup>70</sup>

Another difference between the rules of morality and law arises in terms of the source of enforcement, the authority to be held responsible in case of violation of the rules, and the type of sanction to be applied.<sup>71</sup> These issues are attributed to the fact that legal norms are heteronomous while moral norms are autonomous. Accordingly, while the sanction mechanism in law is a material sanction sanctioned by the state, in ethics, it can be subjected to natural, conscientious, social, or religious (otherworldly) sanctions.<sup>72</sup>

The following are different points of distinction between legal and moral rules despite the lack of consensus: First, the number of parties to the rules and the form of the rules are different; second, there are differences in the methods of repeal or modification; third, legal rules are bilateral, while moral rules are unilateral; fourth, legal rules are concrete and in the form of laws, whereas morality rules are not; and finally, a new legal rule can repeal existing legal rules however, only losing their importance in social life can repeal morality rules.

The substantial difference between law and morality is whether the essential element in the nature of the rule is the individual or the community. Moral rules are for all human beings, but they appeal to the conscience of each individual separately. Accordingly, for ethics, every person matters

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68 Çağrı, Mustafa. "Ahlaki Müeyyide". In *İslam Ahlakı: Temel Konular Güncel Yorumlar*, edited by Muhammed Şevki Aydın and Ahmet Hadi Adanalı, 3rd ed. Ankara: Presidency of Religious Affairs Publications, 2017, Edition 179.

69 İmamoğlu, Tuncay. "Ahlaksız Hukuk ve Dinsiz Ahlak Mümkün Müdür?: Felsefi Bir Yaklaşım", *Journal of Theological Studies*, no. 55 (2021): 248, <https://doi.org/10.29288/ilted.882188>.

70 Çağlı, *Hukuk Başlangıcı Dersleri*, 52-53.

71 Aral, *Hukuk Felsefesinin Temel Sorunları*, 194 et seq.; Aral, *Toplum ve Adaletli Yaşam*, 173 et seq.; Yörük, *Hukuk Başlangıcı*, 24; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 362 et seq.; Yasemin Işıktaç, *Hukuk Felsefesi*, 4th Edition (İstanbul: Filiz Publishing, 2015), 506-7; Gözler, *Hukuka Giriş*, 40-42; Bilge, *Hukuk Başlangıcı*, 14-15.

72 Rahmi Çobanoğlu, *Hukukta Gaye Problemi* (İstanbul: İstanbul University of Law Faculty Publications, 1964), 28-29; Çağrı, 'Ahlaki Müeyyide', 176 ff.; Feyizli, *Kur'an'da Hukuk-Ahlak İlişkisi*, 111; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 369-74.



individually. When a second individual comes next to the individual, the rules of law begin to apply in addition to morality. Similar to morality, law also appeals to the will of the individual, but this appeal is to the social life formed by people rather than the individual.<sup>73</sup> While the rule of law seeks to ensure the minimum order in society by supervising the individual's external behavior, the rule of morality aims to create a personality by regulating both the internal and external regulation of the individual and to ensure a mature social order with matured personalities.

Last but not least, just as blood circulation in the veins is necessary for life, the circulation of morality among objective legal rules is essential for the law to survive and the protection of its essence. It is sensible to think of law and morality as a single entity that complements each other like light and darkness rather than treating them as separate sets of opposite rules.<sup>74</sup>

At this point, the views aimed at separating the boundaries of law and morality with sharp lines are also important. These views are specific to the West in the modern period.<sup>75</sup> The natural consequence of the distinction between law and morality is the distinction between "positive law" and "natural law".<sup>76</sup> Western law-originally based on the natural law approach formed by medieval Catholic thought-developed independent of religion and other systems in the following period. In this context, many jurists, especially positivists defended the views that there is no connection between law and morality.<sup>77</sup>

In this respect, there are different views on the issue of the immorality of positive law. The first view is that a norm must be oriented towards the notion of law and morality to qualify as a legal norm. The second view does not treat rules as legally valid if they are contrary to the basic principles of morality, humanity, and justice, even when established by a competent body. The third

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73 Çağıl, *Hukuk Başlangıcı Dersleri*, 54; Aral, *Toplum ve Adaletli Yaşam*, 164-65.

74 Ahmet Esat Arsebük, *Medenî Hukuk* (Istanbul: Ankara Law Faculty Publishing, 1938), 20.

75 Arslan Topakkaya, *Hukuk ve Adalet* (Ankara: Adalet Publishing, 2014), 4; Hallaq, 'Groundwork of the Moral Law', 256-57.

76 Köksal, *Fıkıh Usulünün Mahiyeti ve Gayesi*, 302; Hallaq, 'Groundwork of the Moral Law', 252.

77 Köksal, *Fıkıh Usulünün Mahiyeti ve Gayesi*, 299; Topakkaya, *Hukuk ve Adalet*, 5; Hallaq, 'Groundwork of the Moral Law', 249-52.

view asserts that legal rules are rules that are duly enacted by the competent bodies and included in the system of norms that have reached the minimum effectiveness in society.<sup>78</sup>

According to the view that believes law does not always ensure morality with superior conscientious values, there may be legal rules in positive law that are not related to morality and even contradict these rules.<sup>79</sup> Accordingly, a person shall obey the law even if it is contrary to their understanding of morality.

This deserves an examination regarding the issue of the source of law and morality mentioned at the beginning of the article. When there is an acceptance of the source of morality as the individual's conscience, it will be sufficient to make the rule of law based on the social conscience. If the source of law and morality is seen as one, as in Islamic law, "whatever is morally wrong" will be contrary to the law, and more broadly to "fiqh".<sup>80</sup>

Law and ethics have similar principles in many respects, but they differ in their practical validity in terms of their functioning and the methods they use. For example, law deals only with external actions and accordingly regulates rules for the mass, i.e. society, whereas morality has rules for the inner world of the individual as well as his relations with society, i.e. it is based on the individual. Accordingly, the real difference between the rules of law and ethics is whether the essential element in the nature of the rule is the individual or the community. Another example is the source of enforcement, the authority responsible for violating the rules and the type of sanction to be applied. In addition to all these, examples such as the number of parties to the rules, the form of the rules, differences in the method of repeal or amendment, and the fact that legal rules are bilateral while moral rules are unilateral can also distinguish between legal and moral rules. Other instances such as the fact that rules of law are established in a concrete form and in the form of a

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78 Güriz, *Hukuk Felsefesi*, 19; Killoğlu, *Ahlak ve Hukuk İlişkisi*, 315; Işıқтаç, *Hukuk Felsefesi*, 509-10.

79 Güriz, *Hukuk Felsefesi*, 15-16; Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 113; Gözler, *Hukuka Giriş*, 43; Killoğlu, *Ahlak ve Hukuk İlişkisi*, 329.

80 Abdul-Razzaq Alaro, "Ethics of Business in Islamic Law", *The Muslim World League Journal* 37 (2009): 30-31.

law, while rules of morality are not of this nature, and that a new rule of law can abolish rules of law, while rules of morality can only be abolished when they gradually lose their importance in social life can also be added to these examples.

## 2. Traces of Islamic Law in Turkish Law and Writer's View on the Relationship Between Law and Morality

Although there are many claims that modern law is sharply different from Islamic law, it can be said that law is a process and that there is continuity, even if there are breaking points. At this point, it is possible to trace the relationship between law and morality in Islamic law in modern Turkish law.

First of all, today's legal rules also derive their most basic principles from moral theory. For this reason, the relationship between law and morality is quite profound.<sup>81</sup> So much so that it can be said that most legal rules are sanctioned moral rules, whereby legal provisions can completely change the morals and traditions of a country to which it belongs.<sup>82</sup> The rule of law may directly recognize or point to a moral rule. For this reason, it is unlikely to draw a border between these rules. In contrast, there is an indispensable cooperation between the two types of rules. In this respect, it is imperative to recognize that moral rules act as a hypersensitive balance in law. In the same direction, laws that do not conform to the moral views of society should not be enacted. The legislator must always consider the principles coming from the social conscience when making any rule. It has been stated that a law that does not conform to the moral views of a society cannot be candidly owned by that society.<sup>83</sup> For this reason, it is not possible for a rule of law that is not built on moral values and is not based on moral foundation to remain in force.<sup>84</sup> It

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81 Mustafa Tören Yücel, *Hukuk Felsefesi*, TAA, publication no: 37 (Ankara: Türkiye Justice Academy, 2014), 145; Çobanoğlu, *Hukukta Gaye Problemi*, 28-29; Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 101; Gözübüyük, *Hukuka Giriş ve Hukukun Temel Kavramları*, 12; Bilge, *Hukuk Başlangıcı*, 10; Bardakoğlu, 'Ahlâkın Fıkıh Kuralları Arasında Buharlaşması', 59.

82 Arsebük, *Medenî Hukuk*, 16.

83 Hıfzı Veldet Velidedeoğlu, *Türk Medeni Hukukunun Umumi Esasları*, 4th Edition (İstanbul: İstanbul University Law Faculty Publications, 1951), 12-13.

84 Köse *İslam Hukukuna Giriş*, 60; Topakkaya, *Hukuk ve Adalet*, 194; Çağıl, *Hukuk Başlangıcı Dersleri*, 54; Aral, *Toplum ve Adaletli Yaşam*, 97; Bilge, *Hukuk Başlangıcı*, 10; Anıl Çeçen, 'Hukukta Norm ve Adalet', *Journal of Ankara University Faculty of Law* 32, no. 1 (1975): 83, [https://doi.org/10.1501/Hukfak\\_0000000930](https://doi.org/10.1501/Hukfak_0000000930).

is burdensome for legal rules that are not supported by moral consciousness and rules to fulfill legal protection only with sanctions.<sup>85</sup>

The rules regulated by law and the principles of morality adopted by the society can be seen to be similar and identical in terms of subject, content, and scope.<sup>86</sup> For example, the prohibition of theft and manslaughter, fidelity to covenant, the obligation of spouses to be faithful to each other, perjury, and the invalidation of unethical contracts concern both morality and law.<sup>87</sup> Both moral and religious rules prohibit unlawful acts such as theft, manslaughter, and slander. Deception and taking advantage of ignorance have been accepted as a reason for the invalidity of legal transactions since ancient times. The prevention of issues such as the exploitation of legal loopholes, fraud against the law, collusion, and abuse of rights is limited by the second and third articles of the Turkish Civil Code, and by the rules and measures of morality. Likewise, the notions of right and objectivity in using the judge's discretionary power are also based on morality.<sup>88</sup>

Law and ethics also share the commonality of focusing on human beings as subjects and human behavior as actions. It can be added that they have normative features in the form of commanding or prohibiting to ensure social order.<sup>89</sup> The rules of law and ethics-which are put forward to ensure the welfare of society-reveal similar methods by characterizing human behavior as right-wrong, appropriate-inappropriate, and good-bad.<sup>90</sup> In this context, legal rules reinforce the validity of some moral rules by protecting them through sanctions. It is possible to say that the rules of law add worldly/material sanctions by supporting the conscientious, social, or faith sanctions

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85 Çağrı, 'Ahlaki Müeyyide', 176.

86 Güriz, *Hukuk Felsefesi*, 15; Aral, *Toplum ve Adaletli Yaşam*, 164; Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 82; Gözler, *Hukuka Giriş*, 42-43; Gözübüyük, *Hukuka Giriş ve Hukukun Temel Kavramları*, 11; Kılhoğlu, *Ahlak ve Hukuk İlişkisi*, 314; Karaman, *Mukayeseli İslâm Hukuku*, 2016, 2:27.

87 Aral, *Hukuk Felsefesinin Temel Sorunları*, 188-89; Aral, *Toplum ve Adaletli Yaşam*, 165; Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 70-71; Kılhoğlu, *Ahlak ve Hukuk İlişkisi*, 314; Gözler, *Hukuka Giriş*, Gözübüyük, *Hukuka Giriş ve Hukukun Temel Kavramları*, 11-12; Bilge, *Hukuk Başlangıcı*, 6.

88 Arsebük, *Medeni Hukuk*, 20.

89 Muharrem Kılıç, "Hukuk-Ahlâk İlişkisinin Temellendirilmesi ve Ayırım Kriterlerinin Analizi". In *Teorik ve Pratik Yönleriyle Ahlak*. Dem Publications, 2007., 591-92.

90 Güriz, *Hukuk Felsefesi*, 21; Yücel, *Hukuk Felsefesi*, 45, 111.

of moral rules.<sup>91</sup>

The expression of law as a minimum morality involves two important issues. The first of these is the fact that there is a need for legal rules for the concretization of higher moral-conscientious values, and the other is that positive law must harmonize with higher moral values to strengthen its validity.<sup>92</sup> The fact that law is the minimum morality can also be considered from this point of view. More obligations may be prescribed by morality than the rules stipulated by law to ensure social order.<sup>93</sup> The law grants rights to the individual and society with the rules necessary to ensure social order and provides these rights under all circumstances.<sup>94</sup> Morality also grants rights to maintain order, but in some cases, it directly demands the formation of value, virtue, or virtue rather than the delivery of the right to the person.<sup>95</sup> For example, a person is responsible not only for his family but also for society and is asked to forgive the person who commits an offense against him. Therefore, the obligations and moral sanctions imposed by religion and morality and the consciousness they create exceed and surpass the level of the law, which is limited to rights.<sup>96</sup> The fact that people practicing this consciousness reach a higher level of consciousness reduces the need for the coercive power of law; therefore, it reduces its burden. Thanks to the rules of morality, the value judgments of the person will control the person even at points where there is no material control.<sup>97</sup> To the extent that law is integrated with morality, it realizes its existence and increases its validity rate. Moral rules are also included in life more effectively thanks to the rules of law.<sup>98</sup>

The commanding of similar behaviors by different rules shows the existence of a consensus on the purpose of these rules. The common goal of law and ethics are to ensure justice, objectivity, equity, and truth, which are

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91 Yörük, *Hukuk Başlangıcı*, 22; Yücel, *Hukuk Felsefesi*, 45; Feyizli, *Kur'an'da Hukuk-Ahlâk İlişkisi*, 240-41.

92 Bardakoğlu, "Ahlâkın Fıkıh Kuralları Arasında Buharlaşması", 60.

93 Köse, *İslam Hukukuna Giriş*, 49; Aral, *Hukuk ve Hukuk Bilimi Üzerine*, 70.

94 Köse, "Hukuk Mu Ahlâk Mı?", 32.

95 İmamoğlu, Tuncay. "Ahlaksız Hukuk ve Dinsiz Ahlak Mümkün Müdür?: Felsefi Bir Yaklaşım", 242.

96 Köse, *İslam Hukukuna Giriş*, 49.

97 Ayengin, "İslâm'da İktisadî Hayatın Ahlâki Boyutu", 658.

98 Bardakoğlu, "Ahlâkın Fıkıh Kuralları Arasında Buharlaşması", 60.

based on morality.<sup>99</sup> In this context, the law has a feature that concretizes the abstract principles that morality aims to realize.<sup>100</sup>

Various interpretations have been made on what the purpose of law is, and there is no consensus among jurists on this issue. Among the views on this subject are concepts such as the happiness and well-being of society, justice, legal order, ensuring security, equality, and freedom.<sup>101</sup> These objectives are indications of the unity of legalism and morality in purpose.<sup>102</sup>

The existence of a superior and ultimate reason that would constitute the intellectual basis of positive law, justify it, and aim at “what ought to be” was considered logically necessary.<sup>103</sup> For this reason, the basis of the phenomenon of law -which includes the evaluation of the behavior of the people who make up the society-has been accepted as justice, which is the source or origin of the emergence of law, which is a pure idea, value and a moral value that is “what should be”.<sup>104</sup>

Accordingly, the ultimate purpose of the law is justice. Law, as a means of ensuring justice, provides functionality and serves this purpose by realizing the very purpose of the principles of morality and ethics.<sup>105</sup> It is necessary to apply the measure of justice in the rules of law that regulate social relations and events. At this point, it can be said that it would be meaningless to talk about law that does not carry the value of justice, which is so significant for law and is not evaluated with this measure.<sup>106</sup> For this reason, the existence of a law that is not based on morality, which constitutes the basis of social

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99 Köse, *İslam Hukukuna Giriş*, 49; Yaman and Çalış, *İslam Hukuku*, 39; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 328-29; Yaman, “Kur’ân’da Yasamanın Arka Planı Olarak Ahlak.”

100Çobanoğlu, *Hukukta Gaye Problemi*, 25; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 147, 150, 244; Yaman and Çalış, *İslam Hukuku*, 40; Bardakoğlu, “Ahlâkın Fıkıh Kuralları Arasında Buharlaştırılması”, 59.

101Güriz, *Hukuk Felsefesi*, 57; Çobanoğlu, *Hukukta Gaye Problemi*, 33 et seq.; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 269 et seq.; Çağıl, *Hukuk Başlangıcı Dersleri*, 24.

102Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 327.

103Aral, *Hukuk Felsefesinin Temel Sorunları*, 42; Çağıl, *Hukuk Başlangıcı Dersleri*, 5.

104Ernest Hırş, *Hukuk Felsefesi ve Hukuk Sosyolojisi Dersleri*, trans. Selçuk Baran (Veziroğlu), 3rd Edition (Ankara: Banking and Commercial Law Research Institute, 2001), 169, 220; Aral, *Hukuk Felsefesinin Temel Sorunları*, 42-43; Çobanoğlu, *Hukukta Gaye Problemi*, 41-42; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 271, 305; Çağıl, *Hukuk Başlangıcı Dersleri*, 45; Çeçen, ‘Hukukta Norm ve Adalet’, 99-101; Köse, ‘Hukuk Mu Ahlak Mı?’, 18.

105Çağıl, *Hukuk Başlangıcı Dersleri*, 26-27; Aral, *Toplum ve Adaletli Yaşam*, 163; Topakkaya, *Hukuk ve Adalet*, 193-95; Köse, ‘Hukuk Mu Ahlak Mı?’, 33.

106Aral, *Hukuk Felsefesinin Temel Sorunları*, 44; Kılıoğlu, *Ahlak ve Hukuk İlişkisi*, 270.



order, is unthinkable.<sup>107</sup> In a legal system where there are no moral values and therefore not based on justice, there is no concept of conscientious duty, and the law loses its sociological validity so that the law becomes a pile of rules that only the dominant wins.<sup>108</sup> In addition to ensuring worldly justice, which is the purpose of the rules of law, ensuring the control of this justice through the rules of religion and morality is of great importance regarding the realization of social order and the protection of rights.<sup>109</sup>

However, there are also opinions that the “justice” desired to be provided by law is objective and inherently supra-legal and that it differs from the individual “justice” value included in the aim of being “good” targeted in ethics with its aim of social order.<sup>110</sup> Justice of the ethics also includes the virtue of “virtue” that exceeds the dimension of duty.<sup>111</sup> In this regard, there are also opinions that the norms of law and ethics will be separated from each other but that it is not possible to completely separate them.<sup>112</sup>

The progress of law in the process and the fact that Turkish law is fed by Islamic law can be shown as evidence that a sociological “Islamisation” has been and continues to be experienced, contrary to the secularization effort. The relationship between law and morality constitutes one of the elements of this “Islamisation”. For this reason, in this study, the perspectives of Islamic law and Turkish law on this element are discussed together, not on a sectional or heading basis. The place and connection of these two phenomena, which constitute fundamental parts of social life, are organized differently in legal systems. For example, in the modern understanding of law, including the current Turkish law, “maintaining order”, which constitutes one of the purposes of law, is based on mass-external-authority rather than the personal-intrinsic-creative.

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107Aral, *Hukuk Felsefesinin Temel Sorunları*, 93; Kılıç, “Hukuk-Ahlâk İlişkisinin Temellendirilmesi ve Ayırım Kriterlerinin Analizi”, 601.

108Hırş, *Hukuk Felsefesi ve Sosyolojisi Dersleri*, 169; Aral, *Hukuk Felsefesinin Temel Sorunları*, 94; Çağıl, *Hukuk Başlangıcı Dersleri*, 46; Aral, *Toplum ve Adaletli Yaşam*, 97; Kılıç, “Hukuk-Ahlâk İlişkisinin Temellendirilmesi ve Ayırım Kriterlerinin Analizi”, 601.

109Abdul Karim Zaydan, *Al-Madkhal Ilaa al-Shari'ah al-Islamiyyah*, 60.

110Aral, *Hukuk Felsefesinin Temel Sorunları*, 189; Aral, *Toplum ve Adaletli Yaşam*, 166; Çağıl, *Hukuk Başlangıcı Dersleri*, 304; Hırş, *Hukuk Felsefesi ve Sosyolojisi Dersleri*, 170.

111Köse, “Hukuk Mu Ahlak Mı?”, 18.

112Aral, *Hukuk Felsefesinin Temel Sorunları*, 189; Aral, *Toplum ve Adaletli Yaşam*, 166.

When we look at Islamic law, which is a religion-based legal system, it can be said that a strong connection between morality and law constitutes a building block in the creation of a person-based understanding of law. For this reason, the current Turkish civil law embodies many different interpretations of the relationship between law and morality than the Islamic civil law approach. Understanding the relationship between law and morality as the subject matter of law and morality is of great importance for human beings to comprehend the philosophy of law and to position themselves in terms of religion and the legal system. This is the research question that this study seeks to answer. In the study, in determining the relationship between legal systems and morality, interpretations, similarities and differences are revealed based on the “meanings attributed to the concepts”. As a result, the study concludes that the relationship between law and morality preserves its place quite well in terms of both Islamic civil law and Turkish civil law and has similar characteristics, although there are quite opposite views on this issue in terms of the positioning of man as a subject in the two legal systems compared.

In summary, there are many opinions on the points of distinction. Ethics on the other hand, accepts these points of distinction and argue that these types of rules cover each other and accordingly, this inclusiveness continues in Islamic law and modern Turkish law.

#### **D. From Theory to Practice: “Commercial Morality/Ethics” in the Turkish Commercial Code**

In today’s Turkish law, there are many legal rules based on morality in both private and public law. If we proceed with the example of determining the place of moral/ethical principles and rules in Turkish law, the first issues to be examined in this regard are the principle of honesty, the prohibition of abuse of rights, the rule of good faith, the provisions on the prevention of contravention of general morality, which are also principles of morality, and the commercial law regulations related to them.

For example, although the concept of morality is mentioned only in one place in the Turkish Commercial Code (Art. 1404), morality-based articles

in commercial law are based on the application of the general provisions of the Civil Code and the Code of Obligations to all private law relations to the extent appropriate, as stated in Article 5 of the Turkish Commercial Code, and Article 1 of the Turkish Civil Code. the Turkish Commercial Code is an integral part of the Turkish Civil Code and its general provisions shall be applied in commercial matters that do not have a special commercial provision or custom and usage, it is clear that these principles and rules have an important place in commercial law as well.

In the same direction, when the issues related to commercial ethics in the decisions of the Court of Cassation and the Regional Court of Appeal are examined; it is seen that since there is no special regulation on commercial ethics, a judgment is not established based on this, but the relevant general principles of commercial, obligations, and civil Law are taken as the basis, and the claims regarding unfair competition, exorbitant price increase, commercial customs and traditions, violation of ethics, violation of the rule of honesty and the principle of good faith are put forward by associating them with “commercial ethics”.

Although the term “commercial morality” is not commonly used in Turkish law, there is a term called “commercial ethics”, which means “the issues to be considered while practicing the trade profession”. Accordingly, a merchant is required not to sell defective goods, not to sell at exorbitant prices, not to cheat, and to avoid all behaviors that are incompatible with commercial ethics. Considering that the concepts of morality and ethics, which do not have the same meaning but have very close usage areas, are widely used interchangeably, the issues mentioned within the scope of commercial ethics are also considered within the scope of commercial ethics.

Paragraph 2 of Article 1 titled “Application and Sources of Law” of the Turkish Civil Code states that if there is no applicable provision in the law, the judge must decide according to customary law, and if this is not the case, according to the rule he would have set if he were the lawmaker. Therefore, it is also possible for the judge to take into consideration the rules of commercial ethics when establishing a rule when there is a legal gap in

terms of commercial law.

In addition, the obligation to act as a prudent businessman, the theory of piercing the veil of legal personality, the provisions on unfair competition, and other rules such as the prohibition of competition, the prohibition of excessive pricing and stockpiling, price tariff practices and the relevant rules in insurance and check law, which are specifically regulated in the Turkish Commercial Code, can be given as examples of commercial ethics rules within commercial law.<sup>113</sup>

#### **E. Conclusion**

In this study-taking into account the close connection of Turkish society with Islam and Islamisation-it has been argued that the connection between Islamic law and Turkish law manifests itself in the relationship between law and morality, especially in civil law, and has similar characteristics. It is obvious that the relationship between law and morality is more dominant in Islamic law. In modern Turkish law, the author is of the opinion that this relationship also manifests itself on the basis of the fact that the phenomenon of law develops and changes in the process and is fed by the laws in the past. Although there are more opinions that this relationship is rather weak, the justification of the author's view as an antithesis.

In terms of Islamic law, the rules of religion cover the rules of ethics, and the rules of ethics cover the rules of law. These are intertwined clusters. In terms of today's Turkish law as well, although the rules of religion, ethics, and law are separate, they intersect with each other at some points such as the issues of civil law. The field of commercial law is an integral part of civil law. The regulations on commercial morality/ethics in the Turkish Commercial Code can be shown as an example of the presence of moral rules in the field of commercial law and therefore in the field of civil law.

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113 For a detailed study on this issue, see: Atalay, Hatice. *Hukuk-Ahlâk İlişkisi Bağlamında İslâm ve Türk Hukukunda Ticarî Ahlâk İlke ve Kuralları*. 1th Edition. Ankara: Adalet Publishing House, 2023

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