

The Origin and Evolution of Fiqh Codification: A Preliminary Analysis

Asal-Usul dan Evolusi Kodifikasi Fiqh: Satu Analisis

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Abstract

Throughout the history codification of Islamic law has been given intense attention because of its effect on practical life. Codification plays a positive role to produce appropriate solutions and fair judgments for litigation and disputation. Codification helps establish justice and equality, protect the rights and freedom, and extend security and stability. This paper intends to explore various efforts made to codify Islamic law in the past up to the present through analytical investigation into the related documents, books and literature. The study posits that all the sections of Islamic law, excluding the rituals ('ibādāt), such as civil, constitutional, judiciary, penal, international, etc. are eligible to be codified. Codification of Islamic law conforms to the legal policy (siyāsah shar'iyah), public wellbeing and the fundamental ruling of permissibility. It is not just valid but rather indispensable as it begets facility for the mankind and removes hardship from them. Thus, codification of Islamic law actualizes the noble objectives of the *Shari'ah*.

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Abstrak

Sepanjang sejarah kodifikasi undang-undang Islam telah diberi lebih perhatian kerana kesannya terhadap kehidupan praktikal. Kodifikasi memainkan peranan positif untuk menghasilkan penyelesaian yang sesuai dan pertimbangan yang adil untuk guaman dan bantahan. Kodifikasi membantu mewujudkan keadilan dan kesaksamaan, melindungi hak-hak dan kebebasan, dan memperluaskan keselamatan dan kestabilan. Kajian ini bertujuan untuk menerokai pelbagai usaha dibuat untuk mengekodkan undang-undang Islam dari masa lalu hingga kini melalui penyiasatan analitikal dalam dokumen, buku dan kesusasteraan yang berkaitan. Kajian ini menegaskan bahawa semua bahagian undang-undang Islam, tidak termasuk ritual ('ibādāt), seperti sivil, perlembagaan, kehakiman, keseksaan, antarabangsa, dan lain-lain adalah layak untuk dikanunkan. Kodifikasi undang-undang Islam mematuhi dasar undang-undang (siyāsah shar'iyah), kesejahteraan umum dan peraturan asas keizinan. Ia bukan sahaja sah tetapi amat diperlukan kerana ia memberi kemudahan kepada manusia dan menghilangkan kesusahan daripada mereka. Oleh itu, kodifikasi undang-undang Islam merealisasikan objektif mulia Shari'ah.

Kata Kunci: Kodifikasi, Undang-undang Islam, Usaha, Shari'ah, al-Fatāwā al-Hindiyyah, Majallat al-Aḥkām al-'Adliyyah.

Introduction

Codification is an orderly and systematic arrangement, usually by subject, of legal rules and provisions, to initiate codes for the legal rules. Every nation should have a law preserved in a codified and unified manner, so that the respective authorities are able to consult with that easily when reaching a particular judgment or solving a dispute. Muslims are likewise in need of such codified law derived from the reliable sources of *Shari'ah*. Codification of Islamic law would be the first and essential step toward unity of Muslims. Islamic law could be codified by applying the codification process to the provisions of the various Schools of Islamic law. It could also be codified from a single School of Islamic law. If there are several opinions on one particular issue within one particular School of law, only one of them shall be selected. Codification of Islamic law therefore means to codify the provisions of various Schools or a sin-

gle School of Islamic law in civil transactions with a view to helping judiciary.¹

Nevertheless, the issue of codification has not been appeared in the period of the Prophet (s.a.w.) and the Rightly Guided Caliphs. Till that time, various interpretations and elucidations had not come into existence, nor had disagreements between different Schools of Islamic law and religious sects had yet been initiated. At that time, those who were appointed judges would consult the *Qur'ān* and *Sunnah*. If they did not find any explicit ruling in the *Qur'ān* and *Sunnah*, they used to give judgment on newly conceived issues based on their own *ijtihād*. Mu'adh ibn Jabal reports:

When the Prophet (s.a.w.) ordered me to proceed to Yemen, he asked me: when a case is referred to you for adjudication, how will you decide it? I said: I would decide it in the light of the *Qur'ān*, He said: if you do not find any guidance in the *Qur'ān*, then? I said: then I would decide it according to the *Sunnah* of the prophet (s.a.w.). He said: if you do not find anything in *Sunnah* of the Messenger of Allah too, what then? I replied: in that case I would resort to *ijtihād* and endeavor to form my own opinion, and would strain every nerve towards that end. When the Prophet (s.a.w.) heard this from me he patted me on my chest and said: All thanks to Allah, who has endowed the representative of the Prophet of Allah with that wisdom which the Prophet of Allah approves.²

¹ Mustafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al-Āmm*, (Damascus: Dār al-Qalam, 1998), vol. 1, pp. 313-314.

² Sulaymān ibn al-Ash'ath al-Sajistānī, *Sunan Abī Dāūd, Kitāb al-Aqdiyyah, Bāb Ijtihād al-Ra'y fi al-Qadā'*, no: 3592, vol. 4, p. 15; Abū 'Īsā Muḥammad Ibn 'Īsā al-Tirmidhī, *Sunan al-Tirmidhī, kitāb al-aḥkām, Bāb mā jā'a al-qādī kayfa yaqḍī*, no: 1327, vol. 2, p. 330; the translation is taken from Amīn Aḥsan Iṣlāḥī, *Islamic Law; Concept and Codification*, (Lahore: Islamic Publications Ltd.,1979), p. 31.

In fact, such practice was typical for those days since at that time anyone who was appointed as a judge or *muftī* was always a *mujtahid* who used to rely on his own discretion to pass the judgment on new cases. Apparently these kinds of people did not feel the necessity to comply with any compiled legal code. However, after that when various opinions of different scholars had appeared, and numerous judgments and verdicts of Muslim jurists and judges were recorded, the job of dealing with these views and judgments became complicated. It was then no longer possible to expect harmony or consistency in these stands and judgments. Hence, the ordinary people, and even the rulers themselves, started to feel the inevitable need for a codified law. In this paper the authors make a brief demonstration and discussion on the efforts made to codify Islamic law. It is hoped that this will help understand the nature of the task of codification.

Codification of Islamic Law

The word "codification" connotes the initiation of codes. The Arabic word for codification is '*taqnīn*'. In the modern sense *taqnīn* literally means: '*wad'ū al-qawānīn fī māddah*', i.e. arranging the laws in codified forms.³ Codification in law simply means the process of forming a legal code. Ashqar (1982) defines codification of Islamic law as the gathering of the legal principles pertinent to a specific area of law, in the form of a book, or code, or compilation. This would be done after reviewing and ordering these principles, eliminating the inconsistency thereof, and then arranging them according to the topics, so that it appears in the form of

³ Majma' al-Lughat al-'Arabiyyah, *al-Mu'jam al-Wasī'*, (Egypt: Maktabat al-Shurūq al-Duwaliyyah, 2011), p. 791; *al-Mu'jam al-Wajīz*, (Cairo: Ministry of Education, 1992), p. 918.

legal articles.⁴ This definition gives a profound picture of codification and demonstrates briefly how it would be done.

Zuḥaylī (1985) defines the codification of Islamic law as shaping the *Sharī'ah* rulings on financial transactions and dealings, into the simple legal articles, in order to facilitate the reference thereto for legal judgment, consolidate the legal decisions, and to ease for the litigants to know the legal verdicts and the basis thereof.⁵ In another occasion (1987) he defines it as drafting the legal contracts and theories of Islamic law in transactions, in the form of legal articles with a comprehensive and inclusive nature, up to the level that referring thereto becomes easy and practical.⁶ According to this definition, codification means giving a legal shape to the *Sharī'ah* provisions on transactions and dealings. The objective is to make easy the processes of judicial reference, consolidating the legal judgments, and enabling the litigants to know the ground of the judgment.

Al-Qaraḍāwī (1997) defines this as the structured *Sharī'ah* rulings in the form of legal materials, ordered and numbered, as had been done for modern laws such as civil, criminal and administrative and so on, up to the stage that it (*Sharī'ah*) becomes uncomplicated and a particular

⁴ 'Umar Sulaymān al-Ashqar, *Tārīkh al-Fiqh al-Islāmī*, (Kuwait: Maktabat al-Falāh, 1982), p. 187.

⁵ Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, (Syria: Dār al-Fikr, 1985), vol. 1, p. 27.

⁶ Wahbah al-Zuḥaylī, *Juhūd Taqnīn al-Fiqh al-Islāmī*, (Beirut: Mu'assasat al-Risālah, 1987), p. 26.

reference and guiding light for judges, lawyers and the community.⁷ This definition also demonstrates the same objectives as the previous one by Zuḥaylī, but it does not confine the provisions to be codified to the transactions and dealings.

However, codified law will be binding on the judges or relevant authorities, as Sirāj (1997) gives the meaning of codification of Islamic law as a process to draft the *Shari'ah* rulings in the form of legal articles, orderly, pertinent to the same subject matter, so that it will be easy in referring thereto, provided that the state or the authority obligates complying with that in the dealings and judiciary.⁸ Thus, al-Shatarī (2007) focuses on the nature of binding and defines it as "drafting the provisions of *Shari'ah* in the binding terms and words, in order to obligate the judges to pass the judgment accordingly."⁹

There is no discrepancy between these definitions. Some define the codification in brief and some make it in detail. In some definitions the objectives and process of the codification have been demonstrated. However, the definitions have not clarified the point whether all the provisions of the *Shari'ah* are equal in importance from the angle of codification. Some even have not related it to the provisions of Islamic law at all, as in the definition of Ashqar, though he has discussed it under the title

⁷ Yūsuf al-Qaraḍāwī, *Madkhal li Dirāsāt al-Shari'ah al-Islāmiyyah*, (Beirut: Mu'assasat al-Risālah, 1997), p. 259.

⁸ Muḥammad Aḥmad Sirāj, *al-Fiqh al-Islāmī Bayna al-Nazariyyah wa al-Taṭbīq*, (Alexandria University, 1997), p. 258; Yaḥyā Muḥammad 'Iwaḍ al-Khilālah, "Taḥnīn Aḥkām al-Shari'ah al-Islāmiyyah Bayna al-Nazariyyah wa al-Taṭbīq," (Ph.D. Thesis, International Islamic University Islamabad, 2002), p. 17.

⁹ 'Abd al-Raḥmān ibn Sa'ad al-Shatarī, *Ḥukm Taḥnīn al-Shari'ah al-Islāmiyyah*, (Riyadh: Dār al-Ṣamī'ī, 2007), p. 15.

of codification of *fiqh*. Thus, the preferable definition of the codification would be "shaping the respective (eligible to be codified) provisions of *Shari'ah* by the expert(s) and experienced people, into homogenous legal articles, provided that these are enforceable, easy for reference, and binding on the judges." This definition encompasses the sense, process and objective of the codification. Also, it clearly demonstrates that only the provisions of *Shari'ah* that are eligible would be codified, like the provisions of transactions and dealings. So, provisions of the rituals (*'ibādāt*) would not be codified as they are not eligible for that.

A code is an end and a beginning. It is because it writes *finis* to the old and permits a new start being made that a code is the given solution when extensive changes in a legal system are required.¹⁰ Among the purposes of the codification is harmonization and clarification. By the codification of law the consolidation of law and regulations would be achieved. Additionally, codification brings the greater uniformity in the laws as the future amendments of law should conform to the system of codification. The scientific and technical evolution means that standards might change, but the basic construction of legislation can remain. Moreover, the simpler, more consistent, more coherent form of law, with better implementation and execution, will ensure that the law becomes more accessible to the public and renders public wellbeing and happiness.¹¹ Another objective which can be achieved through codification is the protection of a legal system against threatened invasion by alien doctrines. Where after a revolution a new legal order is to be established, codification may be the most convenient means to this end.¹²

¹⁰ F. F. Stone, "A Primer on Codification", *Tulane L. R.* 29 (1955), p. 303.

¹¹ M. Kloepfer, "On the Codification of German Environmental Law" in *The Codification of Environmental Law*, edited by H. Bocken and D. Ryckbost. (London, Kluwer Law International, 1996), p. 91.

¹² Here Lies the Common Law: Rest in Peace, *The Modern Law Review*, 3 (May 1967), vol. 30, pp. 243-244.

As regards the codification of Islamic law, some scholars have reservations, expressing their fear on the codification of *fiqh*. In fact some of them opposed this practically and wrote some treatises in this regard.¹³ Among the fears they have expressed is that the codification binds the judge with a single specific opinion that has been chosen by the legislators, while *fiqh* has a wide room with a variety of abundant opinions and jurisprudential judgments from which a judge would be able to choose the preponderant stand pursuant to his judgment and more fitting with the situation. Codified law freezes the judge and imprisons him in the cage of law whereas *fiqh* gives him freedom of movement to choose the ruling according to the circumstances.¹⁴

On the other hand, there are a number of scholars who advocate the codification of Islamic law. Their observations regarding the codification

¹³ For instance: Bakr ibn ‘Abd Allāh Abū Zayd in his book *Fiqh al-Nawāzil*, ‘Abd Allāh ibn ‘Abd al-Raḥmān ibn Bassām in the book *Taqnīn al-Sharī‘ah, aḍrāruhu wa mafāsīduhu*, ‘Allāl al-Fās in his book *‘Difā’ ‘an al-Sharī‘ah*, ‘Abd al-Raḥmān al-Shatarī in his book *Ḥukm Taqnīn al-Sharī‘ah al-Islāmiyyah*, Muḥammad Sa‘īd Ramaḍān al-Būṭī, Sa‘īd al-‘Ashmāwī, and others.

¹⁴ Bakr ibn Abū Zayd, *Fiqh al-Nawāzil*, (Beirut: Mu’assasat al-Risālah, 2006), vol. 1, p. 89.

of Islamic law are far stronger than the reservations of the opponents.¹⁵ The advocacy for the codification of Islamic law is based on the legal policy (*siyāsah al-shar‘iyyah*), which refers to the act that leads to achieve benefit and remove harm from mankind, though there is neither any revelation about it and nor did the Prophet (s.a.w.) proclaim it.¹⁶ Indeed, the objective of codification is to reform various issues and organize the affairs of human society, and hence it is considered to be among the policies that cause the obtaining of the advantage and the removal of the harm thereof. Moreover, codification inclines to the public well-being and the noble objectives of the *Sharī‘ah*.¹⁷ Thus, Imām Abū Zahrah, ‘Alī al-Khafīf, al-Zarqā’, al-Qaraḍāwī and others mentioned that codification of Islamic law is not only allowed, rather it is compulsory.¹⁸

¹⁵ Among those who have advocated for the codification are, for instance: Muḥammad Abū Zahrah in his foreword for the book *al-Islām wa Taqnīn al-Aḥkām fī al-Bilād al-Sa‘ūdiyyah*, Muṣṭafā al-Zarqā in *al-Madkhal al-Fiqhī al-‘Āmm*, Yūsuf al-Qaraḍāwī in his book *al-Fiqh al-Islāmī Bayna al-Aṣālah wa al-Tajdīd*, Aḥmad Maḥmūd Shākīr in his book *Ḥukm al-Jāhiliyyah*, Abū al-A‘lā al-Mawdūdī in his book *al-Islām wa Taqnīn al-Aḥkām*, ‘Abd al-Karīm Zaydān in his book *Nizām al-Qaḍā’ fī al-Sharī‘ah al-Islāmiyyah*, and others.

¹⁶ Ibn al-Qayyim al-Jawziyyah, *al-Ṭuruq al-Ḥukmiyyah*, (Cairo: Mu’assasat al-‘Arabiyyah, 1961), p. 15.

¹⁷ Muḥammad Zakī ‘Abd al-Barr, *Taqnīn al-Fiqh al-Islāmī, al-Mabda’ wa al-Manhaj wa al-Taṭbīq*, (Qatar: Idārat Iḥyā’ al-Turāth al-Islāmī, 1986), pp. 62 and onwards.

¹⁸ ‘Abd al-Wahhāb al-Khallāf, *al-Siyāsah al-Shar‘iyyah fī al-Shu‘ūn al-Dastūriyyah wa al-Khārijīyyah wa al-Māliyyah*, (Kuwait: Dār al-Qalam, 1988), p. 20; Abu Zahrah, *al-Islām wa Taqnīn al-Aḥkām fī al-Bilād al-Sa‘ūdiyyah*, (Riyadh: Maṭba‘at al-Madani,

The validity of the codification is also consistent with *Maqāṣid al-Sharīʿah*, as it begets facility for mankind and removes hardship from them. So, as long as it secures the public wellbeing it is permitted, as Ibn Qayyim says:

The *Sharīʿah* is founded on wisdom and wellbeing of mankind here and in the Hereafter. It is entirely justice, compassion, public interest and wisdom. Whatever provision departs from justice to injustice, from kindness to the opposite, from wellbeing to the blight, and from wisdom to futility, would not belong to the *Sharīʿah*, though it is inserted therein by interpretation.¹⁹

Various efforts to Codify Islamic Law

Attempts at Standardization of *Fiqh* (before Ottoman *Majallah*)

Effort of Ibn al-Muqaffaʿ:

According to the historical sources, Ibn al-Muqaffaʿ²⁰ is the first person who felt the necessity for the codification of Islamic law. In the

1996); al-Zarqāʿ, *al-Madkhal al-Fiqhī al-ʿAmm*, vol.1, p. 203; al-Qaraḍāwī, *al-Fiqh al-Islāmī bayna al-Aṣālah wa al-Tajdīd*, (Beirut: Muʿassasat al-Risālah, 2001), p. 55.

¹⁹ Ibn Qayyim al-Jawziyyah, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1991), vol. 3, p. 11.

²⁰ He was a competent writer, Persian in origin, and transformed many books from Persian to Arabic, died in 144 AH. See Muḥammad Salām Madkūr, *al-Madkhal li al-Fiqh al-Islāmī*, (Kuwait: Dār al-Kitāb al-Ḥadīth, n.d.), p. 107.

second century of *hijrah* at the beginning of the Abbasid rule, Ibn al-Muqaffa' made a proposal and submitted it to the Abbasid Caliph Abū Ja'far al-Manṣūr. In this proposal he stated that in light of the presence of a contrast of opinions and conflicts among rulings on any single issue, the Caliph may need to order the drafting of rules for all the cities, based on the *Qur'ān* and *Sunnah* of the Prophet (s.a.w.). In the absence of any legal (*shar'ī*) text, the analogy or *ijtihād* would be accepted as long as it leads to justice and the wellbeing of the Muslim nation. In his proposal he wrote to the Caliph:

The issue Amīr al-Mu'minīn has to pay attention to is that of the contradictory provisions of Islamic law, which has presently reached at such a level that it is no longer possible to ignore this. If Amīr al-Mu'minīn agrees, he may pass an order that all the rulings and judgments that have been passed till now shall be compiled in a book and presented to Amīr al-Mu'minīn, and every faction shall be submitted with the underlying evidence and arguments. Then, Amīr al-Mu'minīn may assess the whole situation and give his own opinion on each case and restrict the court from any infringement thereof. In this way all provisions and rulings scattered here and there can be articulated in a form of legal binding code, free from errors. Accordingly, all the sections of Islamic state will be governed by a uniform legal system. We hope that the nation will agree unanimously on the judgments and rulings of Amīr al-Mu'minīn.²¹

However, this proposal was not accepted at that time because of the refusal of Muslim jurists to take the responsibility of forcing people to imitate them, since they themselves cautioned their disciples to not be fanatical about their opinions. Similarly, they themselves refrained from giving legal verdicts fearing that they could be wrong in judgment as it is something pertaining to divine law and legislation.²²

²¹ Abū Zayd, *Fiqh al-Nawāzil*, vol. 1 p. 18; Islahi, *Islamic Law Concept and Codification*, p. 89.

²² Madkūr, *al-Madkhal li al-Fiqh*, p. 107.

Effort of Two Caliphs Abū Ja‘far Maṣū‘r & Hārūn al-Rashīd:

When the Caliph Abū Ja‘far Maṣū‘r went to perform the pilgrimage to Makkah in 148 AH he asked Imām Mālik to unify people under his School of law. However, Imam Mālik refused it by saying that people of each region found solace in following their respective Imāms and jurists. The Caliph then became convinced, kept silent at this reply, and abandoned this idea. In 163 AH the Caliph Abū Ja‘far Maṣū‘r went to perform the pilgrimage again and presented the same idea before Imām Mālik for a second time and said to him:

O' Abū ‘Abd Allāh (surname of Imām Mālik), take the discipline of *fiqh* and compose it in a different form, shunning the strictness (in terms of practicing) of ‘Abd Allāh ibn ‘Umar, the ease of ‘Abd Allāh ibn ‘Abbās, and the individualities of ‘Abd Allāh ibn Mas‘ūd. What I mean here is just to abide by the principle of middle course as it is the best of affairs. Such a compilation should be a collection of rulings and verdicts of Imāms and companions of the Prophet (s.a.w.). If it is accomplished on this course we will urge people to follow this compilation and agree unanimously with your school of Islamic law, and then we will pass a decree throughout the realm that infraction thereof is firmly discarded.²³

However, Imām Mālik refused such a proposal to gather people under his School and force them to comply with his opinions. He said:

Do not do this because people have already received various opinions, heard many narrations and observed numerous traditions. Each nation has accepted and followed what they received from their earlier scholars. Bringing them back from what they believe is difficult. So, let them with what they are doing, and what they preferred for themselves.²⁴

Later on, the Caliph Hārūn al-Rashīd also approached Imām Mālik with the same idea and request, but Imām Mālik insisted on his previous

²³ Islahi, *Islamic Law Concept and Codification*, p. 90; Madkūr, *al-Madkhal li al-Fiqh*, p. 108.

²⁴ Abū Zayd, *Fiqh al-Nawāzil*, vol. 1, p. 19.

stand. In the meantime he composed his great book, '*al-Muwatta'*'. The Caliph wanted to distribute its copies throughout the country and pass a decree making the book a reference and source for judiciary and *fatwā*. However, Imām Mālik again declined this request saying,

The Companions of the Prophet (s.a.w.) differed in opinion regarding the *furū'* (subdivisions) and are scattered here and there in many countries. Essentially all of them are right in their judgments and opinions.²⁵

It seems that what was intended by Ibn al-Muqaffa' in his letter is different than what was directed by these Caliphs. The Caliphs just asked Imām Mālik to make his book *al-Muwatta'* as a reference for legal judgment and *fatwā*, which could be helpful for the people to agree and abide by a single opinion selected from several possible legal opinions pursuant to the public wellbeing.²⁶

Effort of Sulṭān Muḥammad Aurangzeb 'Ālamgīr:

Another effort was later made by one of the kings of the Indian subcontinent, Sulṭān Muḥammad Aurangzeb 'Ālamgīr. In the eleventh century AH a board of prominent Islamic scholars ('*ulamā'*) from the subcontinent was formed by the Sulṭān under the chairmanship of Shaykh Niẓām in order to compile a book which would encompass the judgments and *fatāwā* that had obtained the consensus of leading jurists of the Ḥanafī School of Islamic law. This attempt produced a book named as "*al-Fatāwā al-'Ālamgīriyyah*" which is known as "*al-Fatāwā al-Hindiyyah fī Madhhab al-Ḥanafīyyah*". This book, however, was not compiled as a legal code, binding for the Islamic scholars and judges, but was rather just a compilation of *fiqhī* issues and corollaries (*furū'*), either

²⁵ Madkūr, *al-Madkhal li al-Fiqh*, p. 108; Abū Zayd, *Fiqh al-Nawāzil*, vol. 1, p. 20.

²⁶ Madkūr, *al-Madkhal li al-Fiqh*, p. 108.

real or hypothetical, with a scholarly legal discussion, followed by mentioning the preferred opinion chosen by the respective committee.²⁷

This compilation (*al-Fatāwā al-Hindiyyah*) is published and available now in six huge volumes, and is considered to be among the significant and reliable references in the Ḥanafī School of law. This monumental work, as al-Zarqā mentions, is an attempt which resembles the codification of *fiqh* because it is not structurally in the form of law in its modern meaning. Instead, it is a *fiqh* book which encompasses rulings and issues in performing the rituals (*ʿibādāt*) and dealings (*muʿāmalāt*). It also resembles, to a certain extent, the drafting of laws in general because it is compiled by following some styles of legal drafting, albeit without the discussion on the related evidences and arguments. It is confined to the opinions that are preferable to the Ḥanafī School. Although this compilation is closer to a detailed book of *fiqh* because it includes compositions of the rulings of the rituals which have no place in the codification of civil code, it has some similarities with the method of codification. Nevertheless, codification, in its modern meaning, has appeared in the *Majallat al-Aḥkām al-ʿAdliyyah* of the Ottoman Caliphate in 1293 AH.²⁸ This will be discussed below.

Modern Codification

Effort of Ottoman Caliphate:

With this intellectual trend towards codification, another attempt of codification was made by the Ottoman government in the thirteenth century AH, which was comparatively much more successful. The Ottoman authority aimed to extract civil law from the Islamic law that adhered to the Ḥanafī School, in accordance with the public needs and interests, without being bound by the preponderant opinions of the Ḥanafī School.

²⁷ Ibid., p. 109; Islahi, *Islamic Law Concept and Codification*, p. 91.

²⁸ Al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀmm*, vol. 1, p. 238.

A panel of seven prominent scholars was constituted for this task. The objective was to compile Islamic jurisprudence in a codified form that would be convenient for consultation, and free from various opinions, and could also be an authoritative reference to all well-known rulings and judgments. Moreover, it was decided that it should be accessible to everyone. With these objectives in mind, the committee accomplished this challenging task in 1293 AH/ 1876 CE. A collection of Islamic legal provisions was recorded in this compilation that was more relevant to the realities of that time. The compilation was enacted by the Ottoman Sultān with the name "*Majallat al-Aḥkām al-ʿAdliyyah*". It was drafted in the form of legal articles which stood at 1851 articles, readily available and devoid from disagreements and variations. Some less preferred legal opinions were also recorded in this compilation because these were required for the public wellbeing at the time.²⁹

Likewise, in 1326 AH under the Ottoman Empire, another legal code of Family Law was compiled on marriage, divorce, etc. In this compilation a lot of legal opinions from the Schools other than the Ḥanafī School of law were recorded, such as the invalidity of marriage and divorce of coerced persons. This is considered to be the best legislative work achieved by the Ottoman government and they were proud of this. At the same time it is considered to be the first instance of implementation of the idea of Ibn al-Muqaffaʿ, which had been embraced by Abū Jaʿfar al-Manṣūr and advocated by the Caliph Hārūn al-Rashīd. Similarly, it was the first step of exiting from mere imitation (*taqlīd*) and not being committed to a single School of Islamic law while giving a verdict and passing a judgment.³⁰

Other Official and Unofficial Attempts

²⁹ Madkūr, *al-Madkhal li al-Fiqh*, p. 109; Islahi, *Islamic Law Concept and Codification*, p. 92.

³⁰ Madkūr, *al-Madkhal li al-Fiqh*, p. 110.

Effort of Muḥammad Qadrī Bāshā:

In Egypt, al-Khadīwī Ismā'īl refused to apply the provisions of the *Majallat al-Aḥkām al-'Adliyyah* because of a desire for independence and freedom from subordination to the Ottoman state. Hence, he gave preference to the law of Napoleon, arguing that the *fiqh* with its existing condition could not be codified. This argument created a big noise among the public who are of the view that it is possible to codify the *fiqh*. Hence, the prominent jurist Qadrī Bāshā codified some provisions taken from the Ḥanafī School of law, following the process of *Majallat al-Aḥkām al-'Adliyyah*. This attempt, however, did not get any official endorsement. Nevertheless, Muḥammad Qadrī Bāshā published his work in the form of three books: First, the book related to the civil transactions entitled "*Murshid al-Ḥayarān fi Ma'rifat Aḥwāl al-Insān*", which contains (941) articles and it was published by Egyptian Government from the *Būlāq* press in 1308 AH. Second, the book related to the provisions of the family law entitled "*al-Aḥkām al-Shar'īyyah fi al-Aḥwāl al-Shakhṣiyyah*". Here, he discussed the issues related to the gift (*hibah*), interdiction (*ḥajar*), bequeathing (*iṣā'*) and inheritance (*mīrāth*). In most of the Muslim countries today, this is a reliable reference regarding the respective subject and it has (647) articles. Third, the book on *waqf* named "*al-'Adl wa al-Inṣāf fi Aḥkām al-Waqf*" or "*Qānūn al-'Adl wa al-Inṣāf li al-Qaḍā' 'alā Mushkilat al-Awqāf*", which contains (646) articles.³¹

Effort of Shaykh Muḥammad 'Āmir:

³¹ Yūsuf Aḥmad Muḥammad al-Badawī, *Madkhal al-Fiqh al-Islāmī wa Uṣūluhu*, (Amman: Dār al-Ḥāmid, 2007), p. 374; Muḥammad 'Abdul Jawwād, *al-Taṭawwur al-Tashrī'ī fi al-Mamlakah al-'Arabiyyah al-Su'ūdiyyah*, (Cairo: Maṭba'at Jāmi'at al-Qāhirah wa al-Kitāb al-Jāmi'ī, 1977), p. 214.

Shaykh Muḥammad ʿĀmir made a gigantic effort to draft numerous fundamental principles of *fiqh* of the Mālikī School in the form of legal code, and named it '*Mulakhkhaṣ al-Aḥkām al-Sharʿiyyah ʿalā al-Muʿtamad min Madhhab al-Imām Mālik*'. This effort, however, did not get official endorsement since the judges were not required by the state to adhere to this. This effort was apportioned into four sections: *sharʿī* judiciary and what related thereto, family rights and personal law, civil transactions and donations, and lastly, inheritance law. All these are drafted in 928 articles. Muḥammad ʿĀmir was a lawyer in Bēghāzī, Libya, and he made this effort in 1937 CE.³²

Effort to Codify Family Law for Egypt and Syria when they were united:

In the period when Egypt and Syria were united (1958-1961 CE) the policymakers of these two countries decided to unify some of their legal codes. They decided to do this for four types of laws, with the family law at the top of the list. A committee of three members from different specializations was formed for each law. Dr. Muṣṭafā Aḥmad al-Zarqā was appointed the chief of the committee for family law, who along with the *mufṭī* of Egypt and the under-secretary of the state of Egypt formed the members of the committee. The committee drafted the whole project of a unified legal code for the family law, which encompassed all the relevant chapters thereof, from marriage to inheritance. The committee dealt with all the problems and difficulties suffered by Muslim families, irrespective of whether it was related to marriage, divorce, child custody, expenditure, will, inheritance, or the like. Also, the committee asked the *sharʿī* judges about the problems when legal actions are taken against thereof by the spouses. Moreover, in this project the committee formed and drafted such provisions that dealt with and aimed to solve most of the problems of family life without being bound to any particular School

³² Al-Badawī, *Madkhal al-Fiqh al-Islāmī wa Uṣūluhu*, p. 375; Jawwād, *al-Taṭawwūr al-Tashrīʿī*, p. 215.

of Islamic law. The committee also quoted the discretionary opinions (*ijtihādāt*) of the early scholars, whose thoughts are not recorded as a School of law, yet whose views and thoughts are cited in the books of disagreement of the scholars. Being the first reformative law encompassing the family issues, the committee submitted this project, along with an illustrative note of the elucidation of its codes and their sources, to both central and regional Ministers of Justice, to ensure that the president of United Arab Republic could release this. However, the project was not released due to the military upheaval in Syria in 1961 CE, wherein the unity was destroyed, rendering the project to a tale of history.³³

Effort of Shaykh Ahmad ibn ‘Abd Allāh al-Qārī:

Majallat al-Aḥkām al-Shar‘iyyah is a result of the efforts made by Shaykh Ahmad ibn ‘Abd Allāh al-Qārī. Although personally he is from the Ḥanafī School, this *Majallah* is drafted based on the Ḥanbalī School. The author was working as the chief of the high court in *Makkah al-Mukarramah* at that time, when the King ‘Abd al-‘Azīz asked him to compose the *Majallat al-Aḥkām*. Regarding this, his idea was that it should be drafted by a board of prominent scholars, and should be derived from the references and books of all the four prominent Schools of Islamic law, in a way similar to the *Majallat al-Aḥkām al-‘Adliyyah* drafted by the Ottoman Caliphate in 1293 AH. Moreover, it would not be confined to any single School of Islamic law, but rather it would rely on the strongest and preponderant opinion of any School, based on the evidences and arguments of the *Qur’ān* and *Sunnah*, as well as what ensures the public wellbeing. Shaykh al-Qārī was highly pleased with this proposal, and made a successful effort to draft the provisions of *fiqh* with a

³³ However, lastly this project is published under the title: "*Mashrū‘ Qānūn al-Aḥwāl al-Shakṣiyyah al-Muwahḥad, lil Iqlīmāy al-Maṣrī wa al-Sūrī fi ‘Ahd al-Waḥdat Baynahumā*", (Damascus: Dār al-Qalam, 1996); see Al-Zarqā, *al-Madkhal al-Fiqhī al-‘Amm*, vol. 1, p. 266.

new formation. His *Majallah* has relied on several sources of Ḥanbalī School of law namely, *al-Mughnī*, *al-Sharḥ al-Kabīr*, *al-Furū'*, *Sharḥ Muntahā al-Irādāt* and *al-Qawā'id al-Fiqhiyyah* of Ibn Rajab al-Ḥanbalī. This *Majallah* contains 21 books, and each book has numerous chapters with several sections. Collectively, all the books, chapters, and sections in the *Majallah* include 2382 articles or *fiqhī* codes.

Effort to Unify Family Law for Arab Countries:

The first conference of the Ministers of Justice of Arab countries held in Rabat in 1977 CE stressed on the importance of unified legislation within Arab countries. In this regard, the Ministers agreed that the provisions of the *Sharī'ah* are the advantageous and more secured sources to achieve this goal.

Thereafter a committee on the ministry level recommended that it was necessary to consolidate all the efforts made in these countries to codify the provisions of the *Sharī'ah*. They also recommended that the special priority should be given to unify the family laws of the Arab countries in a way that it actualizes the necessary reformation in the family system, which would be derived from various Schools of Islamic law and pursuant to the public wellbeing. So, a committee of *shar'ī* judges and competent *fuqahā'* was formed to accomplish the project. The committee worked on it for three years (1982-1985), and then presented it to a plenary session in Amman at the end of the eighties attended by representatives of all the Arab countries.. However, the representative of the Kingdom of Saudi Arabia had reservations about this and did not approve it. Other Gulf countries also refrained from endorsing the inclusion of obligatory will (*waṣiyyah wājibah*) in the project, along with some other reformative provisions that were contrary to the opinions pertaining to the prevailing Schools of law in their countries. Given the controver-

sies, it was decided that the project would be left as a reference for each Arab country which they may utilize whenever they wish.³⁴

Experiences of al-Majāmi' al-Fiqhiyyah (Fiqhī Councils):

In order to get back the vitality of Islamic jurisprudence, a number of Islamic scholars urged that a *fiqhī* council must be established, just like other scientific councils. Through this council, the individual efforts in *fiqh* and its particulars could be focused to achieve collective and common efforts. Hence, such councils would be the means to utilize potential efforts to derive the necessary rulings from the classical sources, especially in responding to the new issues and cases. In fact, this would be a platform to exercise *ijtihād* collectively. These *fiqhī* councils play a great role in unifying and codifying Islamic law through communal *ijtihād*.³⁵ It is known that the key activities of these councils are issuing *fatāwā*, publishing resolutions, exercising collective *ijtihād* and so forth. However, these councils also undertake the job of codification of Islamic law within a single School of Islamic law, as well as amongst all the prominent Schools of Islamic law. For example, in 1392 AH/1971 CE *Majma' al-Buḥūth al-Islāmiyyah* of al-Azhar accomplished the projects of codification in Ḥanafī School, as well as in Mālikī, Shāfi'ī and Ḥanbalī Schools. This Council also had a plan to codify from amongst

³⁴ However, lastly the text of this project is published in *Majallat al-'Arabiyyah li al-Fiqh wa al-Qaḍā'*, published by the Secretariat of the Council of Arab Ministers of Justice in Morocco, Issue: 2, Year: 2, 1985, pp. 19-262; see Al-Zarqā, *al-Madkhal al-Fiqhī al-'Āmm*, vol. 1, p. 267.

³⁵ Aḥmad Abū Ḍāhir, *al-Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, (Damascus: Dār al-'Aṣmā', 2009), pp. 201-202.

the preferred *fatāwā* and opinions of all Schools, but the plan has not been executed yet.³⁶ Examples of some of these councils are as follows:

Majma' al-Buhūth al-Islāmiyyah bi al-Azhar: This council was established in Egypt in 1961 CE, under the chairmanship of Shaykh al-Azhar. The council contains several committees such as the committee of the *Qur'ān* and *Sunnah* studies, the committee for *fiqhī* research, the committee for Islamic tradition and heritage and finally the committee for social studies. It consists of the widely known scholars of the various fields of Islamic studies. The council studies the Islamic law and heritage from various dimensions along with the contemporary issues that concern the Muslim world. The council also plays an important role in codifying the Islamic law from various Schools.³⁷ The task of this council is similar to the task of compilation of the *Majallat al-Aḥkām al-Adliyyah*, as the council formed several committees which comprise the experts in *fiqh* and law, to codify and organize the *fiqh* of all the schools separately, and prepare a common ground of law that can be used by each of the Schools of Islamic law. In fact, it has already issued a draft code for sales and related transactions in all the Schools.³⁸

Majma' al-Fiqh al-Islāmi bi Jiddah: This *fiqhī* council was established in 1981 CE with its headquarter in Jeddah, the Kingdom of Saudi Arabia. One of the core objectives of this council is to study the problems of the modern era, and continue with the practice of original *ijtihād* in order to derive the necessary solutions from the reliable sources of Islamic law. In recent years this council has played an important role in facilitating the process of getting benefited from Islamic jurisprudence. This is in accordance with the spirit of the *Sharī'ah*, which includes observa-

³⁶ 'Abd al-Nāṣir Tawfīq al-ʿAṭṭār, *Tawḥīd Taqnīnāt al-Azhar li al-Sharī'ah al-Islāmiyyah*, (Cairo: al-Nasr al-Dhabbī, 2002), vol. 1, p. 11.

³⁷ Mannā' al-Qaṭṭān, *Tārīkh al-Tashrī' al-Islāmī*, (Riyadh: Maktabat al-Ma'ārif, 1996), p. 406.

³⁸ Al-Badawī, *Madkhal al-Fiqh al-Islāmī wa Uṣūluhu*, p. 437.

tion of the principle of ease and the removal of hardship and difficulty. Moreover, the council intends to present the provisions of Islamic law in a specific and precise form, so that one might be inclined towards Islamic law in various sectors of life.³⁹

Al-Majma' al-Fiqhī al-Islāmī bi Makkah al-Mukarramah: In implementing the general decision of the Organization of Islamic Conference (OIC), the government of the Kingdom of Saudi Arabia has established this *fiqhi* council, which is a subordinate of the *Rābiṭat al-Ālam al-Islāmī*, in 1384 AH with its headquarter at *Makkah al-Mukarramah*. The council consists of a group of the expert scholars, jurists and researchers from various corners of the world, who undertake the study of the various issues and problems of the Muslim nation and try to find out the solution thereof relying on the reliable sources of Islamic jurisprudence, the *Qur'ān*, *Sunnah*, consensus of the scholars and others. The objectives of this council include working to vitalize and restore the *fiqhī* heritage, and show the superiority and competency of Islamic jurisprudence over all other prevailing positive legal systems of the world. Essentially, the council has several committees with different responsibilities. One of them is the drafting and formulation committee, which undertakes the duty of forming the *fiqhī* provisions in legal codes and articles, so that it will be facile and easy to be applied. The management of the council has published all the resolutions of the council in book format, making easy the job of revision and review for the researchers.⁴⁰

Recent Efforts of Codification

The family law of Malaysia could be considered a current example for codification of Islamic law. Malaysia has two types of family law.

³⁹ Ibid., pp. 441-442.

⁴⁰ Sulaymān al-Ālīwī, *al-Fiqh al-Islāmī fī al-Qarn al-Rābi' Āshar*, (KSA: Dār al-Āṣimah, 1999), vol. 2, pp. 117-124.

The *Shari'ah* family law applies to Muslims while the civil law applies to non-Muslims.⁴¹

The legal systems of Saudi Arabia and Iran are based on the Islamic law derived from the *Qur'ān* and *Sunnah*, articles of their constitutions could be considered a step forward towards the codification of Islamic law. Article (1) of the constitution of Saudi Arabia says, "the Kingdom of Saudi Arabia is a sovereign Arab Islamic state; Islam is its religion and the *Qur'ān* and the *Sunnah* are its constitution."⁴² Interpretation of the *Qur'ān* and the *Sunnah* remains necessary, and this is carried out by the Islamic scholars (*ulamā'*), the Saudi religious establishment.⁴³ Article (4) of the constitution of Iran states, "All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the constitution as well as to all other laws and regulations, and the *fuqahā'* of the Guardian Council are judges in this matter."⁴⁴ Furthermore, the *Shari'ah* Standards for Islamic financial institutions that are issued by the Accounting and Auditing Organization for Islamic Financial Institutions, known as (AAOIFI),⁴⁵ could be con-

⁴¹ Kamala M. G. Pillai, *Family Law in Malaysia*, (Malaysia: LexisNexis, 2009), p. 5.

⁴² Constitue, *Saudi Arabia's Constitution of 1992 with Amendments through 2005*, constitueproject.org, p. 3.

⁴³ Dary Champion, (2003). *The paradoxical kingdom: Saudi Arabia and the momentum of reform*, p. 60; http://en.wikipedia.org/wiki/Legal_system_of_Saudi_Arabia, retrieved on 22.11.2014.

⁴⁴ Constitution of the Islamic Republic of Iran, p. 9.

⁴⁵ The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), previously known as Financial Accounting Organization for Islamic Banks and Financial Institutions, was established pursuant to the agreement of Association which was signed by Islamic Financial Institutions on February 26, 1990 in Algiers and registered on March 27, 1991, in the state of Bahrain as an international autonomous non-profit making corporate body. The main objective of AAOIFI is, to develop, disseminate,

sidered a kind of codification of Islamic law for the issues that are resolved in such standards.⁴⁶

The majority of the contemporary scholars concur that the merits of codification and its motives are far higher than the perils thereof as seen by some scholars. One of the values of codification is that it eases the review of the provisions. Since the books of jurisprudence are displayed in a manner that is different from what is typical, and immerse in different opinions with regard to a single issue, it could make non-specialists (who form the majority) confused and puzzled when they want to adopt *fiqhī* rulings. If the provisions of *fiqh* are codified with easy and familiar phrases, and arranged in a feasible manner, it would be easy for the judge, jurist, lawyer, and for a typical learned person to know the provisions of *Shari'ah* in contracts and transactions. Sometimes many of these people may become reluctant to review the applicable *Shari'ah* provisions because of the difficulties of consulting the books of *fuqahā'* and may prefer to adopt the conventional law because of the smoothness of going through its references and encyclopedia. The codification of *fiqh* also leads to the accuracy of legal provisions and to the adoption of feasible stands based on opinions from various Schools, or even from a single School of Islamic law.⁴⁷

It is not correct to say that codified law freezes the judges, prevents them from exercising *ijtihad* and accordingly makes them idle. This is because codification of *fiqh* does not mean that the judge solely depends on reading and memorizing the scripts and documents in connection with the case. Despite having a codified law, studying, doing research and ex-

prepare, review and amend the accounting and auditing thoughts and standards for Islamic financial institutions, in conformity with the *Shari'ah* and the environment in which Islamic financial institutions are operating.

⁴⁶ Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Shari'ah Standards for Islamic financial institutions*, (Bahrain: Manama, 2010).

⁴⁷ Al-Zarqā, *al-Madkhal al-Fiqhī al'Āmm*, vol. 1, pp. 319-320; Zakī 'Abd al-Barr, *Taqnīn al-Fiqh al-Islāmī*, p. 23.

ercising *ijtihad* will remain in place as necessary and required. The laws that have been codified in the world would not be comprehensive enough to cover all cases or situations, although they are extensive in coverage of articles, chapters and clauses.⁴⁸

Nevertheless, there are numerous challenges and obstacles to implement the movement of codification of Islamic law. In most cases these obstacles are interrelated and these could be internal or external, local, regional and global as well. The foreign interference in Arab and Muslim affairs, the individual and global campaigns against Islam and Muslims, the existing conventional legal system in some Arab and Islamic countries, the political division and *fiqhī* fanaticism among the Muslims, etc. are some notable challenges in this regard. These challenges could be overcome by creating awareness of the disasters of foreign intervention and conventional legal system, sharing the knowledge and beauty of diversity and pluralism of Islamic doctrines and Schools, having public involvements in practicing the Islamic provisions, strengthening the faith in Islamic legal system that it has flexibility and eligibility to provide solutions for each period and place, and others.⁴⁹ Islahi (1979) discusses some obstacles for initiation and survival of the codification of Islamic law, such as nationalism, secularism, blind following (*taqlīd*), corruption of society and so forth.⁵⁰ He further provides some guide-lines for the codification of Islamic law, such as broad-mindedness of the scholars, following the righteous ancestors concerning the interpretation of the *Qur'ān* and *Sunnah*, doing suitable amendments in the laws based on

⁴⁸ Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, pp. 267-268; Zakī 'Abd al-Barr, *Taqnīn al-Fiqh al-Islāmī*, p. 26.

⁴⁹ Jābir 'Abd al-Hādī Sālim, *Taqnīn al-Fiqh al-Islāmī bayna al-Mu'tamarāt wa al-Tashrī'āt*, paper presented in the conference namely *Taṭawwur al-'Ulum al-Fiqhiyyah, al-Fiqh al-Islāmī: al-Mushtarak al-Insānī wa al-Maṣāliḥ*, organized by Ministry of Awqāf and Religious Affairs, Oman, 9 April, 2014; pp. 41 and onwards; <http://www.almahdara.com/ar/vb7/showthread.php?t=3666> (accessed on 17 February, 2016).

⁵⁰ Amin Ahsan, *Islamic Law; Concept and Codification*, pp. 94-96.

custom and public wellbeing, reforming the system of education, rooting out Western influence as well as clarifying doubts against Islamic law.⁵¹

Conclusion

The codification is considered an important new issue. It is given intense attention due to its effect and influence on practical life, and due to its positive role to produce appropriate solutions, and fair judgments for litigation and disputation. Codification is a process that contributes to the reformation in political, social, financial as well as in judiciary sectors. This reformation can be achieved by drafting fair Islamic codes, pursuant to the principles, values and customs of the Muslim nations. Codification would help establish justice and equality, protect the rights and freedom, and extend security and stability. Codification of Islamic law would be the timely solution to the question of the unity and solidarity among the Muslim world. All the sections of Islamic law, excluding the rituals (*‘ibādāt*), such as civil, constitutional, judiciary, penal, international, etc. are eligible to be codified. So, codification in Islamic law refers to the codification of *fiqhī* provisions and not to the *Sharī‘ah* in its wider sense and overall contents. Therefore, various efforts are made throughout the history to codify Islamic law. Codification of Islamic law conforms to the legal policy (*siyāsah shar‘iyyah*), public wellbeing and the fundamental ruling of permissibility. It is indispensable as it begets facility for the mankind and removes hardship from them. Thus, codification of Islamic law actualizes the noble objectives of the *Sharī‘ah* (*maqāsid al-sharī‘ah*).

⁵¹ *Ibid.*, pp. 97 and onwards.