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**Dispute over the Legality of Codification of Islamic Law:  
A Critical Analysis**

**Perselisihan Tentang Kesahihan Kodifikasi Undang-Undang Islam:  
Analisa Kritikal**

Md. Habibur Rahman,\* and Muhammad Amanullah\*\*

**Abstract**

Codification of Islamic law is studied due to its positive role on practical life to produce appropriate solutions and fair judgments for litigation and disputation. Codification is a process which contributes to the reformation in political, social, financial and judiciary sectors, by drafting fair Islamic codes, pursuant to the principles, values and customs of the Muslim nations. However, there is a scholarly debate on whether Islamic law could be codified or not. A group of intellectuals validates it while another group invalidates it. Hence, this study aims to critically examine the intellectual dispute over the legality of codification of Islamic law. The study is accomplished through the critical analysis of related documents, books and literature. The study verifies that codification of Islamic law is not just valid but rather indispensable because it conforms to the legal policy (*siyāsah shar‘iyyah*), public wellbeing and fundamental ruling of permissibility. In addition, codification of Islamic law complies with the noble objectives of the *Shari‘ah* (*Maqāṣid al-Shari‘ah*). The study finds out that the merits and motives of codification are far higher than its perils as seen by some scholars. It posits that codification of Islamic law would be the timely solution to get back the unity and solidarity among the Muslim world. It concludes that all the sections of Islamic law, excluding the rituals (*‘ibādāt*), such as civil, constitutional, judiciary, penal, international, etc. are eligible to be codified. Thus, codification in Islamic law refers to the codification of *fiqhī* provisions and not to the *Shari‘ah* in its wider sense and overall contents. Moreover, the study also provides required conditions to be observed in the codification of Islamic law.

**Keywords:** Codification, Islamic Law, Legal Policy, Public Wellbeing, Fundamental permissibility, *Maqāṣid al-Shari‘ah*.

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### **Abstrak**

Kodifikasi undang-undang Islam diberi perhatian kerana peranan positifnya dalam kehidupan manusia dalam menghasilkan solusi yang sesuai dan pertimbangan yang adil dalam perbicaraan dan perselisihan. Kodifikasi undang-undang menyumbang kepada perubahan dalam sektor politik, sosial, kewangan dan kehakiman, dengan penyediaan kod syariah yang adil, berdasarkan prinsip, nilai dan budaya orang Islam. Walau bagaimanapun, terdapat perdebatan ilmiah tentang kodifikasi tersebut sama ada ianya boleh dilakukan atau sebaliknya. Sebahagian cendekiawan berpendapat ianya dibolehkan manakala sebahagian yang lain menafikannya. Oleh itu, kajian ini mengkaji secara kritis perselisihan intelektual mengenai kesahihan kodifikasi undang-undang Islam. Kajian ini dicapai melalui analisis kritikal terhadap dokumen, buku dan kesusasteraan yang berkaitan. Kajian ini mengesahkan bahawa kodifikasi undang-undang Islam bukan hanya sah tetapi diperlukan kerana ia mematuhi dasar undang-undang (*siyasah sharyariyyah*), kesejahteraan awam dan ketetapan asas yang dibenarkan. Di samping itu, kodifikasi undang-undang Islam adalah mematuhi objektif *Shariah* (*maqasid al shari'ah*). Kajian ini mendapati bahawa merit dan motif kodifikasi ini lebih memberi kesan baik daripada bahaya sebagaimana difahami oleh beberapa ulama. Ia mengemukakan bahawa kodifikasi hukum Islam adalah penyelesaian bagi mengembalikan perpaduan di kalangan dunia Islam. Ia menyimpulkan bahawa semua bahagian undang-undang Islam, tidak termasuk ritual, seperti sivil, perlembagaan, kehakiman, hukuman, antarabangsa, dan lain-lain layak untuk dikodifikasikan. Oleh itu, kodifikasi dalam undang-undang Islam merujuk kepada kodifikasi fiqh dan bukannya Syariah secara keseluruhannya. Selain itu, kajian ini juga menyediakan syarat-syarat yang perlu dipatuhi dalam pengkodifikasi hukum Islam.

**Kata Kunci:** Kod Pengubahsuaian, Undang-undang Islam, Dasar Perundangan, Kesejahteraan Awam, Kebolehpercayaan asas, *Maqasid al Shari'ah*.

### **Introduction**

Codification has become one of the modes of exercising *ijtihad* (interpretation and re-interpretation of Islamic law) in the contemporary age, like *fiqhi* councils, collective discretion, and so forth. It is an orderly and systematic arrangement, usually by subject, of legal rules and provisions, to initiate codes for the legal rules and to provide these rules with legal feature. No nation can survive without a system that governs its daily activities, which is known as law and which is referred in order to solve the disputes among various nations. Hence, every nation should have such law preserved in a codified and unified manner, so that the respective authority is able to consult with that easily while passing a judgment or solving a dispute and so forth. So, as Muslims we are 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 to unify the Muslims; since without a compilation of unified and codified law,

Muslims would not have any other common point that could bring them together under one umbrella. In fact, al-Qaraḍāwī (1997) states that many contemporary intellectuals deem that one of the obstacles that hinder the application of *Shari'ah* in our Muslim society, after independence, is that it is not codified.<sup>1</sup>

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 inside that School of law, one of them shall be selected. Hence, codification of Islamic law means to codify the provisions of various Schools or a single School of Islamic law in civil transactions, when the state decides that the judiciary shall operate based on a single School of law only.<sup>2</sup>

However, scholars differ in opinions concerning the validity of codification of Islamic law while a group of them permit this and another group invalidate. In this paper the author critically examines such scholarly dispute over the legality of codification of Islamic law and then gives the preference based on the strongest evidence and reasoning.

### Definition of Codification

The word "codification" connotes the initiation of codes. The Arabic word for codification is '*taqnīn*'. In the modern sense *taqnīn* literally means: '*wad'u al-qawānīn fī māddah*', i.e. placing and arranging the laws with the codes.<sup>3</sup> Codification in law simply means the process of forming a legal code. The codification will be defined from two dimensions; conventional and Islamic.

From the conventional perspective, codification refers to bringing together the provisions and legal principles related to one of the areas of civil and public relations. The next stage includes categorizing, arranging, and formatting them with authoritative, concise and precise expressions in the form of articles in series. Afterwards, the stage comes to release them in a form of law or system enforced by the state, including a

<sup>1</sup> Yūsuf al-Qaraḍāwī, *Madkhal li Dirāsāt al-Shari'ah al-Islāmiyyah*, (Beirut: Mu'assasat al-Risālah, 1997), 259.

<sup>2</sup> Mustafā al-Zarqā, *al-Madkhal al-Fiqhī al-ʿAmm*, (Damascus: Dār al-Qalam, 1998), 1:313-314.

<sup>3</sup> Majma' al-Lughat al-ʿArabiyyah, *al-Mu'jam al-Wasīṭ*, (Egypt: Maktabat al-Shurūq al-Duwaliyyah, 2011), 791; *al-Mu'jam al-Wajīz*, (Cairo: Ministry of Education, 1992), 918.

requirement for judges to apply these principles among the people.<sup>4</sup> Murad (n.d.) defines the codification as the compilation of legal principles, statutes, rules and regulations, in written form, pertaining to a specific subject matter, covering any of the branches of law, such as civil code, penal code, and so forth. It refers also to the collections of the text itself.<sup>5</sup> Sinha and Dhiraj (n. d.) introduce codification as "A compilation of legal principles, consolidated into a single enactment, and generally having relation to the same subject matter, e.g. a penal code, a code of criminal procedure, a code of civil procedure, the earliest known as that of Babylonion, Hammurabi (2000BC)".<sup>6</sup> Wharton, moreover, defines the codification of law as the collection of all the principles of any system of law into one body after the manner of the Codex Justinianus and other codes.<sup>7</sup> Nonetheless, in the global context, it refers to the process of reducing customary international law or other rules of international conduct to a written form which is then adopted as a treaty by the nations of the world.<sup>8</sup>

From the Islamic perspective, Ashqar (1982) defines codification 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 legal articles.<sup>9</sup> 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 *Shari'ah* rulings on financial transactions and dealings, into the simple legal articles, in order to ease the reference thereto for legal judgment, consolidate the legal decisions, and to ease for the litigants to know

<sup>4</sup> Al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀmm*, 1:313.

<sup>5</sup> ʿAbd al-Fattāḥ Murād, *Dictionary of Legal Terms in Four Languages*, (Egypt: n. p., n. d.), 118.

<sup>6</sup> Hari Mohan Sinha & Dhiraj Pal Narula, *Legal Dictionary*, (Delhi: Pioneer Publications, n.d.), 35.

<sup>7</sup> Wharton's Law Lexicon, 1976 reprint, 208; taken from KJ Aiyar, *Judicial Dictionary, A Complete Law Lexicon*, (New Delhi: LexisNexis, 2007), 231.

<sup>8</sup> Hague Codification Conference (1930), taken from James R. Fox, *Dictionary of International and Comparative Law*, (New York: OCEANA Publications, INC., 1997), 53.

<sup>9</sup> ʿUmar Sulaymān al-Ashqar, *Tārīkh al-Fiqh al-Islāmī*, (Kuwait: Maktabat al-Falāḥ, 1982), 187.

the legal verdicts and the basis thereof.<sup>10</sup> In another occasion (1987) he defines it, 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.<sup>11</sup> So, according to this definition, codification means giving a legal shape to the *Sharī'ah* provisions on transactions and dealings. The objective is to ease up the processes of judicial reference, consolidating the legal judgments, and enabling the litigants to know the ground of the judgment.

In addition, 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 reference and guiding light for judges, lawyers and the community.<sup>12</sup> This definition also demonstrates the same objectives as the previous definition, but it does not confine the provisions to be codified to the transactions and dealings.

However, codified law will be binding on the state or relevant authorities, as Sirāj (1997) gave the meaning of codification of Islamic law as a process to draft the *Sharī'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.<sup>13</sup> Thus, al-Shatarī (2007) focuses on the nature of binding and defines it as "drafting the provisions of *Sharī'ah* in the binding terms and words, in order to obligate the judges to pass the judgment accordingly."<sup>14</sup>

So, there is no discrepancy between these definitions. Some defined the codification in brief and some made it more detailed. In some definitions the objectives and process of the codification have been demonstrated. However, the definitions did not clarify the point on

<sup>10</sup> Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, (Syria: Dār al-Fikr, 1985), 1:27.

<sup>11</sup> Wahbah al-Zuhaylī, *Juhūd Taqnīn al-Fiqh al-Islāmī*, (Beirut: Mu'assasat al-Risālah, 1987), 26.

<sup>12</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 259.

<sup>13</sup> Muḥammad Aḥmad Sirāj, *al-Fiqh al-Islāmī Bayna al-Nazariyyah wa al-Taṭbīq*, (Alexandria University, 1997), 258; Yaḥyā Muḥammad 'Iwaḍ al-Khilāyalah, "Taqnīn Aḥkām al-Sharī'ah al-Islāmiyyah Bayna al-Nazariyyah wa al-Taṭbīq," (Ph.D. Thesis, International Islamic University Islamabad, 2002), 17.

<sup>14</sup> 'Abd al-Raḥmān ibn Sa'ad al-Shatarī, *Ḥukm Taqnīn al-Sharī'ah al-Islāmiyyah*, (Riyadh: Dār al-Ṣamī'ī, 2007), 15.

whether or not all the provisions of the *Shari'ah* are equal in importance to be codified. Some even did not relate it at all to the provision of Islamic law, as in the definition by Ashqar, though he has discussed it under the title of codification of *fiqh*. Thus, the preferable definition of the codification would be "shaping the respective (eligible to be codified) provisions of Islamic *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 ruler." 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 *'ibadat* would not be codified as they are not eligible for that.

### **Dispute of Scholars on Codification of Islamic Law**

Regarding the legality of the codification of Islamic law, scholars have differed in two opinions. Some of them opine that it is permitted, while some others opine that it is not permitted. Here the author demonstrates the arguments of both groups, followed by the discussion on their arguments and then the preferable view in the issue of codifying Islamic law, as follows:

### **Arguments of the Opponents of Codification**

A group of scholars oppose the idea of codification of Islamic law and they opine that it is not permitted. They are namely: 'Abd al-Rahmān al-Shatarī,<sup>15</sup> Ṣāliḥ al-Fawzān,<sup>16</sup> 'Abd al-Rahmān al-'Ajlān,<sup>17</sup> 'Abdullah al-Ghanīmān,<sup>18</sup> Abd al-'Azīz al-Rājīḥī,<sup>19</sup> 'Abd al-Rahmān al-Maḥmūd,<sup>20</sup> 'Abdullah Ālu Sa'd,<sup>21</sup> Bakr ibn Abū Zayd,<sup>22</sup> Abdullah ibn Bassām,<sup>23</sup> 'Allāl al-Fās,<sup>24</sup> Ramaḍān al-Būṭī,<sup>25</sup> Sa'īd al-'Ashmāwī,<sup>26</sup> and

<sup>15</sup> See: al-Shatarī, *'Hukm Taqnīn al-Sharī'ah al-Islāmiyyah'* 50.

<sup>16</sup> See: the foreword of *'Hukm Taqnīn al-Sharī'ah al-Islāmiyyah'*, 3.

<sup>17</sup> Ibid., 4.

<sup>18</sup> Ibid., 5.

<sup>19</sup> Ibid., 7.

<sup>20</sup> Ibid., 9.

<sup>21</sup> Ibid., 10.

<sup>22</sup> Bakr ibn Abū Zayd, *Fiqh al-Nawāzil*, (Beirut: Mu'assasat al-Risālah, 2006), 1:98.

<sup>23</sup> 'Abd Allāh ibn Bassām, *Taqnīn al-Sharī'ah, Aḍrāruhu wa Maḥāsidihi*, (Makkah: Dār al-Thaqāfah, 1379H), 2 and onwards.

<sup>24</sup> 'Allāl al-Fāsī, *Difā' 'an al-Sharī'ah*, (Cairo: Dār al-Kitāb al-Maṣrī, 2011), 61.

<sup>25</sup> Sa'īd Ramaḍān al-Būṭī, *al-Lāmadhhabiyah Akḥṭaru Bid'ah Tuhaddidu al-Sharī'ah al-Islāmiyyah*, (Damascus: Maktabat al-Fārābī, 1985), 122.



so forth. These scholars have reservations with respect to the codification of Islamic law and they expressed their fears regarding it. Their arguments are as follows:

A. Allah (swt) says: "*If you judge, judge in equity between them, for Allah loves those who judge in equity.*"<sup>27</sup> So, judging in equity means to judge pursuant to the truth that Allah has revealed, not to judge according to the codified law; as the truth might be opposite of it. Also, Allah (swt) says: "*if you differ in anything among yourselves, refer it to Allah and His Messenger, if you do believe in Allah and the Last Day.*"<sup>28</sup> So, in the case of any dispute, referring to anything else except Allah and His Messenger is invalid. Also, Allah (swt) says: "*But no, by the Lord, they can have no (real) faith, until they make you judge in all disputes between them, and find in their souls no resistance against your decisions, but accept them with the fullest conviction.*"<sup>29</sup> So, whoever ignores the decisions of the Prophet (pbuh) and does not satisfy with that he could have no real faith. Furthermore, Allah (swt) says: "*it is not fitting for a Believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decisions.*"<sup>30</sup> So, nothing could be obligatory to follow except what Allah and His Messenger has decided.<sup>31</sup>

B. The Prophet (pbuh) says: "the judges are of three types, one is in the Heaven and the other two are in the Hellfire. One: who knows the truth and judges accordingly, is in the Heaven. Second: who knows the truth but does not judge accordingly, is in the Hellfire. The third: who judges among the people with ignorance, he is also in the Hellfire."<sup>32</sup> So, if the judge decides pursuant to the codified law, while he knows it is the opposite of the truth, he would be in the Hellfire.<sup>33</sup>

<sup>26</sup> Muḥammad Sa'īd al-'Ashmāwī, *al-Islām al-Siyāsī*, (Cairo: Maktabat Madbulī, 1996), 234.

<sup>27</sup> Al-Qur'ān, *al-Mā'idah*: 42.

<sup>28</sup> Al-Qur'ān, *al-Nisā'*: 59.

<sup>29</sup> Al-Qur'ān, *al-Nisā'*: 65.

<sup>30</sup> Al-Qur'ān, *al-Aḥzāb*: 36.

<sup>31</sup> Al-Shatarī, *'Ḥukm Taqnīn al-Sharī'ah al-Islāmiyyah'*, 30-32.

<sup>32</sup> Sulaymān ibn al-Ash'ath al-Sajistānī, *Sunan Abī Dāūd, Bāb fi al-qāḍī yukhtī'u*, (Beirut: Dār Ibn Ḥazm, 1997), *ḥadīth* no: 3573, 4:8; Abū 'Īsā Muḥammad Ibn 'Īsā al-Tirmidhī, *Sunan al-Tirmidhī, Bāb mā jā'a fi al-qaḍī*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), *ḥadīth* no: 1322, 2:328.

<sup>33</sup> Al-Shatarī, *'Ḥukm Taqnīn al-Sharī'ah al-Islāmiyyah'*, 34.

C. The codification binds the judge with a single specific opinion that has been chosen by the legislators, while *fiqh* has a wide room with many different opinions and jurisprudential judgments from which a judge would be able to choose the preponderant stand pursuant to his judgment and more in fitting with the situation. So, 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. Therefore, one of the fundamentals in *Sharī'ah* is that the judge shall be a *mujtahid*, and able to extract the *Sharī'ah* ruling from its primary sources. It is true that scholars may also allow a blind follower to become a judge due to the necessity when a *mujtahid* judge might not be available. However, in this case he should be able to choose, prefer, and give the judgment that suits the situations and circumstances, observing the reasons of giving preponderance.<sup>34</sup>

D. The binding codification prevents from exercising *ijtihad* because it forbids changing the *fatwā* pursuant to the variation of the time and place.<sup>35</sup> The dangers of codification will be obvious when we notice that the application of a section of the code sometimes does not fulfill the needs and demands of the circumstances. Alternatively, the application may be suitable for the circumstance, but then circumstances change, and the judge may not be able to do anything else than to make decisions outside those circumstances.<sup>36</sup>

E. Codification could be the means to change the *Sharī'ah* by increasing, decreasing, alteration, modification and the like. Consequently, it could lead to judgment outside what Allah (*swt*) has revealed.<sup>37</sup>

F. Apart from these reasons, codification may also make a judge idle and contented by holding firm only to existing code without striving to refer to the sources of *fiqh* and other evidences that support these directly related opinions.<sup>38</sup>

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<sup>34</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 266; Abu Zayd, *Fiqh al-Nawāzil*, 1:89.

<sup>35</sup> Al-Khilālah, *Taqnīn Aḥkām al-Sharī'ah al-Islāmiyyah*, 202.

<sup>36</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 266; Abu Zayd, *Fiqh al-Nawāzil*, 1:86.

<sup>37</sup> Al-Shatarī, '*Hukm Taqnīn al-Sharī'ah al-Islāmiyyah*', 38; Abu Zayd, *Fiqh al-Nawāzil*, 1:83.

<sup>38</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah*, 267.

### Arguments of The Proponents of Codification

Another group of scholars support the idea of codification of Islamic law and they opine that it is permitted. They are namely: Muḥammad Abū Zahrah,<sup>39</sup> Muṣṭafā al-Zarqā,<sup>40</sup> Yūsuf al-Qaraḍāwī,<sup>41</sup> Aḥmad Muḥammad Shākir,<sup>42</sup> Wahbah al-Zuḥaylī,<sup>43</sup> ‘Abd al-Karīm Zaydān,<sup>44</sup> ‘Abd al-‘Azīz Ālu al-Shaykh,<sup>45</sup> Muḥammad ‘Abdul Jawwād,<sup>46</sup> Aḥmad ‘Abd al-Ghafūr,<sup>47</sup> Mūḥammad Zakī ‘Abd al-Barr,<sup>48</sup> and so forth. This group argues with the legal policy (*siyāsah shar‘iyyah*), public interests (*maṣāliḥ mursalah*), general permissibility (*ibāḥah aṣliyyah*), and others. Their arguments are as follows:

A. Allah (swt) says: " *O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you*".<sup>49</sup> So, obedience to the authority and ruler leads to the obedience of Allah and His Messenger, as long as the ruler does not go beyond the *Sharī‘ah*. Having a binding codified law from the ruler does not contradict any provision of the *Sharī‘ah*. Rather, it conforms to the objective of the *Sharī‘ah*; as it begets benefit and wards off the hardship from the mankind. So, such codified law would be considered and followed accordingly.<sup>50</sup>

B. The codification is a contemporary issue and there is no explicit legal text (*naṣṣ*) which prohibits it either in the *Qur’ān* or the

<sup>39</sup> Abū Zahrah, *al-Islām wa Taqnīn al-Aḥkām fi al-Bilād al-Sa‘ūdiyyah*, (Riyadh: Maṭba‘at al-Madanī, 1966).

<sup>40</sup> Al-Zarqā, *al-Madkhal al-Fiqhī al-‘Āmm*, 1:313, 314.

<sup>41</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī‘ah al-Islāmiyyah*, 263 & *al-Ijtihād fi al-Sharī‘ah al-Islāmiyyah*, (Kuwait: Dār al-Qalam, 1989), 134.

<sup>42</sup> Aḥmad Muḥammad Shākir, *Ḥukm al-Jāhiliyyah*, (Cairo: Maktabat al-Sunnah, 1992), 122.

<sup>43</sup> Wahbah al-Zuḥaylī, *Juhūd Taqnīn al-Fiqh al-Islāmī*.

<sup>44</sup> ‘Abd al-Karīm Zaydān, *Nizām al-Qaḍā’ fi al-Sharī‘ah al-Islāmiyyah*, (Beirut: Mu’assasat al-Risālah, 2002), 212.

<sup>45</sup> ‘Abd al-‘Azīz Ālu al-Shaykh, *al-Islām wa Taqnīn al-Aḥkām*, (Riyadh: Maṭba‘at al-Madanī, 1966).

<sup>46</sup> 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), 228.

<sup>47</sup> Aḥmad ‘Abd al-Ghafūr, *Inḥisār Taṭbīq al-Sharī‘ah fi Aqtār al-‘Urūbah wa al-Islām*, (Beirut: Dār al-Andalus, 1980), 38.

<sup>48</sup> Mūḥammad Zakī ‘Abd al-Barr, *Taqnīn al-Fiqh al-Islāmī, al-Mabda’ wa al-Manhaj wa al-Taṭbīq*, (Qatar: Dār Iḥyā’ al-Turāth al-Islāmī, 1986), 62.

<sup>49</sup> Al-Qur’ān, *al-Nisā’*: 59.

<sup>50</sup> Abū Zayd, *Fiqh al-Nawāzil*, 1:29.

*Sunnah*.<sup>51</sup> So, it would be governed by the legal maxim which says: "*al-ʿaṣl fi al-ashyāʾ al-ibāḥah*",<sup>52</sup> i.e. the norm in any matter is permissibility. In addition, the advocacy for the codification of Islamic law is based on *al-Siyāsah al-Sharʿiyyah*, which refers to the act that leads to achieve benefit and to remove harm from mankind, though there is neither any revelation about it, nor did the Prophet (pbuh) proclaim it.<sup>53</sup> Indeed, the objective of codification is to reform various issues and organize the affairs of human society, due to which it is considered to be among the policies that cause the obtaining of the advantage and the removal of the harm thereof.<sup>54</sup>

C. Codification inclines to the public wellbeing and the noble objectives of the *Sharīʿah*. Abū Zahrah, ʿAli al-Khafif, and others mentioned that not only is codification allowed, rather it is compulsory. It is required to secure justice, public advantage, a fair social system and so forth, and moreover there is no legal evidence forbidding codification, rather absence of such a thing makes the door open for the foreign law.<sup>55</sup>

D. Al-Qaraḍāwī opines that the codification of Islamic law is necessary and obligatory based on the provisions of the *Sharīʿah*. It would revive the practice of *ijtihād* through comparative studies within various Schools of Islamic law, along with the international laws. Codification is required to stop the chaos in Islamic judiciary.<sup>56</sup> Moreover, there are judges who are required to be bound to the extent that they are not worried about the appropriateness when deciding a ruling because not all judges are able to evaluate or choose a particular opinion. Some of them are afraid to give decisions based on personal interest to the extent of making decisions based on one opinion and using another opinion for another case.<sup>57</sup>

E. Muṣṭafā al-Zarqā says that codification of Islamic law is necessary and must, and there is nothing to be worried. It would not rely only on the principles of rights and justice; rather it would rely on Islam-

<sup>51</sup> Ibid., 1:30.

<sup>52</sup> ʿAbd al-Karīm Zaydān, *al-Wajīz fi Sharḥ al-Qawāʿid al-Fiqhiyyah fi al-Sharīʿah al-Islāmiyyah*, (Beirut: Muʿassasat al-Risālah, 2003), 178.

<sup>53</sup> Ibn al-Qayyim al-Jawziyyah, *al-Turuq al-Ḥukmiyyah*, (Cairo: Muʿassasat al-ʿArabiyyah, 1961), 15.

<sup>54</sup> ʿAbd al-Wahhāb al-Khallāf, *al-Siyāsah al-Sharʿiyyah fi al-Shuʿūn al-Dastūriyyah wa al-Khārijiyyah wa al-Māliyyah*, (Kuwait: Dār al-Qalam, 1988), 20.

<sup>55</sup> Abū Zahrah, *al-Islām wa Taqnīn al-Aḥkām*.

<sup>56</sup> Al-Qaraḍāwī, *al-Fiqh al-Islāmī bayna al-Aṣālah wa al-Tajdīd*, (Beirut: Muʿassasat al-Risālah, 2001), 55.

<sup>57</sup> Al-Qaraḍāwī, *Madkhal li Dirāsah al-Sharīʿah al-Islāmiyyah*, 267.

ic legislation policies and their implementation systems. He further argues that, it is the right of the authorities and rulers to undertake something which they deem more appropriate for the contemporary time and the people. There is nothing wrong in codifying the provisions of the *Sharī'ah*, as it renews the spirit of *Sharī'ah* and brings it closer to the contemporary people and their understandings.<sup>58</sup>

F. Aḥmad Muḥammad Shākir also advises and calls upon the codification of Islamic law. According to him, it would be a good move returning to rule pursuant to the revelation. Codifying the law on the grounds of the *Qur'ān* and the *Sunnah* makes the human being come forward to Islam, unifies the judiciary system, and leads to govern according to Allah's guidance.<sup>59</sup>

G. Mūḥammad 'Abd al-Jawwād opines that undertaking the project of codification of Islamic law is an immediate mandatory requirement in order to present it in the worldly known language and format. Accordingly, it could be an autonomous Islamic legal system that can stand up for entire global legal systems.<sup>60</sup>

H. Also, 'Abd al-Karīm Zaydān opines the validity of the codification of Islamic law. He says that this would be done by selecting the preponderant views from the opinions of scholars and jurists of all Schools of Islamic law, after verification by the *Qur'ān* and the *Sunnah*. The task of codification should be accomplished by a selected group of expert, who are experienced and noble scholars of *Sharī'ah* and *fiqh*.<sup>61</sup>

I. Moreover, Wahbah al-Zuḥaylī opines that codification of Islamic law is not only permissible; rather it is obligatory in this era. There is no objection of *Sharī'ah* to present the provisions of *fiqh* simply in the format of legal articles. This will ease the tasks of the judges, lawyers and ordinary public to refer to the provisions of *fiqh* upon necessity.<sup>62</sup>

J. Furthermore, the validity of codification of Islamic law is derived and compared with the consensus of the Companions on compilation of *al-Qur'ān*. Since they have validated the compilation of *al-Qur'ān* considering its significance and role in public wellbeing, the va-

<sup>58</sup> Al-Zarqā, *al-Madkhal al-Fiqhī al-'Amm*, 1:203.

<sup>59</sup> Shākir, *Ḥukm al-Jāhiliyyah*, 122.

<sup>60</sup> Jawwād, *al-Taṭawwur al-Tashrī'ī*, 228.

<sup>61</sup> Zaydān, *Nizām al-Qadā' fi al-Sharī'ah al-Islāmiyyah*, 212.

<sup>62</sup> Wahbah al-Zuḥaylī, *Juhūd Taqnīn al-Fiqh al-Islāmī*, 29.

lidity of codification of Islamic law could also be compared with this despite the difference in the significance and sensitivity of both matters.<sup>63</sup>

### **Discussion on the Arguments**

A. The opponents argue with selected verses of *al-Qur'ān* and the *Sunnah*. We would say that, the point of their arguments is not sound. Judging with the codified law does not lead to judging with injustice. Similarly, referring to the codified law does not mean referring to what Allah has not revealed. It is actually provisions and rulings of the *Sharī'ah*, which have been revealed by Allah. Putting these provisions just in a codified form does not change its status. Also, passing the judgment and giving the decisions by a codified Islamic law is not contrary to; rather in accordance with the judgments and decisions of Allah and His Messenger.

B. Regarding the *Sunnah*, whoever judges with a codified Islamic law would follow the truth and justice, and accordingly he would not be in the Hellfire. The provisions will be codified only when it is truthful, right, and pursuant to the public wellbeing, need of the time and circumstances and so forth.

C. It is not correct to say that codified law freezes the judges, prevents them from exercising *ijtihād* 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. A self-respecting judge would not do so even if he wants to as he would not be able to do so. This is because the law has interpretations and elucidations that should be referred thereto, since they would clarify the points and explain the obscurity of the law. We see in the case of Dr. Sanhūrī who, after drafting the new Egyptian Civil Code, clarified the law in nine big volumes. The first volume contains 1500 pages. This elucidation is named '*al-Waṣīṭ*', i.e. medium; as if he wishes to attempt further elucidation which would be larger and more voluminous, with the name of '*al-Mabsūt*', i.e. extended. Prior to this, the *Majallah* of the Ottoman Caliphate had more extensive and substantial elucidations which were regarded as one of the significant references for the Ḥanafī School of law. Thus, there should not be any fear that in having of

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<sup>63</sup> Al-Khilāyah, *Taqnīn Ahkām al-Sharī'ah al-Islāmiyyah*, 190; Abū Zayd, *Fiqh al-Nawāzil*, 1:29.

a codified law the people of judiciary would rely solely thereupon but rather they still need to study the elucidation and sources of the law.<sup>64</sup>

D. Despite having a codified law, studying, doing research and exercising *ijtihad* will remain necessary and required. The laws that have been codified in this world would not be comprehensive enough to cover all cases or situations, although they are extensive in coverage of articles, chapters and clauses. What must be done if the judge cannot find the textual evidence on a particular case? He must decide on the ruling based on the grounds and arguments he was presented with. He must also be guided by the recognized sources. Thus, the law by itself must specify the sources of reference in the absence of any legal texts. This is similar to the Egyptian positive law specifying the references, in the form of customary practice, or Islamic law or the law of natural justice. Naturally, when the laws will be enacted based on the *Shari'ah* and *fiqh*, it must mention the duties to refer to both, to extract the *Shari'ah* ruling for the case being tried. So again, we do not need to fear that the judge would have to adopt other opinions, and to dispense with the *fiqh* and its sources, or to explore its hidden treasures and gems.<sup>65</sup>

E. The proponents argue with the necessity, public wellbeing and so forth. We would say there is likelihood that the public wellbeing, benefit for mankind, etc. could be misused and misinterpreted. So, the validity of codification shall not be generalized; rather it must be subject to some terms and conditions.

### The Preponderant Opinion

After the discussion on the evidences, arguments, and counter arguments of both opponents and proponents of the codification of Islamic law, we prefer the stand of the proponents. Hence, we are with the view which says that the codification of Islamic law is permitted. The basis of our preference is as follows:

A. The strength of the proponents' argument which says that codification conforms to the legal policy (*siyāsah shar'iyah*), public wellbeing and fundamental ruling of permissibility. As long as it secures the public wellbeing it would be permitted, as Ibn Qayyim says:

The *Shari'ah* is founded on wisdom and wellbeing of mankind in here and Hereafter. It is entirely justice, compassion, public interest and wisdom. Whatever provision departs from justice to injustice, from

<sup>64</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 267.

<sup>65</sup> *Ibid.*, 268.

kindness to the opposite, from wellbeing to the blight, and from wisdom to futility, would not belong to the *Shari'ah*, though it is inserted therein by interpretation.<sup>66</sup>

B. The validity of the codification is also consistent with *Maqasid al-Shari'ah*, as it begets facility for mankind and removes hardship from them.

C. Codification will help the litigants to know in general where rulings will be heading, whether in their favor or against them. Thus a woman who is separated from her husband with young children will get to know whether the ruling is in her favor or her husband's. If this is not legislated and the judges are left free to decide, the woman would not know which school of thought is being used.<sup>67</sup> So, this and the like are the advantages and the issues of public interest that are in accordance with the *Shari'ah* which could be achieved through codification.

D. Moreover, it has occurred that certain judges are blind followers of the schools of law which are dominant in their country. Whoever among them is able to give preference (*tarjih*) and to perform partial *ijtihad* -this is very rare- is usually committed to the school of law that is dominant in the country. In fact, he usually ascribes so much to the predominant opinion that he is unable to depart from it or adopt a weaker opinion, and so forth. This means that the judges are not free to choose what they perceive, but are restricted by the provisions that are specific and defined, though they did not take the form of the codified law. If so, it would be much better for them to be bound by the laws that have been arranged in a book by reliable scholars, who are experts in *Shari'ah* and *fiqh*, know the demands of the time, and can cooperate with upright experts in law, administration, economics and others.<sup>68</sup>

E. The majority of Muslim jurists and contemporary scholars are in agreement with the opinion 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 are the major-

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<sup>66</sup> Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1991), 3:11.

<sup>67</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Shari'ah al-Islāmiyyah*, 267.

<sup>68</sup> *Ibid.*, 268.



ity) confused and puzzled when they want to adopt *fiqhi* 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. Moreover, it might happen that 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 encyclopedias.

F. In addition to this ease, the codification of *fiqh* 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. So what does the judge do in front of this huge collection of different opinions by the scholars? He should exercise *ijtihad* in order to ensure the proper implementation of legal rulings that are codified, though *ijtihad* in the broader sense would be left for those who select and choose the provisions at the moment of codification. Considering the development and complexity of the transactions in this era, it becomes mandatory to ease the procedures for issuance of rulings and judgments to ensure the public interest.<sup>69</sup>

### Conditions of Codification

However, the author does not advocate the codification of Islamic law in general. He opines that codification of Islamic law is permitted, but subject to some important conditions, as follows:

A. The codification shall not be bound by any particular School of Islamic law; because it restricts what Allah has widened in ordainment, and narrows the vast expanse of the *fiqh*. Those who study *fiqh* know that its advantage and merit in the presence of differences in juristic opinions is what makes it vibrant and lively at all times. In general, scholars are different of being moderate, traditional and average in terms of deliberation and thinking. Moreover, there are also the literalists who strictly follow the letter of the divine text, and those who use analogy, and yet others who consider public interests and noble purposes of the *Shari'ah*. So, in this wide ocean of *fiqh* we find so many Schools of Islamic law, to the extent that if one does not get any ruling in any of the prominent four schools of Islamic law, he might find it in other Schools. All Schools of Islamic law have the same connection to the *Shari'ah* as

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<sup>69</sup> Al-Zarqā, *al-Madkhal al-Fiqhī al'Āmm*, 1:319-320.

long as their opinions are not contradictory to the definitive divine text or the trusted consensus of the scholars, or the evident proof in which it is not allowed to differ. If the scholars of the Ottoman Caliphate were finally able to produce the *Majallah*, following all the established Schools of Islamic law, without being bound to only Ḥanafī School, the positive law will not find a place to replace *Sharī'ah* in Islamic countries, and then that would be the dawn of a new era in the codification and its development.<sup>70</sup>

B. Those who enact the laws must, in choosing the Schools of Islamic law, start with the Schools of the Companions. Then the School of the Successors and then those come after them. The selection should be according to the strength of the evidence and the noble objectives of the *Sharī'ah*. Also, it should secure the rightful interest of mankind, and prevent hardship and affliction upon them. Our jurists, from time to time, were leading examples; many of them were able to evaluate an opinion by saying that "this is easier for the people". This attitude renders them to validate many of the transactions, favoring whatever was decided using the standard analogy, such as the manufacturing contract (*istiṣnā'*<sup>71</sup>), the redemption sale (*bay' al-wafā'*<sup>72</sup>) and so forth according to the Ḥanafī School of law.<sup>73</sup>

C. The tendency of facilitating ease for the people is the spirit of the *Sharī'ah* itself whereby Allah (*swt*) wants ease and not hardship. Hence, *Sharī'ah* has enjoined facility and forbidden difficulty. Therefore, whenever there will be two *fiqhi* opinions that are equally strong but one is more stern and the other is easier, the easier one should be chosen because it is more in accordance with the virtue of the Prophet (pbuh), "who would choose the easier one as long as it did not lead to sin when he was given two options."<sup>74</sup>

<sup>70</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 269.

<sup>71</sup> Literally: a request to have something manufactured. Technically: requesting a manufacturer to make a particular good to particular specifications. See: *ISRA Compendium for Islamic Financial Terms*, (Kuala Lumpur: ISRA, 2010), 102.

<sup>72</sup> Literal meaning: loyalty. Technically: when a person in need of cash sells real estate or an asset on the condition that the seller be allowed to get the commodity back upon paying its price. It is also called a trust sale, and the Shāfi'ī School called it a returned mortgage. See: *ISRA Compendium*, 24.

<sup>73</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī'ah al-Islāmiyyah*, 270.

<sup>74</sup> Muḥammad ibn Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī, Bāb Ṣifāt al-Nabiyy*. (Beirut: Dār al-Kutub al-'Ilmiyyah, 2002), *ḥadīth* no: 3560, 2:427; Abū al-Ḥusayn Muslim ibn al-Ḥajjāj al-Nisābūrī, *Ṣaḥīḥ Muslim, Bāb mubā'adatuhu lil āthām wa ikhtibāruhu min*

D. The law must be seen, whenever it is no longer reasonable, in the light of practical application. The observations of the advocates and solicitors in general must be corrected if a need for correction arises or if they need to be expanded. This is because rulings derived by *ijtihād* are subject to change. ‘Umar ibn al-Khaṭṭāb issued a *fatwā* with an opinion and in the following year he made another *fatwā* with a new opinion even though the case was the same. When he was asked why, he answered, "the previous decision was based on what we have known before, and the decision now is based on what we know now." In addition to this, Imām al-Shāfi‘ī also had two opinions; the first was in Iraq and is known as the 'old opinion' (*qawl qadīm*) whereas the second was made while he was in Egypt and is known as the 'new opinion' (*qawl jadīd*). Thus, in the books of Shāfi‘ī School those terms are often used, i.e. Imām al-Shāfi‘ī said such in his old opinion or such in his new opinion. When *fatwā* changes to fit the changes of times, situations, places and traditions, the law, though it is codified, might also change to fit the changes of times, situations, places and traditions.<sup>75</sup>

#### Scope and Process of Codification In Islamic Law

Codification of Islamic law would be done in a way that the state derives all of its codifications, in various sectors, from Islamic Jurisprudence in general. So, it could be derived from all the prominent Schools of Islamic law, or from one single School of Islamic law, as well as from the opinions of jurists among the Companions (*ṣaḥābah*) and their followers (*tābi‘īn*). Also, it could be taken from the opinions of those who came afterwards, and from those scholarly opinions which had been recorded in the books about disagreements of Muslim jurists, despite the absence of any particular School of law for each of them regarding all the chapters and transactions of *fiqh*. They are namely al-Layth ibn Sa‘ad, al-Awzā‘ī, Ibn Shubrumah, Ibn Ibī Laylā and others. Nevertheless, it is possible that there is no such opinion available from previous scholars pertaining to an issue intended to be codified because it may have arisen from contemporary and newly happened events, or because there are opinions from previous scholars which do not correspond to the public wellbeing (subject to *Sharī‘ah* principles) of the time. In these cases new provisions shall be derived for the issue intended to be codified pursuant

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*al-mubāhī ashaluhu*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003), *ḥadīth* no: 2327, vol. 8, part. 15:67.

<sup>75</sup> Al-Qaraḍāwī, *Madkhal li Dirāsāt al-Sharī‘ah al-Islāmiyyah*, 271.

to the current public wellbeing and based on the principles of Islamic Jurisprudence and noble objectives of the *Shari'ah*.<sup>76</sup>

In the process of codification of *fiqh*, if there are several legal opinions about a particular issue, then one of these opinions shall be chosen based on the strength of evidences and arguments, ease of applicability, and closeness to the just and noble objectives of *Shari'ah*. Such selection and preference are an *ijtihad* work that requires something more than *Shari'ah* knowledge, such as having timely discernment of the practical situations of people, the various problems they face, the contraventions they commit and so forth. Mostly, such a job is entrusted to a group of experts and reliable individuals and seldom is left to the decision of any single individual. Hence codification is collective *ijtihad* and not individual *ijtihad*. In a nutshell, codification ensures having a single jurisprudential ruling in each issue, which is precise, concise and applicable to the judge and litigant. In that case the discretion of the judge will be confined to just understanding the text of the code and then its application to facts and events.<sup>77</sup>

Later on, the room for codification expanded in all Muslim countries and in all aspects of the civil, criminal and administrative laws. Civil laws became merged with *fiqh* in the Ottoman Caliphate - in line with what Muṣṭafā al-Zarqā has mentioned- and in the states that were annexed to it, such as Syria, Palestine and Iraq. This reached up to the level where there hardly is a chapter of *fiqh* where the provisions, more or less, have not undergone legal modification and abrogation. Nevertheless, Muṣṭafā al-Zarqā has mentioned some factors for this expansion as follows:

A. Development of cordial economic relationships, whether on a regional or an international level, led to the availability of new modes and cases thereof in these countries. Some of these are matters at the regional level, whereas others are adapted from European countries, such as the European practice of conducting trade using commissions, the various forms of insurance, corporations and others.

B. Since "the contractual stipulations" is a vital issue in the civil transactions it needs to be resolved through a binding codified law. The legal opinions differed in the ruling of stipulating the condition in the contract. Some scholars opine that stipulating the condition in the contract is permitted whereas others opine that it is prohibited.

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<sup>76</sup> Al-Zarqā, *al-Madkhal al-Fiqhī al-‘Amm*, 1:313.

<sup>77</sup> *Ibid.*, 1:314.

C. The state instructed to bind the real estate contracts and transactions with a formal automatic system under its supervision for commercial, legal and political purposes. Therefore, the land registry office, system and record were established. Accordingly the real estate contracts that are concluded outside the office and out of record were considered ineffective and unproductive.

D. The requirement for the systemic procedures and policies that have to be conducted in transactions, surveying of goods, claims, and arbitration of various matters, and the application of laws in various matters such as procedural law and the autonomy of the judiciary, etc. necessitated a modified and codified form of law.

E. What had been associated with this development of civil economy was the rigidity of the *fiqh* at the hands of the later jurists which has paralyzed the productivity of *fiqh*. After the cessation of successive revivalists and reformists who developed and expanded the *fiqh* in the past, eventually the study of *fiqh* returned to the preservation of theories instead of producing new solutions.

F. Developing the *Majallat al-Aḥkām al-ʿAdliyyah* from the Ḥanafī School of law only and not assimilating cases from other Schools of Islamic law, even when the established cases were extensive, led to the inadequacies of the *Majallah* to meet the demands of time and the development of mankind, to the extent that it now has to be augmented by other *ijtihāds*.<sup>78</sup>

### Conclusion

The study reveals that the codification of Islamic law has effect and influence on practical life as it plays a 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. Moreover, codification would help to establish justice and equality, to protect the rights and freedom, and to extend security and stability.

Based on the strength of the arguments and evidences the study concludes that codification of Islamic law is not just permitted but rather obligatory. The study affirms that codification of Islamic law conforms to the legal policy, public wellbeing and fundamental ruling of permissi-

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<sup>78</sup> Ibid., 1:228- 229.

bility. In addition, the study demonstrates that codification of Islamic law would be the timely solution to get back 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. Thus, codification in Islamic law refers to the codification of *fiqhī* provisions and not to the *Sharī‘ah* in its wider sense and overall contents.

Furthermore, this study shows that the majority of Muslim jurists and contemporary scholars are in agreement with the opinion that the merits and motives of codification are far higher than its perils as seen by some scholars. Finally, it is concluded that the validity of codification of Islamic law is also consistent with the noble objectives of the *Sharī‘ah* as it begets facility for mankind and removes hardship from them.

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