

Codification of Islamic Law in the Muslim World: Trends and Practices

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ABSTRACT

Codification of Islamic law started from mid-18th century in the Ottoman *Khilafah* which subsequently extended itself to other Islamic territories. By the end of nineteenth century, hardly any Muslim state could be found without having codified legal system. These codifications took place at the height of western colonisation of Islamic states by implanting their own system of law, leaving adverse impacts on codification and application of *Shariah* and the rules of *Ulama* in its application. However, the imposition of codification of law over the Islamic states by the colonial powers has left them with bitter experience. Legal discussions show the impact of colonial power's imposition of their legal systems on their colonies. Fascinatingly, states were trying to get their independence from colonial powers without realizing the extent of their capture in legal and political systems which inherited from their colonial powers. However, there is an urge for a comprehensive and systemic reconsideration and codification of Islamic law with active involvement and participation of *Fuqaha* in its process with maintaining the *Ijtihad*'s door open. There are heated discussions to revisit the *ta'zir* punishment and limit the powers conferred to judges in order to prevent arbitrary and excessive punishments. This paper does not deny the importance of codification of Islamic laws specifically in certain areas like Islamic Contract law and Islamic banking but this process must be done systematically in line with the *Shariah* principles. This study aims to examine the codification of law in Muslim world, trends and practices and the extent of its effects on status of *Shariah* in the Islamic countries. It starts with the brief history of codification followed by nature and sources of Islamic law. Codification of law in the Muslim world and early efforts of codification, criminal law codification and the impacts of codification on *Shariah* law are the following discussions. It will be sealed off by analysing the status of *Shariah* in Muslim world today, discussion and conclusion.

KEY WORDS: Islamic law, codification, *Hadd*, *Ta'zir*

INTRODUCTION

1.1 BRIEF HISTORY OF CODIFICATION OF LAW IN THE WORLD

The codification of law goes back to the beginning of 1760s. It has been reported that one of the early civil code existed at the time of the king of Babylonia which was based on the doctrine of retaliation. For instance in this regulation, if a male offspring slapped his male parents, it would result in chopping off of his hands. Historically in the Rome Empire, they were two sets of regulations that can be found. The first is *Lex Duodecim Tabularum* followed by body of civil law which greatly helped legislators to make laws.¹

Another significant code which emerged out of Roman Empire was Justinian's regulation; it was inspired by Romulus and Remus² and presented in a way that was not difficult for the vast majority of citizens to understand. This regulation covered religion by compelling the law of Judaism.³

Justinian's Code was significant mainly for two reasons. Firstly, it was easy to understand and well-arranged that everyone could comprehend it without any difficulties. Secondly, the code included the ancient laws of Rome regulations which was a guideline for the court's judges and students of law. As a result, due to the absence

¹"The Impact of Codification of Laws | Online Homework Help | SchoolWorkHelper," n.d.

² In Roman mythology, Romulus and Remus are well known as the founders of the city of Rome. Many authors recorded their story including Virgil who claims that their birth and adventures were fated in order for Rome to be founded. Brittany Garcia, "Romulus and Remus," *Ancient History Encyclopedia*, 2013, http://www.ancient.eu/Romulus_and_Remus/.

³"The Impact of Codification of Laws | Online Homework Help | SchoolWorkHelper."

of any complexity, it became the foundation of law for hundred years. These regulations achieved a positive outcome in merging various sets of laws such as natural law to form private laws.⁴

In addition, Justinian's Code was introduced by Justinian I as the ruler of Byzantine. It was done through introduction of different rules and regulations. Justinian's Code was applied throughout Byzantine Empire and significant numbers of contemporary legal systems find their roots in this code.⁵

Therefore, Civil law as an independent system of law was developed in the mainland of Europe. The emergence of these kinds of sets of rules was mainly due to several key factors such as legal science movements, colonization and various key legislations, especially those codifications of early 1910s.⁶ Moreover, this system of law has been developed more than a thousand years; inevitably it has gone through various changes respectively in terms of content and substance.⁷

Throughout time, Civil law also had a great role in the Muslim world's legal systems through its introduction by Abd al Razzaq al-Sanhuri⁸ which led to the promulgation of a new Civil Code in 1948 in Egypt a Code which has been largely adopted in both Syria and Libya.⁹

1.2 THE SOURCES AND NATURE OF ISLAMIC LAW

Islamic legal system has been extracted from two primary sources i.e. *Quran* and *Sunnah* as the narration of prophet (peace be upon him) (*hadith*).¹⁰ In addition, *Ijma*¹¹ and *Qiyas*¹² are the secondary sources of *Shariah* as to form four basic classical theories of Islamic jurisprudence (*Usul al Fiqh*) and the sources of Islamic law. Throughout the Islamic history, jurists of different localities sat together to form schools of law, while yet other schools came out from among the students of some outstanding scholars. In early days, any well qualified jurists were regarded to have the faculty of *Ijtihad*¹³ where they needed to exercise it cautiously in deriving the necessary rules from the primary and secondary sources of Islamic law.¹⁴

From time to time, the conditions for exercising *Ijtihad* had become less flexible, and it was not that long where the faculty of *Ijtihad* reached to the stage of stagnation (this was also because the number of people who had broad knowledge of Islam were deteriorating). It ultimately reached to the point where the vast majority of people resulted in accepting one school of thought *Mazhab* and its leading jurists as authoritative and reliable to be followed *Taqlid*. Even though, alternative forms of opinions were still being included in the manuals of all schools of thought; however, gradually a dominant or more reliable opinion came to assert itself on the masses of the public.¹⁵

These diverse interpretations of Muslim jurists by exercising their faculty of *Ijtihad* with considerations to primary and secondary sources of *Shariah* as well as considering localities, cultures and practices of the people led to the existence of diversity in *Shariah* law (divine law). Among the Muslim Sunnis, four prominent schools of law emerged and survived namely, Hanafis, Malikis, Shafies and Hanbalis; at the same time there are also many other schools of thought, and many of variant opinions. In the early 140 A.H., suggestions were given to Caliph to resolve

⁴ Ibid.

⁵ Giotto, "Emperor Justinian and the Byzantine Empire," n.d.

⁶ Peter De Cruz, *Comparative Law in a Changing World* (Routledge, 1999).

⁷ Ibid.

⁸ Egyptian jurist and legal scholar. French- and Egyptian-educated, al-Sanhuri proposed modernizing Islamic law based on the historical, social, and legal experience of the respective countries. He was involved in the construction of the civil codes of Iraq and Egypt. Legacy also lies in his extensive works on Islamic law. <http://www.oxfordislamicstudies.com/article/opr/t125/e2094>

⁹ Ibid.

¹⁰ Dr Khaled Abou El Fadl, "The Nature of Law and Morality: Plain Islam," n.d.

¹¹ *Ijma'* means consensus, that is, acceptance of a matter by a specified group of *Fuqaha*. The matter on which *ijma'* is of interest in Islamic jurisprudence (*fiqh*) is comprehended in one of the two following ways:

1. Any matter related to Shari'ah⁽¹⁾
2. Any matter (of interest to Muslims)⁽²⁾

There different types of *Ijma* which are namely Explicit (*ijma' azima* or *ijma' qawli*), Silent (*ijma' rukhsat* or *ijma' sakuti*), Unknown opposition (*'adam al-ilm bi al-mukhalif*), Absolute (*ijma' qat'i*). <http://www.islamicperspectives.com/meaningofijma.htm>

¹² *Qiyas* in Islamic law is "analogical reasoning as applied to the deduction of juridical principles from the Qur'an and the Sunnah (the normative practice of the community)." With the Qur'an, the Sunnah, and *ijma'* (scholarly consensus), it constitutes the four sources of Islamic jurisprudence (*usul al-fiqh*).

<http://global.britannica.com/topic/qiyas>

¹³ **Ijtihad**, (Arabic: "effort") in Islamic law is "the independent or original interpretation of problems not precisely covered by the Qur'an, Hadith (traditions concerning the Prophet's life and utterances), and *ijma'* (scholarly consensus). In the early Muslim community every adequately qualified jurist had the right to exercise such original thinking, mainly *ra'y* (personal judgment) and *qiyas* (analogical reasoning), and those who did so were termed *mujtahids*." <http://global.britannica.com/topic/ijtihad>

¹⁴ J N D Anderson, "Codification in the Muslim World: Some Reflections," *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht/The Rabel Journal of Comparative and International Private Law*, 1966, 241-53.

¹⁵ Ibid

these differences and come up with an authoritative list of rules but were strongly opposed by Malik Ibn Anas as the founder of Maliki school of thought.¹⁶

Therefore, Islamic law must not only be regarded as divine law but also jurist's law as it is not only based on revelation (*Wahai*) but also on the scholarly opinions and writings of the great Muslim Scholars. However, the influence of Roman law on *Shariah* law is imminent too but it must also be pointed out that *Shariah* law is not entirely jurists or man-made law. First of all, jurists base their interpretations of *Shariah* rulings on recognised sources of *Shariah* and secondly, *Shariah* law lacks the doctrine of stare decisis. When *Amir al Muminin Khalifah Umar*, the second Caliph, was informed that he ruled a case to a certain extent in different manner from his previous decision which almost contained similar facts, he said that it is better to return to the right path than to be persistence in an error. However, this is not to state that *Shariah* courts do not entirely tend to follow a line of previous decisions in practice.¹⁷

Consequently, any codifications of Islamic law or any enactments by the state authorities could not be found, until very recently. These diversities in interpretations of law came to be regarded as a mercy from Allah s.w.t.¹⁸ this was mainly due to the fact that Muslim jurists were afraid that codification will result in the closure of *Ijtihad's* doors and will create blind followers of *Shariah* without applying their own cognitive reasoning.

1.3 CODIFICATION OF LAW IN MUSLIM WORLDS AND EARLY EFFORTS OF CODIFICATION

Codification of Islamic law is the process by which the various legal rulings of the *Sharah (al-ahkam al-Sharah)* of a specific subject matter (as such as property, torts, family law, etc.) that are collected and restated in a clear and concise manner. It is to form a legal code that has full effect within the range of political jurisdictions.¹⁹

In pre-modern Islamic codification, the early attempts were made to codify popular and sound opinions of different schools of thought (*mazhab*) by making them more easily accessible. Varieties of books were codified ranging from *ikhtilaf al-fuqah* by Ibn al-Mundhir (d. 931), to comparative collection of legal rulings such as *Bidayat al-mujtahid* of Ibn Rushd (d. 1198), and to state sponsored legal references such as the seventeenth century Moghul *Fatw lamgryah*. In fact, these efforts were referred to as legal solidifications rather than legal codifications. These were later outgrown by the colonial enterprise (India and the Malay world) as well as the movement for modernisation and reformation of legal systems (Ottoman Empire and Africa). In addition, codification process of Islamic law began in the beginning of nineteenth century and continued throughout the middle of twentieth century. At this time, the majority of Muslim nations completed their legal codification processes and unified their judicial systems.²⁰

One of the early attempts to codify Islamic law was made by Ibn al-Muqaffa (d.759), the great scholar and the advisor of *khalafah* Abbasid. By knowing that the vast diversity of opinions on law and system of principles among the Muslims will lead to civil conflicts, Ibn al-Muqaffa submitted a letter to Abbasid caliph, al-Manr (r. 754-775) recommending that he must choose one sound position from the plurality of opinions in one issue and make it a persuasive uniform vision of the *Sharah*. In addition, there were other efforts to uniform Islamic law, an effort that intended to provide works that had included sound opinions of a given school on a given subject, such as *Fatwa lamgryah*.²¹

By the end of 17th century after the occupation of India, under the leadership of Governor General Warren Hastings, the first experiment with formal codification of Islamic law took place. Rather than replacing local laws with British laws, the British occupant's administration slowly developed a hybrid legal system. These attempts were made to have an easier access to Islamic law thus they made a series of English translations of key Ahnaf texts. *Al-Marghns Hidyah* was translated by Charles Hamilton in 1791, and in 1792 there was a translation of *al-Sirjiyya* in inheritance law by Jones. Later on, Neil Baille supplemented these early translations with his *A Digest of Moohummuddan Law* (sic) by 1865 which was a picked translation of other parts of *Fatw lamgryah*. Consequently, these translations provided the surface for what has to become later on the Anglo-Muhammadan Laws. It was a complete code of Ahnaf School of law combined with British laws with the intention of making the latter more prominent than the former.²²

Moreover, there was another attempt in the codification of *Shariah* which took place under the Dutch in Java, Indonesia. Same as India, Javanese society was ambiguous about this mainly because local customs and

¹⁶ Ibid

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Elgawhary, Tarek A. "Codification of Law." "Citation for Codification of Law Codification of Law | Tarek Elgawhary - Academia.edu," n.d.http://www.academia.edu/5009956/Citation_for_Codification_of_Law_Codification_of_Law , visited on 11/06/2015

²⁰ Ibid.

²¹ Ibid., 2.

²² "Citation for Codification of Law Codification of Law | Tarek Elgawhary - Academia.edu."

traditions (*Adat*) existed side by side of Islamic law. However, the Dutch, unlike the British, had no interest in a hybrid system or in codification of local laws. Their main intention initially was to create a codification that suited to govern Dutch settlers and subsequently native people. As a result, by 1848 the Dutch had issued codes that governed civil procedures (*Burgelijk*) as well as criminal procedures (*Strafvordering*). However, the penal code governing locals came later in 1873 which was very similar to the Dutch national penal code. Same as British in India, the Dutch colonial officials had control of the local *Shariah* and *Adat (local custom)* courts, which gave the final authority to Dutch judges in accordance to Dutch law.²³

Further codifications started in the Ottoman *Khilafah* starting with legal reforms in the early 1830s. By 1840, there was a codification of penal code founded on Ahnaf law. Their code of commerce was originated from European codes which came into effect in 1850. However, the most famous of all the Ottoman codifications was the *Mecelle Ahkam Adliya* issued between 1870 and 1877 which contained 1,851 articles regarding commercial transactions and court procedures (but not covering family or criminal law) based on *Ahnaf* School.²⁴

Mecelle historically was presented by a committee of Muslim legal experts led by Ahmet Cevdet Pasha with the objective of making *Shariah* more accessible to courts and to remove any claim that the Ottomans were using European codes rather than Islamic law. Therefore, it was the first attempt by the Ottoman *Khilafah* to codify Islamic law. Its significance went through beyond the Ottoman heartland of the Balkans and Anatolia. These new codes were introduced to *Nimiyye* (national courts) as a result of the *Tanzimat* reformations to post 1839. Egypt as well as a major centre for legal reformations throughout this period. Just like many other areas which were under colonial rule and influences, Egyptian legal system was plural and not unified, including a mixed arrangement of natives and colonial legal jurisdictions.²⁵

To sum up, there were numerous efforts of codification. In the meantime, attempts were made to produce a national code which was planned to be administered by national court system, as well as the area of personal status law (*al-ahwal al-shakhiah*) to be administrated by the *Shariah* courts. In 1866, Rifah al-ahw, a highly-educated al-Azhar scholar and a reformist translated and published the French Civil Code and French Trade Law. In 1870, Khedive Ismail requested various *ulama* to share their thoughts on the practicality of codifying Islamic law and adopting aspects of French law. Al-ahw who was a minister of justice along with Qadir Pasha, took an interest in codification and ultimately provided three works of codified Islamic laws namely as *al-Ahkam al-Shariyah fil-ahwal al-shakhiah* (a collection of Ahnaf rulings which is related to personal law status) published back in 1880, *Murshid al-hayran ill ma'rifat abwal al-insah* (a collection of Ahnaf rulings regarding to trade law) published in 1890, and *Qanun al-adl wa al-insaf lil-qada' 'ala mushkilat al-awqaf* (a work seeking to codify rulings on religious Waqaf and donations) that has been published in 1894.²⁶

In 1876, Mixed Courts were founded in Egypt to provide rulings to non-native people and it was asserted to be an enhancement of egregious Ottoman capitulations that Egypt had inherited. Based on that, a diverse European code was drafted to govern above mentioned courts; however those codes were mostly influenced by French codes. The importance of the Mixed Court Codes can be noticed when it majorly influenced the drafting of Egypt's civil code in the late 18th century. Moreover, Egypt has followed suit with restructuring *Shariah* courts from a procedural perspective in 1857. By the year 1880, there was an order that the *Shariah* courts should follow the most agreed opinions of the Ahnaf School (*arja aqwal al-anafiyah*). Consequently, the motion was set on the formation of a committee with regards to Personal Status Law with the purpose of creating a codification of these opinions. The committee was a mixture of secular trained lawyers, a profession that became popular in the late nineteenth century. The established code was modified later on with specific laws throughout the early decades of the 19th century.²⁷

Under the Ottoman *Khilafah*, the personal status laws were codified under the basis of Ottoman Law of Family Rights in 1917. Despite that fact, Turkey officially stopped implementing Islamic law in 1926; the 1917 code was adopted in the formerly Ottoman *Khilafah*. Unlike earlier Ottoman *Khilafah*'s efforts at codification with the exception to *Mecelle*, the Law of Family Rights was completely *Shariah* compliant.²⁸

1.4 THE EFFECTS OF THE CODIFICATION MOVEMENT ON SHARI'AH

With regard to the effects of codification, Ebrahim Mossa asserts that law does not solely reflect the ideology of a country but its culture and overall situation as well. One simply cannot deny that it is not always the case. There are many instances where the law is not always reflective of the society's ideology. For example, Islamic law is not law

²³ Ibid., 3.

²⁴ "Citation for Codification of Law Codification of Law | Tarek Elgawhary - Academia.edu."

²⁵ Ibid., 3.

²⁶ "Citation for Codification of Law Codification of Law | Tarek Elgawhary - Academia.edu."

²⁷ Ibid.

²⁸ ibid

of the land in Turkey, Tunisia and Malaysia notwithstanding that it has Muslim majority population. Colonial powers imposed their laws on their colonies by abolishing and ignoring their existent laws of the lands. As a result, there are ongoing efforts by their democratic governments and civil societies to adjust the laws with the needs and ideologies of their societies.

Alongside imposing economic, military and political influence over their colonies, these colonial powers also relied on a complex system of cultural ideology to impose their legal and cultural systems into their occupied colonies.²⁹

Foucault states that “Law is not merely rules and principles; it is continuously growing as the exercise of power and the insistence of knowledge, in which it can shape the hearts and minds of the people”.³⁰ Colonisation of the Middle East by the European countries firmly upholds the Foucault’s Theory. Western states justified the occupation of their colonies on the basis of protecting these people from their own retrogression and retarded cultures.³¹ Lord Cromer on the colonisation of Egypt asserted that the main objective of Britain was to protect Egypt.³²

Legal discussions show the impact of colonial power’s imposition of their legal systems on their colonies. Fascinatingly, states were trying to get their independence from colonial powers without realizing the extent of their capture in legal and political systems which inherited from their colonial powers.³³

Therefore, colonial powers used the idea of unproven orientalist about the inefficiency of the Muslim legal systems, and championed the idea of adopting western legal system as the key to development and progression. Mitchell believes that through colonisation of Arab states, it made Middle East countries not only filled with their products but also became the exhibition of European institutions and beliefs.³⁴ Although the process of legal reforms transformed Middle East to modern states, however, it is also succeeded to pass “an un-appealable verdict on the whole history and the legal culture of those states”.³⁵ In addition, Lord Cromer stated that “people of Egypt need to be convinced or pushed into prohibiting the true aspiration of the western civilization”.³⁶ Looking at colonial legal discussion, it approves the idea that legal discussion is another way of controlling and ruling people. It goes without saying that legal discourse had shaped their ideologies, subjectivities and their way of thinking systematically affecting their mind-sets and worldview.³⁷

Furthermore, they achieved their goals by having privileged access to discourse and communication.³⁸ This reflects that colonial powers engaged all means aside from using political and economic measures to control their colonies, and utilised the legal discourse to successfully influence their norms, values and ideologies as well as their territories.³⁹

Unquestionably, controlling knowledge through education and media can affect not only the understanding of ordinary people but their behaviours and way of thinking as well. Therefore, these legal discussions did automatically affect the societies’ principles, values, morality as well as justice, says Foucault.⁴⁰ Hence, the legal discussion has been used by colonial powers as a tool and soft power to respectively impose their ideologies on their colonies, be it economic, political or social.⁴¹

In this regards, there were persistent claims by the colonial states that legal imposition had a significant role on the development and formation of law in those colonies.⁴² In addition, after 1910 onwards, there were massive legal reformations by Arab states inclined with western legal systems.⁴³ Moreover, they successfully planted the idea into the Ottoman *khilafa* that progression and development could only happen by way of codifying their legal systems in line with western models.

²⁹ Imtiyaz Yusuf, “Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates,” *Journal of International and Global Studies* 1, no. 2 (2010): 193–95.

³⁰ Beck Anthony, “Foucault and Law: The Collapse of Laws Empire,” 1996.

³¹ Yusuf, “Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates.”

³² Ibid.

³³ Anthony, “Foucault and Law: The Collapse of Laws Empire.”)

³⁴ Yusuf, “Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates.”

³⁵ Ali Iyad Yakub, “Islamic Roots of Democracy, The,” *U. Miami Int’l & Comp. L. Rev.* 12 (2004): 269.

³⁶ Ibid.

³⁷ Michael Karlberg, “The Power of Discourse and the Discourse of Power: Pursuing Peace through Discourse Intervention,” *International Journal of Peace Studies*, 2005, 1–25.

³⁸ Teun A Van Dijk, “Principles of Critical Discourse Analysis,” *Discourse & Society* 4, no. 2 (1993): 249–83.

³⁹ Ibid.

⁴⁰ Stuart Hall, “Foucault: Power, Knowledge and Discourse,” *Discourse Theory and Practice: A Reader* 72 (2001): 81.

⁴¹ Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law Is Illegal* (John Wiley & Sons, 2008).

⁴² Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer Science & Business Media, 2007).

⁴³ Clark B Lombardi and Nathan J Brown, “Do Constitutions Requiring Adherence to Sharia Threaten Human Rights?: How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law,” *American University International Law Review* 21 (2006): 379–435.

From that period onwards, the idea of development and progress in a Eurocentric manner had a strong role on the mind of the Arab states and their people⁴⁴. The colonial discourse easily could succeed to consciously or unconsciously instil that development is only achievable by way of reformation and following the western legal system.

As a result, codification which was clearly the re-election of western legal system took place at the expense of Muslim legal system and its values and norms.⁴⁵ In addition, in consequence of the process of codification and occupation by western colonial power, it led to nothing but isolation of Islamic law. This was due to the fact that colonial powers perceived Islamic law as a threat to their interests.⁴⁶

The outcome of legal reformation resulted in detachment of Islamic law from people's life and prevention of its application in its original form. Court's systems and procedures were re-structured and instead of *Qadis* handling cases, it was substituted by a complex codified system which was in the hand of officials of the state.⁴⁷ Furthermore, the codification had minimised the powers of *Qadis* as they could not give full consideration on a case to case basis, rather they had to follow binding codified codes.⁴⁸

It is not so surprising that the process of the codification of Islamic law led to the appearance of judges who were well-versed in the western system of law whereas they had minimum knowledge and understanding of *Shariah* law and values of Muslim community.

These judges were influenced by choosing western model of legal system over *Shariah* as they perceived it as a necessity tool for progression and development. Unlike *Qadis*, they were ill-informed about Islamic law and how to maintain social unity and harmony in a society with Muslim majority population. As a result, by introducing legal codification, new classes of judges emerged who lacked expertise in *Shariah* and faced difficulties in handling cases concerning *Shariah*.⁴⁹

Sonbol states that the practice in *khilafah Osmania* courts was that the *shariah* judges were proactive in inspecting cases dealt with personal status of litigating parties such as being husband, wife, and widow, male or female.⁵⁰ It would affect the decision of *Qadis* to reach to a thoughtful decision in a litigation process by considering every aspect of cases without being gender bias by looking at all circumstances of each case.⁵¹

However, the judges were western educated and in some places they were following codes that were shaped by the code of Napoleon that believed in male's superiority over female.⁵² Code of Napoleon emphasised on the superiority of husband over his wife as the most capable person who can manage the affairs of the family, therefore all the rights and privileges have to be in his favour and entitlement.⁵³ Napoleon Code based a discourse that favoured men's supremacy over women, basically spreading the culture of male dominance over women constructing gender inequality in the society.⁵⁴

As a result of this codification which was based on the practice of taking and combining elements from many different systems brought various contradictions from different doctrines into one legal system.⁵⁵ Many of these elements were inconsistent with *Shariah* principles. Muslim judges in Ottoman *Khilafah* were in liberty to refer to other schools of thought to reach to a decision whereas the current judges were confined and bound to refer to codes which were available to them.⁵⁶

Lack of judge's proactivity in deciding cases made them incapable of reaching to sound and fair decisions unlike *Qadis* in an uncoded law,⁵⁷ and judges with minimum understanding of *Shariah*.⁵⁸ Furthermore, Islamic intuitions were ideologically colonised by being controlled and monitored by dictatorial and puppet governments

⁴⁴ Ugo Mattei, "Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi, The," *Md. L. Rev.* 64 (2005): 220.

⁴⁵ Lombardi and Brown, "Do Constitutions Requiring Adherence to Sharia Threaten Human Rights?: How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law."

⁴⁶ Anver M Emon, *Islamic Natural Law Theories* (Oxford University Press, 2010).

⁴⁷ Yusuf, "Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates."

⁴⁸ *Ibid.*

⁴⁹ Amira El-Azhary Sonbol, "The Genesis of Family Law: How Shari'ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes," *WANTED*, 2009, 179.

⁵⁰ Barbara Freyer and Zeinab Abul-Magd, "Tahlil Marriage in Shari'a, Legal Codes, and The Contemporary Fatwa Literature," *Islamic Law and the Challenges of Modernity*, 2004, 161.

⁵¹ Aharon Layish, "The Transformation of the Shar' {a from Jurists' Law to Statutory Law in the Contemporary Muslim World" in," *Die Welt Des Islams* 44 (2004): 85-112.

⁵² Yusuf, "Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates."

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Layish, "The Transformation of the Shar' {a from Jurists' Law to Statutory Law in the Contemporary Muslim World" in."

⁵⁶ Yusuf, "Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates."

⁵⁷ Khaled Abou El Fadl, "Islam and the Challenge of Democratic Commitment," *Fordham Int'l LJ* 27 (2003): 4.

⁵⁸ Yusuf, "Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates."

that even after colonisation era, there were no apparent steps of de-codification of western laws and proceed with re-Islamisation.⁵⁹ Consequently, states took control of law enforcement from Muslim legal experts and conferred it to judges who were western trained individuals.⁶⁰

1.5 STATUS OF *SHARIAH* IN THE MUSLIM WORLD TODAY

As a result of codifications and its imposition through colonisation, *Fuqaha* were side-lined and were excluded to have decision making and legislative powers. Even if they had any say in it, it was very insignificant. The situation was deteriorated by the emergence of educated lawyers and presiding judges with limited knowledge of *Shariah* yet deciding *Shariah* cases.⁶¹

From the beginning of 19th century, many of Muslim Arab systems were influenced by the European legal system by embracing the European and continental Europe notions of law. However, Muslim legal systems though still had a position to stand and a say in most of those nations. However, the above position varies from one to another and can be classified in four in those legal systems.⁶²

The first example of which *Shariah* has been taken away is Turkey. However the *Shariah* still has a role in Turkey but in an unofficial degree, people still use *Shariah* in their infra judicial reconciliation.⁶³ This happened due to series of incidents such as Ottoman empire's loss of world war I and coming into power of Mustafa Kemal Atatürk as the leader of Turkey. He abruptly started the process of secularisation, abolished Islamic law and prohibited any religious based political party.

However, majority of legal systems have been influenced but with exceptions of certain areas such as law of inheritance, *Waqaf*⁶⁴ and of family law. Nearly all the laws have been systematically arranged and codified where *Shariah* in unsystematic manner is only applicable to personal matters. In some countries, states have presented articles with regards to Islam in their constitution to draw the attention that Islam is the main source of law. This is only done mainly because of silencing the opposition and insinuating that these provisions are not symbolic per se.⁶⁵ The last example is countries that went through process of re-Islamisation. This is mainly due to the fact that Islamist governments had taken over the power. Therefore, by re-emergence of Islamist governments, they have introduced the codification of Islamic laws in several areas, as such as the area of criminal law. States such as Iran, Sudan, Libya, and various North African countries, like state of Nigeria and Pakistan are examples of these countries.⁶⁶ Gambia is the latest example as announced itself as a fully-fledged Islamic country.

Currently, application of *Shariah* is only feasible through legislation rather than referring to the classical books of *Fiqh*, which the latter leads to diverse interpretation of *Shariah* and becomes part of complex national legal system. State have attempted through codifications to make various reformations in Islamic law and take control over it, such as the area of family law and law of inheritance. These reformations by the governments were in a bid to get rid of "so-called" socially undesirable interpretations. States like Tunisia made unprecedented reformations like prohibition of polygamous marriage as well as prohibition of extra judicial divorce where the legislators tried their best to indicate that these reformations were still in line with the scope of *Shariah* law (it must be pointed out that these were under the influence of its colonial power).⁶⁷

Moreover, *Shariah*'s position over law of succession, family law and women rights as personal matters did not remain intact and was modified as desired or deemed proper. In the area of family law, liberalised provisions took over the classical traditional Islamic law; the justifications were to liberalise women specifically in the area marriage and divorce. Examples of such legislations are Marriage legislations in Pakistan (1961), Indonesia (1974), Egypt (2000), and Morocco (2004).⁶⁸

Exceptions are countries like Afghanistan, Sudan, Saudi and Iran where polygamous marriages are allowed under the law. Countries such as Turkey and Tunisia has been entirely banned.⁶⁹ In this paper, author does not intend

⁵⁹ El Fadl, "Islam and the Challenge of Democratic Commitment."

⁶⁰ Ibid.

⁶¹ IRudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified," *Mediterranean Politics* 7, no. 3 (2002): 82-95.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ *Waqf* in Islamic law means "the settlement in perpetuity of the usufruct of any property for the benefit of individuals or for a religious or charitable purpose. It may simply be defined as tying up a specific thing in a way that the owner's proprietary title in it may subsist and the profits thereof may go to charitable purposes. Waqf is usually referred to as endowment." A. F. Ahmed I. O. Oloyede, "Islamic Law of Wasiyyah and Waqaf," *National Open University of Nigeria*, 2013, https://www.google.com/?gws_rd=ssl#q=Waqaf++pdf.

⁶⁵ Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified."

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Jan Michiel Otto, "Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy," 2008.

⁶⁹ Ibid.

to discuss about polygamy as it requires completely a separate discussion. Islam restricts and imposes strict conditions for those who intend to practice polygamy where meeting its conditions are close to impossible sometimes. However, courts may impose those restrictions as part of *Masalih* if deemed necessary but a complete ban of polygamy goes against the fundamentals of *Shariah*.

Therefore, currently reformations are going through in many Muslim countries after the election of democratic governments. For example, positive steps have been taken by the Islamic party of justice and development party to repeal laws that are contrary to the tenets of *Shariah*. Malaysia has tremendously strengthened the position of *Shariah* and through legislations, granted more power to *Shariah* courts.

1.6 CODIFICATION OF CRIMINAL LAW

With patterns of non-enforcement, most of Muslim countries have enacted their criminal law in modern criminal codes. However, notable exception is Saudi Arabia which has maintained *Sharia* criminal law although in 2001 enacted a new criminal law procedure. Furthermore, from 1970s onward, some countries decided to include elements of classical *Shariah* criminal law particularly *hadd* punishments⁷⁰ into their existing modern criminal law codes or relevant legislations.⁷¹

1.6.1 Hadd punishment in Saudi

Saudi is an Islamic state having the *Quran* and *Sunnah* as its main sources of law.⁷² Saudis are following the Hanbali school of thought. The judge who is presiding the court is called *Qadi* and the *Qadi* has to be well-versed and to be a scholar in Islamic fields.⁷³ In Saudi Arabia *hadd* punishments are applicable for the cases of Zina. The punishment for an adulterer and fornicators differs in Islam. The punishment for fornicator is hundred lashes while the punishment for the one who is married is stoning to death (there are differences of opinion among Muslim scholars about this punishment as they assert that this severe punishment is not stated in the Quran and the authenticity of the Hadith related to it is doubted). The requirements for proving Zina are in two ways, first if the adulterer by him/herself confesses to his/her crime by swearing four times in front of *Qadi* that he/she has committed adultery to remove any doubts of *Qadi*, or secondly if four witness can testify that they have seen all at the same time the committing of act of Zina.⁷⁴

Additionally, the punishment for those people who have been guilty of armed robberies (*Hirabah*) is execution by sentencing them to death in Saudi Arabia. In case of robbers surrender themselves to the authorities, the *hadd* punishment will be inapplicable and will be reduced accordingly to *Qisas* as of victim's rights. The punishment for the apostasy or *Riddah* in Saudi is beheading (there are also differences of opinion among Muslim scholars of death punishment for apostasy).⁷⁵

However, countries with exception to Saudi Arabia have become increasingly hesitant to carry out *hadd* punishments. Their respective courts like in Sudan, Pakistan and Nigeria rarely impose *hadd* punishments. However, in Iran and Saudi Arabia severe corporal punishments are still carrying out regularly.⁷⁶

1.6.2 State of Zamfara and Northern Nigeria

One of the most recent states who went through re-Islamisation process is the state of Zamfara in the north of Nigeria which as a result they have introduced the *Shariah* penal code in January 2000. Zamfara is a Muslim majority state situated in the northern part of the Nigeria and has already established the *Shariah* courts.⁷⁷

The Zamfara model of re-Islamisation has been followed by other states such as Niger through implementation of the complete Islamic legal system followed by the states of Kistana and Sokoto. The implementation of *hadd* punishment introduced and had been implemented in those states, (in a case of crime of robbery which the sentence is amputation of right hand had been carried out) even though the *Shariah* penal code

⁷⁰ In Islamic criminal jurisprudence, criminal offences are divided into three categories. Firstly *Hudud* and it covers "crimes that are against God whose punishment is clearly stipulated in the *Quran* and the *Sunna*". Secondly *Qisas*, and it refers to offences that are "physical assault and murder that are punishable through retaliation". In these cases, the surviving heirs or the victims are granted with the right to whether waive the punishment or demand compensation (blood money or *diyya*) or may decide to pardon the offender. Thirdly are *Ta'zir* punishment that are not stipulated in the *Quran* or *Sunna*, and judges have the discretionary power to impose it. Etim E Okon, "Hudud Punishments in Islamic Criminal Law," *European Scientific Journal* 10, no. 14 (2014).

⁷¹ Otto, "Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy."

⁷² Elizabeth Peiffer, "Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria, The," *Wm. & Mary J. Women & L.* 11 (2004): 507..

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Ruud Peters and Maarten Barends, "Islamic Criminal Law in Nigeria," 2003.

was yet to come into force. The courts are obliged to follow *Quran* and *Sunnah* and they are following the Maliki school of thought. In addition, by 2002, other twelve northern states of Nigeria have commenced the implementation of *Hudud* by the establishment of *Shariah* courts that deal with criminal matters through enacting the *Shariah* penal code. The above-mentioned states have followed the Zamfara's penal code with insignificant changes. For instance, the state of Kano has introduced an independent *Shariah* penal code and the state of Niger has introduced *Shariah* criminal law by including some amendments to the 1959 penal code.⁷⁸

Furthermore, Iran in 2002 formally proclaimed a moratorium on the application of the punishment of stoning for *hadd* cases, and in 2003, a comparable decision was made with regards to *hadd* amputations. Under Ahmedinejad's administration, cases of amputation for theft and stoning for Zina have been recorded. In Pakistan, *Shariah* principle of retribution (retaliation) has a very strong root in its customary law and has been re-imposed in criminal law from 1990 onwards and still being utilised.⁷⁹

1.6.3 Afghanistan

In Afghanistan under penal code 1972, provisions for crimes which are punishable with *hadd* punishment were included. The courts in Afghanistan are based on the Islamic principles and they follow the Hanafi *Madzhab*.⁸⁰ The *hadd* punishments are applicable in cases of Apostasy, Adultery (for the married couple) but stringent conditions were applicable for the application of *hadd* for adultery which are by two ways, either by confession of the party or by producing fourth witness who had seen the commission of crime at the same time.⁸¹

Hadd punishment is applicable in cases of aggravated murder when the stipulated standards are have been met and if not so, *ta'zir* punishment will be imposed.⁸² Under the law, the execution for *Hadd* and *Qisas* punishment had to be carried out by way of hanging and since 2008 until now, 16 people were sentenced to death by way of hanging.⁸³

Therefore, as a consequence of these arrangements in laws in the Muslim world through codification, it can be said that there are hardly any Muslim states who are left without codifying their *Shariah* laws. However, Saudi and Egypt are exception to this when it comes to status of personal matters. This signifies the fact that states have utilised their powers and influences to decide what norms and values are to be legislated and to be included in their national legal systems. As a result, *Shariah* has become part of national politics rather than to be under the supervision of *Ulama* and this is why laws in codified forms are different from one state to another. Some might say that *Ulama* still have a role in the legislations of the laws but their role is remote and minimum. However, the *Fiqh* in its classical forms still exists but it has been blocked by state's legislations.⁸⁴ On the other hand, the codification had minimised the powers of *Qadis* as they could not give consideration in a case to case basis rather had to follow a stringent and binding codified codes.⁸⁵

Unsurprisingly, the process of codification of Islamic law led to appearance of judges who were well-versed in the western system of law with minimum knowledge and understanding of *Shariah* law and the values in Muslim communities. These judges, had inclinations towards western legal system as they perceived it essential for progression and development and viewed Islamic law outdated and harsh.⁸⁶

Consequently, as a result of the vast codifications of Islamic law in Muslim states, some scholars raised the question whether these legislations can be regarded Islamic. However, some claims that these allegations are made in a bid to infer that the process of re-Islamisation which have taken place in some Muslim states are in fact were not the re-introduction of Muslim legal system.⁸⁷

1.8 DISCUSSION AND CONCLUSION

The major problem with the codifications of *Shariah* law in Islamic states are the issues associated with colonisation. Throughout history, colonial powers utilised their economic and military power to influence and instil their legal systems into their colonies without any consideration to their cultures, faiths and their existent legal systems.

⁷⁸Ibid.

⁷⁹ Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified."

⁸⁰"The Death Penalty in Afghanistan," n.d.

⁸¹Ibid.

⁸²Ibid.

⁸³Ibid.

⁸⁴Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified."

⁸⁵Yusuf, "Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Eds.). Islam and Modernity Key Issues and Debates."

⁸⁶Sonbol, "The Genesis of Family Law: How Shari'ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes."

⁸⁷Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified."

For instance in Malaysia (which was called then Malaya Peninsula), after the British colonisation, the position of Islam was degraded to only personal matters and common law became the dominant law. Since independence in Malaysia, there has been coexistence of justice system where *Shariah* courts deal with the matters related to Islam and applicable to people who profess the religion of Islam whereas civil courts deal with civil and criminal matters. However even with that, the relationship between Civil and *Shariah* courts have not been an amicable one. Prior to 1988, the decision of *Shariah* courts were regularly reviewed by civil courts by *certiorari* and overturned.⁸⁸

In *Shaik Abdul Latif & Ors. V Shaik Elias Bux*,⁸⁹ it was stated by Edward CJ that “before the first treaties the population of the states consisted almost solely of Mohamedan Malays with a large industrial and mining community in their midst. The only law at the time applicable to the Malays was Mohamedan modified by local custom.” In *Ramah v. Laton*⁹⁰ Thorn J. illustrated that: “Muslim law is not foreign law but local law; it is the law of the land, and the local law is a matter of which the court must take judicial notice. The court must propound the law.” In *Tengku Jaafar & Anor v The State of Pahang*⁹¹ the endorsement was given by the Supreme Court that before coming of Torrens system, Islamic law was the applicable law with relation to the land matters in Pahang.⁹² Regardless, the colonial power subjugated Islamic law as the law of the land to common law with regards for the existent status quo at that time.

Indonesia as the largest Muslim-majority country in the world was not immune from the legal imposition of colonial power. Dutch colonisation of Indonesia resulted in its transformation from an Islamic to a secular state. The word Islam is not mentioned in its constitution, however, Islamic law does apply to Muslims such as Islamic banking, family law and inheritance. Therefore, Islamic law has a very limited scope of application.⁹³ It was stated by Tim Lindsey in her presentation mentioned that:

“*Shariah* in the Indonesian system of courts for Muslims is thus largely symbolic, at least as a formal source of law. With the exception of Aceh (where its jurisdiction as the Mahkamah Syar'iyah is much wider), the Religious Courts jurisdiction is limited by statute to only few aspects Islamic legal tradition.”⁹⁴

Currently, the application of *Shariah* is only possible through legislation rather than mere reference to the classical books of *Fiqh* as these diverse interpretations of *Shariah* rulings on certain matters will become part of complex national legal system. However, *Fiqh* in classical forms still exists but in practice, it has been blocked by the state legislation from for implementation by judicial system. States through codifications have attempted to make various reformations in various sphere of Islamic law such as family and law of inheritance. Even though it is imperative to have uniformities in law, these reformations by governments was in a bid to get rid of interpretations which were in the eyes of state socially undesirable. The legislators did try their best to indicate that these reformations were still within the scope of *Shariah*. There are hardly any Islamic countries without a codified *Shariah* law with the exception of Saudi Arabia. Through these codifications, *Shariah* law is not only side-lined but subjugated to civil law. Muslim jurists barely have a say and these legislations are done by those who lack expertise in *Shariah*.

However, the codification Islamic law is imperative to bring about uniformity of law. Codification avails justice and ensures legality of principles. Indeed it promotes key aspects of legality: giving fair notice of what is prohibited, limiting unfettered discretion, increasing uniformity in application to similar cases, and reserving criminalisation authority to the more democratic legislative branch.⁹⁵

It is pertinent to refer to hybrid contract law and Islamic banking systems. Highly sophisticated and competitive global market requires uniformed and clear laws in transactions, dispute settlement mechanisms and the applicable laws to the parties. This uniformity can eventually lead to economic growth and stability. For instance, currently Indonesia is the biggest Islamic retail banking in the world but banks are less likely to refer to *Shariah* courts as stated in their dispute resolution clauses due to lack of uniformity. Islamic financial institutions do not yet have a standard contract for formulation of contracts. Subsequently, there are still lack of clarity about *Shariah* contracts whether it should be notarized or just like the insurance contract between the insurer and the insured.

⁸⁸ Myriam V. Ariff (1971) 1 MlJ 265 and Commissioner for Religious Affairs, Terengganu & Ors V. Tengku Mariam (1969) 1 MLJ 110.

⁸⁹ (1915) 1 FMSLR 204.

⁹⁰ (1927) FMSLR 128.

⁹¹ [1978] MLJ 33.

⁹² [1987] 2 MLJ 74.

⁹³ Wirnyaningsih Gemala Dewi, “The Importance of The Codification of Islamic Contract Law in Solving Banking and Financial Disputes in Indonesia,” *International Journal of Business, Economics and Law*, Vol. 5, no. 3 (Dec.) (2014): 43.

⁹⁴ *Ibid.*

⁹⁵ Paul H Robinson et al., “Codifying Shari’a: International Norms, Legality and the Freedom to Invent New Forms,” *J. Comp. L.* 2 (2007): 10–11.

Standardisation by means of codification of Islamic contract law is needed to provide uniformity of Islamic transactions and standard dispute settlement mechanism.⁹⁶

There are two different views among scholars with regards to the codification of Islamic law i.e. opponents and proponents. The formers are being led by conservative *Salafis* such as prominent Saudi scholar Bakar b. ‘Abdullāh Abū Zaīd, which believes in inapplicability of codification to Muslims. He believes in the inappropriateness of codification adoption and neither through title or content, Islamic law can be accommodated by western model. The following are the main reasons behind their objections:

- i. The fear of legal rules’ distortion by the rulers for forwarding their own interests through codes’ application.
- ii. For fourteen centuries, Islamic legal rules have been successfully implemented without any rules’ codification.
- iii. They claim that Common Law system is not codified yet has been effectively implemented.
- iv. It opposes the practice of *Ijtihād* given to *Fuqaha* by *Shariah*.⁹⁷

However, the proponents of codification of Islamic law such as Sheikh Muḥammad Abū Zahrah, Sheikh ‘Alī al-Khafīf, Sheikh Aḥmad Fahmī Abū Sunnah, Sheikh Ḥasanaīn Makhlūf, Sheikh Yosuf al-Qaraḏāwī, Sheikh Wahbat al-Zuḥaylī, Sheikh Muḥammad Zākī ‘Abdul-Barr, and Muḥammad ‘Abdul-Jawād, deem on its essentiality. ‘Abdul-Jawād and Zuḥaylī called upon Saudi Arabia for systematic codification of Islamic law. They base their arguments on following reasons:

- i. It prevents confusion and misunderstanding. They believe that in Islamic jurisprudence, there are very few rules based on sacred sources and the rest are the jurist’s *Ijtihad*. There are abundant interpretations on the same rulings and if not codified, judges will drown in the sea of these diverse opinions.
- ii. It assists in choosing the most appropriate opinion amongst many.
- iii. Many judges do not have the ability to independently deduce rulings from sources of *Shariah* and it is for the best interest of everyone if qualified scholars extract the most reliable and appropriate rulings rather than leaving it to judges.
- iv. The decisions and judgments of judges may be unified and prevent disputes as it arose in Saudi Arabia and eventually it made reference to certain books compulsory to judges.
- v. Through codification, Muslims will be able to get rid of foreign laws that infiltrated into their legal systems during the colonisation era. As a result, excellence and mastery can be achieved.⁹⁸

Therefore, it is imperative to have a unified legal codes originating its authority from *Quran* and *Sunnah*. The issue of *Ijtihad* must be taken into consideration to avoid imitation and rigidity by introducing a systematic and comprehensive model. The discussion must be led by highly qualified Muslim scholars to prevent any *Shariah* non-compliance issue and prevent the governments to utilise codification to advance their interests and agendas.

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⁹⁶ Gemala Dewi, “The Importance of The Codification of Islamic Contract Law in Solving Banking and Financial Disputes in Indonesia,” 41.

⁹⁷ Najmaldeen K. Kareem Zanki, “Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars,” *International Journal of Humanities and Social Science* Vol. 4, no. No. 9(1) (2014): 134.

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