

4-3-2018

## The Process of Codifying Fiqh Rulings and Its Legal Impacts on Amending Jordan's Family Law 36 of 2010

Orwa Nasser Al-Duwairi

*Al al-Bayt University, orwahdwairi@yahoo.com*

Follow this and additional works at: <https://digitalcommons.aaru.edu.jo/jois>



Part of the [Islamic Studies Commons](#)

---

### Recommended Citation

Al-Duwairi, Orwa Nasser (2018) "The Process of Codifying Fiqh Rulings and Its Legal Impacts on Amending Jordan's Family Law 36 of 2010," *Jordan Journal of Islamic Studies*: Vol. 14 : Iss. 2 , Article 21. Available at: <https://digitalcommons.aaru.edu.jo/jois/vol14/iss2/21>

This Article is brought to you for free and open access by Arab Journals Platform. It has been accepted for inclusion in Jordan Journal of Islamic Studies by an authorized editor. The journal is hosted on [Digital Commons](#), an Elsevier platform. For more information, please contact [rakan@aarj.edu.jo](mailto:rakan@aarj.edu.jo), [marah@aarj.edu.jo](mailto:marah@aarj.edu.jo), [u.murad@aarj.edu.jo](mailto:u.murad@aarj.edu.jo).

## The Process of Codifying Fiqh Rulings and Its Legal Impacts on Amending Jordan's Family Law 36 of 2010

Dr. Orwah Nasser Mohammad Dwairi\*

Received: 29/11/2016

Accepted: 17/9/2017

### Abstract

The present study has been designed not only to discuss the conceptual framework of the process of the Fiqh codification and its historical evaluation but also to focus on the aims and significance of the codification in modernising Islamic Fiqh – Jordan's family law as a case study -. The researcher sought to analyse the legal impacts that can be generated as a result of the process of codifying the five Fiqh rulings, *Wajib* and *Mundob*, *Haram*, *Makroh* and *Mobah* and transform them to legal clauses that can be used to regulate the issues of Muslim life. The researcher has sought to prove that the process of Fiqh codification can make a qualitative leap in the application of Islamic law in our modern life.

### ملخص

هدفت هذه الدراسة إلى مناقشة الإطار المفاهيمي لعملية تقنين الأحكام الفقهية مع الإشارة إلى تطورها التاريخي وأهميتها في إعادة إحياء تطبيق الفقه الإسلامي بما يتلاءم ومعطيات العصر الحاضر وأنظمة الدول الحديثة. كما سعت الدراسة إلى تحليل بعض الآثار القانونية الناجمة عن عملية تقنين الأحكام الفقهية الخمسة: الواجب والحرام والمندوب والمكروه والمباح إلى مواد قانونية. واتخذت الدراسة قانون الأحوال الشخصية الأردني المعدل رقم ٣٦ لعام ٢٠١٠ عينة للدراسة. وخلصت الدراسة إلى أن عملية التقنين تعد نقلة نوعية في جعل الفقه الإسلامي التقليدي متلائماً مع الأنظمة القانونية المعاصرة.

### Introduction:

The process of codifying the rulings of Islamic jurisprudence, 'Fiqh', according to modern legal criteria and judicial system has generated a considerable debate among Sharia scholars as well as political and social circles because it is an unprecedented issue in the context of Islamic law. Since the Fiqh rulings of personal status have been codified as modern legal clauses, Islamic family law has become the major part of Fiqh is still applicable as a modern law addressed the issues of marriage, divorce, inheritance, etc. Such legal process that aims to make Fiqh rulings more workable in our modern word has wide-ranging legal impacts on the main body of Fiqh structure.

In fact, the Fiqh rulings Structure can be changed under such process in terms of how five major rulings, *Wajib*, *Mandob*, *Haram*, *Makroh* and *Mobah*, can be codified as modern legal clauses to be more applicable in addressing issues of Muslim family life. Meanwhile, how Fiqh can preserve its basic legislative structure that contains religious and legal features? It has also become crucial to discuss legal impacts of such process on the structure of Fiqh rulings in terms of its legal diminutions and effectiveness in addressing the issues of Muslim life.

\* Assistant prof, Faculty of Shari'a, Al al-Bayt University.

**Significance and Aims of the Present Study:**

The main reasons behind shedding light on the codification of 'Fiqh' here are as follows:

Firstly, family law or personal status law is considered as the major part of Islamic jurisprudence, 'Fiqh', that has been codified and formulated according to modern legal criteria and through formal and contemporary process of legislation in the majority of Islamic countries<sup>(1)</sup>. As Hassan Al - Hammadi points out, codifying the rulings of personal status has highlighted the value of Islamic jurisprudence because it is the only integrated, formal and institutional codification that has been based on Sharia<sup>(2)</sup>. Thus, any initiative that aims to amend and modernise Islamic family law should take into account the process of Fiqh codification in order to understand how the rulings of classical Fiqh can be reconciled with the modern legal system and how the concept of *Halāl*, 'permissible', and *Haram*, 'forbidden', can be formulated on sound legal grounds.

Secondly, the process of codifying the rulings of personal status is the real starting point for understanding Islamic family law in terms of exploring its legal sources, comprehending its structure, organising its articles as well as formulating its legal clauses, selecting its preponderant rulings from its schools of thought and developing its application. This study, by focusing on the process of codifying the rulings of classical Fiqh of personal status, aims to play a central role in framing this modern legal technique in the context of Islamic law by discussing its meaning and objectives and analysing its legal framework in the context of classical Islamic Fiqh within its schools of thought.

Thirdly, depending on the four Islamic schools of thought<sup>(3)</sup>, namely the *Hanafi*<sup>(4)</sup>, the *Māliki*<sup>(5)</sup>, the *Shafi'i*<sup>(6)</sup> and the *Hanbali*<sup>(7)</sup> in order to formulate the amended family law in Jordan is considered as a new legal method which aims to select suitable jurisprudential rulings that meet the requirements of the modern Jordanian family. In other words, unlike codifying the previous family law which was based on the *Hanafi* school of thought, codifying the amended family law is based on four Islamic schools of thought. As the Supreme Judge justified it, the aim of relying on the aforementioned four schools in formulating the amended law is to narrow the circle of jurisprudential disagreements among these schools and choose the more appropriate juristic opinions that meet the requirements of the family and society<sup>(8)</sup>. It is worth noting that the Jordanian family law is the first Islamic law that has considered the four Islamic schools of thought as legal sources of the family law. Therefore, it seems important to give this issue a proper consideration through the discussion of the codification of Islamic rulings of the personal status.

**Research Questions:**

The present study aims to discuss a number of meaningful questions arisen here:

- 1- To extent the process of codification can make classical Fiqh more workable as modern Islamic law?
- 2- How can the rulings of classical Fiqh be reconciled with the modern legal system and how can the concept of *Halāl*, 'permissible', and *Haram*, 'forbidden', be formulated on sound legal grounds?

- 3- How can Fiqh preserve its basic legislative features under the process of codification?
- 4- What are the legal methods applied to convert the rulings of Islamic law into modern legal clauses?
- 5- What are the jurisprudential criteria applied to select proper rulings out of the four Islamic schools?
- 6- Is it legally accepted if the judge adjudicates on family lawsuits in accordance with legal clauses which have been codified according to an Islamic school of thought that may oppose his / her affiliation to one of the Islamic schools of thought?

### **Research Methods:**

This study seeks to employ the comparative method that aims to make meaningful comparison among Islamic schools of thought regarding their Usual Fiqh methods that used to deduce Fiqh ruling from their original sources. Such academic method assists to explore the major differences among these Fiqh schools in dealing with the issues of Muslim life and how Fiqh rulings can be applied to such issues on sound legal ground. Moreover, using analytical method is also beneficial in discussing the issue of codifying five Fiqh rulings and transforming them to legal clauses by analysing legal impacts that can be generated as a result of such legal process. The researcher aims also to employ historical method to investigate how the issue of Fiqh codification has been emerged in the context of Islamic law.

### **Research Plan:**

The present research has been designed as following:

#### **Firstly: The Conceptual Framework of Process of the Codification:**

- 1.1 Concepts of *Qanon*, *Fiqh* and *Sharia*.
- 1.2 The Interplay among These Concepts.
- 1.3 Concept of Fiqh Codification.

#### **Secondly: Emergence of the Idea of Codification and Key Argument about Codifying Fiqh Rulings:**

- 2.1 Emergence of the Idea of Codification.
- 2.2 Aims of Fiqh Codification.
- 2.3 Fiqh Argument regarding Codifying Fiqh Rulings.
- 2.4 Marriageable Age as an Example.

#### **Thirdly: Legal Framework of the Process of Codifying the Rulings of Fiqh:**

- 3.1 Legal Methods Employed in Codifying Fiqh Rulings.
- 3.2 Legal Impacts Emerged From the Presses of Codifying Fiqh Rulings.

**The Conceptual Framework of Process of the Codification:**

In order to avoid any confusion or ambiguity in the usage of legal technical terms in the context of the process of codifying the rulings of Islamic law, we should:

**Firstly: differentiate between four legal terms ‘Sharia, Fiqh, law or ‘Qanon’<sup>(9)</sup> and codification’ so as to find out how they work together in the legal Islamic system and the process of codification:**

**1.1 Concepts of *Qanon*, *Fiqh* and *Sharia*:**

From a classical Islamic point of view, there is no confusion in the usage of these legal technical terms because the classical jurisprudence was free from the terms ‘codification’ and ‘Law’ as they are in the modern secular world<sup>(10)</sup>. Conversely, the case is different from a contemporary Islamic standpoint because the term ‘law’<sup>(11)</sup> has entered modern Islamic literatures as a consequence of the emergence of the idea of the codification of Islamic Jurisprudence and under the influence of Western laws and terms on contemporary Muslim scholars and Islamic countries<sup>(12)</sup>. Subsequently, the term ‘Law’ has become a widespread and common term that denotes the legal quality of Islamic principles and norms that are derived from their assumed religious authority<sup>(13)</sup>.

Although it is commonplace to use the term ‘Sharia’ and the phrase ‘Islamic Law’ interchangeably, this prosaic English translation does not capture the full set of associations that the term ‘Sharia’ conjures for the believer. ‘Sharia’, properly understood, is not just a set of legal rules. To believing Muslims, it is something much deeper that is infused with moral and metaphysical purposes<sup>(14)</sup>. The Islamic Law or ‘Sharia’ itself is not regarded as Law, as in the modern secular world, which governs and covers only physical human activities. Islamic law contains secular aspects as well as religious practices<sup>(15)</sup> or spiritual aspects and characteristics of everyday life<sup>(16)</sup> which would not be considered as ‘Law’ elsewhere<sup>(17)</sup>. Mawil Izzi Dien has asserted this in saying that “Sharia is a system of Law unlike any other standard text-based legal system as understood in the West”<sup>(18)</sup>.

In the Muslim mind, the term ‘Sharia’ is the path which Allah wishes the believer to follow. It is used in the collecting Allah's commands as revealed in the Holy Qur'an and in the Sunnah or conduct of the Holy Prophet Muhammad<sup>(19)</sup> to guide individuals in their relationship with God as well as their fellow Muslims and the rest of the universe<sup>(20)</sup>. In other words, the term ‘Sharia’ denotes a set of beliefs and worships, moralities as well as the rules of transactions and actions that have been enacted by God to regulate the way Muslims live with each other and interact with their God<sup>(21)</sup>.

Conversely, *Fiqh* is the knowledge of the practical Sharia rulings which are deduced from their resources<sup>(22)</sup>. This definition points out the knowledge of precepts of the Divine Legislator in concerning human affairs. It follows that the aim of *Fiqh* is to regulate the life of the individual as a member of society and a citizen of the state<sup>(23)</sup>. Coulson demonstrated that “the goal of Muslim jurisprudence was to reach an understanding (*Fiqh*) of the Sharia. Its primary task, therefore, was to formulate the principles or sources (*usul*) from which such an understanding might be achieved”<sup>(24)</sup>.

## 1.2 The Interplay among These Concepts:

It can be perceived that the term 'Sharia' includes both the tenets of faith and 'Fiqh' as an intellectual aspect of the Sharia<sup>(25)</sup>. Whilst 'Sharia' is one comprehensive system of Law that is divine in origin, religious in essence, and moral in scope, "Fiqh" is a human product and the systematic intellectual endeavors to interpret and apply the principles of 'Sharia'. The term 'Fiqh' is, therefore, more appropriate for denoting the legal quality of Islamic principles and norms than the term 'Sharia' because the term 'Fiqh' addresses and deals only with rulings pertaining to physical and practical actions. Consequently, the process of codification is more adequate to 'Fiqh' because the major aim of codification is to convert only the rulings of physical and practical actions to legal clauses in order to form a modern law.

Based on that, it can be argued that the interplay among these four legal terms 'Sharia, Fiqh, law and codification' in the process of codification is obvious because the aim of this legal technique is to make 'Fiqh' a law<sup>(26)</sup> and Sharia rulings as modern legal clauses. In other words, the process of codification includes 'Fiqh' as the source of this process and the law as its aim.

## 1.3 Concept of Fiqh Codification:

Returning back to the discussion of the concept of codification from different perspectives, it can be pointed out that the process of codification is defined in line with two standpoints: firstly, according to the organisers of an international seminar on the Codification and Renewal of Contemporary Islamic Fiqh, the codification is the act of "collecting all legal rulings related to a given branch of law in book form or a set of books after they are classified according to subject matter. These rulings will take the form of legal articles"<sup>(27)</sup>. Thus, the process of codification consists of three major legal steps: collecting Sharia rulings, usually by subject, formulating them as legal articles and finally classifying these rulings according to subject matter. One may argue that the word 'selecting' is more suitable than 'collecting' because one of the main aims of codification is to select the preferable rulings that are more appropriate for the needs and requirements of our society, depending on the conclusive evidences.

Secondly, Saleh bin Fawzan defined the codification as "formulating the Islamic rulings as binding clauses and imposing them on the judge in order to employ them to adjudicate on lawsuits"<sup>(28)</sup>. It is worth noting that while the first definition ignored the contentious issue in the process of codification i.e., **binding the judge** to adjudicate on lawsuits in accordance with legal clauses regardless of his affiliation to any Islamic school, this definition highlighted clearly this controversial issue<sup>(29)</sup>.

Thirdly, Mahmoud Tantawi defined Fiqh codification as "a legal process carried out by a competent legislative institution in order to collect many issues under the selfsame subject after organising and numbering them as legal clauses. Codifying any issue should be addressed by only one single Fiqh opinion selected after the exclusion of the rest of the other Fiqh opinions"<sup>(30)</sup>. The researcher points out that this legal process is not intended to be elaborated in motioning Sharia evidences from the Holy Quran and Hadith. However, such process aims to make an easy access to

## The Process of Codifying fiqh ruling

---

judicial judgments regarding any issue under litigation. Tawfiq al-Shawish asserts that the process of Fiqh codification assists the Islamic world to get rid of legal duplication between Islamic Fiqh and secular law. It also contributes to the unification of the judicial culture which helps to give a prominent and independent role in the global progress in legal science and systems<sup>(31)</sup>.

### **Secondly: Emergence of the Idea of Fiqh Codification and Key Argument about Codifying Fiqh Rulings:**

#### **2.1 The Emergence of the Idea of Fiqh Codification:**

The multitude of jurisprudential opinions on the same issue and the differences among Islamic schools of thought are the main reasons behind the emergence of the idea of codification. From the beginning, there were differences of opinion resulting in the emergence of different schools of jurisprudence that ascribed their doctrines to and derived their names from famous jurists of the eighth and ninth centuries. The books on Islamic jurisprudence juxtapose different opinions on the same issues and it appears that the legitimacy of dissent is one of the essential characteristics of Fiqh. In classical legal system, each Islamic school of thought has its own interpretation and application of the Sharia that reflect its own thought. Each Islamic school used its own legal inferential tools to derive Islamic rulings from the Quranic texts and traditions of the Prophet. Each Islamic school represents an independent legal system. This led to the discrepancy in issuing different judgments on the same matter because Hanafi judges were adjudicating on lawsuits according to their schools in the same way as Maliki, Shafi and Hanbali judges did<sup>(32)</sup>.

For example, with regard to the judicial divorce, according to the Hanafi school of thought, the wife has the right to seek the judicial divorce only if her husband is impotent or has other personal defects. Thus, the husband's failure to provide maintenance, intermittent absence, continuous physical abuse and life imprisonment are not sufficient grounds for a judge to dissolve the marriage because divorce is seen as the husband's prerogative. In contrast, The Maliki school of thought gave more rights to the woman to seek the judicial divorce. For instance, the wife has the right to demand the divorce due to husband's desertion, failure to maintain her, cruelty, sexual impotence, or chronic disease. The Maliki school went even further, stating that if the differences were irreconcilable, the court may finalize the divorce without the husband's consent<sup>(33)</sup>.

The first scholar who called for collecting the rulings of classical Fiqh in one legal book according to one Islamic school of thought and regardless of judges' affiliation is Ibn al-Muqaffa<sup>(34)</sup> who was the administrator to Caliph al-Mansur. He sent a letter to the Caliph al-Mansur<sup>(35)</sup> advising him to obligate the judge to adjudicate on lawsuits according to one Islamic school and code. He justified his opinion by saying that "some judges claim to follow the Qur'an and Sunnah but, in reality, actually follow their own predilections in the name of the Quran and Sunnah"<sup>(36)</sup>. His opinion was rejected by the majority of Muslim scholars and he was accused of apostasy '*riddah*'<sup>(37)</sup>.

In the modern era, the first official initiative to codify the rulings of classical Fiqh into one legal book, known as '*the Mecelle or Majalla*', was during the Ottoman Empire which was strongly

influenced by the European legal thought which was based on secularism<sup>(38)</sup>. Muhammad Baqer Al-Sader pointed out that “the process of codification, which started haltingly in the early Ottoman empire, was established, and the debate over the place and role of the Sharia extended to all the artisans of legal literature in the contemporary period: legislators, judges and scholars”<sup>(39)</sup>. The *Mecelle* was formulated according to the Hanafi school of thought which was the official doctrine of the Ottoman Empire. The aim of this legal book was to facilitate the application of law and provide judges with an easily accessible legal book and an authoritative statement of the Islamic law in matters of contracts and obligations<sup>(40)</sup>. In addition, the Ottoman judges were obliged to follow the most authoritative opinion of the Hanafi School. The *Majalla* was widely applied throughout the Ottoman Empire, although judges were still permitted to refer to classical legal texts directly<sup>(41)</sup>.

In 1879, Muhammad Qadri Pasha, who was Minister of Justice, codified the rulings of classical Fiqh of family matters according to the Hanafi school of thought. His compilations of on family law were considered as a semi-official status in those fields of law that continued to be governed by the Sharia after the reforms of 1883, when French civil, commercial, criminal and procedural laws were adopted in Egypt. In 1917, the Ottoman Law of Family Rights was promulgated, which codified the prevailing Hanafi doctrine, but also incorporated selected rules from the dominant Sunni legal schools. The Qadri Pasha Code of 1883 codified Sharia rules of family law on the basis of the Hanafi doctrine into more than 600 provisions. Although the Ottoman Law of Family Rights was never promulgated and never acquired a binding legal force, it resulted in a concise and accessible account of the Hanafi doctrine. Hence, it became a standard manual for the judges of the Sharia courts, who no longer had to look for legal provisions in multiple and hard-to-access medieval treatises and commentaries. The code was taught widely and advocated a highly patriarchal family structure<sup>(42)</sup>.

In Jordan, the process of codifying the ruling of personal status started in 1927 when Prince Abdullah Ibn Al Hussein issued a decree to formulate the first family law according to the Hanafi school of thought. This law was known as the “Family Rights Law” and was in force until Transjordan became a kingdom in 1947. King Abdullah Ibn Al Hussein approved then a new family law which was referred to as the “Interim Family Rights Law” and was published in the official newspaper. But this law was soon altered on August 16<sup>th</sup> 1951 when a new law was approved by King Abdullah and ratified by both the Parliament and the House of Lords. This law was known as the Family Rights Law prior to being nullified by a new law that was known as the Personal Status Law in 1976 which would be applied for more than 30 years. The Law of Personal Status, as amended under No. 61 of 1976, is the law that is considered as the one that addresses women issues and protects their rights the most. This is due to the fact that the law is intended to govern the relationship and effects of marital rights and clarifies the rights of both husband and wife under the marriage contract<sup>(43)</sup>.

A new provisional law was introduced in 2001 during the parliamentary recess but it was rejected in June 2003 by a new parliament. Eventually, a new draft of the personal status law was prepared in 2010 by the Chief Islamic Justice Department. On September 26<sup>th</sup> 2010, this law was approved by parliament and has ever since become in force in lieu of the previous law<sup>(44)</sup>. The

## The Process of Codifying fiqh ruling

---

amended law of 2010 includes new clauses and amendments to the current law of 1976, which, according to the department, are in favour of women<sup>(45)</sup>.

However, the Hanafi school of thought was considered as the main source of the Jordanian family law until 2010 when the amended family law was issued and formulated according to the four Islamic schools. Thus, it can be pointed out that depending on the four Islamic schools of thought gives the process of codification the aspect of flexibility by selecting appropriate rulings that meet the needs and requirement of our societies<sup>(46)</sup>. As the Supreme Judge justified it, the aim of relying on the four schools in formulating the amended law is to narrow the circle of jurisprudential disagreements among these schools and to choose the more proper juristic opinions that meet the requirements of the family and society<sup>(47)</sup>.

For example, with regard to requesting the fiancée to return what was given to her as a present. While some Hanafi scholars allowed returning the gift if it is still in the possession of the one to whom it is given and she had not done any kind of transaction with the dowry that took it out of her possession, some Maliki scholars insisted that nothing of these gifts is to be returned to the man, even if the marriage was called off by the woman. Some of the Shafi scholars pointed out that the man may request the return of all gifts no matter what type they were. If the gifts still exist as they were, they are to be returned. If one cannot return the actual gift, one must return their value. Finally, the view of majority of the Shafi scholars is that if the proposal was ended by the party who had received the gifts, they must return the gifts. If the proposal was ended by the party giving the gifts, he has no right to request the return of the gifts<sup>(48)</sup>.

According to Article 4 of the amended law, he who revokes the engagement must hand back the gifts if still intact and not consumable or else their value at the time of purchase. If the engagement ends due to decease or an unforeseen reason, which no party has nothing to do with, that prevents the marriage, the gifts should be not returned by either<sup>(49)</sup>.

### 2.2 The Aims of Fiqh Codification:

The codification of Islamic jurisprudence “Fiqh” is not only a technical legal process of collecting Sharia rulings in certain areas, usually by subject, and formulating them as legal clauses and articles in order to form a legal Islamic code by using a numbering system<sup>(50)</sup>. It is also one of the necessary tools for the revival of Islamic law and the cornerstone of any project that aims at the application of the Sharia<sup>(51)</sup>. Therefore, the initiatives that seek to reform and modernise Islamic family law must take into account the codification of Fiqh of the family in order to develop its application in addressing family problems.

What is more, codifying the Fiqh of personal status, ‘the Islamic rulings of the family’, is one of the most important reasons that has led to the continuity of application of Islamic family law in most Muslim countries, whereas other parts of the Sharia have been replaced by secular laws, because the codification has made Fiqh of the personal status suit the contemporary judicial structure of the state and has revived the application of family law according to the modern legal system. Justus Moni pointed out that “under the influence of the secular West many Muslim states started modernising the

Islamic law in the nineteenth century both in the Middle East and in the Indian subcontinent. Sharia was considered as a 'source' and not 'the source' of their nation's law, thereby developing a modern legal system. Sharia was restricted to family law in such countries"<sup>(52)</sup>.

As Fiqh texts do not resemble legal clauses because they contain scholarly discussion, and are, therefore, open, discursive and contradictory. They are open texts in the sense that they do not offer a final solution to legal causes that are put for discussion. They are discursive and contradictory because they include conflicting opinions on the issues. Thus, the main feature of classical Fiqh is the disagreement among scholars and it is, therefore, tremendously difficult to recognise the correct opinion among the various views and apply it to the cases. Conversely, the legal clauses of law must be authoritative, clear and unequivocal because there is no room for contradictory opinions or argumentation in law and its legal classes as they must be definitive and final.

Thus, the process of codifying the rulings of Fiqh aims, in the main, to transform classical Fiqh texts into modern legal clauses and make them more applicable in terms of regulating the issues of the Muslim family according to a contemporary legal system. The transformation from a scholarly discourse that comprises different and opposing opinions into definitive and clear legal clauses is the key point in the process of codifying the rulings of classical Fiqh. According to the organizers of an international seminar under the title of *The Codification and Renewal of Contemporary Islamic Fiqh*, codification should be innovative in terms of the ordering of its chapters, the formation of its articles and the choice of its phrases, in a way that appropriately fits and suits the spirit of the current time<sup>(53)</sup>.

In addition, this legal process, 'codification', is the only way to put classical Fiqh into practice and renovate it as a modern legal system<sup>(54)</sup>. As the organisers of the aforementioned seminar asserted, "in the light of the new events, common interests, and accelerating communications, participating scholars call for the necessity of codifying Sharia (Islamic Law) in order to facilitate its application and make it practicable for human needs in every age<sup>(55)</sup>". To put it simply, the objective of the process of codification is to restructure the body of classical Fiqh in order to create a modern Islamic law based on the principles of the Sharia by transferring un-codified or classical rulings to modern and codified ones that should take the form of legal clauses. Cherif Bassiouni underlined that "nothing precludes a given state from codifying the Sharia so as to provide for more certainty of the law and clarity and consistency in its application"<sup>(56)</sup>.

Moreover, one of the major aims of codification is also to regulate the judicial process by restricting Sharia judges to adjudicate on family lawsuits according to specific legal clauses regardless of their affiliation to any Islamic schools of thought. Thus, the process of codification plays a significant role in framing differences and contradictions among these schools by selecting preponderant jurisprudential opinions depending on the strength of the evidence and meeting the needs of modern families and societies. In this case, the Sharia judge's function is to apply the law and adjudicate on family lawsuits according to codified rulings that are officially formulated in order to suit the legal and judicial system of the state.

## The Process of Codifying Fiqh ruling

---

To make a comparison, the classical legal system leaves the details of application of the law to the judge who has a great deal of discretion in adjudicating cases and selecting rules. With the process of codification, the head of state may limit the judge's discretion to apply the law and oblige him / her to adjudicate on lawsuits according to codified rulings 'legal clauses' regardless of his / her affiliation to any Islamic school. Thus, this modern legal technique, 'codification,' contributes to systematizing the juridical process by framing the Sharia judge's functions as well as eradicating the disorder in issuing Fatwa and Sharia rulings. Noah Feldman referred clearly to this aim by maintaining that: "once the law existed in codified form, however, the law itself was able to replace the scholars as the source of authority. Codification took from the scholars their all-important claim to have the final say over the content of the law and transferred that power to the state"<sup>(57)</sup>.

It is striking that the application of Islamic law, nowadays, is not applied by using the classical books of Fiqh but via legislation through the process of codification. In the field of family law, the process of codification is not only a means to ascertain state control over the law and facilitate the findings of the law for the judges but also as an instrument of reform. The rulings of family law that have been codified and are part of the national legal system are now brought under the control of the state instead of being controlled by scholars and judges.

The Fiqh codification can be contributed to addressing the turmoil in the legislative construction in our Islamic societies which has been as a consequence of three main reasons: the stalemate in the Islamic Fiqh, the European cultural, political and military invasion and internal social, political and economic conditions of Islamic countries<sup>(58)</sup>.

To conclude, the process of codification is a modern legal technique in the context of Islamic jurisprudence that aims to restructure the body of Fiqh by reformulating the classical Sharia rulings as binding legal clauses and framing the Sharia judges' functions in order to make Fiqh more appropriate for application and suitable for the modern legal system in addressing the requirements and needs of the contemporary Muslim family. Thus, the essence of the issue of codification transcends the limits of the formalities to the practical application of Islamic jurisprudence. Muhammad Kamal-ud-Deen Imam demonstrated the "the codification is not the sheer classification, numeration and abridgment. Rather, it is a science, formulation, and obligation"<sup>(59)</sup>.

### 2.3 Key Argument about Codifying Fiqh Rulings:

Ibn Taymiyyah pointed out that classical Muslim jurists differed as to whether or not a judge can be obliged to adjudicate disputes according to a particular Fiqh school. Hanafi scholars and some Maliki scholars claimed that the Muslim ruler has the legal right to oblige the judge to adjudicate according to one Islamic school of thought. Conversely, some other Maliki scholars and Shafi and Hanbali scholars claimed that it is not legally acceptable to compel the judge to adjudicate disputes according to a particular Fiqh school<sup>(60)</sup>.

In order to discuss this key point in the process of modern codification, it ought to be clear that scholars<sup>(61)</sup> who adopted the idea of codification believe that the judge has to apply the law and

adjudge lawsuits according to binding legal clauses that have been codified by selecting appropriate rulings from the four Islamic schools of thought regardless of the school he / she is affiliated to. The purpose of codification is to provide all citizens with manners and a written collection of the laws which apply to them and which judges must follow. If there is no specific legal clause for an issue within a given case, the judge shall follow the most authoritative opinion within the Hanafi School of legal thought. In other words, non-codified rulings will apply only when there are no codified rulings. On the contrary, if a legal clause exists, the judge has to apply it, even if he / she personally disagrees with it or sees the legal clauses as being not compatible with the school of thought he / she is affiliated to. What the judge can do in this respect is to raise a plea of unconstitutionality of the law<sup>(62)</sup>.

Scholars<sup>(63)</sup> who rejected the idea of codification did not accept to bind the judge to adjudicate on lawsuits according to specific legal clauses regardless of his affiliation to any Islamic school because the judge, according to the classical Islamic judiciary, was adjudicated on lawsuits according to the principles and rulings of his/her school. For example, Hanafi judges were adjudging legal cases according to their school in the same way as Maliki, Shafi'i and Hanbali judges do. As Abdullah Bassam has maintained that it is not acceptable to select a jurisprudential opinion on a particular issue from one Islamic school and obligate the judge to adjudicate on that issue according to that jurisprudential opinion because there are a number of jurisprudential opinions on that issue and the judge has the right to select the jurisprudential opinion that he believes more appropriate in addressing that legal case and compatible with his own doctrinal conviction<sup>(64)</sup>. Moreover, the process of codification conflicts with the nature of Fiqh because the judge in this case has to apply a specific legal clause even if he / she personally disagrees with it or sees the legal clauses as being incompatible with Sharia or do not suit the legal cases he / she adjudicates on.

For example, the Hanafi school of thought allows a girl who has reached the age of puberty and can manage her own affairs to marry without her guardian's consent because the Kufa<sup>(65)</sup> society, where the founder of Hanafi School of thought, Abu Hanifa, was living, allowed the girl to marry herself if she reached the age of puberty<sup>(66)</sup>. Conversely, the founder of the Maliki school of thought insists that a guardian has to conduct such a marriage because this reflects the patriarchal and more traditional outlook of the Madina<sup>(67)</sup> society, in which the male members of a tribe decided on and concluded the marriages of women. In the Shafi school of thought, the guardian's consent is required only if the girl is a virgin; few Shafi jurists, however, held that a never - married but intellectually - mature girl could marry whomever she wished, even without her guardian's consent<sup>(68)</sup>. This is a good example of how local circumstances engendered variations in the legal rulings. Referring to the need for codification in the light of changing social and economic circumstances, Justice Akbar Ali pointed out that the "Marriageable age of girls is when they attain puberty, the law of the land has fixed the marriageable age of girls at 18. While a Muslim girl can be given in marriage as soon as she attains puberty, the government authorities are bound to enforce the common law of the land. This has led to confusion among Muslims. Such contradictions have made progressive Muslims rethink the changes in age of marriage and codification of Sharia Law to bring uniformity<sup>(69)</sup>".

## The Process of Codifying Fiqh ruling

---

Moreover, one may argue that the nature of Fiqh does not comply with modern legal system because Islamic legislative system consists of five main rulings “*Al-AhkamAl-Taklifiya*”, namely, *Wajib* and *Mundob*, *Haram*, *Makroh* and *Mobah*. According to Islamic legal system, legal obligation in *Mobah*, *Mundob* and *Makroh* is not sufficiently clear to make them capable of being codified because they are characterised by giving Muslim a preference or a choice either by doing the act without obligation as *Mundob* or not doing the act as *Makroh* without obligation or the complete choice as *Mobah*. Meanwhile, the most important aspect in modern legal system is that the law must give final decision and solution that cannot take place unless within the context of obligatory aspect. Therefore, *Mobah*, *Mundob* and *Makroh* cannot be codified to be workable in modern legal system. The process of codification can also eliminate legal aspects of Islamic legislation.

Notwithstanding the fact that this disagreement among scholars and the Islamic schools of thought is acceptable and understandable<sup>(70)</sup> on the academic or theoretical side, it becomes judicially and practically problematic<sup>(71)</sup> because the judge needs to adjudicate on lawsuits according to specific legal clauses. Therefore, codifying the rulings of Fiqh according to contemporary legal criteria has become judicially necessary in order to suit the modern judicial system of the state and facilitate the judge's functions to apply the law as well as avoid the judicial complexity in the application.

The question is now: how the amended family law in Jordan, for example, codified the above case concerning guardian's consent? According to the article 6 of the amended family law, the marriage becomes a valid and legal contract with the approval of one of the parties or his / her guardian and the consent from the other party or his / her guardian at the place of the contract. The article 18 stipulated also that the judge allows, upon request, a maiden who has reached 15 years of age to get married to a qualified man in the case of the guardian preventing that being groundless<sup>(72)</sup>. It can be noted that Jordanian jurists reconciled among different jurisprudential opinions by selecting the appropriate ruling: on the one hand, the amended family law sets the guardian's consent as legal condition, but on the other hand it gives the judge the right to allow a maiden to marry if her guardian prevents her from getting married.

Therefore, the codification of Fiqh of the personal status can be defined as the new legal technique of reformulating the rulings of the classical Fiqh of family as binding legal clauses according to modern legal criteria and judicial system in order to enact a contemporary Islamic code and facilitate the judge's functions to apply the law by selecting the suitable rulings and considering the four Islamic schools of thought as major sources of the law.

## The Legal Framework of the Process of Codifying the Rulings of Fiqh:

### 1- Legal Methods Employed in Codifying Fiqh Rulings:

One of the difficulties facing the process of codification in the context of Islamic law is that Sharia includes both religion and law at the same time. While religion is based on unchangeable spiritual aspects, law is based on secular aspects that are subject to change. As Fyzee puts it, “if two

such divergent forces are made to live together, there will be a clash...it is the struggle between the sacred and the secular...two forces pulling each other constantly on the other direction”<sup>(73)</sup>.

As Islamic family law is a fully religious law based on the Sharia, the relationship that ties the spiritual and secular aspects of family rulings is inextricable and makes the process of codifying the rulings of personal status more complicated. Reiber elucidated this inextricability by stating that “each has an influence upon the other....Neither can be fully understood apart from the other”<sup>(74)</sup>.

As stated, there are major differences between the nature of Islamic rulings and modern legal clauses in terms of their objectives, classification, legal effects and applications. For example, the word *Halal*, as used by Arabs and Muslims, refers to anything that is considered permissible and lawful under Islam while *Haram* is what is forbidden and punishable according to the Islamic law. While the word *Halal* refers to permissible behaviour, speech, dress, conduct, manner and dietary, the word *Haram* refers to any forbidden behaviour, speech, dress, conduct and manner under the Islamic law<sup>(75)</sup>. For Muslims, every aspect of life is regulated by the Islamic law; therefore, the Halal-Haram dichotomy almost always applies to everything, and Muslims make sure they understand which is which since saying or doing *Halal* things / deeds will lead to Paradise and *Haram* to Hell. Within this context, the process of codification, which aims to convert the rulings of *Halal* and *Haram* as modern legal clauses in order to fit the contemporary legal system, has become complex and problematic because the representation of the Sharia emphasises its religious character and focuses on the hereafter; that is, on whether, after one's death, one can expect to be rewarded or punished for certain acts.

The questions that arise here are: what are the legal methods that should be applied to convert the Islamic rulings of the personal status into modern legal clauses? How can Muslim jurists reconcile between Islamic models and the modern legal system? Is it legally feasible to reconcile between the rulings of spiritual aspects and physical human activities in the context of the process of codification?

In order to discuss this question, it can be pointed out that the process of codification aims specifically to formulate the Islamic rulings of physical human activities and practical actions which have visibly legal effects on the individual, the family and the community in this life because they govern the relationships between humans themselves. On the contrary, the Islamic rulings of religious practices or spiritual aspects, such as the rulings of faith, prayer, fasting and pilgrimage, cannot be legally codified since they aim to regulate the relationship between God and human beings and their effects are more visible in the afterlife in terms of entailing the reward and punishment. As Muhammad Kamal-ud-Deen Imam clarified that the area of codification in the context of Islamic law is confined only to the rulings of human transactions which have legal effects on the relationship between individuals and not to the rulings of the worships which represent the relationship between God and the individual<sup>(76)</sup>.

According to the classical Islamic structure, the Islamic rulings of family, “*Al-AhkamAl-Taklifiya*” that regulate family issues, fall into five categories which are as follows: firstly, the obligatory act, ‘*Wajib*’, represents an act whose performance entails reward and whose omission entails punishment

## The Process of Codifying fiqh ruling

---

in this life and the afterlife <sup>(77)</sup>. In other words, '*Wajib*' refers to legal obligations that must be performed by each Muslim <sup>(78)</sup>. For example, according to the classical Fiqh, for a sound marriage contract to be concluded, the dowry is obligatory '*Wajib*', that is, it must be paid by the husband to the wife as part of the marriage contract. According to the Article 40 of the amended law, the stipulated dowry becomes legally payable once the marriage contract is concluded <sup>(79)</sup>.

Therefore, the obligatory act, '*Wajib*', has a strong legal aspect and effect in terms of entailing punishment or reward because performing an obligatory act results in reward, whereas neglecting it will be punished. This applies not only to purely religious obligations, but also to legal ones. This part of law falls outside the judge's competence. In the process of codification, formulating the obligatory act, '*Wajib*', as a legal clause must indicate that it is legally obligatory for someone to act in accordance with '*Wajib*' because it has a legal effect and entails punishment in the case of non-compliance. For instance, the mutual consent between the two spouses is '*Wajib*'; marriage is not deemed legally valid if any of the two is forced to accept it <sup>(80)</sup>. According to the Article 6 of the amended law, the marriage becomes valid and bound by a legal contract with the approval of one of the parties and the consent of the other party at the place where the contract is concluded <sup>(81)</sup>.

Conversely, it is noteworthy that there are a large number of rulings that cannot be codified as legal clauses because they are not legally effective in this life; rather they have a more noticeable religious aspect in the afterlife. For example, for a man who refrains from approaching a prohibited woman, *ajnabiyya*, or performing any other forbidden sexual because of sexual desire, it is obligatory '*Wajib*' for him to marry in order to protect his religion and keep himself away from debauchery and unlawful conduct <sup>(82)</sup>. Therefore, codifying the rulings of obligatory acts, '*Wajib*', that are more relevant to the Muslim's religious commitments are not legally effective because they do not have legal effects.

Secondly, the recommended or preferable act, '*Mundob*', represents an act whose performance entails a reward or commendation but whose omission does not require punishment. That is to say, '*Mundob*' refers to actions that are not required by law but are considered to be meritorious <sup>(83)</sup>. For example, it is a recommended act, '*Mundob*', to state the amount of the dowry at the time of concluding the marriage contract in order to prevent any future disputes or argumentations. The scholars have agreed that it is highly preferable to state the dowry at the time of the marriage contract but it is not a prerequisite for its validity. Thus, if the marriage contract is concluded without the mentioning of the specific amount of the dowry, the marriage contract is still valid.

Consequently, the key question that needs to be discussed here is: is it legally possible to formulate the rulings of the recommended acts, '*Mundob*', as legal clauses? In order to answer this question, two important points should be taken into consideration: firstly, the recommended act, '*Mundob*', is not required by law because it is not obligatory and does not result in punishment according to classical Fiqh. For example, it is recommended for a Muslim who has a desire for sexual intercourse, albeit being able to suppress it, to marry <sup>(84)</sup>, but if he does not like to marry, there will be no punishment because it is not an obligatory act. Thus, it can be noted that codifying the rulings of

the recommended act is not legally effective in some cases because they are not required by law.

Secondly, the legal effects of some of the recommended acts, '*Mundob*', are legally effective. As stated above, it is a recommended act, '*Mundob*', to state the exact amount of the dowry at the time of concluding the marriage contract but it is not a prerequisite for its validity<sup>(85)</sup>. If the dowry has not been stated at the time of the marriage contract, according to the article 39 of the amended law, the husband is required to give his wife a dowry which is comparable to the one that women who are similar to his wife receive<sup>(86)</sup>. In this case, it can be noted that there are legal effects in terms of the value of the dowry and preventing any future dispute between the husband and the wife. Thus, it can be asserted that the rulings of the recommended acts that have visible legal effects should be codified in order to address some family problems.

Thirdly, the prohibited or impermissible act, "*Haram*", represents an act whose performance obviously entails punishment in this life and the afterlife<sup>(87)</sup>. To put it simply, "*Haram*" is a legal term that refers to what is forbidden under Islamic law<sup>(88)</sup>. For example, it is prohibited to marry more than four women at the same time. It is obvious that the prohibited or impermissible act, "*Haram*", has conspicuous legal effects in this life in terms of entailing punishment if the Muslim performs it. It is prohibited for a man to marry his mother, daughter, sister, grandmother, granddaughter, maternal aunt and paternal aunt. It is also prohibited to marry one's brothers' daughters, wife's mother, the wife's daughter, the brother's daughter, the sister's daughter, the father's wife or the son's wife<sup>(89)</sup>.

Therefore, codifying the rulings of the prohibited act is highly important, in particular, the rulings that have clear legal effects because the act of *Haram* leads to violating the rights of other Muslims and thus he / she entails punishment. Conversely, there are a large number of prohibited or impermissible acts, "*Haram*", that do not have noticeable legal effects in this life because the irreligious consequences are more visible in the afterlife. For example, it is forbidden for the fiancé to be alone with his fiancée or to see from her what he is forbidden to see from other women<sup>(90)</sup>. Thus, it can be noted that codifying such rulings is not legally effective in this life because they depend on the Muslim's religious commitment.

Fourthly, the repugnant or abominable act, "*Makroh*", is rewarded when omitted, but it is not punishable when committed; that is, "*makroh*" refers to an action from which the legislator has requested the actor to refrain and the acts that are not legally forbidden but discouraged<sup>(91)</sup>. In some cases, the repugnant act may be reprehensible; in particular, if one persists in performing it. For instance, the act of divorce, which is done without a pressing necessity, is repugnant, "*Makroh*". Therefore, codifying the rulings of the repugnant or abominable act, "*Makroh*", is not legally requested according to Islamic law because they are rewarded when omitted, but they are not punishable when committed and their legal effects are not clear<sup>(92)</sup>.

Finally, the permissible act, "*Mubah*", whose commission or omission is equally legitimate<sup>(93)</sup> because individuals have the option of doing or not doing that act with neither praise nor blame. For example, it is permissible for a wife to waive her right of the dowry or decrease it<sup>(94)</sup>. It is permissible for

## The Process of Codifying fiqh ruling

---

the man to marry more than one, provided that he is capable of doing so, financially, intellectually, physically etc... and is certain that he would not be unjust in dealing with them.

To summarize, the difference between “*Wajib*” and “*Mundob*” is that ignoring the “*Wajib*” entails punishment while ignoring the “*Mundob*” does not. In a similar way, the difference between “*Haram*” and “*Makroh*” is that performance of “*Haram*” is punishable, while performance of “*Makroh*” is not. This is done by classifying the rulings of Fiqh into five categories (obligatory, commendable, indifferent, reprehensible and forbidden) indicating their effects as far as rewarding and punishment are concerned.

Within this complicated and jurisprudential context, the process of codifying the rulings of classical Fiqh of personal status is a highly sophisticated legal technique that should be handled by Muslim scholars who are well-versed in the Islamic sciences such as *Usul al Fiqh*<sup>(95)</sup>, Fiqh, the Sciences of the Quran and the Sciences of the Hadith. In the Islamic legal system, it is important to refer to the science of *Usul al Fiqh*<sup>(96)</sup> as the body of principles and investigative methodologies through which practical legal rules are developed from the foundational sources<sup>(97)</sup>. The science of *Usul al Fiqh* provides scholars with the necessary methods and methodologies to understand the text of the Qur'an and Sunnah. Without understanding the Quranic text or the Hadith, one would not be able to extract laws. Khaled Hassan has summed up the purpose of *Usul al Fiqh* thus: “to arrive at the practical sharia rulings through the use of methodologies and methods which reached these rulings”<sup>(98)</sup>. As the organizers of an international seminar on the Codification and Renewal of Contemporary Islamic Fiqh put it, “this task ‘codification’ should be handled by experienced scholars who know what is suitable for societies in the modern world and its problems. the codification should be innovative in terms of the ordering of its chapters, the formation of its articles, and the choice of its phrases, in a way that appropriately fits and suits the spirit of the current time”<sup>(99)</sup>.

## Conclusion:

The researcher has come to the conclusion that:

- 1- The nature of Islamic Fiqh structure provides legislative flexibility to the process of codification of family law. Particularly, with regard to the rulings of *Mundob*, *Makroh* and *Mobah* which can be employed to frame compulsory legal mechanisms and lack thereof in line with the requirements of contemporary Muslim life.
- 2- Islamic Fiqh is not only a framework of the legal system in Islamic world but also real reflection of social, cultural and religious depth in the Muslim societies. Therefore, initiatives that aim to codify Islamic Fiqh must take into account these dimensions combined in order to make genuine meaningful legal development.
- 3- Fiqh codification contributes to unifying judicial mechanisms in issuing judicial decisions and eliminating the chaos in addressing litigation by restricting Sharia judges to adjudicating on family lawsuits according to specific legal clauses regardless of their affiliation to any Islamic schools of thought.

- 4- The process of Fiqh codification is a technical legal process of collecting Sharia rulings in certain areas, usually by subject, and formulating them as legal clauses and articles in order to form a legal Islamic code by using a numbering system.
- 5- As Fiqh texts do not resemble legal clauses because they contain scholarly discussion, and are, therefore, open, discursive and contradictory. They are open texts in the sense that they do not offer a final solution to legal causes that are put for discussion.
- 6- In the field of family law, the process of codification is not only a means to ascertain state control over the law and facilitate the findings of the law for the judges but also as an instrument of reform.
- 7- The legal clauses of law must be authoritative, clear and unequivocal because there is no room for contradictory opinions or argumentation in law and its legal classes as they must be definitive and final.
- 8- This legal process, 'codification', is the only way to put classical Fiqh into practice and renovate it as a modern legal system.
- 9- Codifying the rulings of Fiqh according to contemporary legal criteria has become judicially necessary in order to suit the modern judicial system of the state and facilitate the judge's functions to apply the law as well as avoid the judicial complexity in the application.
- 10- The process of codifying the rulings of classical Fiqh of personal status is a highly sophisticated legal technique that should be handled by Muslim scholars who are well-versed in the Islamic sciences.

### Footnotes:

- (1) In the context of Islamic law, Fiqh of the family or personal status means the Sharia rulings that regulate all personal status issues such as engagement, marriage, divorce, etc. According to classical Fiqh, the rulings of family divide into four main books: the book of engagement rulings, the book of marriage rulings, the book of divorce rulings and the book of inheritance rulings.
- (2) Al-Hammadi, H. Mohawalat Taqneen Al- Fiqh Fi Al- Asar al Hadith (*Initiatives to Codify the Fiqh. An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh*) .<https://www.youtube.com/watch?v=ppuvjtWJfws> 08/04/13. (Self-translation).
- (3) Each of these sub-schools derives its name from its founder. Abu Hanifa was the founder of the Hanafi School, Malik ibn Anas of the Maliki School, Muhammad ibn Idris al-Shafi of the Shafi'i School, and Ahmad ibn Hanbal of the Hanbali School. Al-Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. Cairo: Arabic House Press. Al Zoheily, W. *Usul al Fiqh*. (1986). Damascus: Thought Press.
- (4) Abu Hanifa (AH 80/ 699- AH150/767) is Muslim theologian and jurist, and founder of Hanafi Law School. He is native of Kufa, Iraq. He is a Persian descent. He studied jurisprudence under a student of Muhammad's Companion Ibn Masud while working as textile merchant. His training in jurisprudence combined with his experience as a merchant led to his use of reason and logic in applying rules to practical questions of life and broadening those rules through use of analogy (*Qiyas*) and preference (*Istishan*). He emphasised personal reasoning and free judgment in legal interpretation. Reliance on his opinion resulted in his eponymous school

## The Process of Codifying fiqh ruling

---

being referred to as 'People of Opinion' as opposed to 'People of Tradition'. His legal doctrines were noted for their liberality and respect for personal freedom. -Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. Al Zoheily, W. *Usul al Fiqh*.

- (5) Malik ibn Anas al-Asbhi (94/716-179/795) is founder of the Maliki School of Islamic law and author of Kitab al-Muwatta, one of the earliest surviving Muslim law books. It records Islam as practised in Madina. Malik was sensitive to the untrustworthy ways in which Sunnah was being produced, and for that reason allowed 'istislah' to overrule a deduction from Quran and Sunnah. Malikites are therefore intermediate between Hanifites and Shafites. See Al-Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. Al Zoheily, W. *Usul al Fiqh*.
- (6) Muhammad ibn Idris al-Shafi (150/767-205/820) is jurist, theologian and founder the Shafi school of Islamic law. Born in Gaza. Died in Egypt. Educated in Quran, Hadith and Fiqh in Mecca, Medina and Iraq. Systematised the theoretical bases of Islamic law and outlined the doctrines and differences of Islamic law schools; thus often called the architect of Islamic law. First jurist to insist that Hadith were decisive source of law over customary doctrines of earlier schools. Rejected use of ray 'personal opinion' in favour of Qiyas 'analogy'. See Al-Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. Al Zoheily, W. *Usul al Fiqh*.
- (7) Ahmad ibn Hanbal (164/780- 241/855) is founder of the Hanbali School. Native of Baghdad. His most famous work was the Musnad, a vast collection of tradition edited from his lectures by his son. Known for literal and legalistic interpretation of the Quran and Hadith. Introduced the principle of istislah 'the best solution in the public interest' as the purpose of legal rulings not clearly specified by Quran and Hadith. See Al-Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. Al Zoheily, W. *Usul al Fiqh*.
- (8) Supreme judge Department. <http://www.sj000d.gov.jo/sjd.pdf>. 11/01/2013. (Self-translation).
- (9) Origin of the term "law" is Greek word and was used to refer to a base or rule. This term has entered the Arabic language as consequence of influence of western laws on Arab countries. Qattan, M. *Date of the Islamic Legislation*. (2001). Cairo: Wahba Library. p. 13. (Self-translation).
- (10) Qattan, M. Tarik al – Tashriah AL –Islami (*Date of the Islamic Legislation*). P. 12. (Self-translation).
- (11) the concept of law '*Qanon*' differs from one nation to another, in particular if we pay attention not only to the customs and conventions, but also to religious and ethical criteria. Qattan, M. Tarik al – Tashriah AL –Islami (*Date of the Islamic Legislation*). P. 12. (Self-translation).
- (12) Qattan, M. Tarik al – Tashriah AL –Islami (*Date of the Islamic Legislation*). P. 12. (Self-translation) .
- (13) Abdullahi, A. *Islamic Family Law in a Changing World: A Global Resource Book*. p.1.
- (14) Hussain, J. *Islamic Law and Society –An Introduction-*. (1999). The Federation Press. p. 26.
- (15) Such as rules relating to belief, prayer, fasting, the making of hajj, giving zakat.
- (16) Such as behaviour towards other people, dietary rules, dress, manners and morals.
- (17) Muslimin, J. *Islamic Law and Social Change: A Comparative Study of the Institutionalisation and Codification of Islamic Family Law in Egypt and Indonesia (1950-1995)*. (2005). University Hamburg. p.6.
- (18) Izzi Dien, M. *Islamic Law -from historical foundations to contemporary practice-*. (2004). Edinburgh University Press Ltd. p.35.
- (19) Hodgkinson, K. *Muslim family law*. (1984). p.1. Hussain, J. *Islamic Law and Society*. p.26.
- (20) Hammudah, A. *The Family Structure in Islam*, p.13.
- (21) Qattan, M. Tarik al – Tashriah AL –Islami (*Date of the Islamic Legislation*). p.13.
- (22) Halaq, Wael. *History of Islamic legal Theories*. (1997). Cambridge: Cambridge University Press. P. 226-233, 253. Al Zoheily, W. *Usul al Fiqh*. (1986). Damascus: Thought Press. p. 6.
- (23) Nasir, J. *The Islamic Law of Personal Status*. p.5.

- (24) Coulson, N. *Conflicts and Tensions in Islamic Jurisprudence*. (1969). The University of Chicago Press. Chicago & London. p.3.
- (25) Arffia, R. *Islamic Family Law*. (2010). London: Thomson Reuters. p.15. Philips, A. *The Evolution of Fiqh*. (2003). New Delhe: *Islamic book Service*.p. 2. Hilal, I. *Studies in Usul ul Fiqh*. PDF.islam@islamic-truth.fsnet.co.uk. Hammudah, A. *The Family Structure in Islam*, pp.13-14. Al Zoheily, W. *Usul al Fiqh*. P.6-10.
- (26) Al-Zuhaili, M. Al- Madahb al – Fiqhia wa Atarooha Fi Al –Taqneen (*The Impact of Islamic Schools on the Codification*). An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh. [http://www.youtube.com/watch?v=aW\\_FWsdFOsA](http://www.youtube.com/watch?v=aW_FWsdFOsA). 28/03/2013. (Self-translation).
- (27) Halawani, A. *Codification & the Renewal of Contemporary Islamic Fiqh*. An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh. <http://www.onislam.net>. 19/2/2012. (Self-translation) .
- (28) Al Shathree. Taqneen al- Shaia been al- Mashroiya wa Adam Al- Mashroiya A. *Codification of Sharia between Legality and Illegality*. (2005) .King Fahd Library. P.11. (Self-translation) .
- (29) According to classical Islamic judiciary, the judge assumes the role of a witness with regard to providing evidence, the role of a mufti with regard to issuing rulings, and the role of a person in authority with regard to having judgments implemented. Assuming that the judge is assigned to decide on matters relating to the distribution of the shares of inheritance, it is not obligatory upon him to be cognizant of matters other than the rulings pertaining to the laws of inheritance, bequests and such related matters. Hence, it is permissible to assign a judge to decide on matters relating to his area of knowledge and whatever does not belong to that area is viewed out of his competence.
- (30) Tantawi, M. *Al- Madkal ila al- Fiqh al Islami (Introduction to Islamic Fiqh)* . (2001). Cairo: Wahba Library. p. 166.
- (31) Shawish, T. Mawsoaat Al – Fiqh al – Islami al – Moasira (The Modern Encyclopedia of Islamic Fiqh Criminal), the Book of Abdul Qadir Mahouda with the Comments of Ayatollah Sayyed Ismail and the Views of Dr. Tawfiq Al-Shawish. Volume 1, Part.1, (2001), Cairo: Al Shorouk Publishing Press. P. 22.
- (32) Al Shathree. A. *Codification of Sharia between Legality and Illegality*. (2005) .King Fahd Library. P.11. Nassan, Abdul Basit. *Criteria for Codification of Sharia*. Nassan. Journal of Legal Studies, 17: p.9. Abdullah, B. *The Codification and Its Disadvantages*. (1959). Mecca: House of Culture Press. P. 2-12.
- (33) Joseph, S and Nagmabadi, A . *Encyclopaedia of Women and Islamic Cultures, Volume 2: Family, Law and Politics*. (2005). The Netherlands: Koninklijke Brill NV. P.443. Zoheily, W. Maosoat al – Fiqh al – Islami (*Encyclopedia of Islamic jurisprudence*).P.P.486-510.
- (34) This is his nickname and his original name is Abū Muhammad ‘AbdAllāhRūzbih ibn Dādūya. He was born in 724 and died in 762 or 756. He was originally from the town of Jur in the Iran. He is member of kuttab ‘secretarial’ class, responsible for translation of historical works from Persian into Arabic. He wrote a series of essays and epistles and translated animal fables ‘kalilawadimma, thatcharacterise the style and spirit of adab literature. Ibn al- Muqaffa’s Books.(1966). Library of Life Press.P.353.
- (35) His full name is Abu Ja'far Abdallah ibn Muhammad al-Mansur. He was born in 714 and died in 775. Al Shathree. A. *Codification of Sharia Between legality and illegality*. (2005) .King Fahd Library. P.11. (Self-translation)
- (36) Ibn al-Muqaffa. *Kotob Ibin al- Muqaffa (The books of Ibn al-Muqaffa)*.Beirut:Dar Al Hayat Press (1966). p.p.353-354.
- (37) Madkour, M. al- Kadah al- Islami (*Islamic Judiciary*). (1995). Beirut: THE Message Press. P.150.
- (38) Europe’s long history of religious warfare and the Age of Enlightenment that followed led to the establishment, in most Western countries, of a firm divide between church and state. See Reclaiming Tradition: Islamic Law in a Modern World. <http://www.iar-gwu.org/node/23>. 15/04/13.
- (39) Baqer as-sader, Muhammad. *The Renewal of Islamic law*. (1993). Cambridge University press. P.3.

## The Process of Codifying fiqh ruling

- (40) Al Shathtree. A. *Codification of Sharia between Legality and Illegality*. (2005). King Fahd Library. P.11. Nassan, Abdul Basit. *Criteria for Codification of Sharia*. Nassan. Journal of Legal Studies, 17: p .9. Abdullah, B. *The Codification and Its Disadvantages*. (1959). Mecca: House of Culture Press. P. 2-12.
- (41) Shamil, Jeppie, Ebrahim. Moosa and Richard, Roberts. *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial*. (1978). Amsterdam University Press. P.40.
- (42) Al Shathtree. A. *Codification of Sharia between Legality and Illegality*. (2005) .King Fahd Library. P.11. Nassan, Abdul Basit. *Criteria for Codification of Sharia*. Nassan. Journal of Legal Studies, 17: p .9. Abdullah, B. *The Codification and Its Disadvantages*. (1959). Mecca: House of Culture Press. P. 2-12.
- (43) *National Situation, Analysis Report: Women's Human Rights and Gender Equality*. Jordan. (2010). 12/02/2013. P.17.
- (44) *Historical Perspective on Jordanian family law*, (2009). <http://www.sjd.gov.jo>. Al Ashkar, O. *Al - Wadah in explanation Jordanian family law* . p13. Melhem, A. *Applied Explanation of Jordanian Personal Status Law*. p. 13. (Self-translation) .
- (45) *National Situation, Analysis Report: Women's Human Rights and Gender Equality*. Jordan. (2010). 12/02/2013. P.17.
- (46) Al-Zuhaili, Mohammad. Al- Madahb al – Fiqhia wa Ataroha Fi Al –Taqneen (*The Impact of Islamic Schools on the Codification*.) An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh. [http://www.youtube.com/watch?v=aW\\_FWsdFOsA](http://www.youtube.com/watch?v=aW_FWsdFOsA). 28/03/2013. (Self-translation) .
- (47) Supreme judge Department. <http://www.sj000d.gov.jo/sjd.pdf>. 11/01/2013. (Self-translation) .
- (48) Zoheily, W. Maosoat al – Fiqh al –Islami (*Encyclopedia of Islamic jurisprudence*), P.P.39-41.
- (49) The Amended Family Law 2010. <http://www.sjd.gov.jo/UploadedFiles/Documents/4de83f92-c040-4b6b-8480-b157b85efad5.pdf>. 24/04/13.
- (50) Nassan, Abdul Basit. *Criteria for Codification of Sharia*. Nassan. Journal of Legal Studies. 17: p .9.
- (51) Al-Zuhaili, Mohammad. *The Impact of Islamic Schools on the Codification*. An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh [http://www.youtube.com/watch?v=aW\\_FWsdFOsA](http://www.youtube.com/watch?v=aW_FWsdFOsA). 28/03/2013. Al-Halawani, A. Codification & the Renewal of Contemporary Islamic Fiqh, an International Seminar. <http://www.oanislam.net/english/shariah/contemporary-issues/interviews->. 19/2/2012.
- (52) Moni, J. Changing world order and the Islamic Jurisprudence: A study of the Judicial Provisions of Islam and their applications in Global Multi religious Community with special reference to Hyderabad, India. (2009). this thesis is presented for the degree of Master of Theology (Islamic Studies) of the Asia Graduate School of Theology (Malaysia-Singapore-Thailand. P.2.
- (53) Al-Halawani, A. *Codification & the Renewal of Contemporary Islamic Fiqh*. An International Seminar. <http://www.onislam.net>. 19/2/2012.
- (54) Al-Zarqa, Mustafa. *Codification of Sharia*. <http://www.onislam.net/arabic/ask-the-scholar/8437/8247/46592-2004-08-01%2017-37-04.html>. 17/01/2003.
- (55) Al-Halawani, A. Codification & the Renewal of Contemporary Islamic Fiqh. An International Seminar. <http://www.onislam.net>. 19/2/2012.
- (56) Bassiouni, Cherif. *Schools of Thought in Islam*. The Middle East Institute. <http://www.mei.edu/content/schools-thought-islam>. 11/04/13.
- (57) Feldn, N. *Why Sharia*. (2008). <http://www.nytimes.com/2008/03/16/magazine/16Shariah-t.html?pagewanted=all&r=0>. 10/04/13
- (58) Albashri, T. al- Masala al- Islamia al- Moasira (The Contemporary Islamic Question: The Legal Status of Islamic Law and Secular Law) (1996). Cairo: Dar Al Shorouk. Pp. 39-40.
- (59) Kamal-ud-Deen Imam, M. *On the Methodology of Codification*. <http://www.onislam.net/english/shariah/contemporary-issues/critiques-and-thought/433027-on-the-methodology-of-codification.html?Thought>.

- 10/12/2012. Translated by Tal'atFarouq.
- (60) Ibn Taymiyah, Majomah al Fatwas, vol. 3, p. 239.
- (61) Al-Zuhaili, Mohammad. Al- Madahb al – Fiqhia wa Ataroha Fi Al –Taqneen (*The Impact of Islamic Schools on the Codification*). An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh.[http://www.youtube.com/watch?v=aW\\_FWsdFOsA](http://www.youtube.com/watch?v=aW_FWsdFOsA). 28/03/2013. Kamal-ud-Deen Imam, M. *Theoretical Bases for Codification of Fiqh*. An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh.<http://www.youtube.com/watch?v=nSmlSGdxqA4&list=PL667F65E3DCC9763F&index=12-03-13>. Al- Bishree, Tariq. Sanhoori, S *Efforts in the Codification of Jurisprudence*. An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh <https://www.youtube.com/watch?v=L3hccsaxr7Y>. 12-03-13. (Self-translation) .
- (62) Dr Ashraf Al Momaree 'the inspector of Sharia Courts in Jordan'. I had a discussion about codification of Fiqh of the family during the interview with him last year 07/07/2012 in the Supreme Judge Department.
- (63) Al Shathtree. A. *Codification of Sharia between Legality and Illegality*. (2005) .King Fahd Library. P.11. Nassan, Abdul Basit. *Criteria for Codification of Sharia*. Nassan. Journal of Legal Studies, 17: p .9. Abdullah, B. *The Codification and Its Disadvantages*. (1959). Mecca: House of Culture Press. P. 2-12.
- (64) Abdullah, B. *The Codification and Its Disadvantages*. (1959). Mecca: House of Culture Press.. P. 10-12.
- (65) Kufa (الكوفة al-Kūfah) is a city in Iraq, about south of Baghdad, and northeast of Najaf. It is located on the banks of the Euphrates River. The Hanafi School was formed in Kufa and it based its rulings largely on ra'y - results of logic deduction of its scholars. See Al-Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. Cairo: Arabic House Press. (Self-translation) .
- (66) Al-Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. (Self-translation) .
- (67) The Maliki School was formed in Medina. This school ruled heavily in favour of the practice 'Sunnah' of the local community of Medina, because at the time it was formed, the word Sunnah did not yet mean "practice of the Prophet".
- (68) Al-Zohra, M. *The History of Islamic Schools in the Policy, Belief and Fiqh*. Zoheily, W. Maosoht al – Fiqh al –Islami (*Encyclopedia of Islamic jurisprudence*). (2012). Third Edition. Damascus: Al-Thought Press. P.212-113 (Self-translation). For more details see Alami, Dawoud, Doreen Hinchcliffe. *Islamic Marriage and divorce laws of the Arab World..* P.P.5-6.
- (69) <http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/article3641769.ece?textsize=large&test=1>. 22/04/13. (Self-translation).
- (70) As I mentioned earlier, the early jurists considered the dissension as a sign of the grace of God. See page 5.
- (71) Kamal-ud-Deen Imam, *Theoretical Bases for Codification of Fiqh*. An International Seminar on the Codification and Renewal of Contemporary Islamic Fiqh. <http://www.youtube.com/watch?v=nSmlSGdxqA4&list=PL667F65E3DCC9763F&index=2>.
- (72) See the Supreme Judge Department's Website. <http://www.sjd.gov.jo/>. (Self-translated).
- (73) Fyze, Asaf A. *The Reinterpretation of Islam*. (1982). Donohue, John J. and Esposito, John L. eds., *Islam in Transition: Muslim Perspectives*. NY: Oxford University Press. p 189-190.
- (74) Reiber, R. *Western Christian Conceptual Framework for Viewing the Family*. (1967). New York: Appleton-Century-Crofts. pp.392.
- (75) Al Zoheily, W. *Usul al Fiqh*. p. 6-20.
- (76) Kamal-ud-Deen Imam, M. *Theoretical Bases for Codification of Fiqh*. Conference on Codification of Fiqh. <http://www.youtube.com/watch?v=nSmlSGdxqA4&list=PL667F65E3DCC9763F&index=2>
- (77) Hallaq, W. *A History of Islamic Legal theories*. (1997). Cambridge University Press. p. 49. Al Zoheily, W. *Usul al Fiqh*. p.p 40-45.

## The Process of Codifying fiqh ruling

---

- (78) John.L. Esposition.*The Oxford Dictionary of Islam*.(2003). Oxford university press. p.82..Al Zoheily, W. *Usul al Fiqh*. p.p37-40.
- (79) The Amended Family Law 2010. <http://www.sjd.gov.jo/UploadedFiles/Documents/4de83f92-c040-4b6b-8480-b157b85efad5.pdf>. 24/04/13.
- (80) Zoheily, W. Maosoht al – Fiqh al –Islami (*Encyclopedia of Islamic jurisprudence*) .P.59.
- (81) The Amended Family Law 2010. <http://www.sjd.gov.jo/UploadedFiles/Documents/4de83f92-c040-4b6b-8480-b157b85efad5.pdf>. 24/04/13.
- (82) Ayoub, H. *Fiqh of Muslim Family*. Translated by: Al-FalahStaff Members. Islamic INC. Egypt: Cairo. p.2.
- (83) John.L. Esposition.*The Oxford Dictionary of Islam*.p.191.Al Zoheily, W. *Usul al Fiqh*. p. 40-45.
- (84) Ayoub, H. *Fiqh of Muslim Family*. p.2.
- (85) Zoheily, W. Al –Maosoah al- Islamia al – Moasira (*Encyclopedia of Islamic jurispruden*)c.P.298-301.
- (86) The Amended Family Law 2010. <http://www.sjd.gov.jo/UploadedFiles/Documents/4de83f92-c040-4b6b-8480-b157b85efad5.pdf>. 24/04/13.
- (87) Hallaq, W. *A History of Islamic Legal theories*. p. 49.Al Zoheily, W. *Usul al Fiqh*. p. 6-20.
- (88) John.L. Esposition.*The Oxford Dictionary of Islam*.p.109.Al Zoheily, W. *Usul al Fiqh*. p. 45-60.
- (89) The Amended Family Law 2010. <http://www.sjd.gov.jo/UploadedFiles/Documents/4de83f92-c040-4b6b-8480-b157b85efad5.pdf>. 24/04/13.Zoheily, W. Maosoht al – Fiqh al –Islami (*Encyclopedia of Islamic jurisprudence*) .P.134-144.
- (90) Ayoub, H. *Fiqh of Muslim Family*. p.97.
- (91) Al Zoheily, W. *Usul al Fiqh*. p. 40-45.
- (92) Zoheily, W. Maosoht al – Fiqh al –Islami (*Encyclopedia of Islamic jurisprudence*) .P.334.
- (93) Hallaq, W. *A History of Islamic Legal theories*. P.49.
- (94) Ayoub, H. *Fiqh of Muslim Family*. p.47.Al Zoheily, W. *Usul al Fiqh*. p. 70-75.
- (95) It can be pointed out that Muslim scholars used the science of “usul al fiqh” to deduce and derive the Islamic legal rulings from their sources because this science deals with not only the characteristics of the Quran and Sunnah but also the methods to derive and infer Islamic rulings from their primary sources, namely the Quran and Sunnah. The science of “usul al fiqh” also tackles all the secondary sources which are either directly or indirectly based on the primary sources of Islamic law, the Quran and the Sunnah. Thus, it can be claimed that usul al fiqh is a science in which reason and revelation come together. It does not rely purely on reason in a way that would be unacceptable to revealed law, nor is it based simply on the kind of blind acceptance that would not be supported by reason. See Abdul Hannan, S. USUL AL FIQH. (pdf). [http://msacalgary.com/advancedbooks/usulalfiqh/usul\\_al\\_fiqh](http://msacalgary.com/advancedbooks/usulalfiqh/usul_al_fiqh). p.4. Al-Alwani, T. Source Methodology in Islamic Jurisprudence Usul al Fiqh al-Islami. (2003). London: the International Institute of Islamic Thought. Forward.Al Zoheily, W. *Usul al Fiqh*. p. 6-20.
- (96) The main difference between Fiqh and Usul al-Fiqh is that the former is concerned with the knowledge of the detailed rules of Islamic law in its various branches, that is, Fiqh focuses on the actions of the individual in relation to legal order. Conversely, the latter is concerned with the methods that are applied in the deduction of such rules from their sources. Fiqh, in other words, is the law itself whereas Usul al-Fiqh is the methodologies upon which injunctions can be deduced from the legal sources. See IzziDien, M. *Islamic Law -from historical foundations to contemporary practice*. p.96. Kamali, M. *Principles of Islamic Jurisprudence*. <http://www.bandung2.co.uk/books/Files/Law/Principles>. p. 12.Al Zoheily, W. *Usul al Fiqh*. p. 45-60.
- (97) John.L. Esposition.*The Oxford Dictionary of Islam*..p.329.Al Zoheily, W. *Usul al Fiqh*. p. 45-60.
- (98) Hassan, K. *Mojam Usul Al Fiqh (Usl The Dictionary of Usul Al Fiqh)*. (1998). pp. 14. (Self- translation)
- (99) Ali Al-Halawani. *Codification & the Renewal of Contemporary Islamic Fiqh*. An International Seminar..<http://www.onislam.net>. 19/2/2.