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RESEARCH ARTICLE

The *Majallah* as Codified Fiqh

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Abstract

Codification was a widespread phenomenon in 19th-century Europe when the *Majallah al-Ahkam al-Adliyyah* (Civil Code of the Ottoman Empire, henceforth *Majallah*) was created. The spirit of the times was such that Europe was heavily under the influence of the French Civil Code. In such a context, the *Majallah* was envisioned as a means to fill the lacunae in the law as applicable to the judicial system. Accepting the *Majallah* as a fiqh text transplanted into a codification paradigm raises the problem of whether the imperatives of fiqh accord with those of that paradigm. This article examines the phenomenon of codification and what functions it serves. The article also delves into the history of the *Majallah* in order to investigate the extent to which it is an expression of a codified paradigm and thereby serves the same functions as the latter. This investigation speaks to the larger imperatives inherent within any effort where Islamic law has been codified.

Keywords

Majallah, Codification, Functional Comparison, French Civil Code, Ahmed Jawdat Pasha

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Introduction

First published in 1868, the *Majallah* was a text containing the rules of fiqh, specifically those pertaining to transactions. It was enacted by decree of the Ottoman Sultanate after a committee of scholars had been commissioned to produce a text that would be used in the *Nizamiye* Courts.[1] By virtue of being a legislation and a code, it is often seen as the first useful instance where fiqh had been successfully codified and applied in a real-world setting, if not an entirely modern one.

The *Majallah* which has seventy-three chapters and 1,851 articles is divided into sixteen books.[2] Following the first article are ninety-nine general and universal axioms that are intended as an aid for the judge in cases where guidance is not found in the *Majallah* proper, which starts with Article 101.[3] The *Majallah* evidently does not run the gamut of fiqh topics, as do the axioms that antecede the substantive fiqh rules forming the bulk of the text. The presence of two different genres in a specific order suggests also that this does not purport to be an academic text but one that fulfills a different function, being internally coherent as a legal text in the modern sense.[4] Another indication of this was the use of selection of rules from within the Hanafi *madhhab*, or school of law, without consideration for the imperatives of legal reasoning but the needs of the time and the welfare of humanity, a justification that would be used in later codifications to conform to European norms. These features all hint toward a European influence in the context of the *Majallah*.[5]

Codification is a phenomenon that accompanied the advent of nation-states. One who accepts that it was relevant in the formation of the *Majallah* would need to delve into an analysis of this phenomenon. What is meant when the term codification is used with respect to law in the Western paradigm? What are the problems it is expected to solve? What are the characteristic principles inherent to this form of legal articulation? These questions are important because if any rules of fiqh are expected to be transplanted into a codified legal paradigm, the raison

1 For *Nizamiye* Courts see Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity* (New York: Palgrave Macmillan, 2011).

2 Ahmed Akgündüz, *Karşılaştırmalı Mecelle-i Ahkam-i Adliye: Mecelle Ta'dilleri ve Gerekçeleriyle Birlikte* (Turkey: Osmanli Arastirmalari Vakfi, 2013).

3 Necmettin Kızılkaya, *Legal Maxims in Islamic Law: Concept, History and Application of Axioms of Juristic Accumulation* (Leiden, The Netherlands: Brill | Nijhoff, 2021), 221.

4 The two genres are legal rules and legal maxims. See Tahsin Görgün, "'Yeni' Anlama ve Yorumlama Yöntemlerinin Fıkıh Usûlüne Göre Durumu," *İslâmî İlimlerde Metodoloji: Usûl Mes'elesi 1*, 2005, 685.

5 See Murteza Bedir, "Fikih to Law: Secularization through Curriculum," *Islamic Law and Society* 11, no. 3 (2004): 389.

d'etre would be to realize these functions. However, as would any transplant in an inorganic context, this contrived transformation would raise certain problems requiring examination.

The driving force behind the *Majallah* was not the principles that characterize codification but the professed desire to resort to local norms rather than imported or transplanted ones when determining the blueprint of a nascent legal system. The *Majallah* was enacted piecemeal over a period of eight years starting in 1868 and ending in 1876. However, the larger historical context was one where the proponents of modernization were pushing reforms conforming to the European trends of the time, which were for the major part, colored by the principles of codification. The milieu in which the *Majallah* had been created was one where the French legal system was held as the standard for legal achievement. The zeitgeist meant that formulative agents of the polity understood that a modern effective legal system needed to be patterned after European ones, which had for the most part been influenced by the French Civil Code. Furthermore, the Ottoman state had transformed through internal and external impulses into a form where the system necessitated legislation to fill a gap which, in turn, was necessitated by the very character of the system. That the *Majallah* is unique in its character and that the factors that gave rise to it were not organic but external to fiqh as a discipline also hint at the European influence underlying it.[6]

The French Civil Code of 1804 is generally considered the epitome of the science of legislation in the modern age. This judgment is justified by the fact that this code has known extraordinary success throughout the world over the last two centuries: It has been adopted in many countries of continental Europe and Latin America as well as being taken as a model of civil codification in the Americas, Asia, Middle East, and Africa, especially in the countries that had been colonized by France, whether through wholesale translation or with considerable modifications.[7]

A number of works have engaged with Islamic law and codification. Tarek Elgawhary has taken the opinions of the *'ulamā'* of 20th-century Egypt regarding the codification of the law of personal status and examined their arguments for and

6 Kızılkaya, *Legal Maxims*, 180.

7 Damiano Canale, "The Many Faces of the Codification of Law in Modern Continental Europe," in *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: The Philosophers' Philosophy of Law from the Seventeenth Century to Our Days*, ed. Enrico Pattaro et al. (Dordrecht: Springer Netherlands, 2009), 149, https://doi.org/10.1007/978-90-481-2964-5_4.

against it.[8] Guy Burak has focused on the conceptual issues that have been debated regarding codification and Islamic law in the scholarship dealing with the last two centuries.[9] In a similar vein, Anver Emon has argued for the compatibility of Islamic law with codification, taking the view of a different approach towards the politics of the state.[10] Leonard Wood has examined legislation as an instrument of Islamic law, comparing premodern and modern views with respect to its Islamicness.[11] This article will first establish how the impulse behind the *Majallah* was affected to a great extent by the French codification regime, then it will address the phenomenon of codification and the imperatives it brings to bear upon rules in a legal context. Lastly, the article will address how fiqh fares when considered in light of those very imperatives.

The Making of the *Majallah* and French Influence

The *Majallah* does not claim explicitly to be codified law or a code. Taken by itself, it is a standard fiqh text with its casuistic rules and division into chapters using a particular scheme not dissimilar to fiqh manuals that were being taught in madrasas at the time, though with some differences.[12] When the *Majallah* was created, the historical context was a peculiar one. The Ottoman Sultanate was in its death throes, and internal and external pressures acted in concert to create the conditions for a change of legal regime. It would be relevant here to discuss the extent of the foreign influence on the *Majallah*, in particular the French character of this impetus.

8 Tarek A. Elgawhary, "Restructuring Islamic Law: The Opinions of the 'Ulamā' towards Codification of Personal Status Law in Egypt," *ProQuest Dissertations and Theses* (Ph.D., Ann Arbor, Princeton University, 2014), ProQuest Dissertations & Theses Global; Publicly Available Content Database (1640769548), https://www.proquest.com/dissertations-theses/restructuring-islamic-law-opinions-i-ulamā/docview/1640769548/se-2.

9 Guy Burak, "Codification, Legal Borrowing and the Localization of 'Islamic Law,'" in *Routledge Handbook of Islamic Law*, ed. Khaled Abou El Fadl, Ahmad Atif Ahmad, and Said Fares Hassan, 1st ed. (New York: Routledge, 2019), 389–99, https://doi.org/10.4324/9781315753881-25.

10 Anver M. Emon, "Codification and Islamic Law: The Ideology Behind a Tragic Narrative," *Middle East Law and Governance* 8, no. 2–3 (November 28, 2016): 275–309, https://doi.org/10.1163/18763375-00802008.

11 Leonard Wood, "Legislation as an Instrument of Islamic Law," in *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon and Rumee Ahmed (Oxford University Press, 2018).

12 Some examples would be *Multaqa al abhur, Quduri,* and *al Ikhtiar*. These and others were the sources to which the creators of *the Majallah* resorted when they produced the latter text. For the Multaqa, see Şükrü Selim Has, "The Use of Multaqa'l-Abhur in the Ottoman Madrasas and Legal Scholarship," *Osmanlı Araştırmaları* 7, no. 7–8 (1988), http://dergipark.ulakbim.gov.tr/oa/article/view/5000116787.

There is evidence that there was a conspicuous desire to import the French Civil Code wholesale through a simple translation or derivation. On one side were the *mutafarnijīn* (or Francophiles) such as Kabuli Pasha (d. 1877), who would insist upon this, while on the other side were people such as Ahmed Jawdat Pasha (d. 1895) and Rushdi Pasha (d. 1882), who advocated for fiqh as a solution to the lacunae present in the law and to have it be the law of the *Nizamiye* Courts.[13] The existence of external political pressure for the same purpose was also an incontrovertible reality. The French ambassador at the time, Monsieur Bourée (d. 1886) – apparently the most powerful of the ambassadors in Istanbul at the time according to Jawdat Pasha – desired to have the Civil Code taught in the halls of the *Divân-ı Ahkâm-ı Adliyye* by appointing a teacher from France and to furthermore have the Civil Code enacted in the *Nizamiye* courts.[14]

A short account of the making of the *Majallah* can be found in the memoirs of Ahmed Jawdat Pasha, who relates how the everyday claims brought before the *Tijārat* (Commercial) Courts had become too much to handle, as foreigners did not want to approach the Sharia Courts. Sharia law did not permit the testimony of non-Muslims against Muslims, nor that of the *musta'man* against the *dhimmi*, [15] and this discrimination made such foreigners – who were, for the most part, Christians – shun the Sharia Courts and advocate for the use of the French Civil Code in the *Nizamiye* Courts.[16]

Meanwhile, the express position of the framers of the *Majallah*, which included Jawdat Pasha, with respect to the reasons for the *Majallah* are expressed in the short essay that precedes the *Majallah* proper. To know this will provide a foundation for comparing the *mentalité* of the *Majallah* with that of the Civil Code that was competing with it.[17]

The framers of the *Majallah* start their argument with an overview of how any legal system is structured: with mention of marriage, transactions, and penal

13 See Ahmed Cevdet Paşa, *Maruzat*, ed. Yusuf Halaçoğlu (Çağrı Yayınları, 1980), 199–201.

14 Ahmed Cevdet Paşa, *Tezakir*, ed. Mehmet Cavid Baysun, vol. 4 (Ankara: Turk Tarih Kurumu Basimevi, 1953), 95. *Paşa*, *Maruzat*, 200.

15 The terms *musta'man* and *dhimmi* are relevant in the Ottoman context where the *Dar al Islam*/*Dar al Harb* paradigm was applicable. In such a context the former referred to a person given security for a temporary duration while the latter denotes a 'protected' person or non-Muslim living in the lands of Islam (*Dar al Islam*) but whose life and property are protected under the Sharia.

16 Ahmed Cevdet Paşa, *Tezakir*, ed. Mehmet Cavid Baysun, vol. 1 (Ankara: Turk Tarih Kurumu Basimevi, 1953), 62–63.

17 For *mentalité*, see Pierre Legrand, "European Legal Systems Are Not Converging," *The International and Comparative Law Quarterly* 45, no. 1 (1996): 60–64.

matters.[18] The Sharia also has the additional category of *ibādat* (forms of worship), but the aforementioned three categories are common to all civilized nations. The framers then admit that contemporary commercial transactions had evolved, such as those pertaining to the *polichay* (bills of exchange) and the laws of *iflās* (bankruptcy), to an extent that had required the creation of independent legislation relevant to those particular areas of commerce. This had resulted in the formation of the Commercial Code, the *Tijārat Kānūnnāmesi* which catered to the aspects of conventional practice, while in other matters recourse was still made to the basic civil law.[19] Issues such as *rahin* (pledge), *kafālat* (bail), and *vakālat* (trusteeship) were treated in a manner similar to penal matters that involved claims of rights violations. That had been perceived to be a lacuna in the legal fabric, and several statutes in the form of *kānūn* (code) and *nizām* (regulation) had been issued to address it.[20] However, these efforts had not managed to supplant the laws of fiqh which had been used time and again to cover this deficiency in the legislation, specifically the area of fiqh that pertains to *muʿāmalāt* (transactions). The framers also admit that there were certain complications that were encountered, with these matters being sent to the Sharia or civil courts on occasion; however, these problems were rendered ineffective once the *Tamyīz-i Huqūq Majlislari* (Courts of Cassation, or appellate courts) were formed. These courts were placed under the authority of *hukkām* (judges) who decreed cases falling under the purview of the Sharia or relating to civil matters in accordance with the laws of fiqh or civil legislation respectively.

However, and here is the crux of the argument, the civil laws were also based on the Sharia, and the judges of the Courts of Cassation not being equipped to understand the workings of fiqh often and inevitably left them vulnerable to charges of arbitrariness stemming from *sū-i ẓann* (malignant suspicion), as if they had been disposed to rule not based upon legislation but juridical whimsy. This was the situation of the Courts of Cassation. When looking at the *Tijārat*

18 For the names and official designations of the framers of the *Majallah*, see Akgündüz, *Karsilastirmali Mecelle*, 46.

19 The Commercial Code of 1850, a translation of the French Commercial Code of 1807, was considered to be defective and inadequate due to the fact that it was effected in a hurry and later underwent modification because it did not fulfill commercial needs. Gülnihal Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi: Osmanlı Devleti'nden Türkiye Cumhuriyeti'ne Resepsiyon Süreci, 1839-1939*, vol. 164 (Türk Tarih Kurumu Basımevi, 1996), 203; Mustafa Şentop, "Tanzimat Dönemi Kanunlaştırma Faaliyetleri Literatürü," *Türkiye Araştırmaları Literatür Dergisi*, no. 5 (May 1, 2005): 655–56.

20 See Halil İnalcık, "Ḳānūn," in *Encyclopaedia of Islam, Second Edition*, ed. P. J. Bearman et al., Encyclopaedia of Islam (Brill, April 24, 2012); Halil Inalcik, "Kanun," in *TDV İslam Ansiklopedisi*, accessed July 25, 2022, https://islamansiklopedisi.org.tr/kanun--hukuk.

Maḥkamalari (Commercial Courts), similar difficulties were encountered, and matters impertinent to commerce gave rise to problems, because the governing law, the *Tijārat Kānūnnāma-i Humāyūn* (Commercial Code of 1850), did not address such issues and no recourse could be had in any of the laws of Europe, as these had not been posited as laws of the Ottoman Sultanate. If these matters were to be looked at from the perspective of the Sharia and thereby sent to the Sharia Courts, they would need to be reconsidered from the very beginning, notwithstanding the mutual incongruities of the principles governing each type of court, thus leading to a dilemma, and this implies that such a transfer might not be possible. If instead the members of the Commercial Courts were entrusted with the solution, these members would be handicapped in the same way as those of the Civil Courts due to their lack of qualifications regarding fiqh.

Based on this explanation, one can discern that the growth in the commercial practice had been the cause for the special commercial legislation where lacunae were found, and this in turn had led to the creation of statutes to address this deficiency. However, such problems could not be fully resolved, and the ultimate recourse had to be made to fiqh. At that point, the relevant courts did not have the necessary qualifications to apply the rules and reasoning of fiqh on such occasions, and this directly led to the need for such a code that would be accessible to the members of those courts. The lacuna in the law was apparently the crossroads where the choice between a pure transplant and a fiqh text had become relevant, but the socio-political milieu was such that legislation was the only choice. Legislation in that milieu took the form of a code, with the exemplar of codification being the French Civil Code.

The dispute between Ahmed Jawdat Pasha and those espousing the French Civil Code was about the substance of the envisioned law, not a question of its form or its discursive character. Even once Jawdat Pasha prevailed and the *Majallah* had been born as a child of the fiqh textual corpus, this did not take away from the fact that it had been enacted in a legislative manner after the fashion of the French Civil Code and the established mindset of the Ottoman statesmen who had been influenced by French ideas of how law should be. Comprising a fundamental part of those ideas is the phenomenon of codification.

Codification

The word codification was concocted by Jeremy Bentham from the Latin noun *codex* (block of wood) and the Latin verb *facis/facere* (to make).[21] In the context

21 Csaba Varga, *Codification as a Socio-Historical Phenomenon* (Budapest: Akadémiai Kiadó, 1991), 19.

of the legal system, codification means to articulate law in a written form. Though codification may perform this function of expression, it is does not subscribe to any inherent values by virtue of its form: "it has nothing to do with the goodness or badness, the wisdom or folly of that which is codified".[22] In itself, codification is "a neutral form, an instrument to bring about a transformation of the structure and content of the law."[23] The linguistic meaning of the term with respect to a text is simply to reduce it to a code, or to systematize or classify it.[24] Thus, codification essentially performs a reductive function. It passes over or makes redundant one or more possibilities of legal precept or interpretation in favor of a single version.

The code may be created in order to bring about the resolution of any of several possible problems. Old laws fallen into disuse might need to be effaced. Repeated amendments and legislative volatility may have left the law inscrutable or buried in a legislative nook. Exceptions to the rule may have accumulated over time, obfuscating the rule itself. An inconsistency might exist in the way related laws are expressed or how laws belonging to diverse subjects coexist. Laws pertaining to the same subject matter may also manifest divergent "economic and social philosophies of the different decades in which they were enacted" and thus need to be modified to reflect the mores of the time.[25] Another problem that the code may be employed to surmount is the entrenchment of the legitimacy of a new political order.[26] Thus, through the establishment of a code, the new polity cements its authority as law-giver and infuses the mechanisms of control with its will.

Two species of codification exist: substantive or true codification[27] and formal codification.[28] The former consists of the "systematic and innovative constructions of a body of written rules relating to one or several defined matters, founded on a logical coherence and constituting a basis for the growth of law in a given

22 F.F. Stone, "Primer on Codification," *Tul. L. Rev.* 29 (1954): 303.

23 Varga, *Codification*, 14.

24 *Merriam Webster's Collegiate Dictionary (Eleventh Edition)* (Merriam-Webster, Inc., 2004).

25 Stone, "Primer on Codification," 304.

26 *Ibid*, "The new State which has come into being by dint of revolution or treaty and desires to state originally its legal principles; the old State which by revolution has overthrown its government or governing class and wishes to state the aims of the new order; the State that desires to imitate the laws of another State; the monarch who desires to leave as his monument an enduring memorial in the form of a complete legal system; the legal reformers who seek to impress the legal structure as a whole with the conclusions of a new economic or social order; all these present situations for which codification has been proposed or used to resolve."

27 See Jean Louis Bergel, "Principal Features and Methods of Codification," *Louisiana Law Review*, no. 5 (1988 1987): 1077–88..

28 *Ibid*, 1088–97.

domain."[29] The latter is characterized by the recognition and categorization of rules already in existence. This type is also termed as a consolidation or restatement.[30] Substantive codifications are largely but not exclusively the defining feature of civil law countries. One example of substantive codification is the statutes introduced in India in the 1800s. Similarly, formal codifications are not unique to common law systems, though they are prevalent there.

Modern codification efforts seeking to impart substantive or true codification to Islamic law incline towards this type of codification, in many cases taking place in former colonies of civil law[31] or common law countries but where the legal fabric has been reconstructed using substantive codification.[32] At a cursory examination, the *Majallah* is an example of formal codification, while the Civil Code that had provided it its motivation is evidently closer to substantive codification. When the *Majallah* came into being, the rules of fiqh existed in a voluminous textual corpus and served as the source for the *Majallah*. In that sense, the *Majallah* is a consolidation of the fiqh pertaining to *muʿāmalāt* (or transactions).

The codification phenomenon may be considered from the perspective of three discursive effects: legislative technique, legal theory, and legal philosophy.[33] Upon a separate examination of these aspects, one can discover the conventional view that has prevailed in European legal culture. Also helpful is the definition given by Scarman who states succinctly:

> A code is a species of enacted law which purports so to formulate the law that it becomes within its field the authoritative, comprehensive and exclusive source of that law.[34]

Legislative Technique

This is the idea that the law must be simple and accessible to its subjects as well as to its practitioners. It should be known and understood so that ignorance of the law is not an excuse at a very pervasive level. The law must also be coherent and not permit contradiction across its width and breadth inasmuch as antithetical

29 *Ibid*, 1075–76.

30 *Ibid*, 1076.

31 Such as Egypt and Iraq.

32 One example is Pakistan where some effort has been made to 'Islamize' the laws. For an analysis of these efforts see Martin Lau, *The Role of Islam in the Legal System of Pakistan*, London-Leiden Series on Law, Administration and Development 9 (Leiden ; Boston: M. Nijhoff, 2006).

33 Canale, "Many Faces," 137.

34 L.G. Scarman, "Codification and Judge-Made Law: A Problem of Coexistence," *Indiana Law Journal* 42, no. 3 (1967): 358.

rules or alternative solutions to a case must not exist. Finally, the law must be all-encompassing, not omitting any possible cases that might appear before the court so that there remains no necessity to turn to another source of law for the case at hand. Comprehensiveness endows the code with "all the law within its field, whether the law's historical source be statute, or custom in the shape of judicial decision."[35]

> This perception of the code as a self-contained and self-referential system illustrates, possibly better than anything, the deep-seated conviction of civilian jurists that law can be reduced to propositional knowledge and that it is useful to organize the law in this way.[36]

Legal Theory

According to this idea, the enactment of a code entails the relegating of all other sources of law to insignificance in comparison to the new code which would reign unchallenged and without peer. Such annihilation of all rivals is necessary because it ensures the possibility for development and reform. It necessitates that judges consciously overlook any role played by extra-legislative elements in the interpretation of the code. The formulation of the erstwhile law that preceded the code thus becomes irrelevant. The dead law is buried for good. The exclusivity of the code stems partly from the notion, more imagined than real, that the code is meant to exhaust all legal solutions. Even where the code allows for reference to externalities, this permission keeps legal authority within the prerogative of the code. That the code purports to exclusive authority has significant implications for all other past legislative forms, rendering them obsolete. Sources of law such as custom are relegated to a merely commendatory character, as the code becomes the only acknowledged law so-called and the only legitimate bearer of norms.

It becomes apparent that in codified legal systems, all law is understood as a system of commands exclusively enacted by the sovereign. This provides the said sovereign stringent control of all legal content and form: any legal materials and sources *besides the sacrosanct code* may be permitted an existence as 'law' only if the sovereign wills them as such. This sacred and 'anointed' character of the code whereby it has become 'the chosen law' abrogates existing law as an older dispensation. This resembles canonization, wherein selected texts are chosen in order to impart them with divine authority while the remaining become apocrypha and of dubious legitimacy.

35 *Ibid*, 359.

36 Pierre Legrand, "Strange Power of Words: Codification Situated," *Tul. Eur. & Civ. LF* 9 (1994): 16.

Legal Philosophy

At this level of discourse, upon examining the phenomenon with respect to the nature of law itself and legal authority, codification can be seen to have become the mechanism for realizing a paradigm governed by the principles of liberty and equality through a positive articulation of these principles and by manifesting them in the other rules that make up the system. The principle of equality would include the notion that all citizens have equal rights under the sovereignty of the law, and this paradigm frowns upon discrimination based upon the religious conviction of the subjects of the law.

Enactment implies the conferral of authority as well as the force and legitimacy of democratic and technical deliberation and the involvement of the "whole community".[37] These ideas have interesting implications for codification. To assert that the enactment of a code an act of law-making is trivial, but the fact that this code lays claim to exclusive sovereignty is a matter worthy of deeper scrutiny. In this 19th century-European idea of law, a code displaces authority from the maker of the law to and hands it to the law itself. Indeed, it would seem that the modern nation state invokes obedience through the authority of the law *qua* code. No entity appears to exist behind the law pulling its strings; the law must be obeyed for its own sake and not because some intelligent entity commands it. Modernity's progress from a unitary sovereign to a nation-state reinforces such a notion. Furthermore, severing ties to former constructions of the law creates ruptures in the understanding of the law. The imperatives of development and reform, essential objectives of a code, require that interpretation not have recourse to any law that has been superseded by the code. This is fathomable but throws into relief the problem inherent in codification: a necessary rupture of epistemic authority. The very act of overt lawmaking through a code denotes a usurpation of legal authority. The impulses that spawn codification (i.e., the need for development and reform) are necessarily accompanied by the need for exclusive authority that imbues the code, and it is this concomitant authority that precludes any rival claimant to legal and thus normative sway.

The Functions of Codification: How Does Fiqh Compare?

Recalling the functions that are served by codification with respect to the law would be appropriate here. One of these is a reductive function that entails the post-codification product to represent the law exclusively. Fiqh similarly has had the notions of specification and abrogation as developed by the jurists. Moreover, codification performs a comprehensive function whereby all rules and norms that

37 Scarman, "Codification and Judge-Made Law," 359.

are meant to regulate human behavior are included in the sanctioned corpus of laws. When looking at fiqh, however, the rules derived from the Divine texts are supposed to cover all acts for which human beings are responsible. Therefore, fiqh addresses a vast variety of human behavior, even transcending that which may be sanctioned by the courts. Thirdly, codification performs an enactive function that serves to legitimate and elevate the text to an official status recognized by the judicial system. In a sense, all other functions can be seen as the consequence of the last (i.e., enactive) function. Enacting a code makes all other relevant rules inadmissible in a court of law. When looking at enactment, fiqh is again different, and the historical distinction between fiqh and *siyāsa* (governance/statecraft) and then between fiqh and *qanūn* (ruler's ordinance) had persisted until the *Majallah* where with certain rules having been ratified by the ruler's executive authority. These were distinguished from the rules of fiqh, which did not undergo this type of enactment. A fourth function is rationalizing function, in which the code and brings order and a particular kind of logic to the selected body of rules.

One can observe that a text in the fiqh paradigm might subsume the same objectives, albeit in ways and forms that are different to those of codification, and these methods bear little resemblance to the means used to effect legislation. However, a qualitative difference exists between the functions performed by codification and any functions that fiqh seeks to perform, because all the functions, whether reductive, comprehensive or otherwise, are imbued with a different sort of *mentalité* than the phenomenon observed in 19th-century Europe. When addressing the hermeneutic functions, fiqh also contains certain devices for effecting changes in a text. However, these are of a different nature to the purported functions of codification due to its view of the legal text and its place with respect to the state and the subject populace. The codification phenomenon seeks to mold the text with a view to achieving certain objectives. In this project, the pre-text is important only as far as material for the ultimate product (i.e., the code) and supersedes the pre-text in its primacy and authority as a reference and ultimate arbiter in case of competing texts. The imperatives of fiqh are such that hermeneutic principles are weighted towards determining the will of the author of the law rather than the considerations of its audience. Thus, textual considerations come before extra-textual ones. This can also be understood as straying into the realm of eisegesis from that of exegesis.

The quest for simplicity is patently an extra-textual consideration in the sense that the purpose is to uncomplicate the task of the consumer and the practitioner of law. This is thus a consideration that functions from the perspective of the audience. The more a society develops in the sense of complicated situations requiring

resolution, the more its law mirrors such complexity in the way rules are expressed and in the way these address diverse cases. When considering the way fiqh has developed over more than a millennium, to encompass its complexity in a single text while remaining true to the imperative of simplification would be unrealistic. Fiqh has always been the domain of the expert and scholars have had famously spent long years studying with different teachers and travelling to distant lands for such knowledge. Of course, this does not rule out the existence of texts that have been written specifically for lay or beginner audiences. However, ultimately the application of fiqh in the courts has been seen as the province of the trained scholar. The framers of the *Majallah* seem to have recognized the scarcity of such trained scholars and intended the *Majallah* to provide guidance to such individuals who would adjudicate in the courts and be able to resort to some level of fiqh even while not being able to access its diversity and complexity.

Wherever human endeavor and a multiplicity of minds is involved, the potential always exists for incoherence and contradiction; however, the presence of a singular source and voice means that fiqh is at least different from a code in the aspect that one does not need to assume a singular voice when reading the Quran and sunnah, as they are both ultimately the utterances of one Supreme Author. Still, one does need to do so when reading a code. The very definition of fiqh clarifies itself as the product of human endeavor, but one derived from a Divine text. With respect to authority, each school of thought in fiqh has its own mechanism for determining the more authoritative rules from others, but this determination does not compare to the categorical exclusion of pre-existent rules as occurs in codification. This authoritarian characteristic found in codification is not to be found in the fiqh tradition.

Does the Code Have Benefits?

The many advantages a codified form brings to the law are compelling. The code brings the concept of logic and order into the legal sphere. The plethora of legal propositions and ideas become coherent and perhaps even consistent as they take the shape of a code, one where meaningful interrelationships may be discerned as opposed to random, arbitrary, and dispersed notions.[38] This order is part and parcel of the oft-touted formal rationality that is supposedly a feature of developed civilizational systems.

This order and method that is introduced into the law serves to make it clear and accessible to the layman, the subject of the law who has perhaps the most to benefit

38 Stone, "Primer on Codification," 307.

from an understanding of the mechanism of social control that increasingly regulates a large portion of his existence. One may also claim that codification makes the law accessible to the lawyer and the judge, and this assertion would certainly have a better claim to truth than the former one. In the workings of the legal system, it is indeed the legal profession that is the most involved with questions regarding what the law is and how it affects the facts of any dispute.

The *sine qua non* of codification is, as said earlier, its reductive function. Thus, the code reduces the plurality of law and legal concepts to a singular uniform body. This uniformity goes some way towards making the law accessible and easier to be discovered. The quality of uniformity and clarity together lead to certainty, a highly desirable value and one of the principal reasons given for adopting codification. This certainty also allows laymen to order their affairs according to what the law requires, because the probability of the courts deciding in a certain manner gives sanction to certain behaviors in the subjects of law. On the other hand, lawyers similarly benefit, while judges are supposed to take the code as a starting point in their deliberations. Thus, law becomes more predictable. Moreover, setting down a code as law serves to diminish the discretion of the judicial organ of the state who, not entrusted with a legislative role, at least according to democratic theory, is not expected to make law, only just to discover and apply it.

As stated earlier, codification is a neutral form and a method. However, this article will show how even a method may not be value-neutral. One should be wary of assertions regarding the supposedly neutral character of codification in a system of law. As McLuhan perspicaciously puts it, "The 'content' of any medium blinds us to the character of the medium."[39] It is typically the medium that mediates between the elements of society and "shapes and controls the scale and form of human association and action."[40]

Perhaps the codified legislation is found to create a measure of certainty in the legal system. However, it would be rash to expect that as social change outstrips legislative foresight and the code becomes less and less relevant, and as judges gain increasing recourse to extra-legislative considerations, this degree of certainty would remain constant. In fact, certainty in the first place is a myth, as this notion of certainty-through-uniform-law assumes consistent application of deductive modes of reasoning by judges who are rarely constrained or obligated to act in such a fashion. Actual judicial activity is technical and discretionary and contrary to imaginary notions that owe their outlook to the civil law way of thinking.

39 Marshall McLuhan, *Understanding Media: The Extensions of Man*, 1st MIT Press (Cambridge, Mass.: MIT Press, 1994), 9.

40 *Ibid*, 9.

The discretionary nature of judicial activity lays bare the myth of uniformity. Over time, the code becomes increasingly removed from the exigencies of social practice and consequently from juristic considerations. As this happens, its role as arbiter of what the law is considerably diminished.

> The struggle once exerted on behalf of the code was therefore largely replaced by the struggles of judicial practice. Codification lost its original *raison d'être*. In other words, from being master of establishing the law, the code became degraded primarily to a conceptual-referential framework of the everyday practice of shaping the law. It is no longer the embodiment, but rather a mere reference-basis of the living law.[41]

One of the much-heralded functions of the code, to wit, that of accessibility to the public (i.e., the lay person) turns out to be fallacious upon considering the implications of how the code comes to relate to judicial activity. While assumed to literally embody the law, the statute results in a determinate form only through the transforming medium of judicial activity, which may take some or many diverse hermeneutic routes to its conclusion. The claim that the codified law will somehow transform the law into a comprehensible reality for the lay population is largely unfounded:

> How can one truly present as clear and certain that which acquires meaning only through judicial interpretation which is at once technical and essentially discretionary? The problem is compounded by the danger that lay persons, encouraged by the apparent accessibility of the code's language, will think that they understand the law.[42]

Even though they are specialists in the legal arena, lawyers are scarcely possessed of the certainty that comes from specialized knowledge of the law. The presence of various interpretations and variable weights that may be assigned in the course of judicial reasoning make the knowledge of what the law is a most inexact science.

The idea of code-as-law is symptomatic of a particular type of rule-based thinking. In other words, those advocating the code as being conducive to the operation of law, whether amongst the specialists or the laity, have a peculiar conception of what law is and how it works. The simplistic notion that law is a set of rules identifies closely with the movement known as legal positivism. The positivist conception stands upon two basic assumptions: Firstly, the status of law *qua* law is contingent upon the fact that it has been laid down or *posited* and secondly, law is conceived as a "finite and comprehensive code."[43] Codified law would evidently be *par excellence* the type of law referred to as positivistic by combining the two

41 Varga, *Codification*, 120.

42 Legrand, "Strange Power of Words: Codification Situated," 20.

43 Brian Simpson, "The Common Law and Legal Theory," in *Legal Theory and Common Law*, ed. William Twining, 1986, 11.

assumptions as a whole. This jurisprudential mindset runs into difficulties when it encounters a notion of law contrary to the positivist notion. One such example would be custom, with Islamic law being even more relevant here. Law that is conceived this way loses its human character, and context as a functioning institution and becomes objectified. An increasing number of jurists find this conception of law to be simplistic and lacking a conceptual depth corresponding to reality. They profess that "law simply cannot be captured by a set of rules, that 'the law' and 'the written rules' do not coexist, and that there is indeed much 'law' to be found beyond the rules."[44]

As a result, this understanding creates a chasm between the reality of what law is and how it is represented in the juristic discourse. The code erects an epistemological obstacle to knowledge of all things legal:

> In other words, it could be that a code leads the jurist astray by suggesting that to have knowledge of the law is to have knowledge of the rules (and that to have knowledge of the rules is to have knowledge of the law!). It could also be that, in its quest for rationality, foreseeability, certainty, coherence, and clarity, a civil code strikes a profoundly anti-humanist note.[45]

The role that codification serves with respect to the law may justify a limited analogy to the way a primary religious text functions as the basis upon which all juristic and jural activity turns. That any usurpation of the legal order in a Muslim society could succeed without attempting to displace the texts that are fundamental to the Islamic legal enterprise and supplant them with an alternative, especially one that is so pliant to the imperatives of political will, would be unsurprising. A more significant difference occurs in the way that texts such as the Qur'an and *Hadīth* are used by the *qaḍīs* or jurists compared to how a code lives in the legal system: The *usūl al fiqh* (or hermeneutic principles) that are cardinal to the nature of Islamic law draw robust boundaries around juristic endeavor, boundaries that are largely absent in paradigms where the integrity of texts has not acquired such a hallowed character. In a codified legal order, the code is the be-all and end-all.

> Legal practice is to flow through the conceptual structure and system of the code. The legal process may only take place within these limits: it is the alpha and the omega. The code maintains its organizing, orientating and methodological functions even when the re-assessment of judicial practice actually runs against codelaw. It is the conceptual system and institution of the code that invariably provide at least the medium of regulation by judicial practice: its officially only referable source of inspiration, components, methodological foundations, and form of expression.[46]

44 Legrand, "Strange Power of Words: Codification Situated," 18.

45 *Ibid*, 18.

46 Varga, *Codification*, 121–22.

The Code as Exclusionary Instrument?

As mentioned earlier, the code is by definition reductionist and hence exclusionary. A choice is made between multiple competing legal concepts, one of which is elevated to the station of the code. This exclusion is analyzed by Legrand, who gives the examples of the Quebec code and the European civil code and states that codification "pursues the implementation of a universal language of recognition and adjudication."[47] In doing so, the code effectively leads to the marginalization of sub-cultures, as in the case of the Quebec code where Anglophiles were deprived, and of ways of thinking about the law, as in the case of the European code which would lead to the extinction of the common-law way of thinking. The code constrains individuals to cases and situations envisioned by the code; thus, as they invoke the authority of the code, their particular cases are subsumed within the universal reality espoused by the code. By omitting certain content from the code and enacting this 'negative space,' the code deliberately excludes certain social conceptions. This effect of monopolization becomes certain because a code necessarily arrogates for itself exclusive authority.

Moreover, the disposal of competing interpretations definitively deals a debilitating blow to intellectual inquiry. Jurists would be compelled to reconcile such rules that have been declared authoritative and thus untouchable. If this cannot easily occur, the jurists may resort to circumventing it through hair-splitting distinctions or by bending or stretching other rules in order to accommodate it as opposed to an outright repudiation. Such a repudiation might have led to a better rule, but codification precludes that possibility from the outset. Semantic distinctions are drawn in desperate juristic attempts to preserve equity or maintain the requirements of justice in difficult cases. Furthermore, other rules are stretched (i.e., the scope of their construal is expanded) to cover situations unjustly excluded by the rule or merely not included in the code. These intellectual gymnastics that are required from scholars are rendered all the more pathetic due to the fact that the rules envisioned in the code had likely been a result of historical and political circumstance and hence arbitrary.

Codification: An Instrument of Power?

Codification is a concrete procedure that transforms the nature of law. It provokes several questions of the type intimated by Legrand as:

> Who, through the text of law, exerts power and over whom? Who is being denied access to power and at what cost? What interests are served by the legal discourse as it defines and circumscribes itself in the way it does?[48]

47 Pierre Legrand, "Codification and the Politics of Exclusion: A Challenge for Comparativists," *U.C. Davis Law Review* 31 (1997): 799.

48 Legrand, 805.

Codification serves the political imperatives by making law subservient to these through its formal rationalization. The exclusive nature of the code betrays totalistic tendencies. The modern nation-state is consummately jealous of rivals to legitimacy and legislative authority. The exclusivity of the code ties in perfectly with the aspiration of the state towards monopoly of the mechanisms of power. This power extends not only to the right to violence but also to the preemptive determination of the social norms that are crucial to the regulation and control of the subject population.[49] Codification leads to definite kinds of changes in the force fields of power and the structures of authority, thus warranting the foregrounding of these issues. Even though the achievement of clarity, logic, and uniformity are often the proclaimed reasons for establishing the code, in claiming to these self-evident virtues the political authority would find its legitimacy reaffirmed and its authority amplified.[50]

How this happens deserves comment. Through the transformation of the legal system to a formally rational one, codification facilitates the accumulation of power of the political class and its ability to wield its will with greater ease. Codification is no mere instrument for the formal ordering of law but instead serves a more consequential role "as a means of *the political power of the state to assert a central will uniformly in the whole of the community.*"[51]

> Codification is the means, and also the product, of the transformation of law from its role being an agent of preserving the traditional framework of everyday life to being an agent to formulate and also to assert the arbitrary will of the ruler, effective by its formal enactment and open to further development in any direction through formally controlled processes.[52]

In its function of making the law formally rational, codification succeeds like no other mechanism. It is "the most widely spread and the most effective means of the law's formal rationalization."[53] This "*technical shaping of the law*" is mirrored by the "*politico-economic organization of society*."[54] Towards this end, bureaucracy and law are developed in tandem as the two institutions fundamental to the political will-to-power of the state, a parallel development to which history has borne witness.[55]

49 For an examination of how the state does this, see Pierre Bourdieu, Loic J. D. Wacquant, & Samar Farage, "Rethinking the State: Genesis and Structure of the Bureaucratic Field," *Sociological Theory* 12, no. 1 (1994): 1–18.

50 Legrand, "Strange Power of Words: Codification Situated," 9.

51 Varga, *Codification*, 334.

52 *Ibid*, 334.

53 *Ibid*, 333–34.

54 *Ibid*, 333.

55 *Ibid*, 335.

> The deepening consolidation and sophistication of political power arose first, in the field of law, in making the norm-aggregate of law relatively complete and well-arranged and, in the field of administration, in establishing an appropriate institutional machinery, together with legislation and administration of justice as integrated into the state machinery itself. Since codification proved to be the most suitable means of making the law relatively complete and well-arranged, the local points of codification development frequently coincided with the progress of administrative organization.[56]

The objectification of law, i.e., its reification through expression in writing and the grant of exclusive, almost sacred authority and erection of norm structures embodied by the code implied that the law had attained a formal rationality that "is considered the *sine qua non* of all conscious, planned and controlled social influencing."[57]

The codification process shifts the locus of law-making from the judiciary to the legislature, and this is manifestly the act of giving this function an overtly political nature. In paradigms such as Islamic law where political interests play a minute role in the making of the law, codification subverts the very nature of the legal system and opens it up to considerations of power.

Conclusion

Codification as a necessary form of law does not sit easily with a system such as fiqh where the workings of the law at the derivation, application, and invocation stages are vastly dissimilar from and based upon divergent premises compared to a system that gives priority to political authority. Codification is an attempt to construct an artificial personality for the law, to treat an imagined distance between law and man as a real one. Codification also inevitably leads to a rupture in the epistemological tradition that has historically defined the operation of Islamic law in society. It has, moreover, led to a forced separation between substance and form, as traditional form has been cast away in favor of norms that have been transplanted in formally rational systems. These systems operate under dynamics that are wholly foreign to the Islamic ethic.

An antinomy evidently exists between the concept of Islamic law or fiqh and the imperatives of a codified law. Even when considering the legal institutions as they have developed in the course of Islamic history, one finds the role of codification to be more abridged than has been assumed. Assuming a separation of powers, since codified law is always the exclusive domain of the law-maker, personified

56 *Ibid*, 335.

57 *Ibid*, 334.

by the legislature in the modern nation-state, if the role of the executive in enacting Islamic law is found to be curtailed, any codified law attributable to the executive would consequently be deprived of much of its legitimacy. As can be discerned, the *Majallah*, is an incongruous transplant into a codified legal paradigm where the particular trappings of this paradigm militate against the spirit and proclivities of fiqh.

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