

CHAPTER II

ARAB CIVIL LAW

HISTORICAL DEBATE AND LEGAL PROGRESS OF CODIFICATION

2.1 Code and Codification

2.1.1 Definition

Code, literally, means the act, process, or result of arranging in a systematic form, and codification means the act of codifying. It does include, in the view of law, two main aspects, namely:

1. The act, process, or result of stating the rules and principles applicable in a given legal order to one or more broad areas of life in this form of a code.
2. The reducing of unwritten customs or case law to statutory form.³⁸

The term of “Code” is defined by L. B. Curzon as:

‘...a systematical collection, in comprehensive form, of laws, e.g., the Code of Hammurabi (Eighteenth Century BC), produced in Mesopotamia, the Code Napoleon (1804).’³⁹

It was, also, defined by William Butler as:

‘...the reduction into the form of a statute, under the sanction of the Legislature, of the body of legal principles and rules which form the law of the State. It may be (1) confined to the statement of such principles and rules as have already been announced by the Legislature or the Courts, or it may (2) contain changes in such principles and rules to correct or amend them, or

³⁸ <http://www.infoplease.com/dictionary/codification>. See also: David M. Walker (1980). *The Oxford Companion to Law*. New York: Oxford University Press. p. 234.

³⁹ L. B. Curzon (2003). *Dictionary of Law*, 6th edn. Kuala Lumpur: International Law Book Services. p. 72.

it may (3) extend still farther and may undertake to lay down entirely new principles and rules for future cases which have never as yet been provided for by the Legislature or which have never yet come before the Courts for adjudication.”⁴⁰

Hence, it is noteworthy that the term, as David M. Walker pointed out, has passed various stages in application. He maintained that it is commonly used for various ancient bodies of legal rules, e.g., Code of Hammurabi, the Old Testament where the bodies of rules are not complete statements. Then, in Justinian’s legislation two codes existed, the Code of CE. 529 that reflected Roman imperial constitutions and in 534 there was published a second Code (*Codex repetitae praelectionis*) in 12 books included more recent legislation, amended and rearranged. The term, also, applied to the Barbarian or Germanic laws and to the collections of maritime customs throughout Europe. From the Fifteenth Century onwards it came to be applied to a more or less comprehensive systematic statement in written form of major bodies of law such as the criminal law or the civil law of a particular state. This movement was stimulated by the uprising of nationalism and the growth of nation-states. Therefore, the five Napoleonic Codes of 1804-1810 (Civil Code, Civil Procedure, Commercial Code, Criminal Procedure, and Penal Code) was a true manifestation of nationalism. This code was followed by a German civil law in 1900 and the Swiss Civil Code in 1912.⁴¹

The equivalent Arabic term for codification is “*Taqnīn*”. Sanhūrī defined the Arabic term as drafting the laws by arranged texts and collecting them in a systematic and consistent form.⁴²

From the foregoing definitions, one can conclude that the codification is to collect legal texts that are respective to a branch of law in an official document, e.g., civil law, commercial law, penal law, law of civil or criminal procedure, law of labor. A “code”,

⁴⁰ http://www.constitution.org/cmt/hornblower/cod_law.htm.

⁴¹ D. M. Walker (1980). Op. Cit., p. 234.

⁴² Sanhūrī (1936c). Op. Cit., p. 3.

therefore, is the official document that contains the legal texts in a particular branch of law. It means that a “Code” should fulfill two essential requisites, firstly to be issued and approved by a legislative authority in the form of an official document and, secondly, to incorporate the major rules of the respective branch of law. By these, one may exclude an unofficial "compilation" that constitutes a collection of legal rules (perhaps with added commentary or structure) but that does not itself have the power of law, such as the commentary works of professors, jurists and legal institutions. A "Code" is also to be distinguished from the legislative works that contain only minor rules of the respective area of law such as: registration law of movable or immovable properties which can be considered as the tail of Civil Code or Commercial Code.⁴³

2.1.2 Codification between Advantages and Disadvantages

An in-depth debate concerning the significance of “Codes” was stimulated among the jurists and legal thinkers from the early codifications of the enlightening movements, namely after the issuance of the Napoleonic Codes. Different approaches prevailed, sometimes with mutual agreements.

Here, the researcher is going to exhibit the advantages and disadvantages that may come with drafting code of the laws, deferring the last argument of the matter to another occasion when comparing between the Civil Law and Common Law Systems, in following sections.

⁴³ Ramaḍān Abū al-Su‘ūd (1983). *Al-Wasīṭ fi Sharḥ Muqaddimat al-Qānūn al-Madanī – al-Madkhal ilā al-Qānūn wa bi-Khāṣṣatin al-Miṣrī wa al-Lubnāni*. Beirut: al-Dār al-Jāmi‘iyyah. volume. 1, pp. 255-256.

2.1.2.1 Advantages

The main advantages of codification could be seen in the following head-points:

- It assists the judges to acknowledge and recognize the rules of law with respect to the cases presented. It also assists the citizens, even the layman, to get information about their rights as well as the duties in front of the law. In other words, it will make the law definite, coherent, certain and easily ascertainable and will thereby reduce litigation and promote justice. The law should be made accessible to the common man and not be the exclusive property of the learned lawyer to be extracted by him from a wilderness of text-books and reports.⁴⁴ The uniform rules help the legal bodies such as judges and jurists, to offer consistent applications and interpretations. Human experience shows that when rules of law are codified the work of interpretation and construction commences. Each word in the statute assumes importance and calls for enforcement as even a “but” or an “and” becomes important.⁴⁵
- Codification is effective in bringing the various regions and territories, where the code is dominant and closer by providing them the ground of making further political integration. Therefore, codification could be accounted as a device of political progress between diverse communities, even nations and states.⁴⁶
- It makes it easier for backward nations and non-code-owing countries to derive their laws from developed codified countries. This point is historically proven by numerous countries quoting the Civil Codes of France, Germany and the Swiss, e.g. the old Civil Code of Egypt (1876 and 1884) was duplicated from Napoleon’s Codes, and the New Egyptian Civil Code (1948) was derived from Codes of various countries. As a matter of fact, codification became the main

⁴⁴ http://www.constitution.org/cmt/hornblower/cod_law.htm.

⁴⁵ S. Maḥmaṣānī (1965). Op. Cit., pp. 170-171; R. Abū al-Su’ūd (1983). Op. Cit., volume. 1, p. 261.

⁴⁶ R. Abū al-Su’ūd (1983). Op. Cit., volume. 1, p. 261.

distinguishing feature of the last two centuries in continental Europe and America, and also some Asian and African countries.⁴⁷

To further determine the significance of codification and grasp the total picture of the argument, it is worthy to refer to John W. Head in his valuable article that addressed the code experience. He indicated the main conditions that make codification more likely and necessary, as follows:

- The existing law is chaotic or difficult to ascertain.
- The existing law is inconsistent with radical political changes that have just occurred.
- The existing law is behind the times generally.
- A "model" code from an earlier time is available and is culturally relevant to the people of the political unit.
- Legal scholars and jurists play a highly important or influential role in the legal system.⁴⁸

It is remarkable; also, that Sanhūrī concluded that codification is necessary when a uniform law is needed in a country with diverse legal systems or when quotation of a foreign law is a prerequisite of reform. It also benefits everybody to recognize the legal rules and enlightens the way which the law should follow in its consequent progress and it is useful to bring the laws of diverse nations nearer. Finally, it helps in establishing the ground to study the comparative law.⁴⁹

⁴⁷ Ibid, volume. 1, p. 262.

⁴⁸ <http://www.law.duke.edu/journals/djcil/articles>.

⁴⁹ Sanhūrī (1936c). Op. Cit., pp. 4-5.

2.1.2.2 Disadvantages

Despite the aforementioned advantages, there was a strong objection against codification. The famous German jurist Friedrich Karl Savigny who first encountered codification as a reaction to Thibaut's call to end the intolerable and inconvenient diversity of private laws prevailing in Germany by adopting a General German Civil Code, modeled on the French Code Civil. Savigny criticized the very notion of codification as inorganic, unscientific, arbitrary and hostile to tradition. At best, it was unnecessary; at worst it would distort and stifle 'organic' legal development.⁵⁰

The main objections demonstrated against codification return to the following reasons:

- Law is a social progressing entity that has always been affected by the changing circumstances of the society. It is, thereon, free of periodical curtailment that may lessen its flexibility to accommodation, weaken its capacity of adaptation and stifle its accessibility to application. In contrast, the non-codified law tends to conform to the principles of common sense, sound reason and justice. Statutory law, on the other hand, tends to become technical and arbitrary. A rule of law stated in statutory form becomes rigid and is more and more rigid as time goes on.⁵¹
- Human language is at best defective and ambiguous. With statutory law, no matter how clear and simple the language may appear at first sight, doubts will arise, ambiguities will be disclosed and inconsistencies between different sections will present themselves.⁵²
- The law-makers usually announce terms and use certain phrases without due discretion of their meaning in use, e.g., terms such as 'good conscience', 'fault', 'fraud', forwarding their

⁵⁰ R. Abū al-Su'ūd (1983). Op. Cit., volume. 1, p.262. See also: ouclf.iuscomp.org.

⁵¹ R. Abū al-Su'ūd (1983). Op. Cit., volume. 1, p. 263; S. Maḥmaṣānī (1965). Op. Cit., p. 171.

⁵² http://www.constitution.org/cmt/hornblower/cod_law.htm.

definitions to the work of judges and jurists and it may sometimes lead to alleged evils coming through judge made law.⁵³

The foregoing criticism was sharply rejected by the adopters of statutory law, firstly, because it is the matter of check and balance between the advantages and disadvantages in general and, secondly, because it was inspired from the approach of the historical school of law that considers law as a changeable entity at all and its rules are not subject of reduction. The opposite view addresses the function of development to juristic works and judges' adjustments. They simply believe that the law is ruling the judge and the judge is ruling the cases presented to him, regardless of whether they are new cases with no precedents or they are preceded cases grounded in daily implementation of law. Also, it is the function of jurisprudence to endure the liability of offering definitions to ambiguous words and unclear phrases and this may be the unique attribute that makes a legal rule a matter of adaptation with the endless requirements of social growth.⁵⁴

2.1.3 The Legal Debate on Codifying Islamic Law

Besides viewing the former arguments about codification's advantages and disadvantages in general, there is a further haggling debate amongst the Muslim jurists on drafting of Codes from Islamic law.

After the *Tanzīmāt* of the Ottoman Caliphate, in part, and because of compelling foreign laws on Muslim countries by the occupiers in previous centuries and thereafter by the allegation of modernity, the codified laws became a prevailing model of jurisdiction for almost all major Islamic countries. Hence, a legal question had arisen: Is codification of Islamic law

⁵³ R. Abū al-Su'ūd (1983). Op. Cit., volume. 1, p. 264.

⁵⁴ Ibid., pp. 262-265.

legitimate? Is it necessary to modernize legal theories of Islamic law in the light of man-made law?

The question of codification hereon shifts to a special atmosphere of critique. It is neither the question of necessity nor is it the case of any advantage it generates. It is, further, the question of legitimacy. This is due to variable causes, some of them with roots going back to ideas manifested in the early history of Islamic law. The main obstacles before the codification of Islamic law as presented by jurists could be summarized in the following points:

1. The nature of Islamic legislation:

The reference to Islamic law is found first in the texts of the Holy Qur'an and the authenticated traditions of the Prophet Mohammad (P. B. U. H). It implies that the law in Islam is mainly derived from the holy texts. A *Mujtahid* should not transgress a particular rule grounded by a text of *Sharī'ah*. He can apply his reasoning when no text could be found that was relevant or when the available text is speculative in meaning and more than one possibility surrounds its understanding. Due to the sanctity of those refereed texts, the jurists had treated the texts keenly and favored an inductive method of application upon an analytical approach that may reduce the detailed laws in general maxims so that the particularity of each single law may get lost. The *Ūṣūl Fiqh* founders also recognized analytical applications in unpronounced cases to apply the analogy (*Qiyas*) or interests (*Maṣāliḥ*). Yet, they deduced general disciplinary maxims of jurisprudence within a descipline called today “*Ilm al-Qawā'id*

al-Fiqhiyyah”, but it was only an advisory work, not fully authoritative in nature and not completely validated in application.⁵⁵

2. The freedom of *Ijtihād*:

The freedom of *Ijtihād* is admissible in Islamic law. It was often beyond the diversity of approaches that flourished in Islamic legal history. Under this tenet, it was difficult to unify un-stated laws because it was considered as in contradiction to the nature of Islamic legislation that obliges qualified Muslims to do *Ijtihād*. It was assumed that the codification stands adversely to free *Ijtihād* by putting the last boundary of law and then undermining the lines of freedom in juristic works.⁵⁶

It is narrated that the Abbasid Caliph Abū Ja‘far al-Manṣūr (d. 158AH) asked Imām Mālik b. Anas (d. 179AH/796CE) to draft the Islamic law. He said:

‘Take the subject of Islamic jurisprudence in your own hands, and do compile it in the form of different chapters. Avoiding the strictness of ‘Abdullāh b. ‘Umar (d. 73AH/692CE), the liberalism of ‘Abdullāh b. ‘Abbās (d. 68AH), and the individualism of ‘Abdullāh b. Mas‘ūd (d. 32AH), compile a code which should reflect the maxim: (the best of affairs is the middle course) and which should be a collection of the legal decisions and verdicts given by the Imāms and Companions of Prophet (P. B. U. H). If you complete the job, we shall bring about a consensus of the Muslims on your school of jurisprudence and enforce it throughout our realm with a decree that contravention thereof be strictly avoided.’⁵⁷ (Trans.)

Mālik politely declined on the plea that one man’s opinion could not be imposed on everyone. People should have the freedom to disagree. In other words, he refused the suggestion to preserve continuity to free *Ijtihād* of the qualified Muslims forever. He stated:

⁵⁵ S. Maḥmaṣānī (1965). Op. Cit., p. 171; Ṭāriq Ziyādah (1990). *Dirasāt fi al-Fiqh wa al-Qānūn*, 1st edn. Lebanon: Dār al-Shimāl. p. 91.

⁵⁶ S. Maḥmaṣānī (1965). Op. Cit., pp. 171-172.

⁵⁷ See the foreword of Muḥammad Zāhid al-Kawtharī for: Abū al-Ḥasan al-Dār-Quṭnī (n.d.), *Aḥādīth al-Muwaṭṭa‘a*. (N.p.): Dār al-Ri‘āyah al-Islāmiyyah., p.3; A. Iṣlāhī (2000). Op. Cit., pp. 90-91.

‘Please ignore that. The people have already made different opinions and jurisdictions. They got and narrated speech and tacit of Prophet. Each group inferred the rulings of Shar‘ah according to their own foundations. They worked and applied rulings according diverse opinions succeeded to them by the first generation. It is, therefore, an extreme treatment and an intolerant behavior to bring them by force about uniform of opinion. Let them choose what they hold and do not enforce anything upon them.’⁵⁸ (Trans. T.W.)

3. The freedom of belief:

Despite the fact that Islam is a universal religion, it is clear that Islam gave the chance of free choice of belief. As a result, Islam tolerated diversity of religions and gave the chance to the existence of multiple religions in Muslim societies. The codification, therefore, may confront an obstacle in cases relevant to exclusive religious affairs. As such, it was difficult to reach a just conciliation between religions’ doctrines in affairs restricted to their full authority in which the reduction of their positions becomes unaffordable or even impossible.⁵⁹

Nowadays, there are two dominant opinions concerning the issue of the codification.

The conservative school may be led mainly by the scholars of Arab Gulf States, especially Saudi jurists and Salafis,⁶⁰ e.g., Bakar b. ‘Abdullāh Abū Zaīd, a prominent Saudi scholar, authored a book that addressed the issue and concluded that the codification is unharmonious to Muslims. It is a Western model and strange both in name and content. The nature of Islamic legislation refutes codification, and it is unfamiliar to Muslims to adopt it.⁶¹

The opponents of codification mainly offer the following points as causes of the preservation:

⁵⁸ Muḥammad b. al-Ḥasan al-Shaybānī (1999). *Muwaṭṭa’ al-Imām Mālik*, 3rd edn. Azamran: Muzaffar Pur. volume. 1, pp. 12-16; Ibn ‘Asākir al-Dimashqī (1992). *Kashf al-Mughṭā fi Faḍl al-Muwaṭṭa’*, 1st edn. Beirut: Dār al-Fikr al-Mu‘āshir. pp. 53-55.

⁵⁹ S. Maḥmaṣānī (1965). Op. Cit., pp. 172-176.

⁶⁰ M. ‘Abdul-Jawād (1977). Op. Cit., pp. 82-83.

⁶¹ Bakar b. ‘Abdullāh Abū Zaid (1983). *Al-Taḥnīn wa al-Ilzām: ‘Arḍ wa Munāqashah*, 3rd edn. Riyāḍ: Maṭbū‘āt Ri’āsat Idārat al-Buhūth al-‘Ilmiyyah wa al-Ifṭā’ wa al-Da‘wah wa al-Irshād. pp. 99-100.

- 1) The fear of distorting the legal rules by the rulers via applying the codes as a device to realize their own interests.
- 2) The Islamic legal rules have been implemented for more than fourteen centuries without codes.
- 3) The Common Law system of several developed Western countries, e.g., English Common Law, approves the fact that it is still acceptable to apply laws without being drafted as codes.
- 4) It is opposed to the right of free *Ijtihād* to the qualified scholars.⁶²

In contrast, Sheikh ‘Alī al-Khafīf, Sheikh Muḥammad Abū Zahrah, Sheikh Ḥasanaīn Makhḷūf, Sheikh Aḥmad Fahmī Abū Sunnah, Sheikh Muḥammad Zaki ‘Abdul-Barr, Sheikh Yosuf al-Qaraḏāwī, Sheikh Wahbat al-Zuḥaylī and Muḥammad ‘Abdul-Jawād, viewed the codification of Islamic law as something necessary. Moreover, Zuḥaylī and ‘Abdul-Jawād called on the Arab countries, especially the Kingdom of Saudi Arabia, to go a step more towards codification of Islamic law, justifying it by various reasons such as the following:

1. It makes everyone refers to the legal rulings and rescues the judges and jurists from searching the depth of a very wide heritage of jurisprudence that contains a lot of disputes and arguments. If the Islamic jurisprudence is reduced to codes, it will surely assist the judges and lawyers to make recourse to them and comprehend the laws without any confusion or disturbance. As a matter of fact, in Islamic jurisprudence, legal rules based on sacred texts are few in number, as compared with those based on opinion and *Ijtihād*.

⁶² Ibid.; M. ‘Abdul-Jawād (1977). Op. Cit., pp. 79-85.

Sacred texts laid down basic principles only. But most of the rules relating to details were the work of juristic *Ijtihād*, which was based on the secondary sources of jurisprudence, namely consensus of opinion, analogy and principles of equity. These details and particulars formed a huge mass of *Fatāwā* or "responses" and filled up a great number of books and commentaries. So, it will not be a controversial fact that a code of laws may help Muslims to utilize this huge heritage from which the codification should take benefit.

2. It may help Muslims to filter and choose the most suitable opinions of former jurists and to conclude with the best.
3. It is difficult today to have judges with qualifications sufficient to independently deduce the legal rules from the primary sources of law. Therefore, it will be interesting to have a code drafted by the qualified personalities and profound scholars, to give others a chance for accessible adjudication of the cases.
4. It may assist in unifying the decisions and judgments of the judges, e.g., in the beginning of the Saudi Arabian rulings, a sharp dispute among the judges was notified, a matter that led to the enforcement of certain books as compulsory references for judgment.
5. The Muslims may not be capable to achieve mastery and excellence without getting rid of the influence of foreign laws which were enforced upon them, and this cannot be merely achieved without applying an alternative code derived from the original sources of Islamic law.⁶³

⁶³ Muḥammad Zaki ‘Abdul-Barr (1983). *Taqnīn al-Fiqh al-Islāmī: al-Mabda’ wa al-Manhaj*, 1st edn. Duha: Idārat Iḥyā’ al-Turāth al-Islāmī. Pp. 25-33; W. al-Zuhaylī (1987b). *Op. Cit.*, pp. 27-34; M. ‘Abdul-Jawād (1977). *Op. Cit.*, pp. 78-85. See also: Faṭḥi al-Duraynī (1985). *Al-Manāhij al-Uṣūliyyah fī al-Ijtihād bi-al-Ra’y fī al-Tashrī’ al-Islāmī*. Al-Sharikah al-Muttaḥidah li-al-Tawzi’. p. 481; Yosuf al-Qaraḍāwī (2001). *Al-Siyāsah al-Shar’iyyah fī Daw’ Nuṣuṣ al-Sharī’ah wa Maqāṣidihā*, 1st edn. Beirut: Mu’assasa al-Risālah. p.74; A. Kamal Abulmagd (1987). “The Application of the Islamic Sharī’ah.” In Proceedings of First Arab Regional Conference: *Arab Comparative and Commercial Law-The International Approach* in Cairo 15-19 February 1987. London: Graham & Trotman), volume.1, p.28-41.

2.2 Civil Law

Under this section, the researcher will mention the definition of the combined term “Civil Law” and then clarify the contents of this area of law to finally describe the differences between “Civil Law” and “Common Law”.

2.2.1 Definition

There are various definitions of “Civil Law” based on its different applications. The explicit one that can be obtained from essential dictionaries and references is the one applied by “Dictionary of Legal Words and Phrases”. It defined the term as:

‘...the municipal law of a state. It is also used to denote that portion of the municipal law of a country which deals with civil rights and remedies as distinguished from the criminal law. It is sometimes employed as opposed to ecclesiastical law. When used without any qualification it is generally understood to mean the Roman law as contained in the Corpus Juris Civilis. Among the primary systems the civil law holds the most prominent place. It is the great source from which most other systems of jurisprudence have been derived, and they still recognize the influence of its principles and doctrines.’⁶⁴

According to L. B. Curzon, the term “Civil Law” could be employed to the following senses:

- The law a people has settled for itself, peculiar to the state itself’: Justinian’s Institutes (533).
- The entire corpus of Roman law.
- Non-military law.
- Non-criminal law, generally relating to the interactions of individual citizens.
- Legal systems, often codified, based originally on Roman law.⁶⁵

David M. Walker also stated on that the term is used in the following different senses:

⁶⁴ *Dictionary of Legal Words and Phrases* (1975). Durban: Butterworth’s. volume. 1, p. 256.

⁶⁵ L. B. Curzon (2003).Op. Cit., p. 69.

- In that the Roman civil law was that applied to Roman citizens only, as contrasted with law applicable to immigrants and foreigners.
- Civil law also was distinguished from the rules of law developed by the praetors and other Roman magistrates.
- The law of the Roman world and of Roman citizens everywhere.
- From being the law of the Roman State, it was extended to the law which any state had constituted for itself.
- Later on with the development of the Roman Church, civil law came to mean the whole body of state law as opposed to the body of church law.
- In countries whose legal systems have been founded closely on the Roman civil law, it was used to distinguish the law applicable to ordinary citizens from commercial law applicable to merchants or persons in trade.
- In the context of comparative law, a civil law system is one mainly based on the Roman law, as contrasted with a common law system, one mainly based on the common law of England.
- Civil law is commonly contrasted with criminal law, administrative law, military law and ecclesiastical law.
- It is sometimes used to designate the national or municipal law of a state as contrasted with public international law.⁶⁶

It can be said, also, that a “Civil Code” is a systematic compilation of laws designed to comprehensively deal with the core areas of private law or, in other words, is a “unified,

⁶⁶ D. M. Walker (1980). *Op. Cit.*, p. 222. See also: R. Abū al-Su‘ūd (1983). *Op. Cit.*, volume. 1, pp. 157-158.

organized and comprehensive code of law that encompasses contract, tort, property, family, and inheritance law”.⁶⁷

The term’s equivalent in Arabic is “*al-Qānūn al-Madani*”. It is defined by Sanhūrī as “the law that governs the mutual relationship among individuals.”⁶⁸ Also, Ramaḍān Abū al-Su‘ūd, an Arab legal thinker, defined the term as the core private law that organizes the individuals’ relationship despite the position that each individual occupies.⁶⁹

2.2.2 Contents of a Civil Code

A Civil Code encompasses the fields of law known commonly as law of contracts, torts, property law, family law and the law of inheritance.

Hereby, commercial law, corporate law and civil procedure are usually codified separately.

The older Civil Codes such as the French, Egyptian, and Austrian ones generally consist of three large parts:

- Law of Persons (*personae*).
- Law of Things (*res*).
- Issues common to both parts (*actiones*).

The newer codes such as the ones of Germany and Switzerland are based upon the Pandect System structure:

⁶⁷ Jay M. Feinman (2003). *1001 Legal Words You Need to Know*. Oxford: Oxford University Press. P. 77. For further details refer to: *The New Encyclopedia Britannica* (1973-1974), 15th edn. Helen Hemingway Benton Publisher. volume. 4, p. 660; Sir Thomas Edlyne Tomalins (1835). *The Law Dictionary*, 4th edn. London. volume. 1, (civil law).

⁶⁸ Sanhūrī (1972). Op. Cit., volume. 1, p. 103.

⁶⁹ R. Abū al-Su‘ūd (1983). Op. Cit., volume. 1, p. 157.

- General part.
- Law of Obligations.
- Law of Things.
- Family Law.
- Law of Inheritance.

The Civil Code of the state of Louisiana is divided into five parts:

- Preliminary Title.
- Of Persons.
- Things and Different Modifications of Ownership.
- Of Different Modes of Acquiring the Ownership of Things.
- Conflict of Laws.

In the Arab World, a civil law is entitled to organize the interactions of individuals in the society, whether it is personal statute or it is financial status. It generally includes two basic areas:

- ❖ Law of Personal statute “*Qānūn al-Aḥwāl al-Shakhṣiyyah*”.

This includes the following matters:

- Identifying the status of the person as a distinguishing personal statute and determining the competence of receiving rights and obligations.
- Settling the family-related issues and domestic relations including the nature of marriage, civil associations, and domestic partnerships, issues arising during marriage, including spousal abuse, legitimacy, adoption, surrogacy, child abuse, and

child abduction, the termination of the relationship and ancillary matters including divorce, annulment, property settlements, alimony and parental responsibility orders.

❖ Real rights “*al-Aḥwāl al-ʿAyniyyah/ al-Aḥwāl al-Māliyyah*”.

This includes the following matters:

- Property Law “*al-Ḥuqūq al-ʿAyniyyah*”. This branch deals with financial interaction between individuals.
- Personal Rights or Obligations “*al-Ḥuqūq al-Shakḥsiyyah /al-Iltizāmāt*”. It is the financial relationship exists between two parties in which the law establishes a financial right on a party for the interest of the second party. The civil law, hereby, identifies the obligations in terms of existence, effects, assignment and expiry and regulates the categories of unnamed contracts.⁷⁰

In this context, Sanhūrī classified “Civil Law” into two categories:

- Personal Statute “*al-Aḥwāl al-Shakḥsiyyah*”.
- Transactions “*al-Muʿāmalāt*”.⁷¹

He described law of the personal statute by stating that: “It is that which organizes the individual’s relation with the family”.⁷² Therefore, law of transactions is that which organizes an individual’s relationship to others in relation with property. The property, in the view of law, consists of rights. The right in transactions is an interest owning a financial value recognized by law to the individual. The right is one of two: real rights and personal rights.

⁷⁰ R. Abū al-Suʿūd (1983). Op. Cit., volume. 1, pp. 158-159; Muḥammad ʿAbdul-Jawād (1991a). *Buhūth fi al-Sharʿah al-Islāmiyyah wa al-Qānūn: Uṣūl al-Qānūn Muqāranatan bi Uṣūl al-Fiqh*. Alexandria: Manshaʿat al-Maʿārif. pp. 83-86.

⁷¹ Sanhūrī (1972). Op. Cit., volume. 1, p. 103.

⁷² Ibid.

The latter is obligation that usually used to mean rights with relevance to the debtor and to mean debt with relevance to the creditor,⁷³ Sanhūrī added.

Although the Arab companions to law recognize that the civil law encompasses two essential parts: personal statute and transactions, they often apply the term to mean the second part only. This is due to certain historical circumstances that made it difficult to codify the law of personal statute under a uniform Civil Code. The legal system of most Arab countries was based upon Islamic law for a long time before the enactment of the European oriented codes. This tradition was commonly prevailing, despite the existence of multiple religions in Muslim populated territories. The Ottomans, later on, granted non-Muslim minorities certain privileges to protect their own particularities by applying their religious laws in personal law affairs. When the quotation of Western codes became a model, these traditions were stable and it was difficult to drop the granted rights and privileges. Hence, the latter Civil Codes could not ignore this fact. Yet the lawmakers tried to find a way to have a reasonable conciliation between the laws or the traditions of those religions.⁷⁴

The foregoing point is clearly elaborated by Muḥammad ‘Abdul-Jawād, a fellow of Sanhūrī. He has clarified that Civil Law is often applied in the Arab World to the law of property only, because they have derived this part from the Western Codes, whereas the law of personal statute was restricted to the religious particularities. They held that the Muslim law of personal statute should exclusively refer to Sharī‘ah law.⁷⁵

⁷³ Ibid.

⁷⁴ R. Abū al-Su‘ūd (1983). Op. Cit., volume. 1, pp. 159-160.

⁷⁵ M. ‘Abdul-Jawād (1991a). Op. Cit., p. 62.

2.3 Comparison between Statutory Laws and Case Laws

At the beginning, it is noteworthy to remember the fact that the term “Civil Code” in the context of comparative law is the system that is mainly based on the Roman law, as contrasted with a common law system, one mainly based on the common law of England. In other words, the world’s legal systems can be divided into families linked by common origins. The most widespread families of law originated in England and Western Europe.⁷⁶

Between the 11 and 15 Centuries the law of England was strongly influenced by Roman-law learning, and in the 16 Century the kings of England and continental rulers welcomed experts trained in Roman law as administrators. After the Norman Conquest of 1066, there had grown up at the courts of Westminster a profession of practitioners who were expert in the law and procedure of the centralized court system, strongly organized and unwilling to yield its position to a new group of specialists of Romanist learning, thus, the reception of Roman law in the continental style was prevented in England. The former patchwork of Anglo-Saxon law was gradually replaced by royal judges who dispensed justice throughout the countryside, applying the same general principles everywhere. The result was a shared body of law, “the common law of the realm”. This system spread to England’s colonial empire, including most of Canada and what was to become the United States.⁷⁷

The other leading legal system is called the civil law. It is modeled upon the law of ancient Rome, which was revived by Italian scholars in the 11 Century and then spread to the rest of continental Europe.⁷⁸

⁷⁶ J. M. Feinman (2003). Op. Cit., p. 77.

⁷⁷ Ibid; *The New Encyclopedia Britannica* (1973-1974). Op. Cit., volume. 4, p. 665.

⁷⁸ J. M. Feinman (2003). Op. Cit., p. 77; D. M. Walker (1980). Op. Cit., p. 222.

The most influential modern Civil Code was the one of Napoleon Bonaparte in France at the beginning of the 19 Century (1804). Napoleon was codifying the egalitarian ideas of the French Revolution and he believed that the law should be accessible to all. The elegance and simplicity of the Napoleonic Civil Code found favor in many other countries. It was followed by number of codes, e.g., Austrian Allgemeines Bürgerliches Gesetzbuch (1812), Civil Code of the State of Louisiana (1825) “the only code in United States”, Chile Código Civil (Civil Code) written mostly by Andrés Bello and the base of the codes of Colombia, Ecuador and other Latin American countries (1855), Quebec or Civil Code of Lower Canada (1865) repealed and replaced by Civil Code of Québec in 1994, German Bürgerliches Gesetzbuch (1900), and Swiss Zivilgesetzbuch (1907). The most influential codes among them are the France Code, the German Code and the Swiss Code.⁷⁹

Each of the two systems has certain characteristics and features that distinguish one from the other.⁸⁰ We may indicate the main differences between them in the following scopes:

- The heart of most civil law systems is a Civil Code, whereas the central figure in the common law tradition is the judge. Most of the common law evolved through case-by-case decision-making over the centuries. The rules of law are generalizations derived from countless specific cases.⁸¹
- In civil law countries, courts are free to consider anew any legal question irrespective of former determinations made by other courts, and decisions by other judges in cases with different facts are irrelevant. In contrast, common law courts are bound by judicial precedents.

⁷⁹ D. M. Walker (1980). Op. Cit., p. 234; *The New Encyclopedia Britannica* (1973-1974). Op. Cit., volume. 4, p. 665.

⁸⁰ See: D. M. Walker (1980). Op. Cit., pp. 222-223.

⁸¹ J. M. Feinman (2003). Op. Cit., pp. 77-78; *The New Encyclopedia Britannica* (1973-1974). Op. Cit., volume. 4, p. 666.

Judges must expand, and even at times overrule, earlier cases so that the law can keep up as social conditions change.⁸²

- In common law countries, judgeship is often a highly political position; judges are either elected or politically appointed. Hereby, they always elaborate opinions showing how their decisions follow the earlier cases, some of which go back centuries, whereas in civil law systems judgeship is basically an administrative position.⁸³
- The job of a civil law judge is to apply the code to the facts and deduce individual decisions from general principles. In contrast, the logic of the common law is inductive in which the judge derives general principles from individual decisions.⁸⁴
- In the common law, the role of adapting the law to changing conditions has traditionally been the task of judges. In civil law countries, the task had generally been performed by university professors so that it has tended to be more systematic and more comprehensive and consistent in its propositions and terminologies than the judge-made common laws, which may have tended to be closer to practical life and perhaps more particular in detail.⁸⁵
- The truly significant difference between the two systems lies in the realm of trial procedures pertaining to the role of the general prosecutor, witnesses, lawyers and the parties' conduct.⁸⁶

Yet both systems reach the same general results and despite the theoretical differences, the requirements of modern life have driven the practices of the two systems closer together, e.g., the United States has made extensive use of statutes to organize comprehensive codes such as the Uniform Commercial Code and the States' Penal Codes. In civil law countries, the generally worded codes have been supplemented by narrower statutes and judges have

⁸² J. M. Feinman (2003). Op. Cit., pp. 78-79.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ *The New Encyclopedia Britannica* (1973-1974). Op. Cit., volume. 4, p. 666.

⁸⁶ Ibid, v. 4, p. 666; J. M. Feinman (2003). Op. Cit., pp. 79-80

developed a body of precedents interpreting the codes, not only for the sake of continuity and social stability but also to save time and effort by avoiding rethinking every problem each time it arises for judicial determination.⁸⁷ As such, according to Sanhūrī's proposition in the Arab Civil Code, it is decided to make the judicial decisions a source of interpretation.⁸⁸

2.4 Legal Progress in Arab and Muslim World

Before enclosing any description of Sanhūrī's code in this study, it is necessary to make a survey of the history of codification in the Arab World as both concept and procedure. Hereby, an elaboration on the historical efforts that have been applied for the sake of codification in the Arab World since the appearance of Islam until the time Sanhūrī's Civil Code was promulgated is needed.

In the following articles and sub-titles, the researcher will briefly discuss the meaning of "Arab World" and then describe the development of codification in the Arab World. Further discussion, pertaining to the legal systems of the Arab countries that enacted Sanhūrī's Code, shall be held in different locations distributed upon different parts of this study when the subject requires.

2.4.1 Definition of "Arabs" and "Arab World"

The borders of the Arab World changed from time to time based on different historical contexts that were undergone by Arabs, due to factors of weakness and strength that usually confront civilizations and political orders.⁸⁹

⁸⁷ J. M. Feinman (2003). Op. Cit., p. 78; *The New Encyclopedia Britannica* (1973-1974). Op. Cit., volume. 4, p. 666.

⁸⁸ Sanhūrī (1972). Op. Cit., volume. 1, pp. 49-50; Iraqi Justice Ministry IJM (1951). *Al-Qānūn al-Madani al-'Irāqī*. Baghdad: Maṭba'at al-Ḥukūmah. p. 4.

⁸⁹ Šūfi Ḥasan Abū Ṭālib (1990). *Taṭbīq al-Sharīah al-Islāmiyyah fī al-Bilād al-'Arabīyyah*, 3rd edn. Cairo: Dār al-Nahḍah al-'Arabīyyah. p. 3.

The Arabs, before the appearance of Islam, had been mostly known as Badu who live in the desert of the Arabian Peninsula (*al-Jazīrah al-ʿArabiyyah*). The term “Arab” yet did not denote a certain race or nation. After the demise of the Prophet Muhammad (12AH/632CE) and in the political era of Umayyad Caliphate, when Islam spread over the area of the Southern Mediterranean Sea from the west to India in the east and Samarqand in the north, the term had been applied to signify the Arab who conquered the lands to be distinguished from “*Mawāli*” who originally resided there. In this age, it was noticed that the Umayyad authorities did not encourage the Arabs to integrate deeply with non-Arab communities, to preserve their local customs and occupy the leadership of the Muslim nation by which they inherited the Arabic culture, and the estate of traditions and customs originated by Islam. Thus, they preserved the Arabs governing the entire regions, including the conquered territories.⁹⁰

When the Abbasid era came (132AH/749CE), the notion totally changed and the religious tendency was the banner of the new order due to various factors manifested in the wide-spreading of Islamic teachings, dissemination of the Arabic language everywhere, conversion to Islam in large numbers so the Muslims became the largest populated majority and lastly the integration between Islam and domestic cultures and civilizations. Hereon, a new integrated culture appeared with credible features modeling a universal civilization encompassing various nations and different religions and races. During this age, non-Arabs, even non-Muslims, played a great political role to the extent that enabled them, later on, to drop the authority from the control of Arabs. The term “Arab” in the Abbasid reign took a socio-cultural dimension and became applicable for the Muslim nation, representing the identity of a multi-cultural community. The new application of the term, basically, was

⁹⁰ Ibid., pp. 3-4.

implemented by the Christian opponents, especially the French, to describe the eternal essence of the Islamic civilization.⁹¹

Later on, the power of Arabs diminished and was eventually lost due to the political division in which every part of the Muslim World was divided into parts ruled by different rulers with severe disputes over power. Seljuks (455AH/1063CE), who were originally Turks, controlled Iraq which formed the center of the *Abbasid* State and ousted them from the power. The Ottoman Turks (1157-1924CE), later on, controlled the order and put the Islamic States under their control. Yet, the only law that was implemented over the centuries was derived from *Sharī'ah* law and Arabs became a critical part of Muslim World within uniform borders and under the same banner.⁹²

In the Nineteenth Century, the Ottoman Caliphate suffered from severe crises and weakness. The European super-powers encountered the Caliphate in various ways. They shaped the spirit of racial nationalism among Muslim nations, including the Arabs, as similar to the concept diffused over continental Europe. A large number of Arab nobles and opponents to the Ottoman Caliphate adopted the nationalism as a solution for the Arab World's problems.⁹³ Hereby, the term of "Arabs" shifted from the universal Islamic entity to a narrower one in which the Arabs were manifested as a nation that owns a particular language, lives in a limited land peculiar to them and forms a community entitled "The Arab Nation" (*al-Ūmmah al-ʿArabiyyah*).⁹⁴ In accordance to this, the Arabs are defined as a large and heterogeneous ethnic group found throughout the Middle East and North Africa".⁹⁵ Thus, the term "Arab World" became more practical and after the occupation of major Arab lands and

⁹¹ Ibid., p. 3.

⁹² Ibid. pp. 4-6; S. Maḥmaṣānī (1965). Op. Cit., p. 210.

⁹³ S. H. Abū Ṭālib (1990). Op. Cit., pp. 6-7; S. Maḥmaṣānī (1965). Op. Cit., pp. 210- 212.

⁹⁴ S. H. Abū Ṭālib (1990). Op. Cit., pp. 6-7.

⁹⁵ See: http://en.wikipedia.org/wiki/Arab_world.

obtaining the right of self determination the Arab World labeled the basis of independent states, but yet remained divided and scattered.⁹⁶

Nowadays, the Arab World consists of twenty-two countries stretching from Mauritania in the west to Oman in the east. They have a combined population of 323 million people. The Arab World thus accounts for just over two-fifths of the total population of the entire Muslim world.⁹⁷ This means that the Arab World stretches across more than 12.9 million square kilometers (5 million square miles) of North Africa and the part of Western Asia called the Middle East. The Asian part of the Arab World (including Arabia proper) is called the *Mashriq*. The North African part (excluding Egypt and the Sudan) of the Arab World is known as the *Maghrib*.⁹⁸ Therefore, twenty states and two territories are considered to be part of the Arab World as all use Arabic as one of their official state languages, and most of their inhabitants speak one or more of the Arabic languages and dialects (though ethnically quite varied). The Arab states and territories are: Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Western Sahara (SADR) and Yemen.⁹⁹

It is noteworthy that in the northern regions of Iraq (20-25%) and Syria (5-10%) lives the Kurds, a people who speak Kurdish, a language closely related to Persian but with no discernible relationship to Arabic. The nationalist aspiration for self-rule or for a state of Kurdistan, has created conflict between Kurdish minorities and their governments. Large Kurdish minorities also exist in non-Arab Iran (5-10%) and Turkey (20%). Also, in North Africa the Berbers (or *Amazigh*) pre-date the Arabs, and most North African Arab countries have large Berber populations. In Morocco, Berber speakers form over 35% of the total

⁹⁶ S. H. Abū Ṭālib (1990). Op. Cit., pp. 7-8.

⁹⁷ See: http://en.wikipedia.org/wiki/Arab_world.

⁹⁸ Ibid.

⁹⁹ See: Ibid; S. H. Abū Ṭālib (1990). Op. Cit., p. 7; S. Maḥmaṣānī (1965). Op. Cit., pp. 214- 215.

population; in Algeria they represent about 20% of the population. In Libya they form about 4% of the population, mainly near the Tunisian border. There are much smaller isolated Berber communities in Tunisia, Mauritania, and even one oasis in Egypt. However, in Somalia, although it is a member of the Arab League, the predominant language is Somali, and the population is Somali, not Arab. For this reason, they are sometimes excluded from the definition of the Arab World. However, Somalia joined the Arab League in 1974 and 99% of its population is Muslim, resulting in close ties with decidedly Arab states.¹⁰⁰

2.4.2. Development of Codification in the Arab World: the Concept and Procedure

To understand the nature of Sanhūrī's work, a brief reference to the efforts made in the past towards codification of law in the Arab and Islamic World is needed.

So far as the period of the Prophet (P. B. U. H) and of the four great Caliphs is concerned; the question of codification did not arise at that time. With the passage of time, when a growing number of juristic schools appeared and the job of the courts was not as simple as before, it was not possible any longer to expect the harmony in scholars' opinions and judges' verdicts, as much as the rulers themselves, began to feel the necessity of a codified law.¹⁰¹

The historians refer the very roots of codification in Arab World, as the concept, to the well documented event of *Ibn al-Muqaffa'*'s dialogue (d. 144AH/762CE), with the Caliph *Abū Ja'far al-Manṣūr* (95-158AH/713-775CE). *Ibn al-Muqaffa'*, a famous writer in Arabic literature, was the first to see the necessity of codification. He put a proposal before *Abū Ja'far al-Manṣūr* in a formal letter named "*Risālat al-Ṣaḥābah fī Ṭa'at al-Sulṭān*" (Message of

¹⁰⁰ See: http://en.wikipedia.org/wiki/Arab_world.

¹⁰¹ A. Iṣlāḥī (2000). Op. Cit., p. 89.

Companions in the Obedience of the Sultān) and because it was fruitless it was then called “*al-Risālah al-Yatīmah*” (The Orphan Massage), stating:

‘And one problem of these two Islamic States (Chufa and Basra) and other provinces to which *Amīr al-Mu’minīn* has to give his deep thought is that of the divergence of opinion on Islamic Law, which has now reached such proportions that it is no longer possible to close our eyes to it... If *Amīr al-Mu’minīn* would like it, the answer could be; that *Amīr al-Mu’minīn* issue a decree that all decisions and judgments so far passed be compiled in the form of a book and placed before *Amīr al-Mu’minīn*, and every sect must attach with it all the arguments which support their viewpoint, duly based on reasoning and authoritative references. *Amīr al-Mu’minīn* may thereafter review the whole record, and give his own judgment in each case, and restrain the law courts from contravention thereof. In this way all the scattered decisions and judgments – covering a variety of subjects of all shades – shall assume the form of a regular, written code of law, free of errors. Accordingly, all Islamic States shall come to be governed by a uniform legal system. It is hoped that Allah Almighty shall bring about a consensus of the *Ummah* on the opinion and verdict of *Amīr al-Mu’minīn*.’¹⁰² (Trans.)

The Caliph did not accept the proposal in this form, but he kept it in mind. When he went to perform the pilgrimage to Mecca in (148AH/765CE), he indicated the idea to *Imam Mālik*. *Mālik* opposed the proposal and said that the followers of each school found solace in following their respective doctrines. It is also maintained that the Caliph went again to the pilgrimage in (158AH/775CE), and he put the whole scheme before *Mālik*. It is also believed that *Mālik* did not formally agree with the proposal, but compiled his *Muwatt’a*’ yet holding the opinion thereof of his own. History has it on record that during their reign, both *Al-Mahdī* (d. 169AH) and *Harūn al-Rashīd* (d. 193AH) also approached *Mālik* with the same question, which again was refuted by him.¹⁰³

It is recorded by history that during the first three centuries of Islamic history, the function of *Ijtihād* remained free of the interference of rulers; and judges remained free to

¹⁰² ‘Abdūllah b. al-Muqaffā’ (1998). *Risālat al-Ṣahābah*, 1st edn. Beirut: ‘Ālam al-Kutub. pp.58-60; A. Iṣlāhī (2000). Op. Cit., p. 89; Ibn ‘Abd al-Barr (n.d.). *Al-Intiqā’ fī Faḍā’il al-Thalāthah al-‘Immah al-Fuqahā’*. Beirut: Dār al-Kutub al-‘Ilmiyyah. pp.40-41; Ibn ‘Asakir al-Dimashqī (1992). Op. Cit., p.56.

¹⁰³ M. H. al-Shaybānī (1999). Op. Cit., volume, 1, pp. 12-16; A. Iṣlāhī (2000). Op. Cit., p. 90-91; S. Maḥmaṣānī (1965). Op. Cit., pp. 158-159; S. H. Abū Ṭālib (1990). Op. Cit., pp. 233-234. See also: Ibn ‘Abd al-Barr (n.d.). Op. Cit., pp. 40-41; ‘Abdūllah b. Qutaybah (1904). *Al-Imāmah wa al-Siyāsah*. Cairo: Maṭba‘at al-Nīl. volume 3, pp. 150-159.

implement the law according to inspiration of courtesy and justice based on the fundamental evidences of Islamic Holy References and other relative sources of jurisprudence like Analogy (*Qiyās*), Custom (*‘Urf*) and Public Interest (*Maṣlaḥah Mursalah*).¹⁰⁴

The concept of codification was presented in various forms in the later history of Islamic jurisdiction. It was improved and advanced in very slow and gradual steps in such a form that it is sometimes difficult to decide how to categorize them from a contemporary perspective. Generally, the historians of Islamic legal system indicate the different typical approaches, that to be discussed in the following sections, as the very beginnings of the codification concept.

A. Adoption of the four prominent doctrines of jurisprudence:

After the confusion of political order and division of power that occurred during the *Abbasid* era, a beginning of juristic rigidity came to be grounded. The majority of scholars favored adopting certain schools founded by famous *Mujtahids* to the extent that this gradually led to severe doctrinism in juristic opinions. This became dominant, especially after the conflict of opinions that happened as a result of freedom of juridical opinions that sometimes made a clash with the consensus of the Muslim scholars. The four best known schools of four great Imāms; Abū Ḥanīfa (d. 150AH/767CE), Mālik, Shāfi‘ī (d. 204AH/820CE) and Aḥmad b. Ḥanbal (d. 241AH/855CE) became dominant. The Ḥanafī Doctrine diffused more due to the Abbasid’s adoption of this school and the appointment of major judges from its fellows, e.g. the popular judge Abū Yosuf (d. 189AH/805CE). Shāfi‘ī Doctrine was preferred in Egypt, the place where the doctrine had grown in. Mālikī Doctrine became prevalent in West Africa

¹⁰⁴ See: S. Maḥmaṣānī (1965). Op. Cit., pp. 141-160.

(*Maghrib*). The judges mostly were selected from these schools according to the historical contexts of each and based on opportunities. Under the jurisdiction of Ṭūlūnid (254-292AH) and Akhshidid (323-358AH) the judges were selected from the four schools, with a certain favor to the Shāfi'ī School. Therefore, it became a judicial tradition for the judges to consult their doctrine in applying the rules. Yet, the rulers did not adopt a certain school to be the only reference of adjudication and people were free to choose the judge they preferred in accordance with the common acceptability of these doctrines.¹⁰⁵

B. Official adoption of a certain doctrine as a formal judicial reference:

In Fāṭimids era (358-654AH) in Egypt and West Arabia, the situation of judicial order totally changed. They, for the first time in Islamic history, created a new post of Super Judge “*Qāḍī al-Quḍāt*”. They used to choose a scholar from Ismā'īliyyah Shiite to the post, imposed the Shiite Doctrine over both territories and adopted it as the only reference for Fatwā and Judgment. Also, history records that the Mālikī Doctrine was imposed in West Africa by Al-Mu'izz b. Badīs b. Yosuf (d. 454AH/1026CE) in the middle of the Fifth Century of *Hijrah*. The Ayyūbid (566-648AH) adopted the Shāfi'ī Doctrine but selected the judges from the followers of the four Sunni Doctrines. In the age of Mamālīk (648-922AH) the post of judge was only entitled to the followers of the four Sunni Doctrines, even the post of disciplinary teaching (*Mashīkhah*) was reduced to them.¹⁰⁶

In the beginning of the Ottoman jurisdiction, the situation was the status quo of the former order; no official adoption of a codified law and with multiple juridical doctrines in

¹⁰⁵ S. H. Abū Ṭālib (1990). Op. Cit., pp. 234-235; S. Maḥmaṣānī (1965). Op. Cit., p. 176.

¹⁰⁶ Al-Qalqashandī, *Ṣubḥ al-A'shā* (n.d.). Cairo: Maṭabi' Kostatsomas. volume. 4, p. 35.

power. But because the Ottoman rulers embraced the Ḥanafī Doctrine, they used to select a Ḥanafī scholar to the post of *Sheikh al-Islām* who was entitled to issue *Fatwā* according to his doctrine. The Ḥanafī Doctrine, therefore, became powerful. Later on, Sultān Salīm al-Awwal (ruled between 1512 and 1520CE) issued a decree (*Farman*) announcing the Ḥanafī Doctrine as the official doctrine of the State, both in aspects of Fatwa and judgment. As such, the Ḥanafī Doctrine controlled the positions of *Sheikh al-Islām*, *Fatwā* givers (except the *Fatwā* in cases of *‘Ibādāt*) and the judges over the territories ruled by the Ottomans. The same policy took place in Egypt in the reign of Muḥammad ‘Alī Bāshā (1769-1849CE) when the Ottoman Caliph issued a decree specifying the legal approach of Ḥanafī Doctrine to the official *Fatwā* and judicial affairs too.¹⁰⁷ As concluded by Şübḥī Maḥmaşānī, the adoption of a certain doctrine as the compulsory reference was a primary step or pre-requisite to the codification of Islamic law, especially as a scholarly version of officially preferable laws and juristic opinions was prepared too.¹⁰⁸

C. Official selection of laws from a certain doctrine of jurisprudence:

As a result of the enforcement of Ḥanafī Doctrine in the legal courts, the policy of courts, as well as the laws and juristic approaches became unified. Yet the diversity of opinions and disputes upon the best resolutions for juristic questions, within the Ḥanafī Doctrine from the internal side of the school, remained truly an obstacle to a full adoption of a uniform code of law. This pushed the Ottoman rulers to think about a preferable selection of legal resolutions

¹⁰⁷ S. Maḥmaşānī (1965). *Op. Cit.*, p. 176-178; S. H. Abū Ṭālīb (1990). *Op. Cit.*, pp. 235-236.

¹⁰⁸ S. Maḥmaşānī (1965). *Op. Cit.*, p. 178.

when different approaches conflicted with each other, aiming at a uniform opinion to be imposed over all territories of the Ottoman Caliphate.¹⁰⁹

Departing from the foregoing idea, the Ottomans promulgated a series of legislative commands to organize the financial and administrative policy, as well as the governmental institutions, in special decrees known as “*Qānūn Nāma*” (the Message of Law) that was mainly created according to Islamic teachings and dominant customs. They used the word “*Qānūn*” to distinguish these worldly commands from the Divine legal obligations. These took place in various forms such as “*Farmān, Khaṭṭi Sherif of Gullḥane, Khaṭṭi Humayūn and Irādah Saniyyah.*” These forms of official orders rarely surveyed the policy of private laws, abandoning it to the Ḥanafī collections and compilations of *Fatāwā* that their consultation had been the task of *Sheikh al-Islām*. Thus, history has recorded the “*Qānūn Nāma*”, that of the Sulṭān Muḥammad al-Fātiḥ after he conquered Constantine (Istanbul) in 1455CE. It contains administrative directives and some penal laws. The then-Caliphs continued the same policy. In the reign of the Sulṭān Muḥammad II, a ‘*Qānūn Nāma*’ concerning the distribution of conducting bills “*Sanadāt al-Taṣarruf*” respective to state-owned lands (*Al-Arāḍi al-Meriyah*) was promulgated. The Sulṭān Sulaymān I (1520-1566CE) was known as “Sulaymān Qānūnī” due to the numerous legislative directives he offered, which were drafted in a special collection published in 1550CE containing the ordinances organizing administrative and financial matters along with some penalties.¹¹⁰

¹⁰⁹ S. Maḥmaṣānī (1965). Op. Cit., pp. 178-179; S. H. Abū Ṭālib (1990). Op. Cit., pp. 236-237.

¹¹⁰ S. H. Abū Ṭālib (1990). Op. Cit., pp. 237-238; S. Maḥmaṣānī (1965). Op. Cit., pp. 183-184.

In the reign of the Sulṭān Sulaymān I and the then-Ottoman Caliphs (in the middle of the Sixteenth Century) a trend to collect elective laws from the Ḥanafī School of jurisprudence appeared. The Sulṭān Sulaymān Qānūnī authorized *Sheikh al-Islām* Abū al-Su‘ūd b. Muḥammad b. Muṣṭafā al-‘Imādī al-Kūrdī (898-982AH/1492-1574CE) to perform the duty of an elective compilation of laws. He did author a compilation of Fatwa known as “*Ma‘rūdāt Abū al-Su‘ūd Afandī*”. Sulaymān Qānūnī had also asked Sheikh Aḥmad al-Ḥalabī (d. 956AH/1549CE) to author a book on Islamic law; easy to be understood by common readers, comprehensive in substance and encompassing an abstract to the outputs of former Ḥanafī references like (*al-Qaddūrī*, *al-Mukhtār*, *al-Wiqāyah* and *al-Kanz*), then he authored “*Multaqā al-Abḥur*”. Despite the great benefits that these books had facilitated, the analysts consider them as only advisory references and partially authorized drafts.¹¹¹

Later on, during the Eleventh Century of *Hijrah* (Seventeenth Century), another positive attempt was made under the orders of the Sulṭān Muḥammad Awrangzeb ‘Ālamgīr. A scholarly Board of five members, from the best Indian scholars and under the leadership of Nizām Burhān Burī, was constituted with the directive to compile a book that, in the Sulṭān’s words, “should embrace such *Fatāwā* or judgments as had obtained the consensus of eminent scholars of jurisprudence, and which should be a treasure-house of valuable information, having the approval of religious luminaries”. The compilation of “*Al- Fatāwā al-Hindīyyah/al-Fatāwā al-‘Ālamgīriyyah*”, within six volumes, was authored, but it did not fulfill the requisites of an official Code, owing to the fact that it was not compulsory applied, not drafted

¹¹¹ S. Maḥmaṣānī (1965). Op. Cit., pp. 182-185; S. H. Abū Ṭālib (1990). Op. Cit., p. 238; T. Ziyādah (1990). Op. Cit., p. 88; Fikret Karcic (1993). *Ta’rīkh al-Tashrī‘ al-Isālmī fi al-Busnah wa al-Hrisik*, 1st edn. Istanbul: Sirkeci. p. 62.

in a systematical order and encompassed both the rules of *‘Ibādāt* and *Mu‘āmalāt* in which some of the rules were only imaginary and abstract truths. Although it was not compiled in the style of a modern Code, it was an important link in the chain of the works attempted in this direction.¹¹²

In the second half of the Nineteenth Century, several law compilations emanated to organize the ownership of land, in which most of them basically quoted from the Islamic law principles of ownership. The most famous compilation was the land law (*Arāḍi Qānūn Namasi’*) (*Qānūn al-Arāḍi*) issued in 1274AH /1857CE.¹¹³

The codification of Islamic law reached an advanced stage with the issuance of the compilation of “*Majallaht al-Aḥkām al-‘Adliyyah*” (1869-1876CE). This compilation was an important event in the history of codification, due to it being derived from Islamic law and applied in most territories ruled by the Ottomans, except Egypt. It became the official code of civil law to all the countries ruled under the Caliphate, even for a period after their independence. The government constituted a panel of seven top ranking scholars under the presidency of Aḥmad Cevdat Bāshā (1822-1895CE) and entrusted them with the job, with a directive to compile a book on Islamic jurisprudence in a systematic form, which should be quite convenient to consult, free from disputes, be an authoritative reference on all well known pronouncements and decisions, and should be readily available to anyone.¹¹⁴ The committee finalized the job in (1293AH/1876CE). This compilation was authored in the form of the modern codes and it contained 1851 Articles divided into an introduction and sixteen chapters. The introduction contained 100 Articles elaborating the definition of jurisprudence (*Fiqh*), its

¹¹² S. Maḥmaṣānī (1965). Op. Cit., pp. 159-160; T. Ziyādah (1990). Op. Cit., p. 89; Muṣṭafā Aḥmad al-Zarqā’ (2004). *Al-Madkhal al-Fiqhī al-‘Āmm*, 2nd edn. Damascus: Dār al-Qalam. volume. 1, p. 236; A. Iṣlāḥī (2000). Op. Cit., p. 91.

¹¹³ S. H. Abū Ṭālib (1990). Op. Cit., p. 238.

¹¹⁴ A. Iṣlāḥī (2000). Op. Cit., pp. 91- 92.

categorization and main maxims.¹¹⁵ In drafting the code, the committee had never stepped outside the limits of the Ḥanafī rite and the rules which they laid down were for the most part actually applied by the *Fetvā Khanī (Fatāwā Qaḍī-Khān)* of Fakhruddin Ḥasan b. Manṣūr al-Farghānī (d. 592AH). However, among the opinions of the most authoritative jurists of the Ḥanafī rite there were some which were perceived as less rigorous and more suitable to the needs of contemporary times, and they adopted these opinions.¹¹⁶ Amendments to the *Majallah* were worked out by a committee in 1920-1921. The committee went beyond the Ḥanafī rite and took various principles from other schools. The amendments were, however, never enacted into law, since Turkey soon embarked upon a radical legal reform.¹¹⁷

Substantively the *Majallah* covered both less and more than a European Civil Code. It dealt with contracts (sale, hire, guarantee, dept, etc.) and some torts, but not with non-contractual obligations and did not regulate other areas of private law, such as marriage, divorce, inheritance, and various aspects of genuine property.¹¹⁸

The Ottomans, in enacting this policy, relied on the maxim of Legal Politics (*al-Siyāsah al-Sharʿiyyah*) to legitimize it and gain the force of obedience upon the citizens. It was stipulated in *Majallat al-Aḥkām al-ʿAdliyyah* (Article 1801) that if an official command emanated from the Sulṭān to utilize a juristic opinion of a certain *Mujtahid* in a particular legal question because it was deemed more suitable to the contemporary age and more respondent to everyday life of people, the judge should be bound by it and not utilize the other opinions. If

¹¹⁵ Ibid., p. 92; S. H. Abū Ṭālib (1990). Op. Cit., p. 238-239.

¹¹⁶ Herbert J. (1975). Op. Cit., p. 69; S. Maḥmaṣānī (1965). Op. Cit., p. 179; S. H. Abū Ṭālib (1990). Op. Cit., p. 238-239.

¹¹⁷ Herbert J. (1975). Op. Cit., p. 69.

¹¹⁸ Ibid., pp. 65-66; S. H. Abū Ṭālib (1990). Op. Cit., p. 238-239.

such conduct happens, the verdict given will be out of validity and shall not take place to application with the executive personnel,¹¹⁹

‘If an order has come from the Sulṭān, that as regards some special matter the opinion of one of the founders of the Law should be acted on, on the ground that it is more convenient for the business of the time and for people, in that matter the judge cannot act by the opinion of another founder of the Law and contrary to the opinion of that one. If he does, his judgment is not executed (*Nafiz*).’¹²⁰ (Trans.)

In a report advanced by the Drafting Committee of the *Majallah*, the reporters sealed the statements with these words:

‘Finally, as most of the Articles written in this *Mejelle* refrain from going outside the Ḥanafī doctrine, and are in force and acted upon in the *Fetvā Khanī* at the present time, there seems no necessity for a discussion about them...Because it is necessary to act according to whatever opinion his Majesty, the leader of the Muslims orders that people should act, the report is laid before the Grand Vizier also, in order that he may order it to be decorated with the Imperial writing of his Majesty the Sulṭān, if on trial the enclosed *Mejelle* is approved by him.’¹²¹ (Trans.)

D. Official selection of laws from various doctrines of jurisprudence:

The policy of legal oriented politics (*Siyāsah Shar‘iyyah*) that was followed by the Ottomans was also manifested in the form of adopting different schools of Islamic jurisprudence in the creation of later codes. Commonly it was decided by the scholars that an imitative person (*Muqallid*) is allowed to follow opinions of different qualified scholars if he is keen to protect the objectives of the law. However, if he is not aware of these objectives and boundaries, he may transgress the limits of Sharī‘ah at the end, especially when he consciously seeks the easiest opinion to apply, regardless of the authenticity it owns.¹²² With combining both the regulations of the right of a ruler to select the most suitable opinion and of the legal permission

¹¹⁹ S. H. Abū Ṭālib (1990). Op. Cit., p. 237; S. Maḥmaṣānī (1965). Op. Cit., p. 179.

¹²⁰ C. R. Tyser, D. G. Demetriades, Isma‘īl Ḥaqqī Effendi (Transl.) (2001). *The Mejelle: Being an English Translation of Majallah el-Ahkam-L-‘Adliya and a Complete Code of Islamic Civil Law*. Kuala Lumpur: The Other Press. p. 319.

¹²¹ Ibid, pp. xxix-xxxī.

¹²² M. Z. ‘Abdul-Barr (1983). Op. Cit., pp.35-48; Muḥammad Sallām Madkūr (2005). *Al-Madkhal li-al-Fiqh al-Islāmī: Ta’rīkhuh wa Maṣādiruh wa Nazariyyātuh al-‘Āmmah*. Kuwait: Dār al-Kitāb al-Ḥadīth. pp. 318-327.

for following various opinions in regards to legal questions, the Ottoman Caliphate drafted a code for the law of marriage, divorce, etc., which was known as “*Qānūn Ḥuqūq al-‘A‘ilah al-Uthmānī*” (Ottomans Law of Family Rights). It was enacted in 1917. It was basically authored in accordance with the Ḥanafī approaches but had incorporated selected opinions from other rites based on the interests of the people. As such, it applied the rules that each minor religion considers in its family affairs as “Personal Statute”. Although this code was repealed in Istanbul only two years later, it was, for a long time, applied in Lebanon, Syria, Palestine and Jordan. Also, it is noteworthy that the Arab States followed the same politics when, later on, they codified their family law, especially in Egypt, Syria, Iraq and Tunisia with special reference to the area of personal statute, trusts “*Awqāf*”, inheritance, and will “*Waṣīyyah*”.¹²³

E. Adoption of the foreign legal codes (man-made law):

Throughout its entire history, the Ottoman Caliphate had felt the necessity of a well-established legal system. Although *Majallah* was considered an attempt for Islamization of laws, on one hand, it was, on the other hand, counted as the Ottomans approach for adaptation of the foreign laws.

N. J. Coulson, a professor in oriental laws, holds that the derivation of western law began as a result of the system of Capitulations in the Nineteenth Century. The Western powers ensured that their citizens residing in the Middle East would be governed by their own laws. This brought about familiarity with European laws particularly in mixed cases involving Europeans and Muslims in respect to trades and commerce. The laws applied under the Capitulatory system turned with the state’s desire for comprehensive legal codification to form

¹²³ Herbert J. (1975). Op. Cit., p. 70; S. Maḥmaṣānī (1965). Op. Cit., pp. 179-180; S. H. Abū Ṭālib (1990). Op. Cit., pp. 239-241.

the basic trends of this progress. At the same time the adoption of these European laws as a territorial system meant that foreign powers might acquiesce in the abolition of Capitulations that became increasingly irksome as a growing emphasis was placed on national sovereignty. As a result of these considerations a large-scale reception of European law was effected in the Ottoman Caliphate by the *Tanzimāt* reforms of the period between 1839 and 1876.¹²⁴

The *Tanzimāt* reforms included the introduction of a European style army, codification of customary land tenure relations, reorganization of taxation, provincial and ministration, judiciary and education.¹²⁵

The codification reforms started as a mass reflection to the huge advances realized in Europe. The citizens of the Ottoman Caliphate put the state under serious pressure asking for constitutional reforms, especially after the draft of the Napoleonic Civil Code. The Caliphate promised the citizens that the orders applied in the state would be similar to European orders. The “*Tanzimāt*” was the policy that adopted by Sultān ‘Abdul-Majīd on 3 November 1839, in his first year of jurisdiction.

The first constitutional document that came to ground was *Khattī Sherīf of Gullhane* (Chamber of Roses). Its primitive section includes a deep description of the backwardness and instability in the Caliphate due to misapplication of Divine laws. It ‘figured out’ that the legal reform is the way for a solution. It also declares the principles of human liberty, recognizes dignity of ownership and equality to all residents before the law without any discrimination based on religion or job. Besides that, it decides that the fulfillment of disputed rights should be only attained through a judicial verdict in a public trial and the punishment should be after a

¹²⁴ N. J. Coulson (1964). *Op. Cit.*, pp. 150-151.

¹²⁵ Fikret Karcic (1999). *The Bosniaks and the Challenges of Modernity-Late Ottoman and Hapsburg Times*. Sarajevo: El-Kalem. p. 155.

public trial and in accordance with the rules of law. The document also promised a reform in administrative and judicial aspects by resetting the laws.¹²⁶

Except for the Commercial Code of 1850 and the old Penal Code of 1851, the promises contained in the *Khattı Sherif of Gulhane* did not materialize. The disorder and disruption prevailed in the Caliphate territories and the foreign pressure enhanced on the Caliphate, the matter that pushed Sulṭān ‘Abdul-Majīd to order a second supplementary document of reform known as *Khattı Humayūn* (Imperial Edict) of 18 February 1856 which promised the reform of judicial tribunals and the creation of mixed tribunals, the reforms of penal and commercial codes to be administrated on a uniform basis and the reform of prisons. Moreover, the document reinsured the former one by posing more promises of reform and reorganization of the state. It emphasized again the privileges secured for the Christian minorities by Sulṭān Muḥammad Fātiḥ and indicated more positive amendments based on the new circumstances that were on the ground. The decree also guaranteed freedom of religion, declaring that no one could be compelled to change his religion. Also, equal opportunity was promised in competing for public offices, recruitment by civil, military and other public services, as well as schooling, regardless of religious or national differences. In addition to that, it declared the authenticity of religious courts for non-Muslim minorities to rule on and determine their personal statute. Mixed Courts or councils were introduced to hear commercial and criminal cases between Muslims and non-Muslims and among non-Muslims of different denominations. Other changes introduced included the abolition of corporal punishment, and a pledge to reform the criminal law, penal and prison systems.¹²⁷

¹²⁶ S. Maḥmaṣānī (1965). Op. Cit., p.188.

¹²⁷ H. S. Amin (1985). Op. Cit., pp. 379-380; Niyazi Berkes (1998). *The Development of Secularism in Turkey*. London: Ustrst & Company.pp.155-192.

These constitutional instruments did not create any effective mechanism to ensure the application of their provisions until 1876 when the Sultān ‘Abdul-Ḥamīd II promulgated a more substantive constitution to check the absolute powers of the Sultān but in the following years of his reign the constitutional regime was suspended in 1878 and it was restored only in 1908. As a result of *Khattī Humayūn* reforms and later reforms done by ‘Abdul-Ḥamīd II, the state ratified various codes in various respects of law, some of which purely quoted from European codes and others derived from the Islamic law.¹²⁸ This situation continued until the Union and Progress Party announced the Republic of Turkey in 1923 and abolished the Caliphate system in 1924 and then a new constitution was introduced by the national assembly in 1924.¹²⁹

The foregoing discussion proves that the laws of the Ottoman Caliphate flowed in two opposing directions:

- I. A direction towards westernization of the law in the form of adopting the foreign laws, with special reference to French Codes. In this respect, the Caliphate duplicated different sets of foreign laws such as the following codes:
 - The Penal Codes of 1840 and 1851 which codified the substantive rules of the Islamic law and the prevalent local customs. These codes were replaced by the law of 1858 which drew on French law and was later amended in 1911 and appended three times between 1910 and 1915 by provisions taken from Italian law.
 - The Commercial Code of 1850, as appended in 1860.
 - The Land Law of 1858 and the Conveyance Law of the State Lands of 1913.

¹²⁸ S. Maḥmaṣānī (1965). Op. Cit., p. 188-189. For further information about the Ottoman Laws and Ordinances ‘Farmanat’ see: Muḥammad Nūr Faraḥat (1993). *Al-Ta’rikh al-Ijtimā’ī li-al-Qānūn fī Miṣr al-Ḥadīthah*. Kuwait: Dār Su’ād al-Ṣabāḥ. pp. 11-16, 97-103.

¹²⁹ H. S. Amin (1985). Op. Cit., pp. 380-381.

- The Marine Trade Code of 1863 which was mainly borrowed from the French law with certain provisions taken from Dutch and Portuguese maritime laws.
- The Commercial Procedure Code of 1861 which remained in force until 1880 when it was replaced by the Civil Procedure Code of 1880 as amended in 1911.
- The Criminal procedure Code of 1879.¹³⁰

These sets of laws were a duplicate of the Western laws and some of them distorted the Islamic rulings in aspects of estates and penalties, e.g., article 54 in the land law stipulated equal inheritance between males and females. The penal law did not codify the Islamic penal system including the *Hudūd*, and usury was made legitimate.¹³¹

II. A direction towards codification of Islamic law, and this movement was represented by two main compilations:

- The issuance of “*Majallaht al-Aḥkām al-‘Adliyyah*” (Compilation of Principles of Justice) in 1293AH/1876CE under supervision of *Cevdat Bāshā*. The compilation covered the rules of transactions (*Mu‘āmalāt*), the rules of actions and the principles of judicial trials and proofs.
- The issuance of “*Qānūn Ḥuqūq al-‘Ā’ilah*” (Family Law) in 1336AH/1917CE. The significance of this compilation refers to three reasons: firstly, it is the first historical code in respect of family law on the basis of Sharī‘ah law, secondly, it stepped outside the Ḥanafī rite

¹³⁰ Ibid., p. 165; S. Maḥmaṣānī (1965). Op. Cit., pp. 192-195.

¹³¹ Abduh Jamīl ‘Aḏhūb (2005), *Al-Qawānīn al-Waḍḥīya al-Faransiya wa al-Sharī’a al-Islamiya: Taqarub wa Tabā’ud* (A’māl al-Nadwa al-latī ‘Aqadathā Kullīya al-Ḥuqūq- Jāmi’at Bairūt al-‘Arabīya bi-Munāsabat Mi’atai ‘Ām ‘Alā Iṣḍār al-Taqnīn al-Madani al-Faransi 18004-2004. Baīrūt: Manshūrat al-Ḥalabī al-Ḥuquqiya, al-Ṭab’a al-Ūlā), p.17; T. Ziyādah (1990). Op. Cit., pp. 94-100.

to other Sunni rites of jurisprudence, and finally, it included special rules pertaining to the religious family law of both Jews and Christians.¹³²

In addition to that, other laws dealing with different questions, such as those regulating local administration of the provinces, police, prisons, public buildings, societies, trade-unions, civil servants and their pensions were also promulgated.¹³³

In summary, the Law on Provincial Administration of 1864 provided for the establishment of *Nizamiyyah* Courts at the provincial level. They were soon provided with codified laws derived from European Continental law tradition. Hence, a complex dichotomy affected the legal status of the Caliphate which was rooted in the nature of the reforms campaigned with *Tanzimāt*. The dichotomy spread over aspects of both legislative and judicial institutions. The laws were separately quoted from Islamic Jurisprudence and European codes. As well, the judicial body was divided between “*al-Maḥākim al-Nizāmiyyah*” (The Official Courts) that were established in 1860 to apply the foreign codes and “*al-Maḥākim al-Shar‘iyyah*” (The Shar‘ah Courts) that belonged to the personal statute of the Muslim majority within the state. However, the *Majallah* was meant for the reference of both Shar‘ah and *Nizāmiyyah* Courts.¹³⁴ Despite that, there existed “*al-Maḥākim al-Khāṣṣah*” (the Special Courts) which branched into Council Courts for the foreign residents inside the Caliphate and Spiritual Courts for the non-Muslim minorities in respect to the family law.¹³⁵

¹³² Abduh Jamīl ‘Aḍhūb (2005), Pp.18-19; S. Maḥmaṣānī (1965). Op. Cit., pp. 192-195; H. S. Amin (1985). Op. Cit., pp. 167-168; M. ‘Abdul-Jawād (1977). Op. Cit., pp. 30-31; N. K. al-Zanki (2001). Op. Cit., pp. 66-67.

¹³³ H. S. Amin (1985). Op. Cit., p. 168; S. Maḥmaṣānī (1965). Op. Cit., p. 195.

¹³⁴ F. Karreic (1999). Op. Cit., Pp.56-57; M. ‘Abdul-Jawād (1977). Op. Cit., p. 31; N. K. al-Zanki (2001). Op. Cit., pp. 67-68.

¹³⁵ S. Maḥmaṣānī (1965). Op. Cit., pp. 204-205.

The institutional separation of *Sharī'ah* and *Qāmūn* paved the way for future secularization. However, to Niyazi, codification was in itself an unmistakable mark of secularization in a Muslim society as it is a designed, concrete human effort to formulate the *Sharī'ah* as a positive law.¹³⁶

Following the 1923 Lausanne Peace Conference the new regime in Turkey reached the decision that the process of codification should be conducted in conformity with the legal systems of modern European States. This time, entirely novel codes were drafted, following the provisions of the Swiss Civil Code, Italian Criminal Code, German and Italian laws of land and sea trade, and the Neufchatel procedural law, all of which were accepted and ratified following the regular discussions in the Grand National Assembly. After a time other Codes followed these.¹³⁷

2.4.3 Legal Status of Arab Civil Laws before Enacting Sanhūrī's Codes

The Arab countries of the era before enacting Sanhūrī's Codes were divided into three groups with regards to their civil laws.

These were namely the following:

- (A) A group was following unwritten laws. This was represented by Kingdom of Saudi Arabia and Yemen. The former was applying Ḥanbalī doctrine according to the teachings of Sheikh Muhammad b. 'Abdul-Wahhāb (1703-1791) whereas the latter was applying the opinions of the Zaidiyyah School of law which is commonly considered as a moderate Shiite School that runs closely to Ḥanafī doctrine.

¹³⁶ Niyazi B. (1998). Op. Cit., p. 161.

¹³⁷ H. S. Amin (1985). Op. Cit., pp. 381-382.

- (B) A group was applying a statutory law derived from the Islamic Sharī'ah as approached by Ḥanafī doctrine. This group was applying “*Majallaht al-Aḥkām al-‘Adliyyah*” the Code which was issued by the Ottoman Caliphate in the second part of Nineteenth Century. It was implemented even after the demise of the Caliphate in Syria, Palestine, Eastern Jordan, Iraq and Libya.
- (C) A group was following Codes extracted from the French Civil Law. This includes Egypt, Lebanon, Tunisia, Algeria and Marrakesh.¹³⁸

The historical circumstance behind this division could be the fact that these Arab countries – except Marrakesh and some territories of Yemen- were under jurisdiction of the Ottoman Caliphate until the Nineteenth Century. During this era a common law from Islamic Sharī'ah was applied. Then, Egypt during the reign of Muhammad ‘Alī Bāshā obtained its autonomy. While the Caliphate codified the *Majallah*, its application was not extended to Egyptian territories and it remained in applying unwritten Sharī'ah law, along with some French Codes especially those relevant to commercial law. Egypt started a reform campaign within the reign of Ismā‘īl Bāshā (1830-1895). When Tawfīq Bāshā (1852-1892) became the ruler, Mixed Courts and then National Courts were established imitating the fashion of French courts. A modern set of laws were codified to be applied by these courts in the era between 1875 and 1883 among which was the Civil Code. Therefore, Egypt became a companion of a Civil Code quoted from the French Civil Code of 1804.¹³⁹

Algeria was incorporated to France in 1830. Therefore, the French Civil Code was applied in Algeria. Then France announced protection over Tunisia and Marrakesh and quoted

¹³⁸ Iraqi Justice Ministry IJM (1945). *Mashru’ al-Qānūn al-Madanī*. Baghdad: Maṭba’at al-Ḥukūmah. p. 3; Sanhūrī (1936b). *Op. Cit.*, pp. 286-287; Ḥāmid Muṣṭafā (1948). “Ḥālāt al-Tashrī’ al-Madanī fi al-Waṭan al-‘Arabī,” *Maj. Al-Qaḍā’*, 6 (1-2), pp.42-43; Sanhūrī (1962). *Op. Cit.*, pp. 8-9.

¹³⁹Sanhūrī (1962). *Op. Cit.*, p.9; H. Muṣṭafā (1948). *Op. Cit.*, pp. 41-42.

two sets of Civil Codes (Tunisia 1906 and Marrakesh 1913) which were generally extracted from the French Code but having more flexible and progressive characters.¹⁴⁰

After the division of the Ottoman territories post World War I, Syria and Lebanon came under the mandate of France. Lebanon abandoned *Majallah* during the mandatory era and created the Lebanese Civil Code (1934) which was derived from the French Code, albeit better in substance and worse in draft. Iraq, Eastern Jordan and Palestine came under the mandate of Great Britain and yet maintained *Majallah* as the Code of Civil Law. Territory of Hejaz became independent and then combined with Najd to form the Kingdom of Saudi Arabia which adopted the Ḥanbalī-Wahhābī doctrine. Yemen remained unoccupied and maintained the laws of the Zaidiyyah. Libya was occupied by Italy before War World I, but they did not change Libya's Civil Law (*Majallah*).¹⁴¹ Therefore, the Arab countries were divided into these three groups in term of application of their Civil Laws.

¹⁴⁰ Sanhūrī (1962). Op. Cit., pp. 9-10; H. Muṣṭafā (1948). Op. Cit., P.42.

¹⁴¹ Sanhūrī (1962). Op. Cit., pp. 9-10; H. Muṣṭafā (1948). Op. Cit., P.42.