

IBN HALDUN UNIVERSITY
ALLIANCE OF CIVILIZATIONS INSTITUTE

PH.D. THESIS

**Improvement or Degeneration of *Fiqh*? A Critical Study of
the *Majalla***

Danish Naeem

Thesis Supervisor: Prof. Dr. Alparslan Açıkgenç

İSTANBUL, 2023

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**By
Danish Naeem**

**A thesis submitted to the Alliance of Civilizations Institute in partial
fulfilment of the requirements for the degree of Doctor of
Philosophy in Civilization Studies**

Thesis Supervisor: Prof. Dr. Alparslan Açıkgenç

İSTANBUL, 2023

APPROVAL PAGE

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I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

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ABSTRACT

Improvement or Degeneration of *Fiqh*? A Critical Study of the *Majalla*

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This thesis critically engages with the concept of *fiqh* and its manifestation in the form of the *Majalla*. Problems are occasioned when human predicaments are expressed in textual form. Does *fiqh* fare better in this than law as conceptualized in the West? Does a *fiqh* paradigm change for the worse when a *fiqh* text is taken as a code? The *Majalla* presents an interesting case that is at a critical juncture in history. In the beginning, I critically investigate how *fiqh* compares with the Western legal paradigm in its conceptual and philosophical underpinnings. I then address the most pertinent question of whether the historical circumstances surrounding the *Majalla* represent a paradigm shift or a break in the *fiqh* tradition, arguing that while the former is unwarranted, the latter seems to be. In Chapter 4, I survey some of the historical debates that surrounded the making of the *Majalla*, which provides a more nuanced picture of its substance and form. In Chapter 5, I address the concept of codification and investigate the imperatives motivating that phenomenon. I conclude that the same text, if posited in circumstances where modern understandings of codification are prevalent, would presumably manifest a degeneration of *fiqh* as the imperatives that inhere in a *fiqh* paradigm are different. Chapters 6-7 address a deeper philosophical comparison of *fiqh* and law, where I address the notion of a ‘gap’ and demonstrate how it occurs at two occasions in the *fiqh* paradigm, which affirms the character of *fiqh* as rooted in discovery rather than performativity. Thereafter, I further explore these notions concluding that legislating a *fiqh* text like the *Majalla* confuses the *fiqh* paradigm by imposing a configuration of roles that is not suited to that paradigm.

Keywords: Code, Comparison, *Fiqh*, Jurisprudence, Law, *Majalla*

ÖZ

Fıkıhta İyileşme mi Yoksa Yozlaşma mı? Mecelle Üzerine Eleştirel Bir Çalışma

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Bu tez, fıkıh kavramı ve onun Mecelle formundaki tezahürü ile eleştirel bir şekilde ilgilenir. İnsan çıkmazları metin biçiminde ifade edildiğinde sorunlar ortaya çıkar. Bu konuda fıkıh, Batı'da kavramsallaştırıldığı şekliyle hukuktan daha mı iyidir? Bir fıkıh metni kod olarak alındığında fıkıh paradigması daha mı kötü yönde değişir? Mecelle, tarihin kritik bir noktasında bulunan ilginç bir vakayı sunuyor. Başlangıçta, kavramsal ve felsefi temellerinde fıkıhın Batı hukuk paradigmasıyla nasıl karşılaştırıldığını eleştirel bir şekilde araştırıyorum. Daha sonra Mecelle'yi çevreleyen tarihsel koşulların bir paradigma değişikliğini mi yoksa fıkıh geleneğinde bir kırılmayı mı temsil ettiğine dair en uygun soruyu ele alıyorum ve birincisinin temelsiz olduğunu, ikincisinin ise öyle göründüğünü savunuyorum. 4. Bölüm'de, Mecelle'nin yapısını çevreleyen ve onun özü ve biçimi hakkında daha incelikli bir resim sağlayan bazı tarihsel tartışmaları inceliyorum. 5. Bölümde, kanunlaştırma kavramını ele alıyorum ve bu gelişmeyi tetikleyen zorunlulukları araştırıyorum. Bir fıkıh paradigmasının içerdiği buyruklar farklı olduğundan, aynı metnin, modern kanunlaştırma anlayışlarının yaygın olduğu koşullarda ortaya konması durumunda, muhtemelen fıkıhın yozlaşmasını göstereceği sonucuna varıyorum. 6-7. Bölümler, fıkıh ve hukukun daha derin bir felsefi karşılaştırmasını ele alıyor, burada bir "boşluk" kavramına değiniyor ve fıkıhın ifa edilebilirlikten ziyade keşfe dayalı olduğunu onaylayan fıkıh paradigmasında iki durumda nasıl meydana geldiğini gösteriyorum. Daha sonra, Mecelle gibi bir fıkıh metninin kanunlaştırılmasının, bu paradigmaya uygun olmayan bir roller konfigürasyonu dayatarak fıkıh paradigmasını karıştırdığı sonucuna vararak bu kavramları daha da araştırıyorum.

Anahtar Kelimeler: Fıkıh, Fıkıh Usulü, Hukuk, Kod, Mecelle, Mukayese

DEDICATION

I dedicate this dissertation to Islam and to those who follow the Prophet (peace be upon him) with sincerity to establish the Word of Allah on the earth



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Istanbul, 2023

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CHAPTER ONE

INTRODUCTION

1.1. The Problem

In 2006 a seemingly coordinated media campaign was waged in the Pakistani media against the Hudood Ordinances of 1979. That law was ultimately abolished in favor of the pretentiously-named Protection of Women Ordinance in the same year. In 2018, a referendum was held in Ireland where the Irish resoundingly voted to repeal the Eighth Amendment which grants an equal right of life to the mother and the unborn baby.¹ Separately, the seminal *Rode v. Wade* case of 1973 was overturned by the United States Supreme Court in 2022 and the right to abortion was deemed to not be a fundamental right protected by the US Constitution.²

What do these historical occurrences have in common? These are instances of criminalization of certain human behaviors through laws and those being overturned or created, laws that regulate norms and behavior, that evoke deep feelings in diverse populations. In the case of the Hudood Ordinances we see that there are certain problems when articulating actual human occurrence in human language. Even when setting aside purely ideological contentions one can see certain problems remain. For example, bringing *ḥadd* and *ta'zīr* rules together in one text, to be adjudicated upon under the jurisdiction of the same court leads to confusion and overlap.³

The controversy that the abortion debate has provoked in the United States and to a

¹ “Irish Abortion Referendum: Ireland Overturns Abortion Ban,” *BBC News*, May 26, 2018, sec. Europe, <https://www.bbc.com/news/world-europe-44256152>.

² Craig Newton, “*Dobbs v. Jackson Women’s Health Organization* (2022),” LII / Legal Information Institute, June 28, 2022, https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29

³ Moeen H. Cheema and Abdul-Rahman Mustafa, “From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan,” *UCLA J. Islamic & Near EL* 8 (2008): 1; For *ḥadd* see (B. Carra de Vaux, [J. Schacht]), and (A.-M. Goichon), “*Hadd*,” in *Encyclopaedia of Islam, Second Edition*, Encyclopaedia of Islam (Brill, n.d.), 20, https://referenceworks.brillonline.com:443/entries/encyclopaedia-of-islam-2/hadd-SIM_2586; For *ta'zīr* see M.Y. Izzi Dien, “*Tazir*,” in *Encyclopaedia of Islam, Second Edition*, Encyclopaedia of Islam (Brill, n.d.), https://referenceworks.brillonline.com:443/entries/encyclopaedia-of-islam-2/tazir-SIM_7475.

lesser extent, in Europe has created a dichotomy in the public where the public is expected to be either pro-life or pro-choice. These labels represent a simplistic understanding of the matter and attest to the fallacy of the old adage that there are two sides to each story. The abortion debate is a mirror of the complexities of a single issue and the inability of legislation to embody the niceties of all the different contingencies inherent in that. Nuances are very important. Not only do simplistic, dichotomic apprehensions of a complex situation unduly simplify the 'sides' to an issue, but they force observers to take sides, creating a schism in society. Furthermore, the binary values of legal and illegal that are associated with such issues through legislation serve to deepen that schism.

The abortion debate and its accompanying legal vicissitudes demonstrates that in any human problem, complexity leads to disputes when it comes to expression of the problem in a law. The second example does the same for a Muslim problem: the articulation of a human issue in legislation that is supposed to reflect Divine will. The challenge in the legal realm is to articulate these nuances in legislation so much so that all possible contingencies and actional consequences are represented in the law. The abortion debate, as an example, results in a discourse dichotomising the two extremes of fetal rights on the one side and bodily autonomy of the woman on the other, which neglects other questions such as the rights of the father or the moment of inception of the baby. Most of these problems stem from an inability to express rules that would encompass all the ethical and moral considerations that underlie human disputes. The idea that it is even possible to aspire to such rules is an illusion.

1.2. Rules and the 'Gap'

Legal scholars in the Anglo-American academia have addressed the problem that confronts the judge when he tries to apply a rule to a factual situation. This is the problem of the 'gap'. What is this curious 'gap'? One may well ask. In any individual case the lawgiver and decision maker can decide the particular dispute or question by referring to the facts of that case. However, for situations where lawgivers cannot be present a text stands in for them and that inevitably leads to situations where the rules in that text are *over-inclusive* or *under-inclusive* because the justifications behind the rules in those cases would not be available to the decision maker in those situations

who are not the lawgiver themselves. They would just have the rules in front of them to decide on particular facts without knowing with certainty why rule was posited and for which circumstances it was made. Therefore, those rules, without such guidance, would exclude more they were meant to and include more than they were meant to. Such is the nature of rules by necessity. Codification amplifies this problem as it takes a single text to replace a multiplicity of texts and makes that text the sole authoritative and comprehensive source of the law. Another problem that is evident is that of juridification which is a term used to describe the excess of laws.⁴ It describes the proliferation of laws to control every aspect of life, a sort of legal contamination through the bureaucratization of the social world. According to Teubner, this may be because when law is used as a mechanism of control it “has at its disposal modes of functioning, criteria of rationality and forms of organization which are not appropriate to the “life-world” structures of the regulated social areas and which therefore either fail to achieve the desired results or do so at the cost of destroying these structures.”⁵

This phenomenon becomes relevant and meaningful when speaking in terms of modern regulatory law which is “both politicized and socialized.” With centralization of power in the modern state there is an overreach by the political will and legislative action, in its modern regulatory sense, is wielded to both resolve and preempt disputes.

1.3. Islam and the Regulation of Society

Most societies in the world are plagued by underdevelopment, corruption, crime, despotism and a general dearth of the rule of law. This problem is not peculiar to Muslim societies but to the world at large but the general subjection of Muslim populaces to the larger hegemonic world order means that discourse is often critical of Islam attributing the ills of society to the religion itself. That has prompted calls for reform from several quarters. The refrain from the collective camp of the modernists and Orientalists alike is that the problem is endemic to Islam itself and by extension to

⁴ G. Teubner, “Juridification: Concepts, Aspects, Limits, Solutions,” in *A Reader on Regulation*, ed. Robert Baldwin, Colin Scott, and Christopher Hood (Oxford University Press, 1998), 389–440, <https://doi.org/10.1093/acprof:oso/9780198765295.003.0015>.

⁵ Teubner, 3–4.

Islamic law,⁶ ‘the core and kernel of Islam itself’.⁷ On the other hand, there are those that attribute all present tribulations to an imperfect application of this very law looking single-mindedly towards the period of its origins, disregarding the thousand or so years of tradition that has developed in between. Both of these views are hyperopic in that they overlook the thousand years between the genesis of Islam and the advent of modernity when this law adequately and consistently served the needs of Muslim society and the imperatives of societal change. The epistemic link that bound Muslim societies to their hallowed origin whilst it served contemporaneous needs through flexible accommodation of custom into the law employing sophisticated juristic hermeneutics remained intact for a tumultuous millennium. The forces of modernity operating at different levels of influence effectively severed this link and threw the Muslim individual into disorientation standing in a strange world where there is more often than not a palpable dissonance between the demands of his faith and the exigencies of the times. This transition from a harmonious pre-modern society to an incongruous modern reality warrants deeper investigation.⁸

The problems faced by Muslim societies are thus symptomatic of a deeper malaise in societal and institutional structures. These problems may be traced back a large extent to the onset of modernity and its concomitant changes. One of these has been the gradual displacement of Islamic law from the privileged space it has occupied since the birth of Islam and its relegation to a matter of individual choice. Its power to forge behavior has been largely transformed and thus diminished.⁹ For more than a thousand years Islamic law – or more properly, *fiqh* – followed a trajectory that saw the legal subject’s perspective evolve from a life of discipleship to subscription to one of four schools of thought or *madhhabs*, each with their refined methodologies and principles.¹⁰ This trajectory was arrested with the death throes of the Ottoman Empire and the enactment of the Tanzimat which featured a new development - the *Majalla* –

⁶ By Islamic law here Schacht refers to *fiqh*, what may be termed the premier science of Islamic civilization.

⁷ Joseph Schacht, *An Introduction to Islamic Law* (Oxford Oxfordshire ; New York: Clarendon Press, 1982), 1.

⁸ Refer to Turkish history of Tanzimat (Hodgson V3, inalcik) and Great transmutation Also

⁹ See Wael B. Hallaq, "Muslim Rage and Islamic Law," *Hastings Law Journal* 54(2003).

¹⁰ See (Ed.), "Madhhab," in *Encyclopaedia of Islam, Second Edition*, vol. 12, Encyclopaedia of Islam (Brill, n.d.), 551, https://referenceworks.brillonline.com:443/entries/encyclopaedia-of-islam-2/madhhab-SIM_8798; Ferhat Koca, "Mezhep," in *TDV İslâm Ansiklopedisi*, accessed June 2, 2023, <https://islamansiklopedisi.org.tr/mezhep#4-fikih>.

a code which aimed to provide a clear and systematic statement of the law for the Sharia and *Nizāmiye* courts.

1.4. The *Majalla*

The *Majalla* is seen as the natural extension of the Hanafi *fiqh* paradigm, as the authentic response of the Ottoman ulama to challenges brought on by the interaction with Europe amidst a decline in military and technological prowess. It is sometimes termed as the highest organic development of the *fiqh* tradition before it was rudely interrupted by political forces. Closely related to this issue is the more general issue of whether *fiqh* can operate in the state whose conception of law is a positive codified one.

The *Majalla* was compiled by a committee of jurists and scholars, not all proficient in *fiqh*, headed by Ahmet Cevdet Pasha and enacted by Imperial Ottoman decree to be used in the *Nizāmiye* Courts.¹¹ In this it may be compared to another historical project that went before it commissioned by the Mughal emperor Aurangzeb Alamgir (r. 1658–1707), interchangeably known as the *Fatāwā ‘Ālamgīriyya* and *Fatāwā Hindīyya*. This was a compendium of *fiqh* rules and was carried out by a team of religious scholars led by Shaykh Nizam Burhanpuri.¹² A feature of the *Fatāwā ‘Ālamgīriyya* is that it is predominated by the most preferred opinions or the strongest ones (*ẓāhir al-riwāya*) with the weaker opinions (*nawādir*) being articulated only in the case where the former are not applicable or where they express the indication of the responsum (*fatwā*).¹³

The *Majalla*, which has seventy-three chapters and 1,851 articles is divided into sixteen books.¹⁴ Following its first article are ninety-nine axioms which are general and universal and intended as an aid for the judge in cases where he does not find

¹¹ In this work I have preferred the commonly used Turkish transliteration of his name, Ahmet Cevdet. For the names and official designations of the framers of the Majallah, see Ahmed Akgündüz, *Karşılaştırmalı Mecelle-i Ahkam-i Adliye: Mecelle Ta’dilleri ve Gerekçeleriyle Birlikte* (Turkey: Osmanlı Araştırmaları Vakfı, 2013), 46.

¹² A.S. Bazmee Ansari, “Al-Fatawa al-Alamgiriyya,” in *Encyclopaedia of Islam, Second Edition*, Encyclopaedia of Islam (Brill, n.d.), II:837a.

¹³ Ahmet Özel, “el-Âlemgīriyye - TDV İslâm Ansiklopedisi,” in *TDV İslâm Ansiklopedisi* (TDV İslâm Araştırmaları Merkezi, 1989), <https://islamansiklopedisi.org.tr/el-alemgiriyye>.

¹⁴ Akgündüz, *Karşılaştırmalı Mecelle*.

guidance in the *Majalla proper*, which starts with Article 101.¹⁵ The *Majalla* evidently does not run the gamut of *fiqh* topics as do the axioms that antecede the substantive *fiqh* rules that form 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 which fulfills a different function being internally coherent as a legal text in the modern sense.¹⁶ Another indication was the use of selection of rules from within the Hanafi *madhhab*, or school of thought, without consideration for the imperatives of the legal reasoning but needs of the time and the welfare of humanity, a justification that was used in later codifications to conform to European norms. These features all hint towards European influence in the context of the *Majalla*.¹⁷

The *Majalla* is a text designed to be used in a legal context. The subject matter of this text is *fiqh* and studies have been undertaken to determine the breadth of the sources that the *Majalla* has been derived from. The *Mir'āt i Majalla* penned by the *mufī* of Kayseri, Mesud Efendi (d. 1894) is a compilation of the sources of the *fiqh* rules of the *Majalla*.¹⁸ His study shows that the total number of these sources comes to 151, some used more frequently than others.¹⁹ One of the major sources for the *Majalla* was the *Multaqā al Abhur*, as was the *Fatāwā Fatāwā 'Ālamgīrīyya*.²⁰ That the substance of the *Majalla* is *fiqh* rules is undisputed. When digging deeper into the context and circumstances of the text the story becomes more complicated.

The framers of the *Majalla* asserted that the source of the rules therein was the Hanafi *madhhab*. Comparing the corpus of *fiqh* to an ocean without end (*baħr bī pāyān*) they assert the necessity of juristic qualification and expertise (*malaka*) for deriving the

¹⁵ Necmettin Kızılkaya, *Legal Maxims in Islamic Law: Concept, History and Application of Axioms of Juristic Accumulation* (Leiden, The Netherlands: Brill | Nijhoff, 2021), 221.

¹⁶ The two genres are legal rules and legal maxims. Tahsin Görgün, “‘Yeni’ Anlama ve Yorumlama Yöntemlerinin Fıkıh Usûlüne Göre Durumu,” *İslâmî İlimlerde Metodoloji: Usûl Mes’ele* 1, 2005, 685.

¹⁷ Murteza Bedir, “Fikih to Law: Secularization through Curriculum,” *Islamic Law and Society* 11, no. 3 (2004): 389.

¹⁸ Mesud Efendi, *Mirat-i Mecelle-i Ahkâm-i Adliye* (Matbaa-i Osmaniye, 1884). For Mesud Efendi see Ferhat Koca, “Mesud Efendi,” in *TDV İslâm Ansiklopedisi*, accessed January 4, 2023, <https://islamansiklopedisi.org.tr/mesud-efendi>.

¹⁹ Efendi, *Mirat-i Mecelle-i Ahkâm-i Adliye*; Kemal Yıldız and Tayip Nacar, “Mir’ât-ı Mecelle’de Belirtilen Mecelle Kaynakları,” *İslam Hukuku Araştırmaları Dergisi*, no. 20 (2012).

²⁰ Şükrü Selim Has, “The Use of Multaqā’l-Abhur in the Ottoman Madrasas and Legal Scholarship,” *Osmanlı Araştırmaları* 7, no. 7–8 (1988): 409–11, <http://dergipark.ulakbim.gov.tr/oa/article/view/5000116787>.

pearls of juristic rules in order to resolve problems.²¹ The function of this description far from being denigrative as stated by Berkey - “the shari‘a as traditionally formulated, with its lack of fixed reference points, was virtually unnavigable, and therefore unsuitable to the needs of a modern state and its citizens” – the point being made here is that a certain level of scholarly competence is required to work with *fiqh* and extract rulings.²² More specifically, the Hanafi *madhhab* was differentiated from the Shafi‘ī in that the former has not undergone emendation like the latter has and is scattered and complicated and, therefore, it presents hardship to distinguish the correct opinion where there are antithetical rules and to apply that rule to the facts of any case.²³ In his commentary on the *Majalla* Haydar Efendi affirms this difference with an interesting quote: “I marvel at the Hanafi, how he can become a jurist (*faqīh*) before forty years and I marvel at the Shafi‘ī how he cannot become a jurist after 40 days.”

1.4.1. The Majalla in the Muslim World

The *Majalla* was adopted in many of the Arabic speaking countries, except Egypt and the Arabian Peninsula, especially those that had been under sway of the Ottoman empire.²⁴ Khedive Ismail Pasha (d. 1895) did not permit its enactment in Egypt because of the fear of legal dependence on the Ottoman Empire.²⁵ The whole of the Arabian Peninsula did not adopt the *Majalla* because the Hanafi madhhab was not in operation there in the first place. In the regions comprising today’s Syria, Jordan, Iraq, Lebanon, Palestine and Israel the *Majalla* continued in force for a time after the Ottoman Empire dissolved. In Lebanon this went on with respect to property rights until 1930 and other rights until 1939. For Syria the same happened with respect to property rights until 1930 and for other rights until 1949. For Iraq the *Majalla* remained in force until 1951 and for Jordan until 1977. In Palestine after separation from the Ottoman Empire it remained in force until 1948 under the British mandate

²¹ Ahmed Cevdet Paşa, *Mecelle-i Ahkâm-i Adliye* (Istanbul: Matbaa-yi Osmaniye, 1300), <https://archive.org/details/mecelleiahkmiadl0001ah>.

²² Robert W. Hefner and Muhammad Qasim Zaman, eds., *Schooling Islam: The Culture and Politics of Modern Muslim Education*, Princeton Studies in Muslim Politics (Princeton, N.J: Princeton University Press, 2007), 52.

²³ Cevdet Paşa, *Mecelle-i Ahkâm-i Adliye*, 4.

²⁴ M. Akif Aydın, “Mecelle-i Ahkâm-ı Adliyye,” in *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul, Turkey: TDV İslâm Araştırmaları Merkezi, 2003), 233–34.

²⁵ For Khedive Ismail Pasha see Atilla Çetin, “İsmail Paşa, Hidiv,” in *TDV İslâm Ansiklopedisi* (TDV İslâm Araştırmaları Merkezi, 2001), <https://islamansiklopedisi.org.tr/ismail-pasa-hidiv>.

and even survived the creation of Israel. The Israeli government let it operate until it was replaced piecemeal by new laws and this state of affairs continued until the 1970s. In Gaza and the West Bank, the *Majalla* finds itself as one of the most cited sources even today.²⁶ It operated, partially, in Albania until 1928, and in Bosnia and Herzegovina until 1945 and in Cyprus until the 1960s. In Southeast Asia the *Majalla* was in force for a time in Johore, one of the sultanates to form part of Malaysia.

1.5. The *Majalla* and Codification: *Taqnīn* or *Tadwīn*?

Codification is the process that norms undergo to attain a particular form, something that the *Majalla* can also be said to have underwent, albeit arguably so. The *Majalla* was originally drafted in Classical or Ottoman Turkish but was translated later to Arabic and other languages.²⁷ The Arabic word for codification is taken as *taqnīn*, related to the word *qānūn* or law (and in the Ottoman context, executive legislation by the ruler). The word *qānūn* owes its etymological lineage to *canon* from the Greek.²⁸ On the other hand, the concept of *tadwīn* is seen by some as being the analogue to codification.²⁹ It is a term having its origins in a non-Arabic Persian context (referring to *dīwān* or payroll register) but which has passed into the Arabic and Islamic tradition in the form of *tadwīn*.³⁰ Does the *Majalla* represent an instance of *taqnīn* or *tadwīn*? Or is it more justifiable to see it as a codified text? Of course, the answer would depend historically, either on how the framers of the *Majalla* saw it, or how semantic content is associated with the *Majalla* at any point in contemporaneity.

1.6. *Taqnīn*: Codification in the Muslim World

Law in the Muslim world, after the development of nation-states and in the tumultuous period of the 19th and 20th centuries was shaped in the image of legal regimes as existed in the colonial powers of the time or, in general, European legal systems. In the Ottoman Empire, the Commercial Code of 1850, the Penal Code of 1858, the Code of

²⁶ M. Akif Aydın, “Mecelle-i Ahkâm-ı Adliyye,” 234.

²⁷ Cevdet Paşa, *Mecelle-i Ahkâm-ı Adliyye*.

²⁸ Ziyaeddin Fahri Fındıkoğlu, *İlçtimaiyat*, 3rd ed. (Istanbul: İstanbul Üniversitesi Yayınları, 1947), 242.

²⁹ Fındıkoğlu, 243.

³⁰ Fındıkoğlu, 241–42.

Commercial Procedure of 1861, and the Code of Maritime Commerce of 1863 were promulgated which were based in European and specifically French law, a civil law paradigm. In the Indian subcontinent the British colonizers purged *fiqh* from the legal system and imposed legislation originating in the common law, examples of which are the Contract and Evidence Acts of 1872, the Penal Code of 1860 and the Transfer of Property Act of 1882.³¹

An interesting insight in the codification of law in the Muslim world is how some scholars have found similarities between the French Civil Code and the norms found in one of the *fiqh madhhabs*. In his dissertation Elgawhary quotes Sayyid ‘Abdallah ‘Alī Ḥusayn who saw similarities between the French Civil Code and Mālikī *fiqh* so much so that in his opinion nine tenths of the former was taken directly from the latter.

³² This resembles the assertion by Jamaluddin who says that the French Civil Code accords with (*tevaḥuk ettiḡi*) in most characteristics the Shafī‘ī maddhab because most of the works in the libraries of Egypt – that was colonized by the French – were penned by Shafī‘ī ulama.³³

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 against it.³⁴ 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.³⁵ In a similar vein, Anver Emon has argued for the compatibility of Islamic law with

³¹ J. N. D. Anderson, “Codification in the Muslim World: Some Reflections,” *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 30, no. 2 (1966): 244.

³² 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), 173–74, (1640769548), <https://www.proquest.com/dissertations-theses/restructuring-islamic-law-opinions-i-ulamā/docview/1640769548/se-2>.

³³ Cemaleddin, “Mukayese-i Kavanin Medeniyye: Mecelle Ahkam Adliyye - Fransa Kanun Medeniyesi,” *İlm-i Hukuk ve Mukayese-i Kavanin Mecmuası* 1, no. 1 (March 31, 1909): 22.

³⁴ Elgawhary, “Restructuring Islamic Law: The Opinions of the ‘ulamā’ towards Codification of Personal Status Law in Egypt.”

³⁵ 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>.

codification, taking the view of a different approach towards the politics of the state.³⁶ Leonard Wood has examined legislation as an instrument of Islamic law, comparing premodern and modern views with respect to its ‘Islamicness’ or Islamicity.³⁷ Even more relevant to our purposes are the contentions in favor and against the *Majalla* that the traditional scholars and *ulamā* had in history. The benefit of hindsight can be availed as usual in any case but insights and analyses that emerge from contemporaries have an especially important role in our understanding of a phenomenon. The experience of Egypt is therefore valuable for this purpose.

1.6.1. Debates For and Against Codification in Egypt

In his doctoral thesis, later published as a monograph ElGawhery recounts the arguments that were made in 19-century Egypt for and against codification by jurists of the time. He asserts that if the scholars in Egypt are analyzed codification should be evaluated according to the interplay of the three concepts: *al-siyāsa al-shar‘iyya*, *ijtihād*, and *talfīq*.³⁸ Those who argued for codification did so in their insistence upon the need to look outside one school of thought (*talfīq*), the necessity for being open to interpretation that is not limited to the boundaries of one’s own school (i.e., *ijtihād* or reasoning that requires a mastery of juristic processes) and lastly the empowerment of courts to regulate contentious issues of the time such as divorce and thereby a reconfiguration of the roles of the pillars of the state (*al-siyāsa al-shar‘iyya*). One argument was for courts to redeem the requisite expertise for considering the niceties present in complicated divorce cases by making up for a lack of education with a code that would assist the judges in adjudicating in a more just manner. Another argument was for a reconstitution of the entire legal system after a collective *ijtihad* taking into account the entire juristic corpus, contemporary societal conditions and Western secular legal codes. After arrival at the most correct opinions with respect to the *Sharī‘a* sources any deficiencies can be remedied through selection from Western

³⁶ 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>.

³⁷ Leonard Wood, “Legislation as an Instrument of Islamic Law,” in *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon and Rume Ahmed (Oxford University Press, 2018).

³⁸ Elgawhary, “Restructuring Islamic Law: The Opinions of the ‘ulamā’ towards Codification of Personal Status Law in Egypt,” 81–82.

sources.³⁹

Those who opposed codification did so with a concern for the role of the jurists and a fear that this was being undermined.⁴⁰ There was also the understanding that codification even though it might result in the same substantive rules was a product of the secular state and severed from the Divine origins whence it came, subject to secular reasoning which was not *ijtihad*.⁴¹ Another, more conservative argument was the caution against bringing together the schools of thought in *fiqh*, including even the *Shi'i* schools, distorting the way that the *Sharī'a* has been understood. This contention advocates against the divorcing of statements from their interpretive contexts which is what overlooking the *madhhabs* or schools of *fiqh* would do. The disregard for the classical juristic discussions would lead to misconstrual of the law and deconstruct the structure of legal authority.⁴² Taking the most authoritative opinions of the *fiqh* schools would be preferable to bypassing them altogether. *Talfīq* was derided as it led to accepting opinions that were not legitimized by any school of *fiqh* when this eclectic selection was based upon whims and not real necessity (*ḍarūra*). There was, furthermore, a fear that letting *maṣlaḥa* drive the formulation of legal prescriptions instead of the imperatives of the legal texts or *nuṣūṣ* would lead to a worsening the societal fractures rather than healing them.⁴³

Islamicity of the Majalla

There has been a debate in academia regarding how Islamic the *Majalla* is. This has certain implications for the question of whether it represents a break in the tradition, and whether there are normative considerations for such a model to be applied in a Muslim polity. The question of *Islamicity* is a very significant issue because if the *Majalla* represents a new paradigm which allows the state to function in modernity in an effective way while holding true to the tradition it is a powerful tool to be used to bring the Muslim world into the contemporary age without giving sanction to the degeneration that regularly accompanies modern forms of governance and regulation.

³⁹ Ibid, 111.

⁴⁰ Ibid, 126–27.

⁴¹ Ibid, 147–49.

⁴² Ibid, 149–50.

⁴³ Ibid, 153–55.

Such forms present problems because distort the relations not only between individuals and family units but between the organs of state and between all the different constituents of the body politic. Such modern technologies of societal configuration reimagine society in new, destructive ways that warp the harmonious structures that have persisted for ages and more often than not create more problems than solve them. Most importantly, the relationship of the Muslim society with its Creator that has been the cornerstone of most Muslim societies until modernity is jeopardized with these tools of reform.

Thus, to evaluate whether the *Majalla* is, and if so, to what extent it is Islamic is an important question. Wood summarizes the debate in the academia with respect to the question of whether any legislation is Islamic, and has categorized it into six criteria.⁴⁴ The first is whether the law serves a legitimate public purpose. The second is that a state that calls itself Islamic may bestow Islamicity on any law just by decree. The third is that the law is Islamic in terms of its political and cultural provenance. The fourth is the substantive correspondence of the norms with the rules present in the classical *fiqh* corpus. The fifth, which seems very similar, is that the rules have been gleaned from the *fiqh* texts. The sixth one is that the legislation is legislation has emerged as a result of a consultative or democratic process.

The *Majalla* needs to be evaluated according to these criteria before we can consider the criteria themselves if they are justified. The *Majalla*, if it can be claimed to serve a function that furthers the legitimate objectives of the state in its management and regulation of the populace would be seen by some to be Islamic. Wood gives the example of Iran which, after the Revolution of 1979, endorsed legislation made before and viewed such laws as Islamic even though there was little to relate those to the Islamic texts and this was justified on the basis that these laws provided the means for the maintenance of social order and necessity. The *Majalla*, and this is undeniable, came about as solution to a practical problem: the legislative lacuna that existed in the sphere of transactions and the lack of trained *Shari'a* scholars to access the existing *fiqh* corpus. The question of Islamicity through executive labelling is not so relevant here because the other and more important criteria were fulfilled by the law. Besides

⁴⁴ Wood, "Legislation as an Instrument of Islamic Law," 562–64.

this, the Ottoman Empire did not have a constitution at the time the *Majalla* was created. If compared with the Iranian state and its use of religious authority, the matter is very different from the Sunni Ottoman Empire. The latter did not claim similar legitimacy and therefore all its legislation was not seen to be Islamic by fiat. The substantive rules of the *Majalla* are taken directly from the texts of Hanafi *fiqh*. Thus, they not only correspond with Hanafi norms but are authored directly by Muslim jurists. Regarding the last criterion of democratic or consultative process, the *Majalla* cannot boast of being a product of democratic function but is evidently a consequence of consultation: the committee served a consultative function and provided the necessary expertise.

1.7. The Structure of the Study

This study is born from a concern about the issues that arise when law is incorporated in a society, specifically when this law is predicated in *fiqh*. In this thesis I argue that *fiqh*, when compared with law is a different kind of creature, if it can be called that. By considering various issues pertaining to how the nature of rules changes when they are written down in a particular way and a specific context, I try to show how these issues have a bearing on *fiqh* in general and the *Majalla* in particular. This thesis is, for the most part, a comparative exercise showing the different features of two independent paradigms: law and *fiqh*. Since the *Majalla* represents *fiqh* in its substance but also law in its positive nature and the way that it has been performatively brought into existence, this study brings together insights regarding the various functions and problems associated with *fiqh* and law. I will also consider some of the historical criticisms that were made with respect to the *Majalla* by both Muslims and non-Muslims and how some of them were responded to. Thus, I hope to attain a holistic picture of some of the substantive and formal, the jurisprudential and the philosophical aspects of the *Majalla* in order to reach a more sophisticated conclusion regarding the place of the *Majalla* in a legal system and, more properly, a system based upon *fiqh*.

In Chapter Two, I will analyse the concept of *fiqh* with respect to the notion of law. Is Islamic law another name for *fiqh*? Does the concept of *fiqh* equate in its niceties with law that is characterized as Islamic? As is apparent, these are two different but similar concepts from two distinct paradigms. Law is known and understood to be a human

artifact used in order to achieve certain aims. These may be regulatory or intended to shape human morals or behavior. In contrast, *fiqh* is a human product where rational juristic endeavor is used for similar aims; however, this effort is tied to texts that have a Divine provenance. Therefore, this elevates the rules that emerge to a ‘semi-sacred’ status. Thus, this activity, this *ijtihad*, earns blessings and Divine pleasure for both the one who does it and the one who is subject to the resultant rules, i.e., the subject of this law. In this chapter, I lay out some of the methodological and ontological issues pertaining to both law and *fiqh* when two such concepts are displayed in proximity, and I argue that *fiqh* needs to be differentiated from law in the way that it exists. This clarifies certain difficulties in our understanding of what the *Majalla* is and what any *fiqh* text might be if posited in a ‘law’ paradigm.

Chapter Three relates to the problem of *fiqh* in history. The important question here is whether the *Majalla* represented a paradigm shift in the tradition of *fiqh* and whether this was in any way a consequential development for the development of *fiqh*. Is *fiqh* a science and did it undergo a Kuhnian revolution? Does the making of the *Majalla* in its particular context represent a paradigm shift in *fiqh* where there was a monumental transformation changing the character of *fiqh*? What are the implications of this paradigm shift, if there is one, for *fiqh*? If the trajectory of *fiqh* has been disrupted, it would make more sense to infer that the *Majalla* represents a degeneration of *fiqh* but this is not a necessary conclusion. I argue that *fiqh* has not undergone a paradigm shift in the Kuhnian understanding but that there does seem to be a sort of rupture in its epistemic continuity and the way it is derived from the sources.

In Chapter Four, I present a case where the *Majalla* was criticized and defended. It is the case of Mandelstam, a Russian jurist of Jewish origin, and his criticisms of the *Majalla* which are addressed by Elmalili Hamdi Yazir, one of the most important jurists of the late Ottoman Empire. These critiques and insights help us get a deeper understanding of the issues surrounding the *Majalla* in the eyes of contemporary figures who had an opportunity to deal with the law at a close level.

Chapter Five deals with the issue of codification and *fiqh*. Codification is a phenomenon that needs to be studied in order to understand its imperatives and compare them to those of *fiqh*. If the two are different, codifying a *fiqh* text would have

interesting and consequential implications in general. I argue that such imperatives are different and discarding the imperatives that are inherent in *fiqh* would lead to distortion.

Chapters Five and Six contain an examination of the issues surrounding the use of language and rules in *fiqh*. The way rules are created means that there are problems of under- and over-inclusion. Furthermore, rules can either be discovered or created. Since, language can either be descriptive (a *khabr*) or performative (an *inshā'*), the way the rules of *fiqh* are posited in legislation is an interesting problem to study as the different roles that take part in creating and maintaining any legal system use the same rules but in different ways and with various relative effects. The lawmaker, law-applier, and other important roles that exist in all legal systems negotiate with the text in particular ways and each system has its own configuration to produce a result peculiar to that configuration. Here I argue that positing the *Majalla* as an utterance of the ruler leads to a distortion of the effects of a *fiqh* text which should be a description or *khabr* and not a performative or *inshā'*

CHAPTER TWO

FIQH AND LAW

2.1. Introduction

Our idea of law pervades our lives and has significant social import. Law not only affects our dealings and disputes but also normatively orders how we are supposed to behave in society. With the adoption in the 19th century of codified legislation as a universal feature of the nation state *un-codified fiqh* is a rarity in juridical systems of the world. For one to understand the nature of this seemingly innocuous shift, one would need to compare *fiqh*, the preceding paradigm, with law which is the subsequent one.

With the adoption of codified legislation as a universal feature of the nation state un-codified *fiqh* is a rarity in juridical systems of the world. The *Majalla*, with its *fiqh* content but specific form and other particularities, seems to be the crossroads where this transmutation is most apparent. For one to understand the nature of this seemingly innocuous shift, one would need to compare *fiqh*, with law qua law, which is the subsequent one. Thus, the presence of this change necessitates a diachronic comparison.

However, some might question the need to compare in the first place. Is not *fiqh* a type of law also referred to as *Islamic law*? Has it not, in the fashion of all law, evolved inexorably into this codified form which is the very evidence of its modern sophistication? This evokes the thesis that asserts the superiority of whatever is recent to that which historically precedes it giving way to the fallacy of historical teleology.⁴⁵⁴⁶ If something happened in history, is it inevitable that it would have happened in that form? Decisions taken were the only ones that could have been taken?

⁴⁵ See Aviezer Tucker, *A Companion to the Philosophy of History and Historiography*, Blackwell Companions to Philosophy 41 (Chichester, U.K. ; Malden, MA: Wiley-Blackwell, 2009), 275, Table of contents only <http://www.loc.gov/catdir/toc/ecip0811/2008007601.html>.

⁴⁶ David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought*, 48th print of Harper Torchbook ed. publ. 1970 (New York: Harper Perennial, 2014), 135–36.

To say that those are the only ones that should have been taken – and thus *fiqh* as law is the best form that *fiqh* could have taken is obviously a conflation of historical trajectory with normative progression.

This Chapter addresses the questions: ‘what is meant by comparison?’ and ‘what is law?’. It goes on to understand *fiqh* in terms of an approach which would be effective in deciphering the particulars of the transformation to law. Such schemes of intelligibility would make comparison both meaningful and lend utility to an appreciation of *fiqh* and its role within a paradigm constituted by law. As for the question ‘what is meant by law?’ its relevance is precipitated by the occasion of formulation of the *Majalla* in a ‘legal’ form and the tacit assumption that it would thereby retain its character with respect to the Sharia. It also investigates the meaning of *fiqh* and law and whether using the latter as a category and theoretical paradigm would distort the former. It also delves into the framework of comparison which would need to be evaluated if one compares a system based in *fiqh* with a modern legal one.

2.2. Problems in Comparison

If we accept the term Islamic law as a synonym without a thorough inquiry of what ‘law’ means we risk imposing an entire semantic structure and its associative baggage onto the notion of *fiqh*. Even further, this would be tantamount to an orientalist outlook which assumes a universal concept of what ‘law’ is and evaluates all objects apropos to that perspective disfiguring the idea of *fiqh* with grave consequences for all that is based on it. If we compare an apple and an orange while taking the orange as the criterion of comparison, the apple would fall short on many parameters: colour, taste, form, smell and so on. The same would be true for the orange if the apple were taken as the standard of comparison. However, if the comparison merely sought to examine the ‘appleness’ of the apple that would be another species of comparative exercise and thereby the danger of an ideological imposition would not be so severe.

Comparison presumes that the two objects are comparable, i.e., there is *some* basis for which the two objects can be gainfully be considered as ‘equal’ but not too ‘equal’ on the comparative plane. For comparison to be made two objects must not be identical. To say, upon observing two versions of the same object that do not vary at all, that they are identical would be the be all and end all of comparative analysis. Excessive

difference, on the other hand, serves no utility either. There is no rhyme or reason why one would compare a cat and an elevator. We can say that these two things are not commensurate. A comparison of *fiqh* and law is even more problematic because this is not a comparison between two civil law systems. This is not even a comparison between a civil law and a common law system, both of which have many common elements. This is a comparison between two paradigms that also do not share a common geographical or chronological setting.

2.3. Comparison and the Functional Approach

There is more than one way to compare two legal systems or paradigms. Several diverse approaches have been developed by legal comparatists. These include structural, hermeneutic and the functional methods. Comparative law has long been governed by the functional method of comparison. The way this method works is that comparable rules or institutions are placed in proximity so as to determine which of the two is the better solution in a given case or a shared problem. The next step is to ask the question, which instrument is used in each society to resolve this shared problem? Or, in other words, which institutions exist in each society that serve to enact the same function in both: we have two solutions to a common problem. The functional approach, thus, rests in ‘functional comparability’ or ‘similarity of solutions’.⁴⁷

Zweigert and Kotz, the chief exponents of the functional approach state in their seminal work, *Introduction to Comparative Law*, that “[i]ncomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function.”⁴⁸ The centrality of the ‘problem’ and the emphasis on facts when comparing functionally stems from a conviction that there are facts which can be known objectively that exist in both paradigms. However, the two paradigms might be distinct in the way legal concepts are constituted in each and how language is used to express those concepts and like the congruence of the sweet water of the river and the salt water of the sea this might just prove to be an insurmountable problem. The

⁴⁷ Esin Orucu, "Methodology of Comparative Law," in *Elgar Encyclopaedia of Comparative Law*, ed. J. M. Smits (Cheltenham: Edward Elgar, 2006), 443.

⁴⁸ Konrad Zweigert and Hein Kötz, *Introduction to comparative law*, trans. Tony Weir, 3rd rev. ed. (Oxford Clarendon Press 1998), 34.

solution that is presented by the functional comparatist is to abstract the facts from the concrete social problem so that the niceties of the relative circumstances surrounding each case in do not affect the comparison as each paradigm has its own culture, society and individuals all of which are unique and non-replicable in their own ways. Thus, “the starting point is not considered the law, or the structure of legal institutions, but the facts.”⁴⁹

There is an assumption here that all the developed nations react to legal issues in very similar ways and means which is tantamount to a *praesumptio similitudinis*, a presumptive similarity of the practical results.⁵⁰ We find here a “concealed universalism” and the fundamental idea that all societies are similar.⁵¹ Zweigert and Kotz echo this insight stating that “the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.”⁵²

Even though this approach makes intuitive sense it is subject to certain drawbacks. Firstly, institutional function of legal institutions is not easy to ascertain.⁵³ Moreover, an objection may well be made that ‘facts’ cannot be divorced from the comparatist’s subjective interpretation of what took place and that to assume objectivity is not only naïve but perhaps an inability to understand how society and human language work. That the functional method is effective should not blind one to presence of these assumptions while engaging in effective comparison. One should also not shy away from asking “whether the function which the rule or institution serves is a worthwhile one”⁵⁴, and whether the comparatist’s “perception of the merits and demerits of different legal systems will be based on a range of (often unarticulated) value-judgments”.⁵⁵ The functional approach is a ‘better solution’ method and to proceed without questioning the role of law in society and with “uncritical acceptance of the ideological foundations of Western legal systems” implies that one makes those value

⁴⁹ Anne Peters and Heiner Schwenke, "Comparative Law beyond Post-Modernism," *The International and Comparative Law Quarterly* 49, no. 4 (2000): 808.

⁵⁰ Zweigert and Kötz, *Introduction to comparative law*, 40.

⁵¹ Peters and Schwenke, "Comparative Law beyond Post-Modernism," 809.

⁵² Zweigert and Kötz, *Introduction to comparative law*, 34.

⁵³ Jonathan Hill, "Comparative Law, Law Reform and Legal Theory," *Oxford Journal of Legal Studies* 9, no. 1 (1989): 104.

⁵⁴ "Comparative Law, Law Reform and Legal Theory," *Oxford Journal of Legal Studies* 9, no. 1 (1989).

⁵⁵ "Comparative Law, Law Reform and Legal Theory," 106.

systems the standard for comparison.⁵⁶ One should be cautious when placing a system such as Islamic law besides a Western legal system or concept because each is subject to disparate assumptions. Elaborating on this Grossfeld states:

How are we to respond to a system which is not habituated to 'law' in our sense, where court decision is not the model method of resolving disputes? We have no intercultural notion of law: our rather formal conception of it is culturally determined. Other peoples see any authoritative pronouncement as 'law', that is, as a rule to be followed, though it may be a question what counts as an authority. The deep structure is often not what we think it and is not to be found where we look for it. The trouble is that we see other cultures through preconceptions from our own. Perhaps we cannot do otherwise. But this leads to problems of method which we cannot deal with here. One may just mention 'functional comparative law', 'economic analysis of law', and 'sociological aspects'.⁵⁷

When we put codification under the microscope, we find that it is unprecedented in the history of *fiqh*, at least in the form and having the purposes that are espoused by the European and other Western legal systems. Having stated that, if the functions of codifications were critically examined there is the potential to glean profound insights as there is the possibility that the *Sharīʿa* is subject to the same or similar imperatives. There is also the possibility that there are other essential characteristics that might militate against those specifically Western considerations or outweigh them. We will delve further into this approach with respect to the *Majalla* in Chapter Five.

2.4. The Science and its Foundations: *Fiqh*

In the Muslim intellectual corpus, there is a significant literature studying the issues related to the value of the different types of knowledge. In the quest to find that knowledge which is beneficial, there was an impulse for classifying knowledge according to its character ranging from the praiseworthy to the harmful. The ten foundations (*mabādīʾ al-ʿashara*) also known alternatively as the eight headings (*ruʿūs al-thamānīya*) of the sciences were developed and prefaced most disciplinary teaching

⁵⁶ "Comparative Law, Law Reform and Legal Theory," 107. For a good examination of functionalism see Michele Graziadei, "The functionalist heritage," in *Comparative Legal Studies: Traditions and Transitions* (2003) Legrand, Pierre; Munday, Roderick. Cambridge, UK: Cambridge University Press. (2003).

⁵⁷ Bernhard Grossfeld, *The strength and weakness of comparative law* (New York: Clarendon Press; Oxford University Press, 1990), 9.

manuals historically.⁵⁸ These were first compiled as a poem by Muḥammad ibn ‘Alī Ṣabbān.⁵⁹ It would be useful here to present the ten foundations and delve into the more relevant ones with respect to *fiqh* as a discipline. The *mabādī’ al-‘ashara* are as follows. The definition or defining limits (*hadd*); its subject matter (*mawḍū’*); the fruits (*thamara*) of its mastery; the goods that serve as its end (*ghāya*); its merits (*faḍl*); its relation to other sciences or its classification (*nisba*); the founder of the science (*wāḍi’*); the name of the science (*ism*); the sources – lit., support (*istimdād*); the legal ruling of learning the science (*ḥukm al-shār’ī*); and the questions investigated in the science (*masā’il*). The *istimdād* for *fiqh* are all the scholastic disciplines of the *Sharī’a* and those of the Arabic language. The fruits that one gains by acquiring this knowledge is to be able to practice according to the *Sharī’a*. The purpose of the discipline is to attain that same practice with mastery and the attainment of a degree of certitude or probabilistic belief (*ẓann*) below absolute certainty.⁶⁰ This is because the strongest sources of knowledge and thus demonstration in Islam are the Qur’an and Sunna and these are certain with respect to their provenance or authenticity (*qaṭ’ī al thubūt*). However, they are not certain with respect to their meaning or implication (*ẓanni al dalāla*) but only probabilistically true. This is the reason that *fiqh* is the domain of *ijtihād* or juristic interpretive endeavor at the high level.⁶¹

2.5. The Concept of *Fiqh*

To define *fiqh* would be a difficult task. This is so not only because the word *fiqh* is an Arabic word not finding its precise equivalent in the English language, but also because it is an artefact – a concept that owes its very existence to human endeavor – it is not only similar to a chair in that it was constructed by humans but it is ontologically different in that its existence is in the mental realm unlike that of a tree or a chair. In its literal sense being synonymous with ‘understanding’, ‘*fiqh*’ has been

⁵⁸ Omar Anwar Qureshi, “Disciplinarity and Islamic Education,” in *Philosophies of Islamic Education: Historical Perspectives and Emerging Discourses*, ed. Nadeem A. Memon and Mujaddad Zaman, Routledge Research in Religion and Education (New York, NY: Routledge, 2016), 96.

⁵⁹ Muḥammad ibn ‘Alī Ṣabbān and Aḥmad ibn ‘Abd al-Fattāḥ Mullawī, *Hāshiyat Al-Ṣabbān ‘alā Mallawī al-Sullam*, 2nd ed. (Egypt: Mustafa alBabi alHalabi wa awladih, 1938), 35.

⁶⁰ Aḥmad bin Muṣṭafā Tashkōpruzade, *Miftāḥ al Sa’ādah Wa Miṣbāḥ al Siyādah Fī Mawḍū’āt al ‘Ulūm* (Beirut: Dar Ibn al Hazm, 2010), 415.

⁶¹ For *ijtihād* see Bernard Weiss, “Interpretation in Islamic Law: The Theory of *Ijtihād*,” *The American Journal of Comparative Law* 26, no. 2 (1978): 199–212; Anver M. Emon, “*Ijtihād*,” in *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon and Rumeen Ahmed (Oxford University Press, 2018), 180–206, <https://doi.org/10.1093/oxfordhb/9780199679010.013.37>.

defined by Abu Hanifa as the “knowledge pertaining to man: his rights and duties” (*maʿrifat al nafs mā lahā wa mā ʿalaiḥā*). This is a broad overarching conception relating to whatever befalls a human being and his resultant rights and obligations whether they be in the realm of justiciability or whether they bear upon his corporeal body or his spiritual one, or whether they pertain to temporal concerns or the eternal Hereafter. This definition encompasses all the disciplines that originate in the Sharia barring none.⁶² Historically this was the earlier understanding of *ʿfiqh* which with the passage of time and human experience gave way to a more specialized and specific definition exemplified by the words of Shafīʿī, that *fiqh* is “the knowledge of the *sharʿī aḥkām* (predications made in the *Sharīʿa* - sing. *ḥukm*), pertaining to actions, that have been derived from their detailed evidences.”⁶³

2.5.1. *Fiqh and the Ḥukm*

In Islam the *ḥukm* represents the limit of the juridical process, and more properly, it is the ultimate object of the *muftī*’s juristic activity – the fruit emanating from the process of *ijtihād*. The *ḥukm* is posited by the *muftī* or *qāḍī* as being the probable will of the Almighty with respect to the case under advisement. There are three possible classifications of the *ḥukm*: firstly, *ḥukm al-qāḍī* which is the determination of judicial fact; secondly, *ḥukm waḍʿī* which is the determination of validity; and lastly, *ḥukm talkīfī* which is the determination of the religio-moral status of acts. The latter two are also grouped together and called *ḥukm sharʿī* (Figure 1).

Ḥukm al-qāḍī is conclusive, i.e., incontrovertible but is not precedent-forming. The possibility of the ruling to be in error implies that it cannot set a precedent for future cases. *Ḥukm waḍʿī* can be either the finding that an act satisfies the necessary conditions for that sort of act thereby being valid, or that the “object under consideration constitutes a coextensive occasion (*sabab*), a necessary condition (*sharʿī*), or an impediment (*manʿ*)”.⁶⁴ An example for the former is a contract of *bayʿ*

⁶² Muhammad Ala ibn Ali. Tahanawī Ajam, Rafiq, Khalidi, Abdallah al-, “Fiqh,” in *Mawsuʿat Kashaf Istilahat al-Funun Wa-al-ʿulum*, ed. Rafik Al Ajam (Beirut, 1996), 1282.

⁶³ Muhammad ibn Bahadur Zarkashi, *al-Bahr al-muhit fi usul al-fiqh*, ed. ʿAbd al-Qadir ʿAbd Allah ʿAni and ʿUmar Sulayman Ashqar (al-Kuwayt: Wizarat al-Awqaf wa-al-Shuun al-Islamiyah, 1992), 21.

⁶⁴ A. Kevin Reinhart, “Islamic Law as Islamic Ethics,” *The Journal of Religious Ethics* 11, no. 2 (1983): 194.

(sale) which if it satisfies the requirements – of, say, offer and acceptance – as laid down in the Qur'an and *Hadīth* would be binding and effective. Typical examples for the latter are as follows:

The observation that the moon has arrived at its crescent form is the “proof” that the fasting month of Ramadan has begun. Such a lunar observation, therefore, is the coextensive occasion (*sabab*) for the beginning of the fast. Again, when it is determined that a particular act of ritual worship ... has been performed with intentionality ... that ritual act is valid because intentionality is a necessary condition (*sharṭ*) for such worship. Finally, the observation that a woman has menstrual blood establishes that there is no need for her to perform ritual worship since menstruation is an impediment (*manʿ*) to formal worship.⁶⁵

The *ḥukm taklīfī* purports the division of all human acts into five ‘normative’ categories: obligatory (*wājib* or *farḍ*), recommended (*mandūb* or *mustaḥabb*), neutral (*mubāh*), disapproved (*makrūh*), and forbidden (*ḥarām* or *mahzūr*). The *ḥukm taklīfī* and the *ḥukm waḍʿī* are both types of what is known as the *ḥukm sharʿī*. The *ḥukm taklīfī* is the counterpart to what is known as ‘law’ in the conventional sense. Similarly, the *ḥukm al qāḍī* is the counterpart to what is the judicial judgment which denotes the court's final determination of the rights and obligations of the parties in a case, i.e. the ruling, order, or judgment pronounced by a court when considering or disposing of a case.⁶⁶ One of the characteristics of a judicial decision, at least in the context of the common law, is that courts always consider both the ex-ante and the ex-post perspectives, that is, in addition to setting the current controversy to rest, they seek to peer into the future contemplating the possible effects of their decision on parties exposed to similar situations. In envisaging this latter perspective, they act as a legislature would; their decisions in such cases, usually to seal a gap in legislative purport or a noncommittal verdict of authorities with respect to the present case, complement legislation in an act of tacit law-making. It is apparent that the concept of law in this sense would necessarily extend beyond posited legislation. The keeping of the ex-post perspective in mind when deciding cases indicates the courts’ cognizance of their culpability in making of law and the resultant shaping of society through it.

⁶⁵ Reinhart, 194.

⁶⁶ *Black's Law Dictionary 9th ed.*, (2009).s.vv. "Judgment," "decision."

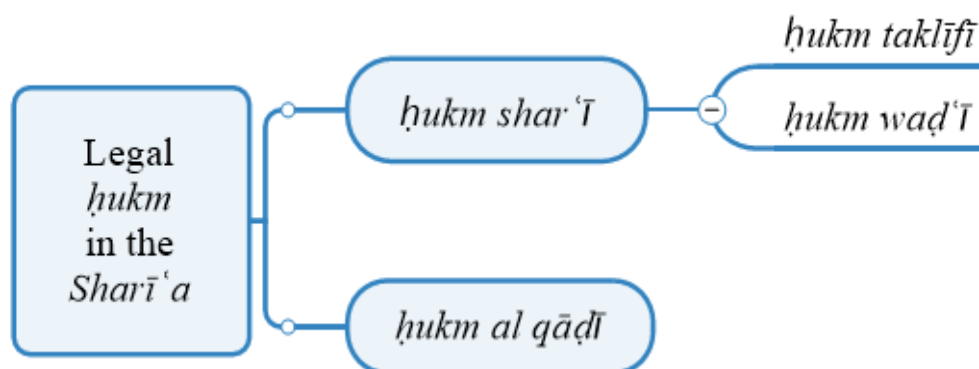


Figure 1: Types of 'Legal' Hukm in the Sharī'a

2.6. Fiqh and the Sharī'a

The relationship of *fiqh* with the *Sharī'a* needs to be established if one is to understand the meaning of *fiqh* itself and its place in the worldview of Muslims. The word *Sharī'a* stems from the word *shar'* and its literal meaning is the *path to the watering-hole* but the acquired meaning has come to be the *way to attain the pleasure of God through his commandments*. The *Sharī'a* is ultimately unknowable: the will of God exists known only to Him unless He has revealed it to humanity.⁶⁷ Even with what has been revealed there are uncertainties and gaps in knowledge which are filled through the juristic endeavor of *ijtihad* resulting in *fiqh*. To settle on one possible explanation for a text wherever there are multiple leaves open the possibility of error. *Fiqh* is thus beset by this lack of certainty and the awareness of this shortcoming leads to a humble outlook in the face of competing interpretations. *Fiqh* can also be distinguished from the *Sharī'a* in that the knowledge of the latter also subsumes other epistemes such as *taṣawwuf* and *kalam* and not only *fiqh*.

Fiqh takes its authority from the Divine whilst law comes into force after the pronouncement of the profane sovereign. The Divine word is exalted and all its nuances have value because they are predicated in ultimate wisdom and absolute knowledge. These characteristics endow *fiqh* with an authority that borders on the Divine and it is imbued with a higher status in the mind of the believer than any decree

⁶⁷ Colin Imber, *Ebu's-Su'ud: The Islamic Legal Tradition*, Jurists--Profiles in Legal Theory (Stanford, Calif.: Stanford University Press, 1997), 30.

of the secular state.⁶⁸

The *Sharīʿa* is a reality that is not visible but through the communication made with humanity through the Divine texts and is the object of inquiry by human jurists. *Fiqh* is the human articulation of that understanding reached after investigative hermeneutic endeavor which being human is a fallible attempt to realize that object. The association of the *Sharīʿa* with the Divine and *fiqh* with the human has prompted the epithets of “God’s law” for the former and “jurist’s law” for the latter.⁶⁹ Some Western scholars of Islam such as Schacht have noticed parallels between the functions performed by specialists in Roman jurisprudence and the *fiqh* jurists, but he underscores the difference in the imperatives that actuated each: “The formation of Islamic law took place neither under the impetus of the needs of practice, nor under that of juridical technique, but under that of religious and ethical ideas.”⁷⁰ This is, of course, not to deny the importance of rational and practical considerations in the development of *fiqh* which were important but were shadowed by the primacy of Revelation.

The association of *fiqh* with jurists and scholars due to the human agency that constitutes it should not make it comparable to the Western notion of law which is wholly an artefact without being rooted in any kind of transcendental authority. The only authority that it may claim is state sanction. *Fiqh*, *pace* law, stems from exegetical exertion upon textual sources. With their reasoning faculties regarded as perfect the Roman jurists were seen to know the Mind of God and can be considered as analogues to the Prophets.⁷¹ They created the primary texts while in the Islamic context the primary texts were the starting point of juristic activity.

Even though *fiqh* is in the realm of the probable and the possible, not the certain, it may be asked why there exists an obligation to obey it. The process of reasoning by

⁶⁸ A decree of the ruler or sovereign body may take on an almost religious legitimacy if it may be justified through norms that impart a duty to follow those in authority. One oft-quoted injunction is that of the Qur’an (4:59): “O you who believe! Obey Allah and obey the Messenger, and those of you who are in authority.”

⁶⁹ Bernard G. Weiss, *The Search for God’s Law : Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī*, Revised (Salt Lake City; Herndon, Va.: University Of Utah Press; International Institute of Islamic Thought, 2010), 15.

⁷⁰ Weiss, 15.

⁷¹ B. Weiss, “Law in Islam and the West, Some Comparative Observations,” in *Islamic Studies Presented to Charles J. Adams*, Eds. Wael B. Hallaq and Donald P. Little (Leiden and New York: E.J. Brill, 1991), 1991, 246–48.

the master jurist (*mujtahid*) culminates in a preponderance of belief in his mind (*ẓann*). However, to act upon a judgement that is reached through *ẓann* is obligatory.⁷²

2.7. *Fiqh* and Genre

In his prolegomenon to his *kashf al ẓunūn*, Katib Chalabi indicates that there are three types of works when it comes to scientific knowledge: the epitome or compendium (*mukhtaṣar*), summa (*mabṣūṭ*) and the normal treatise. The epitome is useful to the advanced student who can benefit from it to jog his memory or the astute beginner who can speedily approach the desired meanings through its precisely formulated expressions. The summa is useful for deep investigation while the ordinary treatise can be availed by all and sundry.⁷³ He further elaborates seven purposes that are behind any kind of textual production. These are: if there is something that has not been written about, or a topic not addressed fully, or an issue that is difficult that needs to be explained, or something that is excessively lengthy that needs to be shortened without getting rid of meaningful content within it. Other authorial purposes could include gathering together matters that are dispersed, or to clear up things that are entangled, or lastly, to correct something where an error has been made.⁷⁴

The *Majalla* is a text containing rules, which derives from the *fiqh* texts that were produced by the jurists in the preceding centuries. In terms of genre *fiqh* is not limited to a single one. Attempting to list the genres, one finds the two main genres of *fiqh* which are *uṣūl al fiqh* (lit. roots of *fiqh*) and *furūʿ al fiqh* (lit. branches of *fiqh*). The former identifies sources for the rules of *fiqh* and elaborates the methods to be used to derive those rules. These methods are for the most part hermeneutic and pertain to the construal of Divine language. The latter offers a classification of all human acts into categories such as the two primary categories: matters of ritual worship (*ʿibādāt*) and *muʿāmalāt* (transactions).

Other than these, there are further genres that have developed in the history of Islamic

⁷² Muḥammad Ibn-ʿUmar Fakḥr-ad-Dīn ar-Rāzī, *Al Maḥṣūl fī ʿilm uṣūl al fiqh*, 2nd ed., vol. 1 (Beirut: Muʾassasat ar-Risāla, 2012), 7.

⁷³ Katib Chalabi, *Kashf al-ẓunūn ʿan asāmī al-kutub wa-al-funūn*, al-Ṭabʿah 1 (Darsaʿādat [Istanbul]: Matbaʿa Alam, 1892), 35.

⁷⁴ Chalabi, 35; Kızılkaya, *Legal Maxims*, 66.

intellectual thought, which serve various functions. These include *qawāi'd fiqhiyya* (*fiqh* maxims), *fatāwā* (legal responsa), *furūq* (legal distinctions), *takhrīj al furū' alā al uṣūl* (derivation of rulings from the sources of law), *hiyal* (legal devices), *nawāzil* (unprecedented cases), *adab al-qāḍī* (legal procedure for judges), *aḥkām al-sultāniyya* (rules for the executive), *shurūṭ* (legal records), *kharāj* (land tax), *farā'id* (inheritance), and *amwāl* (fiscal law). Most of these can be considered sub-categories of *furū'*, such as *shurūṭ*, *kharāj*, *farā'id*, *amwāl* among others.⁷⁵

2.8. What is law? Questions?

Law is most generally regarded as a system of rules or norms. This question of the nature of law is discussed in the books of Western Jurisprudence and Legal philosophy and has given birth to many theories, primary among them being positivist and natural law theories. The dominant difference between the two types of theory is whether morality may be separated from law. What are the questions that are asked in these disciplines respectively? The major questions that are asked in the study of law and legal philosophy with respect to the nature and character of law are two:

1. Are all laws reducible to certain fixed and necessary criteria for their identification as law?
2. Are moral norms a certain source for the formulation and interpretation of laws?

Now, when it comes to the issues that are raised in *fiqh*, they are termed as *masā'il* or problems and are discussed in the books of *fiqh* under the sub-categories of worship (*ibadāt*), transactions (*mu'āmalāt*), marriage (*munākiḥāt*), and criminal regulation (*jināyāt*).⁷⁶

2.9. Islamic law: A Problematic Term?

It must be said that law is not a term that can correspond precisely to the term *fiqh*. Firstly, the normative categories in *fiqh* are five (in the *Shāfi'ī* school) and nine (in the

⁷⁵ Ahmet Akgündüz, "FÜRÜ," in *TDV İslam Ansiklopedisi*, 1996, 250, <https://islamansiklopedisi.org.tr/furu>.

⁷⁶ `Ali al-Salihi. Maliki, *Risalat tahqiq mabadi al-ulum al-ahada `ashar* (Cairo: Maṭba'at al-Sa'ādah, 1907), 56–59, <http://hdl.handle.net/2333.1/3n5tb606>.

Ḥanafī school). This is manifestly different from the simple legal distinction between what is legal and illegal. The addition of other normative categories between the ones that correspond to legal (obligatory and neutral) and illegal (forbidden) such as recommended and disapproved, stem from the concern that *fiqh* has for moral (and immoral) actions and their consequences in the Hereafter. Law deems the province of its interest squarely within the worldly realm and thus cannot look beyond what is actionable in the courts while *fiqh* seeks to regulate human behavior even in solitude where the individual is aware only of the presence of God.⁷⁷ Any action falling in the realm of the actionable is referred to in *fiqh* as being subject to *qaḍā'*; that strictly in the domain of conscience is described as *diyāna*. Law, creates coercive mechanisms and regardless of the morality of the associated criminal act with time that act acquires connotations of immorality and inspires repulsion, or at least aversion. In a society ruled by *fiqh* where norms are internalized regardless of the mechanisms of power in society individuals derive their morality from rules that have Divine association and are thus more *persuasive* in regulating human behavior. Thus, *fiqh* compulsion is primarily a regulation mechanism internal to the human psyche. Furthermore, it would be banal to state the human origin of legislation but this is a quality that law holds common with *fiqh* to an extent. For *fiqh*, the human element is apparent even from the definition where the term 'derived' (*muktasib*) alludes to the human exertion that is used in working on the Divine sources of the Qur'an and the Sunna.⁷⁸ However, since the paradigmatic cases and rules that serve as the sources and origin for the contrived *fiqh* rules are directly extracted from the Divine texts, those *fiqh* rules assume, at the very least, a rootedness in Divine origin.

The usage of Islamic law for *fiqh* is a 19th century phenomenon and starting with the Orientalists has passed without much introspection into the discourse of Muslim authors.⁷⁹ There are several differences which can be noted in this comparison of the

⁷⁷ The binary of legal/illegal is used by Luhmann to construct law as an autopoietic system: Niklas Luhmann, "Law As a Social System," *Northwestern University Law Review* 83, no. 1 & 2 (1989 1988): 140. See generally, Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, *Law as a Social System*, Oxford Socio-Legal Studies (Oxford; New York: Oxford University Press, 2004); and Gunther Teubner, ed., *Autopoietic Law - A New Approach to Law and Society*: (DE GRUYTER, 1987), <https://doi.org/10.1515/9783110876451>.

⁷⁸ That the Qur'an is Divine does not need explanation. The Sunna is also a form of revelation (*waḥī*), be it explicit or implicit (*matlū* or *ghayr matlū*).

⁷⁹ Recep Senturk, "Intellectual Dependency: Late Ottoman Intellectuals between Fiqh and Social Science," *Die Welt Des Islams* 47, no. 3/4 (2007): 283–318.

two concepts. Firstly, law has a dichotomic character: either some action is legal or it is outlawed. *Fiqh* is more nuanced and has a spread of prescriptive force ranging from obligatory to unlawful with recommended, neutral (or ambivalent) and disliked making up the remainder.⁸⁰ The comparable in *fiqh* for illegal would be *ḥarām* but that for legal would be all categories from *mubāḥ* to *farḍ*. Law, in this sense is more reductive than *fiqh*, and leaves large portions of the human behavioral spectrum unregulated. Having said this, all of the legal prescriptions are enforceable in a court of law. If the law states something, it is recognized and may be acted upon in the judicial system. This is not true for *fiqh* where only matters within the purview of *qaḍā* are cognizable while those that are held to be under the realm of *diyāna* are not so and have a purely moral aspect. This aspect may not be neglected, however, because immoral acts, in this sense, are liable to public odium and societal stigma in a Muslim context, as well as subject to eschatological penalty even if they might not be cognizable offences.

Law in the Western sense is a human artefact meant to order human life, individual and collective, where matters are subject to constant change. Hence, it is law and legislation, and especially codification, which serve as mechanisms for change seeking to alter the very fabric of society. Law being a product of mortals and not the sacred, some would have it so that all morality is separated from the legal realm, “Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems.”⁸¹ Consequently, unlike the *Sharīʿa*, law does not claim a divine mandate, though there is a confidence, perhaps misplaced, that human affairs can be controlled through law to the satisfaction and welfare of humanity. Law is subject to a multiplicity of formative forces and this implies that there is a high potential for inconsistency and substantive incoherence.

However, there are similarities present as well.⁸² The type of reasoning that a judge uses in his deliberation when applying the law to the facts of a case is very similar to

⁸⁰ The Hanafi scheme has seven categories in addition to the ones mentioned earlier: a division of *makrūh taḥrīmī* and *makrūh tanzīhī*, and a division of *farḍ* into *farḍ* and *wājib*.

⁸¹ Hans Kelsen, *General theory of law & state*, Law & society series (New Brunswick, N.J.: Transaction Publishers, 2006), 114.

⁸² Weiss, “Law in Islam and the West, Some Comparative Observations.”

how a *qāḍī* reasons when passing judgement. This is a type of practical reasoning which these two realms share with the medical profession. When a doctor looks at the symptoms of a case and decides which treatment to apply, he goes through, more or less, a similar process.⁸³

2.10. The Ontology of *Fiqh*

In most books of *fiqh* its subject matter is said to be action or '*amal*'. However, one must not mistakenly understand the subject matter of *fiqh* in the way the social sciences take action as their subject matter as the uses of each are not comparable.

In his seminal *Miftāḥ al Sa'āda' wa Miṣbāḥ al Siyāda'* Tashkopruzade creates a taxonomy of works based on the ontology of their subject matter.⁸⁴ He delineates a four-fold classification for placing all the different disciplines that existed in his time. He starts with the existence (*wujūd*) in writing (*kitāba*), from which may be inferred the existence in formulation ('*ibāra*'), from which may be inferred in turn the existence in minds (*adhhān*, sing. *dhihn*) and from which may be inferred, lastly, the existence in the concrete things – real or concrete or extra-mental existence or reality (*a'yān*) (see Figure 2). Another way to express their mutual relationships is to understand that the first is a means to know the second, the second a means to know the third, and so on.

He places *fiqh* and associated disciplines like *uṣūl al fiqh* (principles of *fiqh*) in the fourth category, as disciplines that study the reality of being – having *wujūd fīl a'yān* – and under the broader category of '*ulūm al shar'iyya*' (sciences or knowledge disciplines pertaining to the *Sharī'a*) which are all set under that existential grouping. This may be justified as the purpose of *fiqh* is to reach an estimation of the 'Mind of God' with respect to normative human behavior and there is no existence more real than that of the Almighty. However, more relevant to our purposes here is to determine

⁸³ Geoffrey Samuel, "Is Legal Reasoning like Medical Reasoning?," *Legal Studies* 35, no. 2 (2015): 323–47, <https://doi.org/10.1111/lest.12063>; Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988), 36–46. {Citation}

⁸⁴ Tashkopruzade, *Miftāḥ al Sa'āda' Wa Miṣbāḥ al Siyāda' Fī Mawḍū'āt al 'Ulūm*, 54; This topic has been broached Abu Hamid Al-Ghazali, *Mi'yār Al-'ilm Fī Fann al-Manṭiq* (Beirut: Dar al-Kotob al-Ilmiyah, 2013), 47–48.

the realm of existence of the discipline itself, i.e., *fiqh*. What level of existence does *fiqh* fall into? What is cursorily apparent is the existence of the discipline in the textual corpus and therefore in possession of existence in writing.

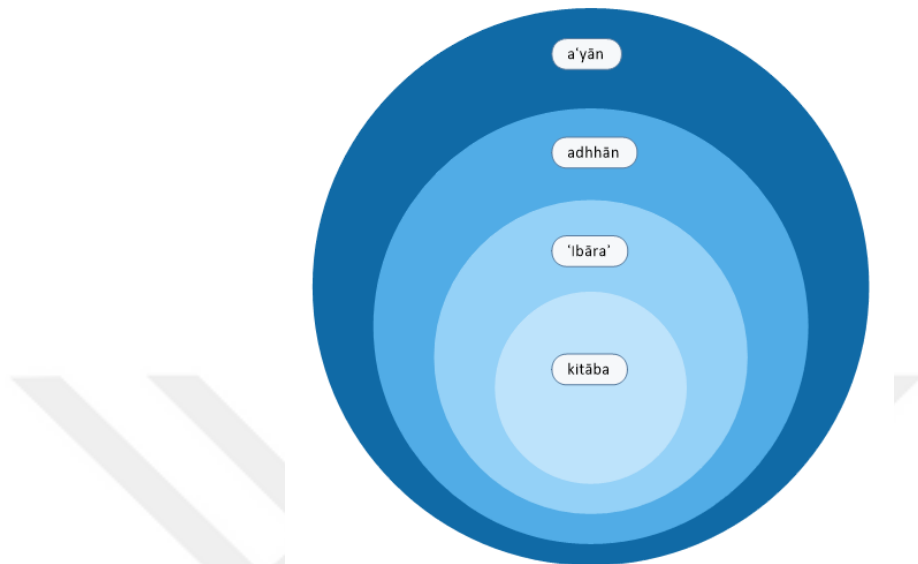


Figure 2. The *Marātib al Wujūd* (The Levels of Existence)

The story does not, however, end there as the articulation of *fiqh* through the rules of language and as such comprehensive of subject matter of the varied disciplines pertaining to language and expression – such as grammar, rhetoric (*balāgha*) and semantics (*ma‘ānī*) – as well as the diverse rules of logic (*mantiq*) – implies that the realms of both words and minds is relevant in the operation of *fiqh*. This is corroborated by the assertion that *fiqh* relies upon and is assisted by (*istimdād*) all the rest of the Sharī‘a disciplines and Arabic language disciplines.⁸⁵

However, being a discipline that is both limited and unlimited due to its basis in probabilistic knowledge (*ẓann*), meaning that which cannot be ascertained with certainty grants *fiqh* a special place the focus of which vacillates across the three realms of writing, formulation and minds as it tries to reach an approximation of what reality is. Let it not be forgotten that *fiqh*, with the realization of human frailty and acknowledgement of the inability to know the Divine will with any more certainty than is provided by Divine revelation, defines its own ambit around the realm of the

⁸⁵ Tashköpruzade, *Miftāḥ al Sa‘ādah wa Miṣbāḥ al Siyādah Fī Mawḍū‘āt al ‘Ulūm*, 587.

conjectural or suppositional.

The objects in reality (*a'yān*) having an actual existence (*wujūd haqīqī*) are implied by the next layer of reality which is the reality in the mind (*adhhān*) and so on. The last level is that of *kitāba* or writing, and the relation of each level with the next is that the former signifies and is a means to know the latter. Writing has an existence that is not real but figurative (*majāzī*), as does formulation. The existence in the mind can, however, be either figurative or real while the last level of existence is that which is extra-mental and concrete, as demonstrated in Figure 3.

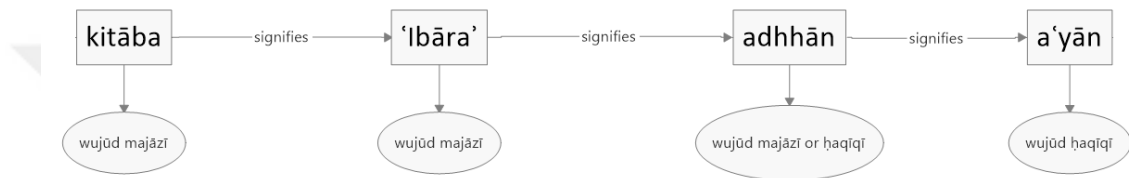


Figure 3. The Inter-relations of the *Maratib al Wujūd*.

Source: Tashköpruzade, 2010

However, in the world of Western law whenever law is made, the act of writing down the formulas of legislation in a context encompassing a particular configuration of state organs and ideology that articulation not only signifies what the reality is but, in fact, constructs it (Figure 4). Legislative pronouncements have a performative character and act to create a social and legal reality. Since these are admittedly speech acts uttered by the Parliament or whichever body serves in place of the sovereign.⁸⁶ There will be further discussion on this issue in Chapter Six.

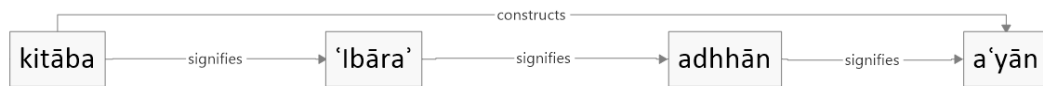


Figure 4. The Inter-relations of the *Marātib al Wujūd* in a Western Paradigm

To elaborate, this is the difference between discovering law and making law. The

⁸⁶ John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (London,: Cambridge U.P., 1969); John R. Searle, *The Construction of Social Reality*, Penguin Books Philosophy (London: Penguin, 1996).

Western legislator makes law and there is nothing comparable with respect to *fiqh* in the Islamic paradigm. The jurist, who writes the *fiqh* text discovers the law which is known ultimately by God alone. By this is meant that the niceties of the law and not the explicit commands that are in the revealed texts. *Fiqh*, being a human activity to discover the rules regarding prescriptive human behavior, leads to the writing down of those rules and this signifies the presence of those rules in the realm of *‘ibāra* which, in turn, implies the presence of those rules in the mind of the jurist which ultimately signifies that there is something that exists in the reality of the outside world corresponding to that mental existence. Now, by transitive logic the existence in writing signifies the existence in reality. Therefore, one can say that the written *fiqh* text and its individual rules signify the existence of real rules (Figure 4).



Figure 5. *Marātib al Wujūd* in *Fiqh* following the Transitive Property

One might object and say that in the end both paradigms result in the same effect. Since the social reality is not apparent or tangible, to construct it or to report it would both refer to the same thing.

Let us examine this claim. The difference in both paradigms is that for Western law the writing does not imply or signify reality but creates it. The human hand that writes legislation constructs a new reality, a juristic existence that is then promoted, elaborated, defended and enforced by the whole might of the state, which, incidentally, also monopolizes the right to violence and is jealous of sharing any power with non-state organisms and institutions. The obvious problems here are firstly that the ability to create reality gives almost an unlimited power to the lawmaker who is not anchored to any moral system or bound by any religious norms because he is supreme in his authority and not confined by any normative system above him. It may be claimed that a constitution plays the same role as a corpus of religious laws that limit the ruler. However, the constitution is again a human artefact that is subject to change. This change is more difficult to obtain than ordinary legislation but it is still possible if a substantial public desire exists for it.

The ability to change the world through law is a significant power. The sultan's prerogative to legislate through *qanun* is similar to the unbridled power of law-making in the Western paradigm. It is, however, always in second place to *fiqh* and the spirit of the Sharia and constrained by the latter as the Sharia has a more real existence than any man-made law. In the scheme of things, the Divine Lawmaker precedes and delegates legislative competence to the human who merely acts as His agent on the earth. Whilst discovering the Divine will the human agent has a circumscribed ambit of sovereignty within which he may legislate and fill in the vacant spaces, as it were, of the normative universe. It is not the prerogative of the state to discover the Divine will but it operates within the jurisdiction defined for it by the Sharia. It needs to enforce the Divine will but this is only in particular cases and for individuals who are party to the court's jurisdiction.

The existence of *fiqh* is a conceptual or mental matter, that is to say that it is an '*amr i 'tibārī*'.⁸⁷ However, when it is written down as a text it acquires an existence in formulation and the mind for whoever reads that text. *Fiqh* rules are inferred and are therefore different from positive rules that are constructed and then assumed to exist as a form of fiction. The *fiqh* jurist works within a paradigm of discovery. He exerts a great deal of hermeneutic acumen to achieve, what he hopes, is a correspondence with the Divine will based upon revelation and the Prophetic example ﷺ. The legislator in the Western sense constructs a system of norms based upon his understanding of society and subject to his moral and ideological inclinations. Since law does not have a physical existence and it also exists in the plane of writing as does *fiqh* one would suppose they are identical with respect to their level of existence. However, even within the plane of writing we find that there are multiple levels of existence. At a glance, it can be seen that posited legislation has its own type of existence. It comes into being with its own contextual and performative rules and has a unique kind of performative force. A law may be quoted in the courts and it would have a wholly different effect than when quotes poetry or a passage from the *Hidāya* for that matter.⁸⁸ The legal prescription would have much more determinative force in that context than

⁸⁷ Wizarat al-awqaf wa-s-suun al-islamiyya Kuwait, "Itibar," in *al-Mawsu'at al-fiqhiyya* (Cairo: Dar as-safwa lit-taba'a wa-n-nasr wa-t-tawzi', 1986). 'Ali ibn Muhammad Jurjani, *Kitab al-Ta'rifat : ta'rifat mustalahat 'ulum al-Quran, fiqh, lughah, falsafah, tasawwuf, makayil, mawazin, maqayis rataba 'ala al-huruf alfabaiyan*, ed. Muhammad 'Abd al-Rahman. Mar'ashli (Beirut: Dar al-Nafais, 2012), 29.

⁸⁸ The *Hidāya* is a *fiqh* text containing the *furū'*.

the passage from the *Hidāya* which would have more weight if it accompanied a message of exhortation or as part of a juristic responsum or *fatwā*. On both occasions the latter would be merely persuasive and non-binding.

Law, thus operates as a fiction. It is deemed to exist through the paraphernalia of the modern state which has appropriated to itself all power to regulate the human experience. In doing so it seeks to bring about societal change and reform to accomplish ends that it decides for itself: a minority decides for the majority how it should live and act and attaches opprobrium to certain acts based upon the former's moral compass and not any Divine originated text.

2.11. Conclusion

The notions of *fiqh* and law are similar in many ways and dissimilar in several. In certain ways, as systems of norms and regulative rules both law and *fiqh* serve similar functions. When law is 'brought to life' it lives and breathes in a different way and in venues that are different from those where *fiqh* resides. *Fiqh*, as an epistemic knowledge separates from law in that the latter is posited and is always a human artefact which is used to control and order society. To state it more definitively, law belongs to the paradigm of construction while *fiqh* belongs to the paradigm of discovery. These observations will serve to provide

CHAPTER THREE

THE *MAJALLA*: A NEW PARADIGM?

3.1. Introduction

The *Majalla* is taken, in many quarters, to be an instance of where jurists negotiated successfully with modernity and produced a text that satisfied the demands of the incipient nation-state whilst retaining the legitimacy of traditional *fiqh*. It was significant in the effects that it had upon the notions of law not only within the Ottoman empire but in the far reaches of the Muslim world. There exists, however, a vigorous debate on whether the *Majalla* represents a continuity in the *fiqh* tradition or a giving way to a new species of legal paradigm which is fundamentally different from the prior one. The notion of a paradigm was proposed by Kuhn to describe how a normal science undergoes a revolution. Can the *Majalla* be described as a new paradigm for *fiqh*? In order to answer this question, one needs to understand the context in which the *Majalla* came into being. In this article we will survey the different opinions that have been expressed regarding this change and consider which of these is a more rational reading of the phenomenon of the change. Does the change warrant a conclusion of break rather than continuity? Thereafter, we shall attempt to reconstruct those historical circumstances. We will investigate whether the *Majalla* might be seen to be a new paradigm in the science of *fiqh* and whether there is an optimal way in which the paradigm change should be described, going on to discuss which analytical framework would be best to understand the changes that occurred.

3.2. Continuity or Rupture?

There are a few important questions to ask here. Did the *Majalla* constitute an occasion which represented a continuation of the traditional *fiqh* paradigm where it is an organic growth of the same continuous tradition of *fiqh* that had ruled the Ottoman empire until that time? This viewpoint states that it was an authentic response by the Hanafi tradition to the circumstances of the Tanzimat and there was no real rupture in the

Islamic law tradition. The other side of the coin is the perspective that states that Islamic law is by its very nature incompatible with codification and is thereby is distorted by the transformation. A confluence of alien European ideas of codification and systemization have affected a tradition in a critical manner and enabled the intrusion of human legislation into the Divine realm as the source of authority is now derived from the former rather than the latter.

It has been claimed by some such as Ayoub that the *Majalla* is a continuation of the traditional *fiqh* paradigm where it is an organic growth of the same continuous tradition of *fiqh* that has existed in Muslim society since the earliest times.⁸⁹ Ayoub seeks in his article to answer some questions, amongst them, the degree to which the *Majalla* actualizes norms belonging to the Hanafi *madhhab* (the ‘official’ *madhhab* of the Ottoman Empire) and how this was justified.⁹⁰ The implication is that if it can be established that the *Majalla* was a manifestation of Hanafi doctrine and the methods of justification tenable, the *Majalla* emerges as an ‘authentic representation of Islamic law’ and not an artificial imposition of alien norms.⁹¹ He also claims that the *Majalla* should be seen as an authentic response by the Hanafi tradition itself to the *Tanzimat* and to the concatenation of legal circumstances that confronted the existing legal paradigm at the time. He further adduces the reasoning contained in the report that supplements the *Majalla* as evidence for the professed justification of the framers that the *Majalla* is ‘in their own words’, as it were, an authentic representative of the tradition. There was thus, following this argument, no real rupture in the Islamic law tradition.

Schacht is perceptive in his observation that *fiqh* or “traditional Islamic law, being a doctrine and a method rather than a code... is by its nature incompatible with being codified, and every codification must subtly distort it.”⁹² He adds that “[s]trict Islamic law is by its nature not suitable for codification because it possesses authoritative

⁸⁹ Samy Ayoub, “The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries,” *Journal of the Ottoman and Turkish Studies Association* 2, no. 1 (2015): 121–46.

⁹⁰ Peters, R., P. Bearman, and F. E. Vogel. “What does it mean to be an official madhhab? Hanafism and the Ottoman empire.” *The Islamic school of law: evolution, devolution, and progress* (2005): 147–158.

⁹¹ Ayoub, “The Mecelle, Sharia, and the Ottoman State,” 121.

⁹² Joseph Schacht, “Problems of Modern Islamic Legislation,” *Studia Islamica* 12(1960): 108.

character only in so far as it is taught in the traditional way by one of the recognized schools.”⁹³ He claims that the *Majalla* deserves to be called a secular and not an Islamic code due the influence of European ideas.⁹⁴ In the context of reforms in the *Sharī‘a*, Anderson admits that the scope for human legislation was limited to the category where the Divine law was ‘indifferent’ because the ‘blueprint’ for human behavioral aspiration was posited by that authority; even legislation grounded in the *Sharī‘a* (such as the *Majalla*) could not legitimately be enacted by humans because such authority was not permitted to them by the Divine.⁹⁵ His contention is that various impulses, first from above and later from below, led to the preclusion of the *Sharī‘a* from the judicial system through the *nizāmiyya* courts and the institution of a code of law in the shape of the *Majalla*. He opines that this represents “a complete reversal of the position previously occupied by the *Sharī‘a* – as an uncoded, divine law which had, an authority, inherent in itself – over [all]”.⁹⁶ He finds remarkable also the eclectic selection of Hanafi opinions on the basis of their propriety to constraints of contemporary life instead of rulings preferred on the basis of juristic methodology.⁹⁷ The *Majalla* thus signifies a disavowal of the *Sharī‘a* in the affairs of the law.

With respect to *fiqh* and its transformation at the time of the *Majalla*, quite a few works have been written describing the change in the form of ‘from X to Y’ and this transmutation is expressed variously as one ‘from jurists’ law to statutory law’⁹⁸, ‘fikih to law’⁹⁹, ‘*fiqh* to Islamic law’¹⁰⁰, ‘Jurists’ law to codified law’¹⁰¹ or even as ‘when the Way becomes the Law’¹⁰². These describe a change that is effected in the premodern *fiqh* tradition, an apparent transformation of what was before, diversely formulated as

⁹³ Joseph Schacht, *An Introduction to Islamic Law* (Oxford Oxfordshire ; New York: Clarendon Press, 1982), 92.

⁹⁴ Schacht, 92.

⁹⁵ J. N. D. Anderson, *Law Reform in the Muslim World*, University of London Legal Series 11 (London: Athlone Press, 1976), 38.

⁹⁶ Anderson, 17.

⁹⁷ Anderson, 17.

⁹⁸ Aharon Layish, “The Transformation of the *Sharī‘a* from Jurists’ Law to Statutory Law in the Contemporary Muslim World,” *Die Welt Des Islams* 44, no. 1 (2004): 85–113.

⁹⁹ Bedir, “Fikih to Law.”

¹⁰⁰ Senturk, “Intellectual Dependency: Late Ottoman Intellectuals between Fiqh and Social Science,” 293.

¹⁰¹ Rudolph Peters, “From Jurists’ Law to Statute Law or What Happens When the *Shari‘a* Is Codified,” in *Shaping the Current Islamic Reformation*, ed. B.A. Roberson (Frank Cass, 2003).

¹⁰² Gregory C. Kozlowski, “When the ‘Way’ Becomes the ‘Law’: Modern States and the Transformation of Halakhah and *Sharī‘a*,” in *Studies in Islamic and Judaic Traditions [II]: Papers Presented at the Institute for Islamic-Judaic Studies, University of Denver*. Ed. William M. Brinner and Stephen D. Ricks (Scholars Press, 1989), 97–112, <http://210.48.222.80/proxy.pac/docview/43551282?accountid=44024>.

jurist's law, *fiqh*, and the Way, into law, Islamic law and codified law. The persistence of this translative formula used to represent this change implies, certainly, that a diachronic change is seen to take place and that the preceding X is a different creature from the succeeding Y and that the change is significant enough to warrant such a characterization. Here we can observe that the problem is more complicated. If we consider the change with respect to the *Majalla* as a text and the *Majalla* in its context. The text of the *Majalla* might not have gone through a transformation but the *Majalla* in context certainly did.

3.3. Text and Context

The distinction between the meaning of words and how they are used offers an intimation as to how the use of a code can differ from the meaning that its language conveys.¹⁰³ The text of the law conveys a particular meaning. This meaning is connected, without dispute, to the formulaic constructions of the words present in the text. A change in this meaning can be effected solely through a change in those particular semantic units or a variance in their order. Be that as it may, the *same* words set in an identical construction might convey a different implication when their use is varied in a different context. Some may argue that this claim would hold water only in the case where the unit of analysis is the word and the sentence is varied through a change in the word order. 'The day will come' and 'Will the day come?' are two constructions with the same units but markedly different interpretations.

The *Majalla* is composed of a prolegomenon and sixteen books. The former is constituted of a small essay (*maqāla*) on *fiqh* and ninety-nine articles on *fiqh qawā'id*. The major part of the *Majalla*, i.e., the sixteen books deal for the most part with *mu'āmalāt* (financial dealings). When we consider the content of these sixteen books, one is struck with a realization: the form of the articles largely resembles a conventional *furū' al fiqh* manual (*furū'* lit. branches, *furū' al fiqh* refers to the substantive rules of *fiqh*).¹⁰⁴ This makes it very interestingly different from a

¹⁰³ J. Wilson, *Language and the Pursuit of Truth* (Cambridge: Cambridge University Press, 1968), 21.

¹⁰⁴ For *furū' al fiqh* see N. Calder, "USUL AL-FIKH," in *Encyclopaedia of Islam, Second Edition*, vol. 10, Encyclopaedia of Islam (Brill, n.d.), X:931b, [https://referenceworks.brillonline.com:443/entries/encyclopaedia-of-islam-2/usul-al-fikh-SIM_7761;Akgündüz, "FÜRÛ."](https://referenceworks.brillonline.com:443/entries/encyclopaedia-of-islam-2/usul-al-fikh-SIM_7761;Akgündüz,)

traditional codified legislation.¹⁰⁵ *Fiqh* texts, at least those under the Hanafi *madhhab*, and from the *furū* ' genre, are casuistic in form.¹⁰⁶

In addition, the mixing of genres in the *Majalla* is also curious. It would appear that there was a conflict that preceded the making of the *Majalla*. Ahmet Cevdet Pasha wanted to provide a solution rooted in *fiqh* while the others wanted a solution resembling the French Code Civil (of which substantive codification is a feature).¹⁰⁷ The resulting product, a selection from the *fiqh* texts along with the afore-mentioned ninety-nine *qawā'id* appears to be a formal codification intended to fit the role of a substantive codification. Thus, here we find *furu* ' literature juxtaposed with *qawā'id* literature.

3.4. The Making of the Majalla and the Prevailing Zeitgeist

The *Majalla* 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.¹⁰⁸ When the *Majalla* 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 *Majalla*, in particular the French character of this impetus.

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 Cevdet Pasha (d. 1895) and Rushdi Pasha (d. 1882), who advocated for *fiqh* as a solution to the lacunae present in

¹⁰⁵ See English law of contracts... or French code civil

¹⁰⁶ I am referring here to *furū* '.

¹⁰⁷ This is 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 domain". See Jean Louis Bergel, "Principal Features and Methods of Codification," *Louisiana Law Review*, no. 5 (1988 1987): 1077–88.

¹⁰⁸ Some examples would be *Multaqa al abhur*, *Quduri*, and *al Ikhtiar*. These and others were the sources to which the creators of the *Majalla* resorted when they produced the latter text. For the *Multaqa* see Has, "The Use of *Multaqa'l-Abhur*."

the law and to have it be the law of the *Nizāmiye* Courts.¹⁰⁹ 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 Cevdet 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 *Nizāmiye* courts.¹¹⁰

A short account of the making of the *Majallah* can be found in the memoirs of Ahmed Cevdet 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*,¹¹¹ 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 *Nizāmiye* Courts.¹¹² Meanwhile, the express position of the framers of the *Majallah*, which included Cevdet 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.¹¹³

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 matters. 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

¹⁰⁹ See Ahmed Cevdet Paşa, *Maruzat*, ed. Yusuf Halaçoğlu (Çağrı Yayınları, 1980), 199–201.

¹¹⁰ Ahmed Cevdet Paşa, *Tezakir*, ed. Mehmet Cavid Baysun, vol. 4 (Ankara: Turk Tarih Kurumu Basimevi, 1953), 95. Paşa, *Maruzat*, 200.

¹¹¹ 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 *Sharī'a*.

¹¹² Ahmed Cevdet Paşa, *Tezakir*, ed. Mehmet Cavid Baysun, vol. 1 (Ankara: Turk Tarih Kurumu Basimevi, 1953), 62–63.

¹¹³ For *mentalité* see Pierre Legrand, "European Legal Systems Are Not Converging," *The International and Comparative Law Quarterly* 45, no. 1 (1996): 60–64.

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.¹¹⁴ 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.¹¹⁵ 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 *mu‘āmalāt* (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 ḡann* (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 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

¹¹⁴ 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.

¹¹⁵ See Halil İnalcık, “Kānūn,” in *Encyclopaedia of Islam, Second Edition*, ed. P. J. Bearman et al., Encyclopaedia of Islam (Brill, April 24, 2012); Halil İnalcık, “Kanun,” in *TDV İslam Ansiklopedisi*, accessed July 25, 2022, <https://islamansiklopedisi.org.tr/kanun--hukuk>; Uriel Heyd and V. L. Ménage, *Studies in Old Ottoman Criminal Law* (Oxford, Clarendon Press, 1973), 167–76.

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 Cevdet 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 Cevdet Pasha prevailed and the *Majalla* 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.

Ayoub, as it has been mentioned earlier, has given sufficient arguments to establish that the *Majalla* has held true to the Hanafi doctrine thereby undermining any arguments that seek to establish a rupture in the tradition of *fiqh* specifically through the substance of the *Majalla*. But here we may ask whether faithful reproduction of

norms implies a continuation of the *fiqh* tradition? The issue is rather more complicated. When one looks upon the *Majalla* as being part of a paradigm one needs to consider whether the text is more than what is written. Can the same language with identical words and their respective connections lead to different interpretations if the context in which the text is used is varied? What if the text remains the same but the context is transformed? This would be the issue with texts like the *Majalla* being used in institutions and contexts that are far different from the ones originally envisioned. Can institutional changes vary the context in which the *Majalla* was used and result in an epistemic rupture or paradigm change?

Hallaq makes an interesting observation regarding the *Majalla* which deserves further inquiry. He expresses that “[i]t was obvious to the reformers and even to their opponents that the venture of the Mecelle was a last-ditch effort to salvage the Sharia as a law in force, but it was also an attempted remedy applied to a problem that had originated as a remedy”.¹¹⁶ To address the remedy which became a problem requiring a further remedy which came in the shape of the *Majalla* we need to delve into history. Besides the immediate circumstances that gave rise to the *Majalla*, there were more distant ones that, taking place over more than a half-century, set the stage for the *Majalla*. The *Majalla* was, thus, the culmination of these events and its emergence can be associated with the historical circumstances that started and continued with the Tanzimat (1839-1878).

These reasons are of some consequence insomuch as the *Majalla* was a product of a political decision taken in concert with multiple actors – similar to a text like the *fatāwa alamgīrī* but a significant point of departure from other *fiqh* works such as *Radd al-Muhtār*, which had always been the result of individual juristic endeavor, prompted by not much more than what the jurist felt was the exigency of the time.¹¹⁷

The problem apparently is that the existing legal system, based upon *fiqh*, was

¹¹⁶ Wael B. Hallaq, *Sharī‘a: Theory, Practice, Transformations* (Cambridge, UK ; New York: Cambridge University Press, 2009), 412.

¹¹⁷ For *fatawa alamgiri* see A.S. Bazmee Ansari, “Al-FATAWA al-ALAMGIRIYYA” *Radd al-muhtār* was the greatest and most renowned work by Muhammad Amin b. ‘Umar b. ‘Abd al-‘Aziz Ibn ‘Abidin (d. 1252/1836), a Hanafi-Maturidi jurist who lived in Syria in the eighteenth and nineteenth centuries, towards the end of the period of Ottoman rule. .

apparently not felt adequate to address the governance of the Ottoman territories especially in their dealings with the rapidly modernizing world outside. The remedy was thus to overhaul the legal system altogether and to attain this end several options were considered. This process preceded the formation of the *Majalla* text proper and thus the problem was larger than what gave rise to the *Majalla*. Mardin gives a detailed and comprehensive picture.¹¹⁸ He states that there were three distinct elements which are intertwined and need to be analyzed separately to make sense of what faced Ahmet Cevdet Pasha at the eve of the formation of the *Majalla*.

The commercial courts of the Ottoman Empire, of which the “mixed” courts were the forerunners, were created partly as a result of the pressures exerted on Ottoman society by a changing commercial world and partly by those generated in the foreign diplomatic missions of the Capital; the criminal code of the Empire was much more indirectly the outcome of foreign pressures and was the end result of a series of domestic reforms, while the codification of the *Mecelle* was the product of a conflict between the contending forces of foreign intervention, native reformist tendencies and Ottoman conservative-reactionary forces. It was also the expression of a compromise between these forces.¹¹⁹

With the claim of the formers of the *Majalla* that there was a shortage of qualified personnel to constitute the *Nizāmiye* courts one must investigate what the situation was regarding the composition of those courts. The *Nizāmiye* courts, unlike the *Sharī‘a* courts, were possessed of a few important qualities.¹²⁰ They featured a collegiate-court system, i.e., multiple judges, they applied the codified state legislation and included a system of appellate levels. They were administered by the Council of Judicial Ordinances (*Dīvān-ı Ahkām-ı Adliye*) in 1868 and came under the supervision of the Ministry of Justice (*Adliye Nezāreti*) in 1876. The *Sharī‘a* courts were supervised by the Şaykh-ul-Islam’s Office (*Bāb-ı Meşihat*). Despite the difference in these two different authorities, many of the *Nizāmiye* courts in the provinces (*tashrā*) were headed by the *Sharī‘a* court judges that existed in those provinces.¹²¹ The Council of Judicial Ordinances did not have any authority over the appointment of the *Sharī‘a* court judges who served in those positions. Meanwhile, when it came to the Ministry

¹¹⁸ Şerif Arif Mardin, “Some Explanatory Notes on the Origins of the ‘Mecelle’ (Medjelle),” *The Muslim World* 51, no. 3 (July 1, 1961): 189–96, <https://doi.org/10.1111/j.1478-1913.1961.tb01124.x>.

¹¹⁹ Mardin, 189.

¹²⁰ Jun Akiba, “Sharia Judges in the Ottoman Nizamiye Courts, 1864–1908,” *Osmanlı Araştırmaları / The Journal of Ottoman Studies*, 2018, 210.

¹²¹ Akiba, 210.

of Justice, many of the scholars or *‘ulamā* were also appointed to the *Nizāmiye* courts by that authority. This means that the even though specialized manpower of the *‘ulamā* was not enough to fulfill the need for the *fiqh* of transactions that was increasingly needed the *Nizāmiye* courts, where the *Majalla* was instituted, would still have a substantial number of *‘ulamā* to interpret that law or, at the very least, supervise the administration of justice there.

The discourse surrounding the creation of the *Majalla* which marked the culmination of the Tanzimat paradigm shows us that, at least at the level of discourse, law was seen to require reform and this reform was brought about through recourse to the French and, to a lesser extent, the German and Swiss legal systems. This has been claimed to represent a syncretic solution, proposed by the Ottoman state as a solution to the problems that occurred in those times.¹²² The *Majalla* was suggested as the authentic course of action taken to fill the void created as, one after the other, the juridical spheres or jurisdictions pertaining to criminal laws, commercial laws, procedural laws, judicial organization, and ultimately the civil laws were defined through legislation of their respective laws.

It would be interesting to observe that these wide-ranging and, taken as a whole, monumental changes in the legal system can be taken to infer a general desire for reform in the European mold. Taken individually, each piece of legislation can perhaps not furnish sufficient evidence for modernization or wholesale importation of, say French legal rules, but *in toto*, the different pieces can be seen as parts of a jigsaw puzzle. This way of looking at things makes it apparent that even though a facsimile of the French or the German system or even their respective codes was not produced or even intended, the specter of European codification and legal change haunted the driving forces behind this paradigm shift.

In order to observe whether this is a case better classified as a syncretic response to different difficult circumstances by the Ottoman elites, or as an epistemic shift of the legal system, it behooves us to look at the larger picture. Analyses that focus on individual rules and their provenance in classical Hanafi *fiqh* are shortsighted as they

¹²² See Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity* (New York: Palgrave Macmillan, 2011).

overlook the context of the larger historical change taking place. Furthermore, another important consideration here would be to examine the reasons given by the committee for the *Majalla*. The short preface to the *Majalla* proper contains several important arguments justifying the creation of this legislation.

Coming back to the important argument made by Ayoub who suggests that the *Majalla* is better understood:

... not in terms of an epistemic break from pre-modern Islamic legal reasoning, but in terms of a continuation and transformation within the Hanafi legal tradition. The *Mecelle* cannot exist without dependence upon and articulation with previously existing norms and legal literature. The *Mecelle* did not appear ex nihilo, as a legal framework alien and opposed to the existing legal literature and legal order, but necessarily emerged out of an existing legal genre of *qawā'id* and norms of late Hanafi tradition in a manner that made it an authentic representation of the legal tradition for the experts of the legal profession.¹²³

He goes on to examine the particular rules of the *Majalla* and their provenance within the existing legal genre of *qawā'id* and norms of late Hanafi tradition in a manner that made it an authentic representation of the legal tradition for the experts of the legal profession. *Pace* Ayoub, this legislation should not be seen in its character as a mere text but must be investigated with respect to its place in the Ottoman judicial system. Doing so makes it clear that its function was envisioned to be a solution to a perceived lacuna in the law, specifically in the rules regarding what is termed civil law.

The acute shortage of qualified personnel who had an adequate knowledge and experience of both the religious law and matters of trade was one of the main reasons the committee gave for the *Majalla*.¹²⁴ This was especially so in the different tribunals for criminal and commercial matters set up in addition to the sharī'a courts during the *Nizāmiye* reforms.¹²⁵ Furthermore, the methodology for determining the most appropriate and valid opinion in the presence of a diversity and abundance of opinions on every topic in the Hanafi *madhhab* made the task of the judges difficult.¹²⁶

¹²³ Ayoub, "The Mecelle, Sharia, and the Ottoman State," 124.

¹²⁴ M. Akif Aydin, "Mecelle-i Ahkâm-ı Adliyye," 231.

¹²⁵ Rubin, *Ottoman Nizamiye Courts*, 28–30.

¹²⁶ Sami Onar, "The Majalla," in *Law in the Middle East*, vol. 1, 1955, 294.

3.5. Kuhn and Scientific Revolutions

According to Kuhn, a paradigm, in the restricted sense, is an exemplar and, in the extended sense, is a disciplinary matrix.¹²⁷ The latter implies a shared system of assumptions, beliefs and values.¹²⁸ Kuhn proposes an account of the history of science where a normal science undergoes a revolution and the old paradigm is replaced with a new one. This paradigm shift is precipitated when members of a scientific community coming across an increasing number of anomalies cannot explain these using the normal paradigm. Thus, the new paradigm will be better able to solve those difficult problems.

Before we can apply Kuhn's conceptual framework to understand the change in the paradigm of *fiqh*, there are a few questions that need to be answered. Is *fiqh* a science? Samuel addresses the question of whether law is a science and whether it undergoes scientific revolutions in a couple of his articles.¹²⁹ He considers three criteria which have been put forth to determine whether a vision is scientific.¹³⁰ The scheme must be based upon reality and not upon fantasy. Secondly, a scientific model tries to explain and describe an objective phenomenon. Thirdly, there needs to be criteria of validation, i.e., it emerges from processes that produce knowledge that is reliable.¹³¹

If the object of study of law, i.e., human action and by extension the human being, has a mind of its own it does not resemble the natural world where when we speak of the behavior of particular atoms or the motion of planets we speak of a domain where

...the objects of observation have ... no symbolic structures of their own with which they can transform their own experience. What happens to a star or a

¹²⁷ Alexander Bird, *Philosophy of Science*, Fundamentals of Philosophy (Montreal ; Buffalo: McGill-Queen's University Press, 1998), 181.

¹²⁸ Samir Okasha, *Philosophy of Science: A Very Short Introduction*, Very Short Introductions 67 (Oxford ; New York: Oxford University Press, 2002), 81.

¹²⁹ Geoffrey Samuel, "Have There Been Scientific Revolutions in Law?," *Journal of Comparative Law* 11, no. 2 (April 1, 2017): 186–213; Geoffrey Samuel, "Is Law Really a Social Science? A View from Comparative Law," *The Cambridge Law Journal* 67, no. 02 (2008): 288–321.

¹³⁰ Samuel, "Have There Been Scientific Revolutions in Law?," 197.

¹³¹ Samuel, 197–98.

molecule is what it means. Neither one has a cosmology, or a game, of its own, but is wholly the subject of someone else's.¹³²

The fact that people do not function in the same manner as physical phenomena means that the behavior of the former may not be studied in a 'scientific' manner, i.e., in an objective manner from the perspective of an external observer; they can be distinguished from the constituent particles of matter by their ability to 'transform experience in terms of a complex structure of meanings'.

[A]s soon as one concedes that the meanings people attach to goods and experience help create the commodities they "consume" ... then there is not much point in analysing their activities as if their behaviour were solely that of matter with no admixture of mind.¹³³

Law is paradigmatic of the humanities and social sciences, disciplines that are characterized by human constructs and relationships, and "everything that is is rooted both in nature and culture, and that both those 'grounds,' simultaneously at work, affect what everything is, does, and means".¹³⁴ Samuel describes how the very notion of science changed and come to be understood as a conceptual system based upon logic analogous to mathematics with organized propositions and deduction in the service of solving problems.

... the Roman expression *scientia iuris* does not mean science in the modern meaning of the term. Indeed the Roman texts themselves suggest that the jurists regarded law as an 'art', the art of distinguishing the good from the bad (*ius est ars boni et aequi*). It was not until the 16th century that one began to associate law with learning in the natural sciences. This association was rooted in two historical developments provoked by humanism. The first was the epistemological change that occurred at the end of the medieval era; the authority of the text gave way to the authority of the *ratio*, that is to say to the authority of human reason as a source of knowledge in itself and free from a text. A legal assertion, even one in the Roman texts themselves, would no longer gain its authority from the fact that it was in a text whose own authority could be traced back, via Justinian, to God. Epistemological validity would increasingly come to depend upon the 'scientific' (*ratio*) foundation that supported the text. Secondly this scientific orientation began to be associated more and more first with the logic of the syllogism (a development that began in the 13th century with the appearance of the works of Aristotle) and then with the coherence of mathematics." The ratio of the law was the ratio of

¹³² Leff, "Law and," 1006.

¹³³ Ibid., 1007.

¹³⁴ Ibid., 1008.

systemisation and the most perfect of systems was that of mathematics and geometry.¹³⁵

Having said this, this conception of law was attacked in the 20th century by American Realism and the works of Perelman.¹³⁶ Samuel concludes that law is not really a scientific discipline. There is no falsification test that can effectively be used to validate it as against an objectively known object. Furthermore, there is far too much of a lack of coherence in its rules and concepts for there to be a resemblance with mathematics. Concepts are not precise and definitions are not impervious to conceptual diffusion. The same upshot would be applicable to *fiqh* as it shares these features and parameters with law and how the latter is used.

Samuel refers to two different ways of looking at research: what he calls research orientations: one based on inquiry and another based on authority.¹³⁷ This dichotomy pertains both to the source of the knowledge at issue and the spirit with which the object of investigation is to be understood. The inquiry orientation is enthused with a spirit of understanding an object or phenomenon through painstaking investigation of all empirical evidence. He goes on to say how this orientation has produced Popper's falsification test. On the other hand, the social sciences, which do not often meet this test, are also, according to Samuel, driven by the same spirit of inquiry and sense of curiosity. The one constraint that they must needs follow is that of methodology.

At first glance the 'ulūm', the 'sciences' of the Islamicate world seem to be premised on the 'authority' paradigm rather than the 'inquiry' paradigm. While these may be literally translated as epistemes, how they are defined provides a window into how the specialists of these disciplines understood their activities. Having admitted this, what we understand by science should not be an unquestioned adherence to the ideological commitments of the logical positivists. Instead, 'science' as a term of prestige may be redefined as any systematic study of a phenomenon, using reasoning that does not give space to logical or rational fallacies. Therefore, taking science in this meaning, can we still admit the possibility of scientific revolutions?

¹³⁵ Samuel, "Have There Been Scientific Revolutions in Law?," 192–94.

¹³⁶ Samuel, 195–96.

¹³⁷ See Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method*, European Academy of Legal Theory Monograph Series (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014), 168–72.

In her seminal article, Masterman discusses the range of meanings that the word ‘paradigm’ could refer to in Kuhn’s work.¹³⁸ She discerns twenty-one separate senses but concludes that these may be grouped together into three senses: the sociological, the artefact and the metaphysical. The first, the sociological sense, refers to a set of scientific habits, “a universally recognized scientific achievement,... a concrete scientific achievement”, “like a set of political institutions”, “and like also to an accepted judicial decision.”¹³⁹ The second is the artefact sense referring to a construct that is used to solve puzzles, “an actual textbook; or classic work”, “as supplying tools”, “as actual instrumentation”, “more linguistically, as a grammatical paradigm”, “illustratively, as an analogy”, “and more psychologically, as a gestalt-figure and as an anomalous pack of cards”.¹⁴⁰ The metaphysical sense is not strictly a scientific sense referring to “a set of beliefs”, a “myth”, “a successful metaphysical speculation”, “a standard”, “a new way of seeing”, “an organizing principle governing perception itself”, “a map”, and “something which determines a large area of reality”.¹⁴¹

This elaboration of the senses of the word ‘paradigm’ can provide useful tools for our purposes as we try to understand the nature and contours of the change. Let us start with the sociological sense. There is implicit in this sense that there is a community of scientists that are working towards the same ends. Coming to the *Majalla*, we see that one of the reasons as given by the Committee was the shortage of qualified personnel. Could it be said that the scientific community as hinted at by the sociological sense of ‘paradigm’ had been transformed? The *Nizāmiye* courts were composed of laymen in addition to *qāḍī*’s and those trained in the religious sciences.

Recalling the nature of a Scientific Revolution, it occurs when members of a scientific community coming across an increasing number of anomalies cannot explain these using the normal paradigm where the scientists can solve problems in a more straightforward fashion. The new paradigm begins to emerge with the occurrence of problems that present difficulties in their solution due to the inability of the normal

¹³⁸ Margaret Masterman, “The Nature of Paradigm,” in *Criticism and the Growth of Knowledge*, ed. Imre Lakatos, Proceedings of the International Colloquium in the Philosophy of Science, London 1965, 2004, 59–89.

¹³⁹ Masterman, 65.

¹⁴⁰ Masterman, 65.

¹⁴¹ Masterman, 65.

paradigm to resolve these problems.

The prevalence of contracts formulated according to European norms without any of the values associated with *fiqh* and without heed for the textual and societal considerations of a Muslim society rendered an acute change in the paradigm. Successive legislation and courts were created especially in the realm of commercial law which gradually circumscribed the operation of *fiqh* in the domain of dispute resolution. Furthermore, judges started to be trained in the Western subjects, with the establishment of the *Mekteb-i Hukuk* in 1874.¹⁴²

3.6. The Majalla: A New Paradigm?

The arguments for a rupture seem to be more persuasive. This is because they view the *Majalla* not as an isolated text but part of a legal system that has been drastically transformed from its traditional structure. Furthermore, the members of the scientific community, i.e., the jurists are primarily not the ones who have a hand in this paradigm change. On the contrary, it is the political elite who have decided that the normal paradigm is inadequate in solving the problems of modernity and imposed a judicial system which does not allow the ‘normal science’ or *fiqh* to function in its traditional form. The result is the *Majalla*, largely a *fiqh* text but within a new legal paradigm. We can understand this paradigm shift better if we understand the *fiqh* paradigm to be constituted of two complementing senses: *qaḍā* (judicial proceeding) and *diyāna* (conscientious following based on the consequences in the Hereafter).

The revolutionary or new paradigm has thus occurred in the judicial system, or in the *qaḍā* sense of the *fiqh* paradigm, spurred by the political whilst the *fiqh* paradigm, in the *diyāna* sense, continues unabated. Another way to think of this change is with the similitude of a building where a group of scientists works. A newer building is constructed alongside the former and another group of individuals is hired to work as scientists therein. The first building falls into decay but the people working there continue to do so while the second flourishes as the number of scientists that function

¹⁴² Bedir, “Fikih to Law,” 383; For a detailed study of the establishment and activities of these schools see Ali Adem Yörük, “Mekteb-i Hukuk’un kuruluşu ve faaliyetleri (1878-1900)” (Türkiyat Araştırmaları Enstitüsü, 2018), <https://acikbilim.yok.gov.tr/handle/20.500.12812/517522>.

within its confines burgeons greatly. The Kuhnian paradigm shift does not occur as it is not the case that the problems dealt with by the science can no longer be solved by it, but that the community of scientists is exchanged with another one, trained differently, to resolve similar problems as before. All this while, the earlier community continues to work, maintaining the paradigm of *fiqh*.

3.7. The Mentalité of *Fiqh*¹⁴³

Since the inception of *fiqh* its systemic features have persisted. The structures of authority and discursive practices which were governed by conceptions integral to how the *Sharīʿa* is envisaged: a comprehensive system motivated by religious and moral concerns that are underpinned by revelation. These considerations have remained constant in the thousand or more years that the *Sharīʿa* has existed undisturbed by the forces of modernity. Legal education has preserved its character, function, and modalities, as have the roles and functions performed by the jurisconsult (*muftī*), judge (*qāḍī*), author-jurist (*muṣannif*) and the law professor (*shaykh*).¹⁴⁴ The functions of these loci of legal activity have been critical to the enterprise of the *Sharīʿa*. Throughout their history they have manifested a particular ethic and have been moved by considerations necessary to the identity and holistic integrity of the *fiqh* enterprise.

It cannot be denied that Islamic law is concerned with the shaping of human society but this interest in social control is far less obtrusive and coercive and operates on the particular individual level rather than on the universal public plane. The legal sphere in an Islamic society coexists in a particular state of stability vis-à-vis the political authority. In spite of the fact that the *qāḍī* is appointed by the ruler, the authority of jurists is supreme and they brook no interference from the political authority. The responsibility of the government, as the protector of the Law, is only to uphold and enforce it. These assertions may be affirmed by studies such as that of Gerber that states that despite the existence of tensions between the jurists and the political authority, and increasingly so in the Ottoman Empire, the state did not interfere in the

¹⁴³ *Mentalité* means outlook: the set of thought processes, values, and beliefs shared by members of a community.

¹⁴⁴ Wael B. Hallaq, *An introduction to Islamic law* (Cambridge ; New York: Cambridge University Press, 2009), 15-16.

role of the jurists to usurp it.¹⁴⁵ He states,

Islamic law assumed its characteristic nature as jurists' law, that is law created, controlled, and supervised by private experts, rather than by any central authority or state-directed body. ... The state could decide to implement this law, or refrain from doing so. More often than not it chose to enforce it only partially, but at least until the Ottoman period it refrained from interfering with this basic intellectual structure; that is, it did not try to dictate what was and what was not Islamic law. There were some signs of change in this basic situation in the Ottoman period...however, these did not amount to abrogating the fundamental nature of Islamic law as jurists' law.¹⁴⁶

The religious texts, the Qur'an and the *hadīth* are the linchpin of the Law and all substantive law flows from these key sources. The ultimate goal for a Muslim according to the injunctions of Islamic legal theory is to strive for the pleasure of God. Towards this end, the *muftī* engages in various interpretative activities to discern the will of God from the revealed scriptures which are the manifestation of the Divine will but do not cater, being finite, to every possible contingency. Even though he does not pretend to political authority, when it comes to legal authority the jurist's position in the paradigm of Islamic law is supreme.

[T]he Muslim jurist, and especially the Sunni jurist, is bound more [than the Roman jurist] to formal sources, to texts. His authority depends more upon his skills than upon any inherent wisdom. The Sunni jurist declares the will of God as revealed in the sacred texts; he does not proclaim the dictates of his own intuition.¹⁴⁷

If the *fiqh* law is obscure, i.e., not self-evident, the jurist is under an obligation to exercise his full interpretive faculties to generate an opinion that approximates Divine will as closely as possible and is thus the manifestation of the Law in that instance.¹⁴⁸ The hermeneutic activity of the jurists presupposed the possibility of error, i.e., the potential for failure to reach the Divine intent. This understanding stemmed from the jurist's acceptance that the human faculty is at best an imperfect vehicle for the

¹⁴⁵ See, generally, "Islamic Law and the State," in *Islamic Law and Culture, 1600-1840*, by Haim Gerber, Studies in Islamic Law and Society, 9 (Leiden ; Boston : Brill, 1999).

¹⁴⁶ "Islamic Law and the State," 46.

¹⁴⁷ Bernard Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihād*," *The American Journal of Comparative Law* 26, no. 2 (1978): 202.

¹⁴⁸ "Interpretation in Islamic Law: The Theory of *Ijtihād*," *The American Journal of Comparative Law* 26, no. 2 (1978): 203.

reception of necessary truths. This also implied considerable latitude for difference of opinion and this implied, in turn, a multiplicity of law, because all opinions, though not enacted in the fashion of codes, had an identical claim to legitimacy provided that they were reached by jurists validly, using sound interpretive tools. These hermeneutic tools and methodologies were honed to sophistication by the jurists whose endeavor was in essence an epistemological one. This meant that failure of the epistemic process had the effect of invalidating the opinion or consigning it to oblivion as it was overtaken by those holding to a higher degree of hermeneutic rigor.

3.8. Epistemologically Sound: The Unbroken *Fiqh* Tradition

The validity of any opinion, that is, its force of law, was not acquired through institutional apparatus or because it had some sort of finality (as Supreme Court decisions have) but it was valid law because “it [was] presumed to be a validly constructed approximation of the Law of God”.¹⁴⁹ The jurist’s opinion was given freely and was in the nature of advice or a responsum. When this jurist’s opinion was given effect through a court’s decision it became irrevocable and binding. The authority of the Muslim jurist is derived from the authority of God.¹⁵⁰ His character or wisdom, though important, was subordinate to his epistemological expertise: “What the jurist declares is authoritative not because it is he who declares it, but because that he declares has been validly derived from the textual sources and is therefore an acceptable expression of the Law of God.”¹⁵¹

When the Muslim subject followed law, he did so as an act of obedience to the Divine. Violation of the law represented a transgression against God, not secular political authority or other notion of arbitrary authority. The individual subject was required to follow law in his individual capacity, meaning as a singular worshiper of God. Thus, “[h]omogenization is largely absent from its agenda of Islamic law” and there was consequently scarce need for “an abstract and universalizing language” to frame law to be imposed on the populace.¹⁵²

¹⁴⁹ "Interpretation in Islamic Law: The Theory of *Ijtihād*," 206.

¹⁵⁰ *Ibid.*, 203.

¹⁵¹ *Ibid.*

¹⁵² Hallaq, *An introduction to Islamic law*, 369.

This notion of an unbroken tradition runs the gamut of the historical existence of the *Sharī'a* when it functioned visibly in Muslim societies. In later ages the development of legal schools or *madhhabs* continued this tradition as opinions were justified through recourse to *madhhab* principles which were in their turn derived from the primary sources. These schools developed methodological tools in order to whittle away the profusion of opinions, though multiplicity to a large measure remained a characteristic feature of Islamic law. They used preponderance (*tarjīh*), correction (*tashīh*) and a host of other devices that operated differently to bestow elevated status to some opinions over others.¹⁵³

Fiqh possessed a substantive rationality though not a formal rationality.¹⁵⁴ This understanding issues from the fact that all juristic opinions in their divergent plurality are pervaded by a single ethos and work towards a unitary end.¹⁵⁵ Codification leads to marginalization of legitimate interpretations of Islamic law, that is, those construals that have their provenance the texts and textual considerations and not in the vested interests of political elites.

When it comes to Islamic law exclusion of choice based on considerations that are other than epistemological (or axiomatic) would lead to arbitrary exclusion of valid interpretations. Exclusion based on considerations such as uniformity or clarification may be counterproductive to the avowed objectives of the legal system if these revolve around the establishment of the *Sharī'a*.

Watson opines that legal change is effected chiefly through transplants and borrowings pace the view that law majorly reflects societal considerations.¹⁵⁶ Rules and institutions have been borrowed and received across paradigmatic boundaries. It is

¹⁵³ Such as *Rājiḥ*, *ẓāhir*, *awjah*, *ashbah*, *ṣawāb*, *madhhab*, *mafiḥ bi-hi*, *ma'mul bi-hi*, *mukhtār*. See *Authority, continuity, and change in Islamic law*, Digitally printed 1st pbk. ed. (Cambridge, UK ; New York: Cambridge University Press, 2005), 121-235.

¹⁵⁴ See Bryan S. Turner, *Weber and Islam*, Max Weber classic monographs (London ; New York: Routledge, 1998), 119; Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001): n. 59 at 275.

¹⁵⁵ "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," 274.

¹⁵⁶ See Alan Watson, *Legal transplants : an approach to comparative law*, 2nd ed. (Athens: University of Georgia Press, 1993).

obvious that codified systems by their nature are far more amenable to foreign transplants than are ‘organic’ systems like Islamic law which despite their transcendent origins are interwoven into societal fabric to a high degree. A codified system retains the ability to discard Islamic norms as easily as these might be transplanted into it. Furthermore, such a system possesses an innate ability to subsume external considerations into an ‘Islamic’ system, considerations not born of the textual imperatives that are critical to Islamic law.

3.9. Conclusion

It would seem that, *fiqh* is not a science according to how Popper would define the latter. It is not even a social science in the manner of law, according to some.¹⁵⁷ Consequently, it does not undergo scientific revolutions. The facts which are the subject of its study are social constructs not natural inanimate objects that may behave in patterns that are invariable. On the contrary, human actions proceed from a consciousness and are grounded in the intellect, a product of the mind and subject to often complicated and abstruse reasoning processes. This lack of ‘real’ existence and unpredictability make such objects unbecoming for scientific study. If we, however, redefine what science means, or in the alternative, assume *fiqh* to be a science as a fiction, we realize that following Kuhn’s understanding, the *Majalla*, as a text in isolation, does not represent a substantial shift in the *fiqh* paradigm as most of its rules are directly sourced from the Hanafi *fiqh* corpus. The *Majalla* did not fundamentally alter the sources of legal authority or the methodology of *ijtihad* or the way rules are derived in Islamic jurisprudence. Instead, the *Majalla* represented a new way of organizing and codifying legal principles derived from Islamic sources, which was intended to facilitate the administration of justice in a more systematic and efficient manner. It also incorporated some European legal concepts and practices, which was seen as a way of modernizing the Ottoman legal system without capitulating to Westernizing forces.

However, if we understand the *Majalla* within its context of the changing Ottoman legal landscape, it becomes more apparent that the *Majalla* can be taken as a rupture

¹⁵⁷ For a detailed discussion see Samuel, “Is Law Really a Social Science?”

in the continuity of the *fiqh* tradition or, at the very least, the symptom of a great schism that transpired with the fall of the Ottoman Empire and the abolition of the *Sharī'a* courts. The way a *fiqh* text was enacted by political authority signified a break in the *fiqh* episteme. From this experience one may conclude that any future attempt to ‘legislate’ a *fiqh* text would pose similar difficulties.



CHAPTER FOUR

HISTORICAL DEBATES SURROUNDING THE *MAJALLA*

4.1. Introduction

There were certain debates that took place at the time of the *Majalla*'s formation. The reason why these debates are important are manifold. Firstly, they give us a window into the character of the viewpoints and attitudes to the *Majalla* at the time of its inception. Secondly and more importantly, they give an important insight into how the jurists and scholars of the time viewed this significant development. By delving into the justifications given for and against the *Majalla* one can more easily appreciate the nature of the *Majalla* itself, as it is seen through the eyes of the class which has the most to say on the matter as from more than one perspective this was their exclusive domain.

After it was realized that there was an acute need to fill the gap in the legal sphere with a species of civil legislation. A split emerged, with the partisans of Westernization on the one side and the ulama class on the other. The former pushed for the adoption of a translation of the Code Civil as had been done in Egypt. The latter argued for the assumption of what they claimed already existed in their tradition to serve the apparent need: the *mu'āmalāt* branch of *fiqh*.¹⁵⁸ They contended that such a text could be compiled and translated for the purpose. After this debate was settled with the decision for the *Majalla*, another one ensued. This pertained to the substance of the *Majalla*. One party asserted: The needs of the time should dictate the selection of the suitable rules whichever *madhhab* they originate in, Hanafī, Shafī'ī, Mālikī or Hanbalī.¹⁵⁹ The other countered that the Hanafī *madhhab* should be strictly adhered to. It was decided to go with the latter opinion, the *aṣaḥ aqwāl aḥnāf*.¹⁶⁰

¹⁵⁸ Discussion on whether muamalat is a comparable category. See *Encyclopedia Kuwait*.

¹⁵⁹ These are the four surviving and prevalent schools of *fiqh* in the world.

¹⁶⁰ The '*aṣaḥ*' is the opinion that is the most 'correct'. It may be contrasted with the *mashhūr* which is the predominant opinion.

It is important to know how the *Majalla* was perceived by both those who did not identify with the Sharia paradigm seeing no utility in it as well as those who saw great value in the laws of the Sharia and saw other legal systems to be foreign and problematic in their regulation of human affairs. In this context the reaction of the ulama or religious scholars is of particular significance because they were privy to how *fiqh* functioned over centuries and could provide critical insight into the *Majalla*'s consonance or otherwise with the rules and principles of Islam. One of these was Hersekli Arif Hikmet who wrote a treatise highlighting certain shortcomings of the *Majalla* while not arguing for its repudiation as a whole.¹⁶¹ Another was Jamaluddin who taught at the *Maktab i Hukuk* and published his comparison of the *kitab al buyu* (book of sale) from the *Majalla* with the French Civil Code.¹⁶²

Yet another perspective was that of those who argued against the adoption of the *Majalla* claiming that it was an obstacle to the realization of modern human values and would restrict the freedom of contract of foreigners who traded with the subjects of the Ottoman Empire. Among these was André Mandelstam who wrote a treatise on the justice system of the Ottomans and identified the shortcomings of the *Majalla* in a bid to push for changes to that system. Mandelstam's perspective is interesting inasmuch as it opens a window into the orientalist mind especially one who was conspicuously an advocate of Western interests working in employment of the Russian Embassy. In a series of articles published in *Bayān al Haq*, Elmalili Hamdi Efendi deconstructed these claims while elaborating upon the spirit of the laws of *fiqh* as encapsulated by the *Majalla* and responded to each criticism by Mandelstam. This series of articles was titled, *A Defence against Seemingly Appropriate Criticism of our Majalla i Ahkam i Adliyya* and penned under the nom de plume of Kuchuk Hamdi.¹⁶³

4.2. Mandelstam and the (In)justice of the *Majalla*

André Nicolayévitch Mandelstam, a Russian jurist of Jewish origin, was born in

¹⁶¹ See Rıdvan Özdiñç, *Osmanlı Modernleşmesi ve Hersekli Arif Hikmet: Mecelle'nin Bazı Mevaddına Dair İntikadname: Mecelle'nin Bazı Mevaddına Dair İntikadname* (Cağaloğlu, İstanbul, 2012).

¹⁶² See Cemaleddin, "Mukayese-i Kavanin Medeniyye," March 31, 1909; Cemaleddin, "Mukayese-i Kavanin Medeniyye: Mecelle Ahkam Adliyye - Fransa Kanun Medeniyesi," *İlm-i Hukuk ve Mukayese-i Kavanin Mecmuası* 1, no. 4 (Haziran 1325 1909): 241–50; Cemaleddin, "Mukayese-i Kavanin Medeniyye: Mecelle Ahkam Adliyye - Fransa Kanun Medeniyesi," *İlm-i Hukuk ve Mukayese-i Kavanin Mecmuası* 2, no. 8 (Teşrin-i Evvel 1325 1909): 81–89.

¹⁶³ *Mecelle-i Ahkam-i Adliyyemize Reva Görülen Muahezeyi Mudafaa*.

Mohilev-sur-Dnieper on March 6, 1869. A graduate of the Faculties of Law and Oriental Languages of the University of St. Petersburg (1891), he was appointed to the chair of international law at that University and after having passed his “magister” examination, was sent to Paris. A thesis on The Hague Conferences on Private International Law (published in two volumes in 1900, in Russian) earned him the degree of Doctor of International Law in St. Petersburg (1900).¹⁶⁴

In 1899, Mr. Mandelstam was appointed the third dragoman of the Russian Embassy in Istanbul, where he remained until the Great War of 1914, advancing to the post of first dragoman. These years spent in the Ottoman capital made him a connoisseur of the Ottoman Empire, a specialist in Russo-Ottoman relations and an attentive albeit partisan witness to the questions of nationality which were affecting this Empire.¹⁶⁵ During the years of the First Great War, Mandelstam was on official mission in Switzerland. The Russian Provisional Government appointed him in the spring of 1917 as Director of the Legal Department of the Ministry of Foreign Affairs, but the Bolshevik Revolution prevented his return to Russia and he was unable to take up this post. He settled in Paris and devoted himself mainly to the study and teaching of international law.¹⁶⁶ He died in 1949.

When in Istanbul, Mandelstam penned the treatise, *La Justice Ottomane dans ses rapports Avec les Puissances Étrangères* (Ottoman Justice in its relations with Foreign Powers). In this work he criticized, among other features of the Ottoman legal system, the *Majalla* and expressed his disaffection with the state of legal affairs. Among his criticisms of the *Majalla*, he protests that it does little to empower the judge, diminishing his discretion,

[T]he Medjelle, although it proclaims the principle that the intention of the parties must be consulted, almost always prevents, by its special provisions, the judge from inquiring about this intention. The provisions of the Médjellé, which are generally imperative, impose conditions and forms such that the judge cannot seek and apply the true meaning of the contracts. Also, the

¹⁶⁴ Jan Herman Burgers, “The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century,” *Human Rights Quarterly* 14, no. 4 (1992): 451, <https://doi.org/10.2307/762313>.

¹⁶⁵ Dzovinar Kévonian, “Exilés politiques et avènement du « droit humain » : la pensée juridique d’André Mandelstam (1869-1949),” *Revue d’Histoire de la Shoah* 177–178, no. 1–2 (2003): 11.

¹⁶⁶ Alexandre Makarov, “André Mandelstam (1869–1949),” in *Annuaire de l’Institut de Droit International* (Session de Bath, 1950).

courts, like the commentators, apply the prescriptions of the civil code to the letter.¹⁶⁷

The inability of a merchant to sell something that he has bought before receiving possession is asserted to be a great shortcoming which would hinder the operation of modern commerce.¹⁶⁸

4.2.1. Elmalili Hamdi Yazir and a Defence of the Majalla

Elmalili Muhammed Hamdi (1878-1942) was an Ottoman scholar accomplished in the traditional sciences. He is famous for his *tafsir*, *Hak Dini Kur'an Dili* (The Truth's Religion Qur'an's Language) in which he uses the rational and transmissive hermeneutical approaches in exegesis of the Qur'an. Elmalili Hamdi Yazir wrote a series of articles in the journal, *Bayan al Haq* addressing Mandelstam's claims and making a case for the *Majalla*. This journal, published during the Second Constitutional Era, was a weekly affair containing articles on religion, literature, politics and science.¹⁶⁹

Elmalili refers to another article in the journal *Ilm-i Huquq wa Muqaysa-i Qawanin* where Arif Bey addresses the criticism of Mandelstam in a cursory manner and asserts that he, Elmalili will do so in a more detailed way.¹⁷⁰ He makes it quite clear that this criticism by Mandelstam does not come from an impartial place but as an official of a foreign power he is performing his function in a most remarkable way. To criticize the *Majalla* on the one hand and to find it appropriate to refer to the Code Civil to complete the deficiencies in the Ottoman trade law is tantamount to recommending that the Ottoman civil law should be cast away not only in matters of trade but in all issues. Mandelstam, according to Elmalili, desires that the Capitulations should be the instrument for not just supervision of and intervention into Ottoman affairs but reshape

¹⁶⁷ André N Mandelstam, *La Justice Ottomane dans ses rapports Avec les Puissances Étrangères*, 2nd ed. (Paris: A. Pedone: Libr. de la cour d'appel et de l'ordre des avocats, 1911), 99, <http://galenet.galegroup.com/servlet/MMLF?af=RN&ae=HT100284369&srchtp=a&ste=14>.

¹⁶⁸ Article 253 of the *Majalla* states: "The buyer before he receives that which has been bought by him can sell it to another person, if it be an immoveable thing, but he cannot do so if it be a moveable thing."

¹⁶⁹ For *Bayan al Haq* see Ekrem Bektaş, "Beyânüllhak," in *TDV İslâm Ansiklopedisi* (TDV İslâm Araştırmaları Merkezi, 1992).

¹⁷⁰ See Muhammed Arif, "Hükümet-i Ecnebiye İle Münasebatında Mehakim-i Osmaniye," *İlm-i Hukuk ve Mukayese-i Kavanin Mecmuası* 2, no. 9 (1325): 180–85.

it into a dependent colony, as it were, where foreign laws are applied compulsorily. This is the suggestion that the clauses of the Code Civile should be applied in the gaps present in the *Qanun i Tijaret i Osmaniyya*. Elmalili states that this is synonymous with rejecting the entire Ottoman civil law and using the French Civil law not only to fill the vacuum in the law but in all matters. It is as if to articulate, “O Ottomans! You have no right of life if you don’t abandon your Ottoman identity!”¹⁷¹

Elmalili appreciates Mandelstam’s zeal in the performance of his official function and wonders what would happen if any Ottoman official considered the French Civil Code deserving of criticism as well as Monsieur Mandelstam considers the *Majalla*. He suggests that Ottoman officials serving in their respective political venues with insights like Mandelstam should analyze foreign codes like the French Civil Code with a view to abolishing the Capitulations system. Elmalili then lists the clauses of the *Majalla* that are mentioned specifically by Mandelstam.

He starts with article 253 of the *Majalla*.¹⁷² It is claimed by Mandelstam that this provision is contrary to the fundamentals of contemporary commerce. The next is article 293.¹⁷³ Not only is this claimed to be contrary to fundamental legal principles but is also antithetical to articles 167¹⁷⁴ and 369.¹⁷⁵ The next is article 320 which offers great harm to contemporary commercial matters because it may allegedly be used to invalidate sales on the flimsiest of pretenses. These alleged harms are, when taken in conjunction with articles 197, 200, 237, and 238, make the sales of land and animals impossible before these may be physically attained. Article 1338 is objected to on the basis that it goes against the Ottoman Trade Law¹⁷⁶ which is silent on this issue¹⁷⁷ and that someone who brings real estate as capital may not form a partnership with it. A further objection is that a partner may dissolve a partnership just through informing

¹⁷¹ Elmalılı Hamdi Yazır, “Mecelle-i Ahkam-ı Adliyemize Reva Görülen Muaheze’yi Müdafaa,” *Beyânü’l-Hak* 2, no. 48 (February 11, 1328): 1025.

¹⁷² The article states “The buyer before he receives that which has been bought by him can sell it to another person, if it be an immoveable thing, but he cannot do so if it be a moveable thing.” See Ahmet Cevdet Pasha, *The Medjellè or Ottoman Civil Law*, trans. W. E. Grigsby, 1895, 38.

¹⁷³ “If a thing before its delivery is destroyed while in the hands of the seller, the buyer is not responsible, and the loss falls on the seller.”

¹⁷⁴ “The Contract of Sale is formed by means of an offer and acceptance.”

¹⁷⁵ “The effect of a sale agreed upon is ownership. Thus when a sale is agreed upon, the buyer becomes owner of the things sold, and the seller becomes owner of the price.”

¹⁷⁶ Article 1338 states: “The capital must be formed of some kind of money.”

¹⁷⁷ See Kanûn-i Ticaret-i Osmani

the other partner.¹⁷⁸ Both 1338 and 1353 are thus a serious threat to foreigners who enter into partnerships with the Ottoman subjects. Lastly, Mandelstam decries article 1632 which allows – contrary to the French Civil Code – the defendant to escape a claim merely by taking an oath.¹⁷⁹

After listing the clauses of the *Majalla*, Elmalili expresses his intention of scrutinizing Mandelstam's criticisms one by one. Has Mandelstam completely understood the content of the *Majalla* articles? What are the underpinnings of those articles with respect to *fiqh*? What are the interests that these foundations serve with respect to a universal civilizational perspective? What comparisons would emerge if these articles are placed next to the articles from the French Civil Code and we consider the respective interests they serve? Do Mandelstam's insights extend to universal civilization? If the afore-mentioned articles were to be changed would recourse to the French Civil law be necessary or is the vast organized corpus of jurisprudence that is with us already enough?

Elmalili considers the instance of sale before possession and gives the example of a merchant in Istanbul who purchases some cloth from a Paris factory costing thousands of liras.¹⁸⁰ This trader makes the sale conditional upon delivery in a certain duration. Thereupon, before having received possession he goes ahead and sells that cloth to a merchant in Selanik at the time agreed upon with the manufacturer and conveys the place of delivery to the latter. Elmalili then considers what effect this transaction would have if the *Majalla* is applied to it. He states that under the quoted rule of the *Majalla* the sale to the merchant in Selanik would not take place.

Elmalili considers to what extent the *Majalla* opposes the type of transaction detailed above, which is regarded as the cornerstone of modern trade by Mandelstam, and what possible harms are borne from this opposition for civilization by putting article 253 of

¹⁷⁸ Article 1353 states: "Partnerships are dissolved also at the will of one of the partners, but it is necessary that the dissolution by one should take place to the knowledge of the other partner, and so long as he is ignorant of the dissolution on the part of the other the partnership is considered as subsisting."

¹⁷⁹ Article 1632 states: "When the defendant proves his defence the action of the plaintiff falls to the ground; but, when he cannot prove it, an oath is imposed on the plaintiff. If the plaintiff refuse the oath, the defence of the defendant is thus proved; but, if he accept the oath, his original action begins anew."

¹⁸⁰ Yazır, "Mecelle-i Ahkam-ı Adliyemize Reva Görülen Muaheze'yi Müdafaa," February 11, 1328, 1026.

the *Majalla* under scrutiny. Before that he delineates the spirit of ‘our civilizational law’ and its philosophy.¹⁸¹

4.2.2. *The Spirit of the Law*

Elmalili starts his argument with the universal claim that the order of civilization is based upon social cooperation and mutual assistance. This spirit relies upon the balance that proceeds from mutual dealings made within the ambit of rights and justice. This justice and balance is not hypothetical having a real existence which needs to be preserved by precluding any means of transgression. The cause of the sense of animosity and its displacement of the sense of cooperation can be laid at the door of transgression and conflict and this violation can never emanate from the agency of the weak. The sole reason why cooperation is inescapable stems from the limitations found in individuals which impede them from realizing perfect power, and from their weaknesses in attaining the necessities of life which implies that they need to seek refuge in cooperation in order to sustain themselves within the parameters of civilization. On the other hand, it is the powerful that fall prey to the freedom of the individual and whose desires and ambitions rest upon their power and lead them to every type of violation. The conclusion is that the weak are bolstered by rights while the strong rely upon their power. Therefore, it is apparent that any civil law which purports to reform civilizational rights must needs constrain the power and the desires of the strong and fortify and reinforce the states of the weak and otherwise it would give way to a coercive ‘civilization’ underpinned by the tyranny of the strong and condemned to ultimately degenerate and succumb to Socialist ideas. The law should therefore strive to balance civilizational interests by channeling the excess from those with excess to the weak and those with shortcomings and thus endeavor to increase the general wealth while precluding contempt and thereby is the sentiment of cooperation can be fortified and strengthened. The domination of the weak by the strong is at times manifest and at times it is hidden and gradual. Speculative transactions that contain uncertainty and risk and lead to harm and conflict even if to one of the two parties are the means whereby the strong trespass gradually upon the weak and encroach upon their economic capacities. Such dealings lead to transgressions that are hidden and are

¹⁸¹ Elmalılı Hamdi Yazır, “Mecelle-i Ahkam-ı Adliyemize Reva Görülen Muaheze’yi Müdafaa,” *Beyânü’l-Hak* 2, no. 49 (March 18, 1328): 1035.

the hallmark of contemporary civil laws even though any legal system that is in any way ‘civil’ in the real sense should work to eliminate these.

Those that are affluent are inclined to entrap the less fortunate in dealings from which the latter have no way out and through such mechanisms the former engender conditions where the wealth of the masses is ensnared through hoarding and the general populace succumb to suffering and adversity. This effect is manifest in the contemporary laws of the time such as the Code Civil that contain provisions that empower those with influence and leverage and instead of functioning to obstruct the afore-mentioned gradual encroachment enable it.

This is the very reason that the Code Civil takes pride in a stringent regime of enforcement of contracts, i.e., it seeks its utmost to keep contracts binding. The *Majalla*, on the contrary, imposes conditions and limitations upon agreements such that it exemplifies the axiom, ‘the removal of an evil precedes the realization of a profit’. In doing so, it goes contrary to the desires of the affluent and mighty whose maxim is that ‘the acquisition of profit takes precedence over the dispelling of harms’ and being so it becomes an easy target for censure. Here Elmalili is sharp in his rebuke of Mandelstam; he imputes ill intention to the latter who seems to be saying that the *Majalla* is an obstacle to the absolute economic advancement of Europe and threatening that either the Ottomans acquiesce to this course or be dispossessed of any say in the matter courtesy of the Capitulations. “Power is with us, might makes right!”¹⁸²

Here Elmalili launches into a defense of the *Majalla* and he states that he does not believe that the *Majalla*, being an embodiment of the Ottoman spirit and a product of the intellectual legacy of the Islamic world, is deserving of this extent of condemnation. He accepts that there might be certain minor improvements that might be made to further contemporary commercial concerns but those would be made by resort to the ‘ocean without shore’ of *fiqh* rather than to the French Civil law and the former would suffice in assuaging the spirit of progress. If the civilization were to forestall any actions and transactions such as gambling, or those that foster avarice in

¹⁸² Yazır, 1036.

any economic roles and functions it would indeed be admirable and it would be noteworthy if any such economic harm or the violation of the spirit of cooperation were thwarted at the outset. Especially in view of the currents that threatened European civilization at that time it was incumbent that the spirit of Ottoman life be more sound with respect to its future.

Elmalili accepts that the bindingness of agreements – the pride of the Civil Code – was a feature of the Ottoman civilization as well through the maxim of ‘the believers abide by their agreements’. However, this is qualified by the consideration of two other maxims, ‘harm is to be removed’ and ‘the removal of an evil is preferred to the realization of a profit’. He elaborates on the how the first maxim is understood stating that there are two aspects to it: the moral (*akhlāqan*) and the juridical (*qaḍāʿan*). According to the former an individual’s utterances, good or evil, determine our knowledge of him. The latter has implications for how we determine the enforcement of contracts which are not enforceable in the absolute sense but only after the imposition of certain limitations and conditions. This is all to say that in order to find any contract enforceable not only between two individuals but for the civilization in general it needs to be devoid of any type or suspicion of dispute, manifest or hidden, material or moral, immediate or gradual, and in order to do so the legal code of the civilization must qualify its moral code. The law must attach conditions and requirements to any normative moral rules. Thus, morality demands that agreements be fulfilled no matter what, juridical practice advocates precaution and insight when fulfilling contracts.

The civil law of the Ottomans, the *Majalla* in particular and *fiqh* in general, categorizes any contract into valid (*sahīh*), voidable (*fasid*) and invalid (*bāṭil*). It is an actual right for someone not to acquire another’s property or to lose his own property to another through false means. Therefore, those agreements pertain to objectives that are not appropriate or where the indications of consent are not met are outright invalid. Those that have some defect affecting the balance and leading to some risk of conflict or possible harm to both the parties are considered voidable. The contracts that are marked by continuous consent, free of all defects and therefore contain genuine balance are considered to be valid and binding. If the civilizational objective is to remove conflict and corruption from the world and establish an authentic brotherhood,

it necessitates that all agreements are freed from the possibility of conflict and uncertainty. In the case that a conflict nevertheless transpires, it should be attributed to the state of the individuals involved rather than the nature of the agreement per se. This being so, the civilizational prerogatives demand that the tyranny of those of strength be curtailed and therefore balance is paramount in all agreements whereby every individual has the duty not to deceive and the right not to be deceived and all fraudulent dealing and trickery is to be nipped in the bud. In the same vein, those agreements that subsume the possibility of deceiving and being deceived and are uncertain in their ends are termed *gharar* (lit. uncertainty) sales in *fiqh* and are seen as voidable (*fāsid*).¹⁸³ The jurists have endeavored to discern aspects of application to new events of such uncertainty-infused sales, which have generally been proscribed by the laws of Islam but have been widespread over the ages. It needs to be observed that in the matters of trade and in absolute terms the sale transaction can intrinsically not be divorced from uncertainty. If it were otherwise there would be no possibility of profit. The uncertainty that is proscribed thus is that which occurs in a large magnitude not just in the absolute meaning of the word. There have been differences of opinion among the jurists in evaluating just how much the uncertainty that is found in contracts is. Also undeniable is the effect of custom and temporal concerns upon the same matter.

When it comes to an object of sale that is unknown, by sight or by knowledge, the Shafii jurists have decreed that the sale is voidable in all cases, the Malikis have allowed such a sale as long as particular characteristics of the object are specified, and the Imams Abu Hanifa and Abu Yusuf have allowed such a contract in the case of immovables and prohibited it in the case of movables due to the low amount of uncertainty and risk found in the former as opposed to the latter. The Hanafis have determined that the *hadīth* which prohibits the sale of that which is not in possession applies exclusively to the sale of movable objects *pace* the Shafiis who take this *hadīth* in an absolute sense.

¹⁸³ For *gharar* see Wahbah Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence*, 4th edition, vol. 1 (Damascus, Syria: Dar al Fikr Mouaser, 2003), 82.

4.2.3. A Sale without Possession?

Here Elmalili elaborates upon an apparent difficulty which has caused criticism of the *Majalla*. He elaborates upon two possible understandings of provision 253 which states that “The buyer before he receives that which has been bought by him can sell it to another person, if it be an immoveable thing, but he cannot do so if it be a moveable thing.” This ‘cannot’ may be construed to mean that such a sale can *never* be valid or it may be understood as being voidable or *fāsīd*. The first meaning would have put modern commerce into much difficulty and vindicated Mandelstam’s objection but the second meaning is necessarily the one that is justified at this place. A sale that is premised upon the second meaning would lead to a conclusion where it is voidable until possession takes place and the buyer has the right to void the sale upto and until the time that he takes possession. At that moment the sale becomes valid in the eyes of the law. At this time, the cause that gives rise to the defect and makes the sale voidable until possession is taken is removed. Once the cause disappears so does the attendant right to void the contract that has accrued to the buyer until now and the sale becomes binding. The reason for this defect which makes the contract voidable is the possibility that the object of sale or a part of it will get destroyed while in the hands of the seller and this is the reason for uncertainty and risk.

The case of the Istanbulite merchant is again taken as an example.¹⁸⁴ He has bought some cloth from a factory in Paris and before he takes possession sells it to a buyer in Thessaloniki; the first sale is valid being free from deception and uncertainty and the second is problematic even while being free from the aforementioned defects. As a consequence, the sale is voidable by the second buyer until the cloth is delivered to him, and this right belongs to him until possession and dissolves immediately thereafter.

Here Elmalili makes the argument that even while the first sale is uncertain and there is the real risk that it might not be concluded due to some incidence of loss, this level of risk is inescapable and must be assumed and deemed acceptable for all sales. With this in mind, the second sale is much more problematic. Its likeness is that of erecting

¹⁸⁴ Elmalılı Hamdi Yazır, “Mecelle-i Ahkam-ı Adliyemize Reva Görülen Muaheze’yi Müdafaa,” *Beyânü’l-Hak* 2, no. 50 (March 25, 1328): 1052.

a structure upon marshy land without bothering to plough it or make sure that the foundation is sound. The second sale is built upon already uncertain foundations (even though these may be within the realm of acceptability) and consequently becomes exponentially more defective. Now, if this transaction, like the sale conducted by the Istanbulite merchant to the Thessalonian, were conducted between parties where there was an disparity of knowledge and power such as a plain villager on the one side and an influential trader on the other, the harms and risk inherent in this transaction would be glaring.

In sum, the objection that Mandelstam has to provision 253 of the *Majalla* is irrelevant and immaterial since a sale without possession is not invalid *ab initio*, and it is not in contrary to the spirit of commercial enterprise because it can be made valid after possession is taken by the buyer. Furthermore, the buyer and the seller both have a recourse from the perspective of the uncertain conclusion of the sale before possession is taken by the buyer and this eliminates potential risk and harm. This is not to deny that this period, i.e., after the agreement is made and before possession is taken, can potentially thwart the enjoyment of profit by either of the parties. If the price of the object of sale in the market decreases it might become advantageous for the buyer to cancel the sale; similarly, if the price increases it might tempt the seller to sell it at that higher price to another buyer and thus cancel the sale. This risk, however, is a risk that remains in every sale where a seller always has the possibility to find a buyer willing to buy at a higher price and therefore this risk cannot be termed a ‘harm’. It can more properly be seen as a groundless fear (*wahm*) and not real injury. Indeed, the possibility that the seller can void the contract before possession is made gives him an opportunity to make up for potential loss if the market price rises and the possibility of this happening more than makes up for any imagined risk that he undertakes by giving the right of cancellation to the buyer before possession is taken. This harm is thus more imaginary than real: a loss of potential profits. The basis of loss and harm has to be, therefore, the risk that emanates from the pre-possession state.

4.2.4. The Case of the Missing Object

The *Majalla* precludes the sale of an object that has yet to be possessed by the seller.¹⁸⁵

¹⁸⁵ Article 253 of the *Majalla* states, “The buyer before he receives that which has been bought by him can sell it to another person, if it be an immoveable thing, but he cannot do so if it be a moveable thing.” Ahmet Cevdet Pasha, *The Medjellè*, 38.

This leads to a couple of possible consequences for a sale of immovable property not in possession of the seller. Either the sale may become *bāʿil* or void *ab initio*¹⁸⁶ or it may just become a defective sale (*fāsid*) which could be rectified later. Elmalili notes that the former construction would justify Mandelstam's criticism that it is contrary to the principle of *res perit domino*.¹⁸⁷

Article 293 of the *Majalla* states that “[i]f a thing before its delivery is destroyed while in the hands of the seller, the buyer is not responsible, and the loss falls on the seller.”¹⁸⁸ Mandelstam's claim is that this article is contrary to the fundamental principles of law as it clashes with the rules of the *Majalla* that state that a sale is concluded with an offer and acceptance and that the effect of the conclusion (*ʿin ʿiqāḍ*) of a sale is ownership.¹⁸⁹ This purported problem is compounded by Article 262 which states that delivery is not an essential condition in a sale.¹⁹⁰ The issue here, according to Mandelstam is that if the object of the sale is destroyed before possession is taken by the buyer it is an injustice to attribute it to the seller. The reasoning goes like this: after the contract is made and before possession is taken there can be one of two possibilities. Either the sale has taken place or it hasn't. If one states the latter, it contradicts the dictum that a sale concludes with offer and acceptance. If one asserts the former, there can be one of two possibilities: either the *ḥukm* of the sale has been established or it hasn't. If it is established, this contradicts the rule “the effect of the mutual agreement (*ʿin ʿiqāḍ*) of a sale is ownership” as according to this principle the loss should be attributed to the buyer as the ownership had transferred to him. All this while the French Civil Code states:

The obligation to deliver the thing is perfect by the consent merely of the contracting parties.

It renders the creditor proprietor, and puts the thing upon his risk from the instant at which it ought to have been delivered, although the delivery have not been actually made unless the debtor should have delayed delivering it; in which case the thing remains at the risk of the latter.¹⁹¹

¹⁸⁶ i.e., void from the beginning.

¹⁸⁷ Mandelstam, *La Justice Ottomane*, 99. *Res perit domino* refers to the principle that risk in the goods passes with ownership.

¹⁸⁸ Ahmet Cevdet Pasha, *The Medjellè*, 44–45.

¹⁸⁹ These are Articles 167 and 369 of the *Majalla*, respectively.

¹⁹⁰ Ahmet Cevdet Pasha, *The Medjellè*, 41.

¹⁹¹ Article 1138 *The Code Napoleon: Or, the French Civil Code* (London: William Benning, 1827), 311.

In response to these criticisms, Elmalili explains the nature of the contract and its resulting *ḥukm*.¹⁹² This difference is obvious and glaring. Together they may be termed as *ṣafqā* (literally, handshake but used to refer to a sale). Taken individually, each has a composite character. The sale may be divided into its beginning and end. It starts with an offer and ends with an acceptance. Even if both are present, the object of sale must needs be valued property (*māl mutaḳawwam*) according to the *Sharīʿain* order for the sale to be valid.

Similarly, the legal status of the sale or *ḥukm* is also divisible. The *ḥukm* of the contract which is ownership, according to the *Majalla*, is thus divisible into the ownership of the *raqaba* which is the restriction of the object to the person's control and the ownership of *taṣarruf* which is the ability to make absolute use of the object. The latter is a material type of ownership while the former is in the realm of meaning. The combination of the two types culminates in complete ownership. This distinction, Elmalili claims, is present even in the French Civil Code as mentioned in Article 1138, above, when read together with Article 1604, precluding the buyer from complete ownership before delivery and expressing the same distinction between bare ownership (*raqaba*) and the ownership that allows absolute benefit (*taṣarruf*).¹⁹³ In other words, the former is a real matter or *ʿamr ḥaqīqī* and the latter is a conceptual matter or *ʿamr iʿtibārī*. The presence of either in exclusion implies defective ownership.

Having established these distinctions, one comes to the understanding that there are four components to the sale, the start of the contract (offer), its end (acceptance), the start of the legal status or *ḥukm* (bare ownership), and its end (ownership with usufruct). Upon the realization of all our elements without any obstacle, the sale comes to fruition, the *ṣafqā* is fulfilled. The *Majalla* does not have any principle stating that after the conclusion of the contract, i.e. after offer and acceptance, the legal status starts immediately because this is an unacceptable rule. Similarly, in the Civil Code, the condition option (*khiyār al shart*) holds the legal status back from realizing itself. In

¹⁹² Elmalılı Hamdi Yazır, "Mecelle-i Ahkam-ı Adliyemize Reva Görülen Muaheze'yi Müdafaa," *Beyânü'l-Hak* 2, no. 51 (March 2, 1328): 1068–69.

¹⁹³ Article 1604 states: "Delivery is the transferring the thing sold into the power and possession of the purchaser." *Code Napoleon*, 445.

the same way, if the legal status is precipitated it does not immediately come to fulfilment but may be delayed due to lack of delivery. Elmalili gives another reference to the Civil Code Article 1601 opining that it affirms his contention that even the Civil Code does not allow for the completion or fulfilment of the sale if the object of sale is destroyed before or after the offer and acceptance.¹⁹⁴ This voidance of the sale in this instance is surely due to the inability of the legal status of the sale to be fulfilled. Otherwise, it would be tantamount to claiming ownership of the destroyed object for the buyer, attributing it to him after the event of the loss.

After this explanation Elmalili comes to the crux of this argument and construes the *Majalla* to mean that offer and acceptance lead to the *in 'iqād* of the contract but the fulfilment of the sale is something different. Possession and delivery are not conditions for the conclusion of the contract. This implies that legal status of the sale comes into being but this does not mean that the whole of this status and its fulfilment is attained. Such fulfilment is contingent upon the absence of any obstacles because the failure to possess denies enjoyment of the object (which is the ownership with usufruct). The sale for which the possibility of fulfilment does not remain is a defective sale, which is voidable.

Therefore, it must be said that Article 293 or the *Majalla*, which pertains to the seller's assumption of loss if the object of sale is destroyed before delivery renders such a sale defective even though it has been concluded through offer and acceptance because usufruct cannot be established for the buyer. It is now apparent that the expression 'concluded sale' or *bay' mun 'aqid* does not refer to a fulfilled sale. If Article 293 did not exist Article 369 (The effect of a sale agreed upon is ownership) would have meant the transfer of risk and ownership in the case of a destroyed object to the buyer and such agreed upon sales would imply a transfer of ownership removing the possibility of enjoyment of the object (usufruct) on the part of the buyer.

4.2.5. The *Majalla*: Vindicated or Villified?

¹⁹⁴ Article 1601 states: "If at the moment of sale the thing sold had entirely perished, the sale shall be null. If a part only of the thing have perished, it is in the election of the purchaser to relinquish the sale, or to demand the part preserved, causing the price thereof to be determined by valuation." *Code Napoleon*, 444

Having gone over some of Elmalili's arguments it is apparent that they are for the most part justified. Mandelstam's criticisms stem primarily from his partisanship of foreigners against the interests of the Ottomans and their subjects but even more so they emanate from more than a perfunctory knowledge and understanding of *fiqh* and its subtleties. Rather, these finer points provide the scaffolding for its more explicit rules. As we have seen on this occasion Mandelstam was not able to read between the lines and understand the way the rules of the Sharia work in practice as we have no evidence that he had the benefit of a classical Islamic education. That being so he reached conclusions that would be expected of someone that lacks the necessary knowledge.

The problem that this brings to our attention is the shortcoming that any codified law would bring to an untrained authority when they would be expected to use those rules in their reasoning. Considering that the *Majalla* was envisioned as a solution for the acute shortage of trained jurists in Islamic law and expected to be applied in the *Nizāmiye* courts by judges who were not *qāḍīs*, the difficulty becomes clearer. How would a person not trained in *fiqh* and properly imbued with the spirit of Islamic law deter himself from such cursory and false construals of a code of *fiqh*? It cannot be denied that the *Majalla* in its organization, explanation through examples and explicit mention of maxims would be very helpful in the judicial determination of disputes. The lack of training, however, is a deficiency that cannot be overcome by the mechanism of a singular code. Reasoning through learned methodologies and casuistic expertise are indispensable when it comes to *fiqh* and its application in the court.

4.5. Conclusion

The *Majalla* has had its share of criticism and support. Some of it has been substantive criticism where the norms contained in the rules of the *Majalla* have been analysed and found wanting for a particular perception of the societal order or due to the weighing of the rights of parties in a certain way, emphasizing certain values over others. The worldview of *fiqh* might be found to be wanting when looked at from the perspective of a non-Muslim foreigner whose risk it does not mitigate as much as he would desire, as *fiqh* spreads the risk of transactions more fairly between the seller and

the buyer. However, looking at matters in a more balanced way removes the misconceptions which stem from an inadequate understanding of how *fiqh* works. It seems as if Mandelstam's training in *fiqh* was deficient to the point that he failed to possess the interpretive scaffolding that is necessary to understand *fiqh* rules in a holistic and just manner. This affirms the necessity for a familiarity with the *fiqh* corpus and its interpretive methodologies for any individual who engages in comparative legal work.



CHAPTER FIVE

THE *MAJALLA* AND CODIFICATION

5.1. Introduction

By virtue of being a legislation and a code, the *Majalla* is often seen as the first instance where *fiqh* was successfully codified and applied in a real world setting even if a pre-modern one.

When it comes to codification it is a phenomenon that accompanied the advent of nation-states. If we accept that it is relevant in the formation of the *Majalla* we would need to delve into an analysis of this phenomenon. What is meant when the word is used with respect to law in the western paradigm? What are the problems it is expected to solve? What are the characteristic principles that inhere in 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 d'être* would be to realize these functions. However, as would any transplant in an inorganic context, this contrived transformation would raise certain problems which need to be examined.¹⁹⁵

The driving force behind the *Majalla* was not these principles that characterize codification but it was a professed desire to resort to 'local' norms rather than imported or transplanted ones when determining the blueprint of a nascent transforming legal system. The *Majalla* was enacted piecemeal through 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 European trends of the time, which were for the major part, colored by the principles of codification. The milieu in which it was 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 were for the most part influenced by the French Civil Code.

¹⁹⁵ Parts of this chapter have been previously published as Danish Naeem, "The Majallah as Codified Fiqh," *darulfunun ilahiyat* 33, no. 2 (December 27, 2022): 597–617, <https://doi.org/10.26650/di.2022.33.2.1150985>.

Furthermore, the Ottoman state had transformed through internal and external impulses into a form where the system necessitated a legislation to fill a gap which, in turn, was necessitated by the very character of the system. That the *Majalla* is unique by character and that the factors that gave rise to it were not organic but external to *fiqh* as a discipline also hints at the European influence underlying it.¹⁹⁶

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 and has been taken as a model of civil codification in America, Asia, Middle East, and Africa, especially those countries that have been conquered by France, whether through wholesale translation or with considerable modifications.¹⁹⁷

5.2. Why the French Civil Code?

The French Civil Code of 1804, also known as the Napoleonic Code, was a comprehensive set of laws that institutionalized equality under the law, guaranteed the abolition of feudalism, and replaced the hundreds of codes that were in effect prior to the French Revolution of 1789.

One of its most important causes was the desire to establish a uniform legal system throughout France.¹⁹⁸ Prior to the French Revolution, the country was divided into numerous regions, each with its own legal traditions and practices. This created confusion and inconsistency in the application of the law, and often led to injustice and inequality. The Revolution itself also played a role in the development of the civil code. The Revolution had brought about sweeping social and political changes, and many of these changes required a corresponding transformation of the legal system.

¹⁹⁶ Kızılkaya, *Legal Maxims*, 180.

¹⁹⁷ 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.

¹⁹⁸ For a more detailed exposition on the genesis of the French Civil Code see Jean-Louis Halperin, *The French Civil Code* (London: Routledge-Cavendish, 2021), 1–15.

The new code was seen as a way to codify the principles of the Revolution, such as equality before the law and the protection of individual rights. Another important factor was the influence of Enlightenment ideas about law and society. Enlightenment thinkers had long argued for the importance of rational, consistent, and universally applicable legal systems, and the French civil code was seen as an embodiment of these ideals.

Finally, Napoleon himself played a crucial role in the creation of the code. As a military and political leader, he recognized the importance of a unified legal system for the stability and efficiency of the state. He also saw the code as a way to establish his own legacy as a reformer and modernizer.

5.3. Codification

The word codification was concocted by Jeremy Bentham from noun ‘codex’ and verb ‘facisfacere’.¹⁹⁹ In the context of the legal system, it means to articulate law in a written form. Though codification may perform this function of expression it 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”.²⁰⁰ In itself, codification is “a neutral form, an instrument to bring about a transformation of the structure and content of the law”.²⁰¹ 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.²⁰² 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 terse definition given by Scarman is noteworthy. He states succinctly that “[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.”²⁰³

¹⁹⁹ Csaba Varga, *Codification as a Socio-Historical Phenomenon* (Budapest: Akadémiai Kiadó, 1991), 19.

²⁰⁰ F.F. Stone, “Primer on Codification,” *Tul. L. Rev.* 29 (1954): 303.

²⁰¹ Varga, *Codification*, 14.

²⁰² *Merriam Webster’s Collegiate Dictionary (Eleventh Edition)* (Merriam-Webster, Inc., 2004).

²⁰³ L.G. Scarman, “Codification and Judge-Made Law: A Problem of Coexistence,” *Indiana Law Journal* 42, no. 3 (1967): 358.

The code may be created in order to bring about the solution of any of several possible problems. Old laws fallen into disuse might have 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. There might be an inconsistency in the way related laws are expressed or how laws belonging to diverse subjects coexist. It could also be that laws pertaining to the same subject matter manifest divergent “economic and social philosophies of the different decades in which they were enacted” and thus they need to be modified to reflect the mores of the time.²⁰⁴ Another ‘problem’ the code may employed to surmount may be the entrenchment of the legitimacy of a new political order.²⁰⁵ 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.

There are two species of codification: substantive or true codification²⁰⁶ and formal codification²⁰⁷. The former consists of “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 domain”.²⁰⁸ The latter is characterized by the recognition and categorization of rules already in existence. This type is also termed a consolidation or restatement.²⁰⁹ Substantive codifications are largely the defining feature of civil law countries but are not exclusively so. An instance of substantive codification are the statutes introduced in India in the 1800s. Similarly formal codifications are not unique to common-law systems though they are prevalent there.

²⁰⁴ Stone, “Primer on Codification,” 304..

²⁰⁵ As Stone puts it “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 de-sires 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.” : *ibid*.

²⁰⁶ See Bergel, “Principal Features,” 1077–88..

²⁰⁷ *Ibid*, 1088–97.

²⁰⁸ *Ibid*, 1075–76.

²⁰⁹ *Ibid*, 1076.

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 countries²¹⁰, or those of common-law countries but where the legal fabric has been reconstructed using substantive codification²¹¹. At a cursory examination, the *Majalla* is an example of formal codification, while the Code Civil which gave it its motivation is evidently closer to substantive codification. When the *Majalla* came into being, the rules of *fiqh* existed in a voluminous textual corpus and served as the source for the *Majalla*. In that sense, the *Majalla* is a consolidation of the *fiqh* pertaining to transactions (or *mu'āmalāt*).

5.4. Codification, *Taqnīn* and *Tadwīn*

Codification may be compared with the twin concepts of *taqnīn* and *tadwīn*. The former is the Arabic term used for codification. Codification, being a relatively modern concept associated with the power of the nascent state and the centralizing tendencies of the recent centuries in the West has found an expression in the Arabic *taqnīn*. The Arabic word *tadwīn*, articulated in Turkish as *tedvīn*, on the other hand represents a more classical understanding representing the collection and compilation of the *Hadīth* and used, to a lesser extent, in other disciplines such as *fiqh* and *tafsīr*.²¹²

It must be admitted that there are certain differences between the codification of laws and *tadwīn* of *fiqh* as it has been undertaken historically. Codification involves the process of creating a corpus of comprehensive and systematic legal rules, which brings together all the laws, regulations, and legal precedents governing a particular area of law. *Tadwīn*, on the other hand, refers to the process of recording and preserving individual legal opinions or rulings, often in the form of written documents. Codification tends to be more comprehensive in scope, as it involves the consolidation of all laws and legal precedents into a single, unified legal code. *Tadwīn*, on the other hand, focuses on the preservation of individual legal opinions or rulings, which may

²¹⁰ Such as Egypt and Iraq.

²¹¹ An instance 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).

²¹² Mehmet Efendioğlu, "Tedvīn," in *TDV İslām Ansiklopedisi* (Istanbul: TDV İslām Araştırmaları Merkezi, 2011), 267.

be specific to a particular time or place. In a codified legal system, the legal code has the authority of law and serves as the primary source of legal authority. In contrast, in a *tadwīn*-based system, individual legal opinions or rulings are considered to be authoritative, based on the reputation and expertise of the scholar or jurist who issued them or the prioritization-mechanism of the school of *fiqh* that they are associated with. The purpose of codification is to create a clear and accessible body of laws that can be easily understood and applied by legal professionals and the general public. The purpose of *tadwīn*, on the other hand, is to preserve and transmit the knowledge and expertise of Islamic scholars and jurists across time and space. Codification tends to be more rigid and inflexible, as the laws and legal precedents are set forth in a comprehensive legal code. *Tadwīn*, on the other hand, allows for greater flexibility and adaptation to changing circumstances, as individual legal opinions or rulings can be modified or updated as needed and the works that have undergone *tadwīn* do not possess any authority or priority in terms of legitimacy.

However, there is a tendency to equate *tadwīn* to codification in some works. Findikoglu in his work on the sociology of law asserts that *tadwīn* admits that both terms have emanated in different civilizational and cultural contexts with respect to time and place but have originated from identical legal needs and therefore are indistinguishable in their content.²¹³ He delineates the process of legal *tadwīn* in three steps. The unwritten legal customs and usages of any state are committed to paper (Findikoglu calls this *tathbīt*). Those customs are then incorporated with other written and solitary executive ordinance and legislations (termed *tawhīd*). Thereafter, there is a systematization of all those legal texts and all are consolidated into a single text.²¹⁴

5.5. Codification: Discursive Effects

The codification phenomenon may be considered from the perspective of three discursive effects: legislative technique, legal theory and legal philosophy.²¹⁵ As we examine these aspects separately, we can discover the conventional view that has prevailed in European legal culture.

²¹³ Findikoglu, *İçtimaiyat*, 243.

²¹⁴ Ibid, 245.

²¹⁵ Canale, “Many Faces,” 137.

5.5.1. Legislative Technique

This is the idea that the law must be simple and accessible to its subjects as well as 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 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”.²¹⁶ Furthermore, “[t]his 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.”²¹⁷

5.5.2. 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 of 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 merely a

²¹⁶ Scarman, “Codification and Judge-Made Law,” 359.

²¹⁷ Pierre Legrand, “Strange Power of Words: Codification Situated,” *Tul. Eur. & Civ. LF* 9 (1994): 16.

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 ‘anointed’ character of the code whereby it is ‘the chosen law’ abrogates existing law as an older dispensation. This resembles canonization where selected texts are chosen in order to impart them with divine authority while the remaining become apocrypha, of dubious legitimacy.

5.5.3. Legal Philosophy

At this level of discourse, where the phenomenon is examined with respect to the nature of law itself and legal authority, it can be seen that codification has been the mechanism to realize a paradigm governed by the principles of liberty and equality through a positive articulation of these principles and manifesting them in 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 discrimination based upon the religious conviction of the subjects of the law is frowned upon in this paradigm.

Enactment implies the conferral of authority as well as the force and legitimacy of democratic and technical deliberation, the involvement of the ‘whole community’.²¹⁸ These ideas have interesting implications for codification. To assert that enactment of a code is an act of law-making is trivial but that this code presumes 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 the law itself; indeed, it would seem that the modern nation state invokes obedience through the authority of the law qua code. There seems to be no entity behind the law, pulling its strings: the law must be obeyed for its own sake and not because some intelligent entity commands

²¹⁸ Scarman, “Codification and Judge-Made Law,” 359.

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 to codification: a necessary rupture of epistemic authority. The very act of overt law-making through a code denotes a usurpation of legal authority. The impulses which spawn codification, i.e., the need for development and reform, are necessarily accompanied by the need for exclusive authority which imbues the code and it is this concomitant authority that precludes any rival claimant to legal and thus normative sway.

5.6. The Functions of Codification: How Does *Fiqh* Compare?

It would be apropos here to recall the functions that are served by codification with respect to the law. One of these is a *reductive* function that entails that the post-codification product represents 'the law' *exclusively*. *Fiqh*, similarly has had the notions of specification and abrogation developed by the jurists. Moreover, codification performs a *comprehensive* function whereby all rules and norms that are meant to regulate human behavior are included in the sanctioned corpus of laws. When it comes to *fiqh*, 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 humanly behavior, even transcending that which may be sanctioned by the courts. Thirdly, codification performs an *enactive* function which 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, the *enactive* function. Enacting a code makes all other relevant rules inadmissible in a court of law. When it comes to enactment, *fiqh* is again different and the historical distinction between *fiqh* and *siyāsa* and then *fiqh* and *qānūn* had persisted until the *Majalla* where certain rules were 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 *rationalizative*. The code orders and brings a particular kind of logic to the selected body of rules.

We 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. There is, however, a qualitative difference between the functions performed by codification and any functions that *fiqh* seeks to perform. This is because all of the functions, whether reductive, comprehensive or otherwise are imbued with a different sort of mentalité than the phenomenon observed in 19th century Europe. When it comes to hermeneutic functions *fiqh* also contains certain devices in order to effect changes in a text. These are, however, of a different nature to the purported functions of codification because of 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 achieve certain objectives. In this project the pre-text is important only as far as material for the ultimate product which is the code and supersedes the pretext 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 that need resolution, the more its law mirrors such complexity in the way rules are expressed and in the way these address diverse cases. Considering the way *fiqh* has developed through more than a millennium, it would be unrealistic to encompass its complexity in a single text while remaining true to the imperative of simplification. *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 *Majalla* seem to have recognized the scarcity of such trained scholars and intended the *Majalla* to provide guidance to such individuals who would adjudicate in the courts and have resort to

some level of *fiqh* even while they could not access its diversity and complexity. One can conclude, therefore, that *fiqh* qua law does not have simplicity as an overarching imperative.

The formation of the *Majalla* subsumes the intention to simplify the choices available to the decision maker by reducing the complexity of the Hanafi madhhab selecting only the agreed upon (*mujma' 'alaih*) opinions where possible; in those cases where there is a difference of opinion (*mukhtalaf fi'h*) selecting the preferred (*rājih*) one. This imperative resembles the motivation to reduce the discretion of the judge and reaches the same result as that other different impulse. This latter impulse stems from the recognition that the judge does not have the ability or right to decide what the law is but only that to decide whether and how to apply it. The reasoning behind the *Majalla* is that the persons delegated the authority to be judges in a particular context do not possess the mastery of *fiqh* as needed and require a simplified source from which to derive their knowledge of what the law is in any particular case. These two contrasting imperatives may perhaps be seen as two sides of the same coin but if we delve into the respective states of mind of the philosophies behind the two systems they are very different. The need to simplify the work of the judge stems from a lack of experts or, in other words, this is a human resource problem. The urge to disinvest the judge of any capacity to make laws or reduce his discretion in applying the law originates in the perspective that views the judiciary as a separate arm of the state from the legislative; the latter is democratically elected and thus has the right to make laws for those that it represents and the judge being a mere nominee, having none of the democratic legitimacy of the elected representative should only decide cases according to the made law and not intervene in the legal operation as much as possible. This difference in ethos has implications for whenever there is a project to apply *fiqh* in a political entity. The desire to restrict the judge's discretion, be it justified or not, questions may be raised with respect to its efficacy and the mechanism of its attainment. Can a judge really be constrained in this fashion? Can the meanings of words be ossified and their connotations and denotations be fixed by codifying a text?

Wherever human endeavor and multiplicity of minds is involved there is always potential for incoherence and contradiction but the presence of a singular source and voice means that at least *fiqh* is different from a code in this aspect one does not need

to assume a singular voice when reading the Qur'an and Sunna – as they are both ultimately the utterances of one Supreme Author – but one *does* need to do so when reading a code. The very definition of *fiqh* makes it clear that it is the product of human endeavor but derived from a Divine text. With respect to authority, each school of thought in *fiqh* has its own mechanism to determine the more authoritative rules from others, but this determination does not compare to the categorical exclusion of pre-existent rules which occurs in codification. This authoritarian characteristic found in codification is not to be found in the *fiqh* tradition.

5.7. 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, perhaps consistent as they take the shape of a code and meaningful relationships between them may be discerned rather than random, arbitrary and dispersed notions.²¹⁹ 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 in the law serves to make it clear and accessible to the layman, the subject of the law who has perhaps most benefit from an understanding of the mechanism of social control that increasingly regulates a large portion of his existence. It may also be claimed that codification makes the law accessible to the lawyer and the judge and, certainly, this assertion would have the 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

²¹⁹ Stone, "Primer on Codification," 307.

desirable value and one of the principle reasons given when adopting codification. This certainty makes it possible for the layman 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 behavior in the subjects of law. The lawyers, on the other hand, benefit similarly while judges are supposed to take the code as a starting point of their deliberations. Thus, law becomes more predictable. Moreover, the setting down of the 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* just discover and apply it.

As stated earlier, codification is a neutral form, a method. However, we shall see how even a 'method' may not be value-neutral. We 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".²²⁰ It is indeed typical that it is the medium which mediates between the elements of society and "shapes and controls the scale and form of human association and action".²²¹

Perhaps there is a measure of certainty that is created in the legal system due to the codified legislation. However, it would be rash to expect that as social change outstrips legislative foresight and the code becomes less and less relevant, and the judges have increasing recourse to extra-legislative considerations, this degree of certainty remains constant. In fact, in the first place, certainty 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 this fashion. Actual judicial activity is technical and discretionary and contrary to imaginary notions owing their outlook to the civil law way of thinking.

The discretionary nature of judicial activity lays bare the myth of uniformity. With 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

²²⁰ Marshall McLuhan, *Understanding Media: The Extensions of Man*, 1st MIT Press (Cambridge, Mass.: MIT Press, 1994), 9.

²²¹ *Ibid*, 9.

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.²²²

One of the much-heralded functions of the code viz. that of accessibility to the public, i.e., the lay person, turns out to be fallacious when we consider the implications of how the code comes to relate to judicial activity. Assumed to embody the law literally, it is only through the transforming medium of judicial activity, which may take any of diverse hermeneutic routes to its conclusion, that the statute results in a determinate form. The claim that the codified law will somehow transform the law into a comprehensible reality for the lay population is largely unfounded:

[H]ow 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.²²³

Even specialists in the legal arena, the 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. This is to say that those advocating the code as 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, that the status of law qua law is contingent upon the fact that it has been laid down or *posited* and secondly, that law is conceived as a "finite

²²² Varga, *Codification*, 120.

²²³ Legrand, "Strange Power of Words: Codification Situated," 20.

and comprehensive code”²²⁴. It is evident that that codified law would be *par excellence* the type of law referred to as positivistic combining the two assumptions in toto. This jurisprudential mind-set runs into difficulties when it encounters a notion of law contrary to the positivist notion. An example of such would be custom or, more relevantly, Islamic law. Law, conceived this way loses its human character, and context as a functioning institution and is objectified. An increasing number of jurists find this conception of law to be simplistic and lacking a conceptual depth corresponding to the 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.”²²⁵

This understanding, therefore, 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.²²⁶

The role that codification serves with respect to the law may justify a limited analogy with the way a primary religious text functions: the basis upon which all juristic and jural activity turns. It is not surprising that any usurpation of the legal order in a Muslim society could succeed without attempting to displacing the texts that are fundamental to the Islamic legal enterprise and supplanting them with an alternative, especially one that is so pliant to the imperatives of political will. There is a more significant difference in the way that texts such as the Qur’an and the *Hadīth* are used by *qaḍī*-jurists from how a code lives in the legal system: the hermeneutic principles (or *usūl al fiqh*) 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 hallowed character. In a codified legal order the code is

²²⁴ Brian Simpson, “The Common Law and Legal Theory,” in *Legal Theory and Common Law*, ed. William Twining, 1986, 11.

²²⁵ Legrand, “Strange Power of Words: Codification Situated,” 18.

²²⁶ *Ibid*, 18.

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 code-law. 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.²²⁷

5.8. The Code as Exclusionary Instrument?

The code is, as mentioned earlier, 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 analysed 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’.²²⁸ In doing so the code effectively leads to 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 extinction of the common-law way of thinking. The code constrains individuals to cases and situations envisioned by the code and 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 enactment of this ‘negative space’ the code deliberately excludes certain social conceptions. This effect of monopolization is 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 as they have been declared authoritative and thus untouchable. If that is not possible easily, they may resort to circumvent it through hair-splitting distinction or through bending

²²⁷ Varga, *Codification*, 121–22.

²²⁸ Pierre Legrand, “Codification and the Politics of Exclusion: A Challenge for Comparativists,” *U.C. Davis Law Review* 31 (1997): 799.

or stretching other rules in order to accommodate it rather than repudiating it outright. Such repudiation would have led possibly to a better rule but codification has precluded that possibility at 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 required from the scholars are rendered all the more pathetic due to the fact that the rules envisioned in the code were likely a result of historical and political circumstance and hence arbitrary.

5.9. 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: “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?”²²⁹

Codification serves 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 over the mechanisms of power. This power extends not only to the right to violence but also to the preemptive determination of social norms which is crucial to the regulation and control of the subject population.²³⁰ Because codification leads to definite kinds of changes in the force fields of power and the structures of authority, it is warranted that these issues be foregrounded. Though the achievement of clarity, logic and uniformity are often the proclaimed reasons for the establishment of the code, in claiming to these self-evident ‘virtues’ the political authority would find its legitimacy reaffirmed and its authority ‘amplified’.²³¹

²²⁹ Ibid, 805.

²³⁰ For an examination of how the state does this see Pierre Bourdieu, Loic J. D. Wacquant, and Samar Farage, “Rethinking the State: Genesis and Structure of the Bureaucratic Field,” *Sociological Theory* 12, no. 1 (1994): 1–18.

²³¹ Legrand, “Strange Power of Words: Codification Situated,” 9.

How this happens deserves comment. Through the transformation of the legal system to a formally rational one codification makes it easier for the political class to accumulate power and wield its will with greater facility. It is no mere instrument for the formal ordering of law but 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*”.²³²

[C]odification 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.²³³

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.”²³⁴ This “*technical shaping of the law*” is mirrored by the “*politico-economic organization of society*”²³⁵ and towards this end bureaucracy and law, the two institutions fundamental to the political will-to-power of the state, are developed in tandem, a parallel development to which history bears witness.²³⁶

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.²³⁷

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 formal rationality which is “considered

²³² Varga, *Codification*, 334.

²³³ Ibid, 334.

²³⁴ Ibid, 333–34.

²³⁵ Ibid, 333.

²³⁶ Ibid, 335.

²³⁷ Ibid, 335.

the *sine qua non* of all conscious, planned and controlled social influencing”.²³⁸

The codification process shifts the locus of law-making from the judiciary to the legislature and this is manifestly the act of making this function overtly of a 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.

5.10. Can the Meaning of Rules be Constrained?

In the quest to limit the judge’s discretion as well as to further the commendable objective of precluding interpretations that are arbitrary, biased or affected by any political motivations, the formalistic ideology that hails codification as the panacea seeks to propose a fiction whereby the legislation made by the appropriate organ of the state becomes the be-all and end-all for legal reference. The thinking is that meanings of words can be restricted in this way by restricting judicial access to a single text. By assuming a code of law and the fiction that judges arrive at the verdict working mathematically from premises to conclusion (in the manner of theoretical reasoning – as detailed in Figure 5) it is believed that they would always arrive at the correct answer, free from bias or whimsy. Can restricting the form of language be used to constrain meaning?

In the world of *fiqh* the tools primarily used to constrain meaning are the *uṣūl al fiqh*. While this might also be termed a kind of formalism, it does not involve the fiction that the posited text is exhaustive and those specific words are only what we have and a hidden assumption, also fictive, that the meanings of those words are obvious and objectively known to the judge. The *uṣūl al fiqh* impart a systematic way of dealing with the meaning of words. This is not to say that rules of interpretation are not used by the Western lawyer or judge. The primary theories of legal interpretation in Anglo-American legal systems are originalism (based on the intentions or purposes of the lawmakers) and textualism (which stresses the precise language used).²³⁹ The *uṣūl al*

²³⁸ Varga, 334.

²³⁹ Mark Greenberg, “Legal Interpretation,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2021 (Metaphysics Research Lab, Stanford University, 2021),

fiqh provide an arguably more detailed and sophisticated system to determine in the best interpretation of the words of the Qur’ān or the Hadīth. A snapshot of this system is illustrated in Figure 6.

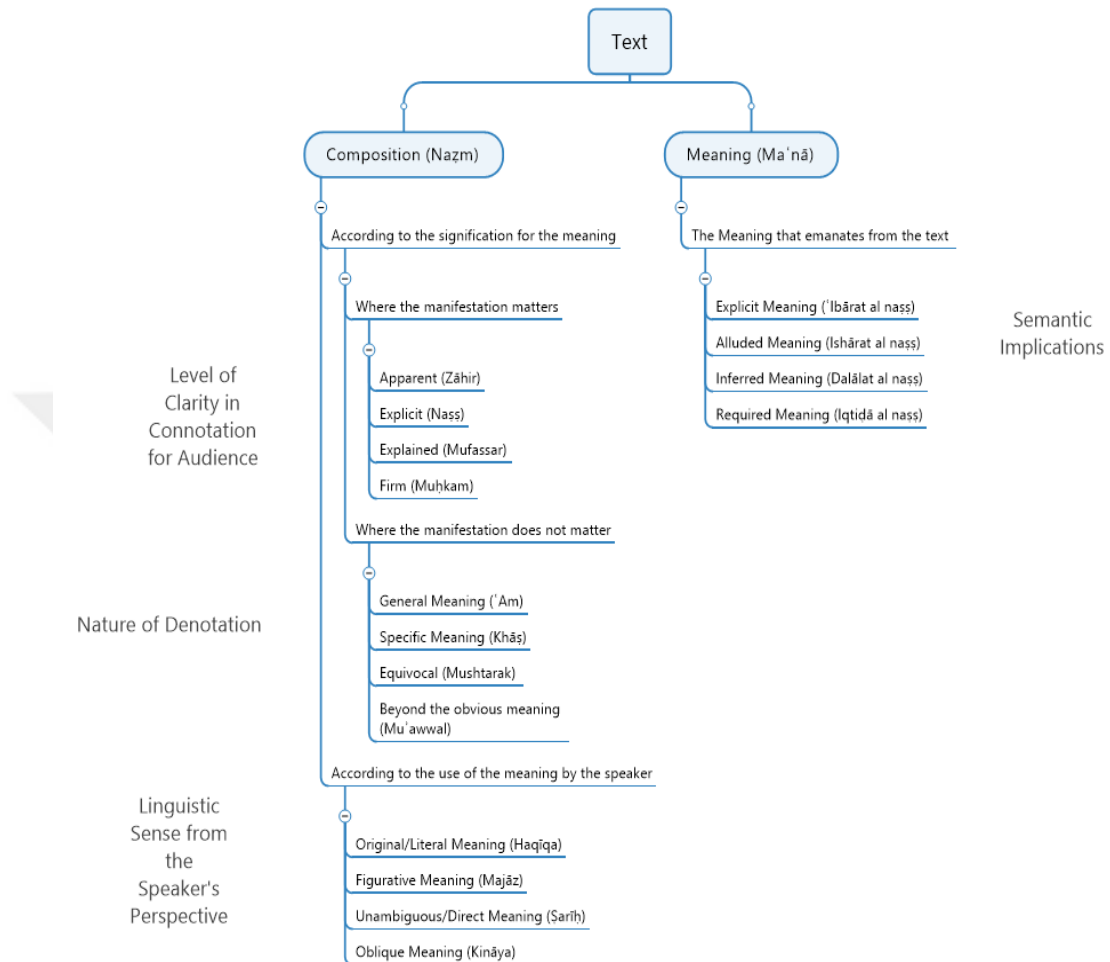


Figure 6. *Uṣūl al Fiqh* Scheme for Textual Interpretation

Source: Āqḥisārī, 2010

The *uṣūl al fiqh* are not the only methods used to restrict the variety of possible interpretations. The *madhhabs* themselves are a way for the jurists to limit and prefer certain opinions over others. The Hanafi system, for example, is a sophisticated ordering of juristic authorities and a hierarchy of texts in order to obtain a system of

<https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/>. John H. Garvey, Thomas Alexander Aleinikoff, and Daniel A. Farber, eds., *Modern Constitutional Theory: A Reader*, 5th ed, American Casebook Series (St. Paul, MN: Thomson/West, 2004), 91–189.

norm restriction.²⁴⁰ The problems or issues (*masā'il*) of the Hanafi madhhab have been classified into three levels so that in the case of conflict one would know which opinion to prefer and that the preferred opinion (*rājiḥ*) is not abandoned over that which is not so (*marjūḥ*). First are the prevailing opinion or manifest transmission (*masā'il al uṣūl* or *ẓāhir al riwāya*) which is the basis of the Hanafi madhhab and must necessarily be followed-unless qualified by authoritative preference. Next, are the rarities (*masā'il al nawādir* – also called *nādir al riwāya*) and lastly, the occurrences (*masā'il al fatwā wa al wāqi'āt* or *nawāzil*).²⁴¹

It has been claimed, however, that the *uṣūl al fiqh* have functioned not really to determine any position that has been taken but to validate it after it was established. Rather than direct how meaning is to be derived or serve as a hermeneutic engine deriving interpretation, it draws the limits beyond which interpretation cannot stray. Thus, it serves an ex-post facto rather than ex-ante function.²⁴² Against this, Calder quotes Ibn Khaldun and Ibn Abidin who distinguish the early jurists from the later ones (*muta'akhkhirūn*) where the former used both the *uṣūl al fiqh* as well as the principles of the *madhhab* for discovery and the latter used both for justification.²⁴³ One thing that stands out in comparing the two paradigms in this matter is that *fiqh* is possessed of a far more sophisticated and methodical system of hermeneutics. This stems, perhaps, from the acceptance that the text is paramount since the textual sources have come down to the jurist and the whole Muslim populace as a trust and human ideologies and motivations do not have a share in their creation. This has led to profound exertion in discovery of all possible levels of meaning and aspects of locution and illocution.

²⁴⁰ Brannon M. Wheeler, *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship* (Albany: State University of New York Press, 1996); Norman Calder, "The 'Uqūd Rasm al-Muftī' of Ibn 'Ābidīn," *Bulletin of the School of Oriental and African Studies, University of London* 63, no. 2 (2000): 215–28, <https://doi.org/10.2307/1559538>. This poem, 'Uqūd Rasm al-Muftī', by Ibn Abidin points the mufti towards the juristic corpus that had to be mastered if action was to be based on knowledge.

²⁴¹ Muhammad Taqī Usmani, *Fatwā: Ta'āruf, Uṣūl, Ādāb*, trans. Muhammad Mansur Ahmad (Karachi, Lahore: Idara Islamiyat, 1436h), 141–66.

²⁴² Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of Uṣūl al-Fiqh," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (BRILL, 2002), 199, https://doi.org/10.1163/9789047400851_011.

²⁴³ Calder, "The 'Uqūd Rasm al-Muftī' of Ibn 'Ābidīn," 226.

5.11. Conclusion

Codification as a necessary form for the 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 which gives priority to political authority. It 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 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 favour of norms that have been transplanted in formally rational systems. These systems operate under the dynamics wholly foreign to the Islamic ethic.

It is evident that there is an antinomy between the concept of Islamic law or *fiqh* and the imperatives of a codified law. Even when we consider the legal institutions as they have developed in the course of Islamic history, we find that the role of codification is more abridged than has been assumed. Since codified law is always the domain of the lawmaker, personified by the legislature in the modern nation-state, if the role of the executive in the enacting of Islamic law is found to be curtailed any codified law attributable to the executive would consequently be deprived of much of its legitimacy. The *Majalla*, as can be discerned, is an incongruous transplant into a codified legal paradigm where the particular trappings of this paradigm militate against the spirit and proclivities of *fiqh*.

CHAPTER SIX

THE *MAJALLA* AND THE USES OF RULES I: CASUISTRY

6.1. Problem and Background

Many modern and historical disputes have been based upon a dichotomic view of issues that are simplistic and overlook the niceties involved in any human controversy, and tend to have a centrifugal effect causing opinions to congeal in two extremes. To resolve such tensions and reach resolutions that are acceptable to the groundswell of the population, lawmakers often legislate on such controversies, creating rules setting regulative boundaries around certain human behaviors.

The controversies associated with abortion in the United States and Europe and the difficulties endured by an enforcement of laws pertaining to the punishment of behavior liable to *ḥadd* seem to be unrelated occurrences but stem from an attempt to impose a particular way of thinking against a problem that is inherent in the operation of rules.²⁴⁴ Abortion activists on either side envision the issue as a clash of opposing rights: right of the woman to choose and the right of the fetus to live. Framing the issue in such stark dichotomic terms begs the question of why are issues not represented in a just manner in legislation. Can legislation be a solution to controversial disputes that threaten to tear apart the fabric of society? Can rules can not only resolve disputes but preempt them authoritatively? What are the problems that the textual expression of human affairs that are subject to controversy bring about?

6.1.1. *The Application of Law and the ‘Gap’*

Legal scholars in the Anglo-American academia have addressed the problem that confronts the judge when he tries to apply a rule to a factual situation.²⁴⁵ This is the problem of the ‘gap’. What is this curious ‘gap’? One may well ask. In any individual

²⁴⁴ (B. Carra de Vaux, [J. Schacht]), and (A.-M. Goichon), “Hadd,” 20–21.

²⁴⁵ Mark Tebbit, *Philosophy of Law: An Introduction*, Third edition (Abingdon, Oxon [UK] ; New York: Routledge, 2017), 25.

case the decision maker can decide the particular dispute or question by referring to the facts of that case. However, the difficulty arises when the decision maker cannot be present at any case owing to the magnitude of the cases or his inability to be present at any or all cases due to his death, illness or mere human finitude. In view of such a context the arbiter would be compelled to produce a generalized rule that would aspire to include all those cases in its ambit. This, however, would lead to two difficulties. These would be the twin problems of *over-inclusion* and *under-inclusion*. Over-inclusion refers to the generalization where the rule covers more instances than are covered by the justification that underlies that rule. Consider the example of the rule 'No dogs allowed' in the context of a public establishment. The unstated justification here is that some or most dogs behave in a way so as to disturb the peace and annoy the patrons that frequent that establishment. This rule covers and therefore keeps out all dogs of all breeds, whether small or big, and whether well-behaved or unruly. Well-behaved dogs would represent an instance of over-inclusion by the rule with respect to the given justification. Such a dog does not upset customers but is barred from the establishment. On the other hand, a pet bear or a horse might be a bigger source of annoyance but are not covered under the rule. This represents a case when the rule is under-inclusive. If the decision maker decides a case and goes against the letter of the rule but in consonance with the spirit of the law, i.e., the principle behind the rule, he might be accused of breaking the law. If he does otherwise, keeps the rule intact but goes against the principle behind the rule, it is similarly a problem because he might be accused of being unjust. The problem here stems from the play between universals and particulars and whether the justificatory principle behind the rule is preferred instead of choosing the rule itself without concern for the principle behind it.

6.1.2. *Incomprehensiveness of a Text*

The abortion example shows how an issue can have nuances that cannot be expressed in public discourse in an effective way to reach resolution of conflict. The example of the zina ordinance and the abortion issue together demonstrate that the same is true of laws that are legislated to articulate the aspects of a controversy may suffer from the problem of the gap as certain criminal behavior might possibly 'fall through the cracks' of the aforementioned 'gap' while other non-culpable acts might be liable to prosecution under the rules expressed textually.

6.1.3. Tying the Judges' Hands

In such cases, the judge's role becomes rather critical and problematic. If he decides to go contrary to the rule and in line with the principle that he thinks is applicable he runs the risk of acting against the purposes of the lawmaker. When the case does not fit precisely under the ambit of the rule the judge must decide using his discretion and compare and contrast rules trying to fit the case under one rather than the other. Another concern, a more critical one, is that the judge might not decide according to the law but follow his own whims or even take after political or mercenary considerations. Therefore, any interpretation and decision-making needs to be somehow bound to the rules and the meanings. However, the nature of rules and language as we have seen is such that this is a very difficult proposition. In order to resolve this problem, the theory of legal formalism has been proposed. Of course, there are certain other notions that form part of the reasons behind the theory such as the belief that understand law as a system analogous to mathematics.

Legal Formalism is the idea that in any legal analysis the conclusion flows inexorably from the incontestable premises. It contends that "[o]nce the proper label was found for an object or action ('contract', 'property', 'trespass', and so on), the legal conclusion soon followed. The notion that most judicial decisions should or could be deduced from general concepts or general rules, with no attention to real-world conditions or consequences, critics labeled 'mechanical jurisprudence'.²⁴⁶ The theory of formalism in legal theory aspires to reduce discretion in the interpretation of legal rules aiming for certainty and thus predictability. It is 'held to be a preoccupation with the outward forms of the law as it is written, at the expense of the inner content or substance of the law'.²⁴⁷ The external form of the law is more important and worthy of attention than the internal substance which in the law's operation may be passed over in favor of the former.

[L]aw is interpreted as a formally closed system, governed by strict rules of inference and demonstrative proof. This has two main implications: (1) as the narrowing down of legal reasoning to the form of the deductive syllogism, a

²⁴⁶ Brian Bix, *Jurisprudence: Theory and Context*, 4. ed (London: Sweet & Maxwell, 2006), 179.

²⁴⁷ Tebbit, *Philosophy of Law*, 25.

formalistic approach is one that is guided by the belief that all legal problems can be resolved by framing them in syllogistic form, whereby major and minor premises yield a demonstrable conclusion; and (2) law is closed off to outside influences, so that its interpretation becomes a purely internal matter, to which other social factors are irrelevant.²⁴⁸

This formalistic perspective was in vogue across continents, in a transnational sense as similar notions took hold of the legal imagination in the United States, France and Germany.²⁴⁹

6.1.4. Weber and Kadijustiz

Weber's notion of kadijustiz is built upon the picture of a *qāḍī* sitting under a tree and dispensing arbitrary justice without recourse to general laws or systematic reasoning.²⁵⁰ This caricature has served to malign *fiqh* and the application of the Sharia as the *qāḍī* has come to be seen as the archetype of irrational and arbitrary jurisdiction. This legal regime is not formally rational but only substantively so. He states that "Pure Kadi-justice is represented in every prophetic dictum that follows the pattern: 'It is written . . . but I say unto you.'"²⁵¹ This seems to resemble casuistry or a caricature of it and overlooks the fact that this problem of judicial discretion and justification exists in the Western and European paradigm as well. How should judges be bound to a methodology so as to preclude their discretion making all decisions fall under the ambit of pre-positing rules?

6.2. The *Majalla*, *Fiqh*, and Casuistry

When it comes to the form of the *Majalla* it is often described as a book of *furū'* or substantive rules. These rules are in the form of graded cases that envision various circumstances and the values that are predicated on to those rules according to the respective circumstances. The question that is relevant here pertains to whether the formation of the *Majalla* in any way transforms the character of this type of reasoning

²⁴⁸ Tebbit, 25.

²⁴⁹ Karlson Preuß, "'Legal Formalism' and Western Legal Thought," *Jurisprudence*, September 15, 2022, 1–33, <https://doi.org/10.1080/20403313.2022.2112457>; Canale, "Many Faces."

²⁵⁰ See Max Weber, Guenther Roth, and Claus Wittich, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978), 806.

²⁵¹ Weber, Roth, and Wittich, 978.

away from the *furūʿ al fiqh* paradigm and towards the legal paradigm that is supposedly composed, for the most part, of rules that are not casuistic in character.

The *Majalla* came into being as a result of a political decision. It was formed on commission by a group of scholars under the tutelage of Ahmed Cevdet Paşa. This event has been characterized by some scholars roughly as the point at which there was a transformation or paradigm shift.²⁵² This was a seminal event in the sense that the Ottoman Empire occupied an important place in the world at this moment in time. Even after its demise the *Majalla* was adopted by several of its successor states such as Jordan, Iraq and Syria. This predominance meant that the *Majalla* had and still does have a great deal of influence in the domain of *fiqh*.²⁵³

With regards to the contention that the *Majalla* does not fit in the normal paradigm, Joseph Schacht's assertion regarding the nature of *fiqh* are illuminating and worth investigation because they lie at the root of this issue. Schacht unambiguously precludes *fiqh* or Islamic law from any change in the nature of codification because according to him any such process would inevitably distort *fiqh*. He states that "traditional Islamic law, being a doctrine and a method rather than a code... is by its nature incompatible with being codified, and every codification must subtly distort it."²⁵⁴

Schacht points out the casuistic nature of Islamic law which "concentrates not so much on disengaging the legally relevant elements of each case and subsuming it under general rules—as on establishing graded series of cases. The extreme links of two series proceeding from different concepts can closely approach and even almost coincide with each other, and then there is a sudden change in the legal effect".²⁵⁵ He elaborates on his assertion noting

casuistical treatment as a literary form, where the underlying rule is implied by the juxtaposition of parallel and particularly of contrasting cases; (3) casuistical decision of as many cases as possible, including purely imaginary ones, in order to cover all possibilities when their subsumption under general

²⁵² See Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York [N.Y.]: Columbia University Press, 2013); Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World."

²⁵³ See Chapter I: Introduction.

²⁵⁴ Joseph Schacht, "Problems of Modern Islamic Legislation," *Studia Islamica* 12 (1960): 108.

²⁵⁵ Schacht, *Introduction*, 205.

norms proves impossible; (4.) decisions of intricate cases which are difficult to decide on the basis of recognized rules. Some of these are, in fact, problems which had arisen in practice, but mostly they are questions designed as exercises in ingenuity and systematic speculation; some of the *hiyal* belong to this category.²⁵⁶

Here, the first observation that one can make about Schacht's understanding of Islamic law's casuistic character is that instead of abstracting certain features of a case and thereafter classifying it under a general rule (presumably along with other cases) Islamic law juxtaposes a succession of cases that are arranged in a particular way. This alludes to a different order and method in treating legal rules in that the derivation of explicit rules is not the objective of jurisprudential exercise; the calculated arrangement of cases to *implicitly* articulate the underlying rule is. Considering that the *Majalla* was an exercise in codification it would be relevant to investigate whether this so-called distortion came about when the *Majalla* came into being.

The 'Islamic law' that Schacht refers to would correspond to *furū' al fiqh* rather than *fiqh* in general.²⁵⁷ We can state this with some confidence when we look at another genre of *fiqh*, i.e. *qawā'id fiqhiyya* ninety-nine of which form the introductory section of the *Majalla* itself. The *furū' al fiqh* genre might be claimed to be the earliest one when it comes to classical Hanafi *fiqh*. Legal texts like *Qudūrī* and *Multaqā* are filled with such writing that can be more appropriately called moral reasoning. The *qawā'id fiqhiyya* genre, on the other hand, can be seen clearly to embody a different character, with maxims that lie on the other extreme of the case-principle divide.

These assertions provoke quite a few questions especially in the context of Joseph Schacht's afore-mentioned claim of the inability of Islamic law to be codified. The primary one is whether casuistry is the defining or essential characteristic of *fiqh*. Going further, one wonders what the nature of the foil against which Schacht is comparing Islamic law. Does law that is not *Islamic* have a different nature? Is it not casuistic for the most part? Having seen what *fiqh* looks like one would be eager to discover if other types of law are not of the same form.

²⁵⁶ See Efendi, *Mirat-i Mecelle-i Ahkâm-i Adliye*; Also see Appendix A in Has, S.S., "A Study of Ibrahim Al-Halabi with Special Reference to the Multaqa" (University of Edinburgh, 1981), 337–45, <http://hdl.handle.net/1842/7422> for a brief overview of the sources of the *Majalla*.

²⁵⁷ For *furū' al fiqh* see Akgündüz, "Fürû"; N. Calder, "Usul Al-Fikh."

It should be stated straightaway that casuistic reasoning is not the only form of reasoning used in *fiqh* texts. The genre of *furu al fiqh* is where one finds this type of reasoning in general. In fact, one could claim that the domain of *furu* is quintessentially casuistic. We will discuss this in more detail later on. When it comes to the compilation of the *Majalla* we see that it is a product of many *fiqh* sources, but especially the *multaqa al abhur*, *hidaya*, *fatawa al hindiyya*, *durr al mukhtar*; while the ninety-nine universal principles in the beginning of the *Majalla* are sourced, for the most part, from *ashbah wal nazair*. The last one is the odd one out, in that the principles or maxims represent a non-casuistical text.

6.2.1. Casuistry

Casuistry (from the latin *casūs* meaning cases) has been used in more than one meaning. The first is a moral reasoning associated with practical philosophy while the second is a pejorative used to indicate that the person impugned is guilty of using clever arguments that are false. Jonsen and Toulmin, in their *Abuse of Casuistry* have reclaimed casuistry from the depths of infamy where it had been cast after the critique of Blaise Pascal.²⁵⁸ After this onslaught by Pascal on the Jesuits' usage of casuistry, the latter had become a byword for specious reasoning leading to deception and outrageous conclusions where such dexterous mental gymnastics would allow for the worst excesses in the right circumstances. This criticism disgraced the entire enterprise of casuistry, dispensing of the baby, as it were, with the bathwater. Thereafter, casuistry became a byword for moral sophistry.

Jonsen and Toulmin connect casuistry to Aristotle's discussions on practical reasoning where he mentions two realms of knowledge. The first is the field of *theory* where certitude is the objective: this is the *episteme*. Here, arguments are atemporal, idealized and necessary. By atemporal he means that it is a statement that is true at all times, e.g. the Pythagoras theorem. 'Idealized' refers to an existence that cannot be found in the real world but only in the conceptual realm. An example would be a circle or a triangle. 'Necessary' would imply that the statement would follow necessarily from axioms

²⁵⁸ See Jonsen and Toulmin, *The Abuse of Casuistry*; For Pascal's critique see Blaise Pascal, *The Provincial Letters*, ed. Paul A. Boer Sr, trans. Thomas M'Crie, 2012.

given these were true. The second type of realm is the *practical*, where arguments are temporal, concrete and presumptive. A temporal argument is one that is true at any point in time but not always; an orange is sweet only at certain times of the year. The truth of concrete arguments is experiential and specific to particular instances. A specific orange may be sweet but no one can idealize it stating that it is more or less of an orange. A presumptive argument may be rebutted and found false. Similarly, an orange from a particular bunch may be presumably sweet but may later be found out to be bitter.

Casuistical reasoning tends towards the practical end of the spectrum while relying upon rules or principles that would associate with the other extreme. It is moral philosophy that espouses generalizations; like the scientist whose vocation is nomothetic. He performs experiments in order to derive or abstract higher generalizable laws. On the other hand, the medical practitioner is a casuist deals with cases and discriminates between them based upon the circumstances particular to each case and his task is thus ideographic.

The process that casuistry takes starts with the statement of a case where the moral value attached is easily discernible. Then, other cases are stated which are different from the earlier cases by degrees. The degree of difference of the successive cases from the former ones determines the weight of the norm or the moral obligation that attaches to each. Jonsen explains that “The strength of the casuists’ method lay in an appreciation of exceptions and excuses generated by different circumstances; the weakness lay in the absence of any theoretically established boundaries of this appreciation.”²⁵⁹

How does one come to realize that a certain text uses casuistic reasoning? Is there a particular form that casuistical arguments take? One source states that such reasoning can be discerned from its conditional form where the case under consideration is preceded by an ‘if’ or a ‘when’. The judgment regarding such a case then follows after

²⁵⁹ Albert R. Jonsen (1987), “Casuistry,” in *Encyclopedia of Religion*, ed. Lindsay Jones, Mircea Eliade, and Charles J Adams (Detroit: Macmillan Reference USA, 2005), 1456.

a ‘then’.²⁶⁰ This conditional indicates the casuistic form. Casuistic reasoning can be contrasted with the apodictic; the linguistic form of commands (*’awāmir*, sing. *’amr*) and prohibitions (*nawāhī*, sing. *nahī*) can be mostly classified as apodictic.

Casuistry embodies practical reasoning more than it does theoretical reasoning. In the latter, arguments are constructed in a way that any circumstances that are proximate to when and where they are offered are irrelevant and they are provided with a type of certainty that is independent of their immediate context. The argument flows from the universal principles that are the starting point – the major premise – towards the particular case that has precipitated the argument – the minor premise – in a downward fashion (see Figure 5). The conclusion flows necessarily from the two premises.²⁶¹

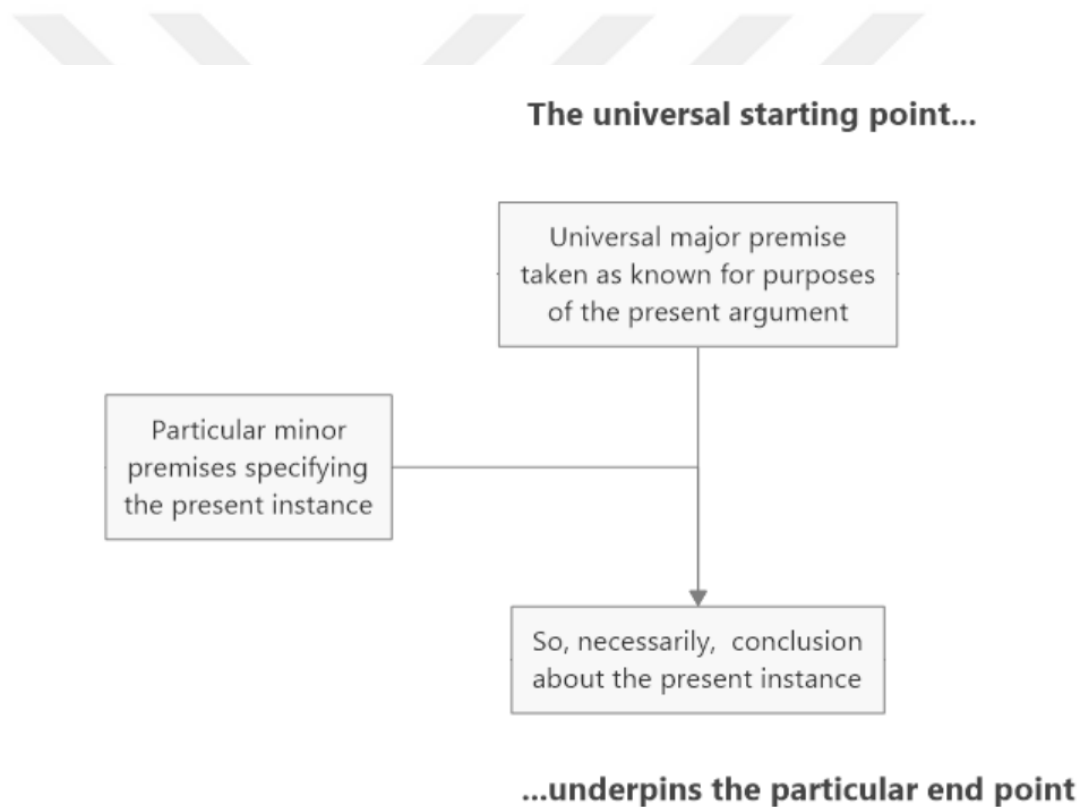


Figure 7. Theoretical Reasoning

Source: *The Abuse of Casuistry*, 1988

Practical arguments, on the other hand, are affected by a range of elements and the

²⁶⁰ A. Marzal, "Mari Clauses in 'Casuistic' and 'Apodictic' Styles (Part I)," *The Catholic Biblical Quarterly* 33, no. 3 (1971): 334.

²⁶¹ Jonsen and Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning*, 34–35.

context here is all-important. The experience gained working with earlier occasions is brought to bear upon the present problem and earlier procedures are reapplied depending on how closely the present case resembles those of the earlier paradigmatic cases that have been resolved. In this sort of reasoning, there is a horizontal movement from the outcomes of such precedents towards resolutions of present problems. Noteworthy here is the provisional nature of the conclusion that is reached. This may be rebutted by circumstances that serve to make the present case dissimilar or exceptional to the precedent that was being looked towards for the grounds of resolution. (Figure 6) Thus, any conclusion in practical reasoning is presumptive. In other words, the conclusion is not of a nature that is certain; it is probabilistic.

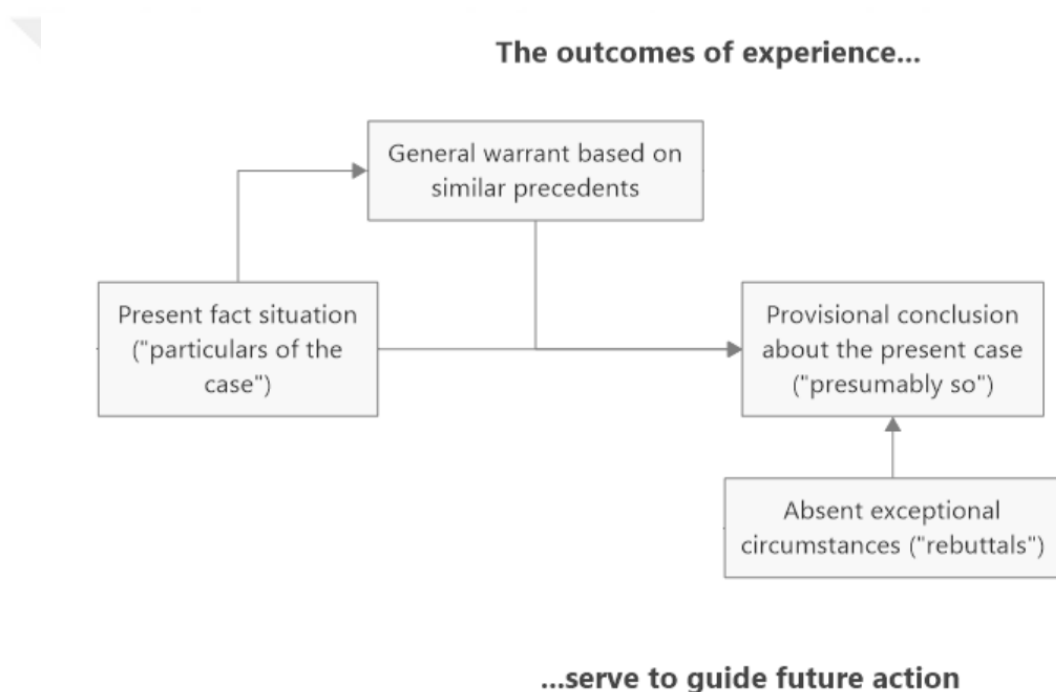


Figure 8. Practical Reasoning

Source: The Abuse of Casuistry, 1988

6.2.2. Type of Arguments in Casuistry

The types of reasoning used in casuistic reasoning may be classified in terms of two reasoning forms that are detailed in the books of classical logic (*manṭiq*) and *fiqh*. In his *Mi'yar al-Fiqh fī Fann al-Manṭiq* Ghazali distinguishes between two types of *qiyās*:

qiyās al ‘illa and *qiyās al dalāla*.²⁶² These are the terms as used by the jurists of *fiqh* whilst the same concepts are expressed as *burhān limmī* and *burhān innī* respectively in the usage of the experts in logic. In his *Mustasfā*, Ghazali explains the *burhān ‘illa*, as he calls it is the inference that goes from the cause to the effect as the existence of flames imply the presence of smoke. Then he distinguishes it from the *burhān dalāla* where the effect signifies the cause, e.g., the smoke implies the existence of fire. There is a relation of implication between the cause and the effect or the effective rationale (*‘illā*) and the consequence (*talāzum*) meaning that sometimes the former implies the latter necessarily and vice versa.²⁶³ An interesting addition here, is the argument where one effect (*ma‘lūl*) implies another. This is to say that one effect implies another because they share the same cause. This resembles casuistry in the way that the judgement for one case can be posited for another which shares the former’s cause. Thus, one case resembles another and the *ḥukm* is the same for both. Another mechanism that resembles casuistry is what is known as *tamthīl* where there is a *ḥukm* for a specific particular it is transferred to another one which resembles it with regard to an aspect of it.²⁶⁴

6.3. *Fiqh* and Casuistry

As referred to the above, *fiqh* in general, and *furu al fiqh* in particular, is casuistic by its nature. Looking at a few examples will help in understanding how that is and how it differs, if it does, from a non-casuistical type of law. The casuistical form is readily apparent in several places in *Qudūrī* as we can see below

Whoever purchases a pile of food for one hundred dirhams, on the presumption that it is one hundred qafizs, then finds it to be less than that, the purchaser has a choice: if he wants, he may take what there is with its share of the price, or if he wants, he may cancel the sale. If he finds it to be more than that, then the excess is for the seller.

²⁶² For Qiyas see Wizarat al-awqaf wa-s-suun al-islamiyya Kuwait., “Qiyas,” in *al-Mawsu‘a al-fiqhiyya* (Kairo: Dar as-safwa lit-taba‘a wa-n-nasr wa-t-tawzi’, 1986); Muhammad ‘Abd al-Rahman. Mar‘ashli, ed., “Qiyas,” in *Kitab al-Ta‘rifat : ta‘rifat mustalahat ‘ulum al-Quran, fiqh, lughah, falsafah, tasawwuf, makayil, mawazin, maqayis rataba ‘alā al-huruf alfabaiyan* (Beirut: Dar al-Nafais, 2012); Muhammad Ala ibn Ali. Tahanawi Ajam, Rafiq., Khalidi, Abdallah al-, “Qiyas,” in *Mawsu‘at Kashaf Istilahat al-Funun Wa-al-‘ulum*, ed. Rafik Al Ajam (Beirut, 1996). Al-Ghazali, *Mi‘yār Al-‘ilm Fī Fann al-Manṭiq*, 222.

²⁶³ Ghazzali et al., *al-Mustasfa min ilmi al usul* (Beirut, Lebanon: Dar al-Arqam, 1994), 129–30.

²⁶⁴ Al-Ghazali, *Mi‘yār Al-‘ilm Fī Fann al-Manṭiq*, 154.

Whoever buys cloth on the assumption that it is ten cubits [in length], for ten dirhams, or [buys] land on the assumption it is one hundred cubits [in length] for one hundred dirhams, then finds it to be less than that, the buyer has the choice: if he wants, he may take it at the full price [of ten dirhams], or if he wants, he may leave it.

If he finds it to be more than the cubits he had mentioned, then [the excess] is for the buyer and the seller has no choice [but to give it up at that price].

If [the seller] says, “I have sold it to you such that it is one hundred cubits for [the price of] one hundred dirhams, each cubit being for one dirham,” and if [the buyer] finds it less [than that], he has the choice: if he wants, he may take of it according to its share of the price, or if he wants, he may leave it.

If, however, he finds it to be more, then he has the choice: if he wants, he may take it all, [on the basis of] each cubit for one dirham, or if he wants, he may cancel the sale.

If [the seller] says, “I have sold you this bale, on the basis that it [consists of] ten pieces of fabric, for one hundred dirhams, each piece of fabric being ten [dirhams],” then if [the buyer] finds them to be less [than that], the sale is permitted according to its share, but if he finds them to be more, then the sale is invalid.²⁶⁵

In contrast to the casuistic text from *Quduri*, a few of the *Majalla* maxims are as follows

- It is a fundamental principle that words shall be construed literally.²⁶⁶
- No attention shall be paid to inference (*dalāla*) in the face of a clear statement (*taṣrīḥ*).²⁶⁷
- Where the text is clear (*naṣ*), there is no room for interpretative effort (*ijtihād*).²⁶⁸
- When the literal meaning cannot be applied, the metaphorical sense (*majāz*) may be used.²⁶⁹
- A reference to part of an indivisible thing is regarded as a reference to the whole.²⁷⁰
- The burden is in proportion to the benefit and the benefit to the burden.²⁷¹

It is apparent that these maxims are of a nature that inclines largely towards an abstract,

²⁶⁵ Ahmad ibn Muhammad Quduri and Tahir Mahmood Kiani, *The Mukhtasar of Imam Abu'l-Husayn Ahmad ibn Muhammad ibn Ahmad ibn Ja'far ibn Hamdan al-Quduri al-Baghdadi (362 AH-428 AH): a manual of Islamic law according to the Hanafi School* (London: Ta-Ha, 2010), 169–70.

²⁶⁶ Article 12

²⁶⁷ Article 13

²⁶⁸ Article 14

²⁶⁹ Article 61

²⁷⁰ Article 63

²⁷¹ Article 88

universal form that is atemporal, idealized and necessary. They are, thus, apodictic in their form. When it comes to *fiqh* in practice there is a way in which theory and practice intersect with each other in producing a form of reasoning. There is a way in which the jurist uses generalizations which he derives from the text and applies it to the particular situation at hand which is there any form of the responsum. This is the role of the jurist the role of the judge is a bit different. The realm which we are interested in as is the realm of legislation and where this occurs in the realm of Islamic law. When Schacht says that Islamic law is casuistic this contention overlooks the division of labor in the vocation of *fiqh*. A comparison with what happens in a hospital would be valuable. What does it mean to be interested in some case scientifically versus clinically? Is the former somehow interested in developing theory as opposed to providing a way out or a solution for the problem at hand? The doctor that diagnoses the patient is not interested for the most part in what treatment to provide her but rather her interests are largely for research. The doctor that treats the patient performs in the realm of practical reasoning and needs to use casuistry. If we consider now the *mufī* in place of the diagnostic would that be a fair analogy? Where does the *qāḍī* stand in this picture? Before considering these questions, it would be more relevant to look at the nature of a case.

6.3.1. Cases?

What is the nature of a case? If cases as they pertain to different situations are unlike, it would not make sense to treat them in a like manner.

A case is a confluence of persons and actions in a time and a place, all of which can be given names and dates. A case, we say, is concrete as distinguished from abstract because it represents the congealing, the coalescence, or the growing together (in Latin, *concrecere*) of many circumstances. Each case is unique in its circumstances, yet each case is similar in type to other cases and can, therefore, be compared and contrasted. Cases can be posed at various levels of concreteness. Some will be composed of quite specific persons, times, and places; others will describe an event or practice in more diffuse terms, such as the "case of the Bosnian war" or the "case of medical experimentation." I refer to cases of the latter sort as "great cases,"²⁷²

²⁷² Albert R. Jonsen, "Casuistry: An Alternative or Complement to Principles?," *Kennedy Institute of Ethics Journal* 5, no. 3 (1995): 241–42, <https://doi.org/10.1353/ken.0.0016>.

Cases discussed by the *muftī* are universals that are limited to and conditional upon certain circumstances specified in the *istaftā* (question posed to the *muftī*). Cases ruled upon by judges or *qāḍīs* are dependent upon particulars that apply to certain specific named individuals. If one were to set these case types on a spectrum, one would discover that on one extreme would be legal axioms or *qawā'id fiqhiyya* which, in their form, are rather “*idealized, atemporal, and necessary*”.²⁷³ On the other extreme is the *qāḍī*'s *ḥukm* which might be termed “*concrete, temporal, and presumptive*” considering that it applies only to the relevant individual or individuals, who are the ones that the judgment addresses (*muqḍī 'alaih*).²⁷⁴ I would like to term the former, theoretical cases and the latter particularized cases. We see, therefore, that each case is of a different nature depending upon the role that the individual plays in the legal system. In order to understand their respective roles, we first need to understand how the paradigmatic cases have diachronically developed in *fiqh* history.

6.4. The Development of *Fiqh*

The Qur'an is the foundational text in Islam. Being the literal words of God, it claims to be guidance for the whole of mankind and especially those that accept its message. All verses in the Qur'an do not have bearing in a legal sense but a minority do. Individuals if they obey the commandments and refrain from what is prohibited will achieve the best life on the earth and be successful in the Hereafter. Thus, the Qur'an embodies the *Sharī'a*, the will of the Almighty and way to eternal success. However, a text by itself cannot speak but it needs to be articulated by a human being. This is why the person of the Prophet ﷺ is so crucial. The person of the Prophet ﷺ is the cornerstone of *fiqh*. By living a life that is to be emulated because it presents the highest archetype which God loves and desires for His human creation, the Prophet's ﷺ life is the starting point not only for Islam but for its laws. The embodiment of values and norms in a human life is a very interesting case because here rules are not being created by lawmakers out of thin air based on experience or received wisdoms but there is a lived life that manifests the prescriptive rules that should order society. If it were only the words in the Qur'an that were present in the world, they would not suffice as mere

²⁷³ Jonsen and Toulmin, *The Abuse of Casuistry*, 26–27.

²⁷⁴ Ibid, 27–28.

textual rules need to be interpreted before they may be used as guidelines for human conduct. Furthermore, the Qur'an being addressed to the whole of mankind serves to produce universal rules, the primary reason being that the addressee is not a single individual. This is where the embodiment of the rules in the life of the Prophet ﷺ becomes vital. By acting upon those prescriptions, the Prophet ﷺ embodied those rules in the best humanly possible way. The Prophet's ﷺ wife Aisha declared this in her statement where she quoted a verse from the Qur'an affirming that "His morals are the Qur'an".²⁷⁵ Now, when we look at how rules can run the gamut from the universal, axiomatic and theoretical to the particular and practical, we go from *episteme* to *phronesis*.²⁷⁶ The translation of *episteme* to *phronesis* is what the example of the Prophet ﷺ accomplishes. The life experiences the he underwent, the individuals that he encountered and his utterances, actions and the occasions when he was silent offer exemplary paradigmatic cases which serve as concrete, clear rules for any individual that encounters those very situations.

The companions of the Prophet ﷺ, in a time when there was no *fiqh*, in the sense that we know today and which developed after a few generations, used to take his example as the source of their guiding principles. When the Prophet ﷺ passed away, the companions served the same exemplary function for the next generation, that of the Successors (*tabi'ūn*). The next generation after that (*tābi' al tabi'ūn*) was the one that encountered difficulties because unlike the Successors who attached themselves to individual Companions in discipleship, they came across multiple successors and had to decide between multiple individual experiences of the Successor generation in cases of apparent conflict of rules. What is clear is that instead of textual rules it was experience with lived lives that provided guidance to the early generations. The translation of those lives to texts is when the problem starts to manifest itself.

We see here that the Prophetic example serves to provide clear instances or paradigmatic cases upon which the jurists build the *fiqh* structure. Is there a 'gap' in *fiqh* similar to when a decision maker in law tries to come up with textual rules to preempt potential causes for conflict? The *faqīh* or jurist expands upon the paradigmatic Prophetic cases and setting them side by side in order that the principles behind the

²⁷⁵ Qur'an (68:4): And you are truly of outstanding character. The *hadīth* is from Sahih Muslim (746).

²⁷⁶ Jonsen and Toulmin, *The Abuse of Casuistry*, 26.

rules become apparent, as we see in the example from *Qudūrī*.

6.5. Two Levels of ‘Gap’

We have seen how the human limits of a decision maker mean that when a state or large political unit is imagined he must necessarily resort to more generalized rules rather than the particularized decisions that he would make for a parochial context because he cannot be everywhere at the same time. This means that such generalized rules contain the potential for incomprehension of many new cases.

Since the Prophet ﷺ lived a finite life the paradigmatic cases that can be extracted therefrom are also finite. What *fiqh* does is that the rules that can be created, in the form of *aḥkām taklīfī* are laid out in texts and those rules are later processed to provide more general or more specific arguments. The specific paradigmatic cases lead to more general rules which in turn lead to specific rulings when the *qāḍī* makes a judicial pronouncement in the form of a *ḥukm al qāḍī*.

At the first level, the jurist endeavors to discover norms from the available data in the shape of the Prophet’s life ﷺ. Here the jurist would necessarily be confronted with a gap when he tries to create the structure of *fiqh*. He plays here the role of decision maker. The paradigmatic cases of the Prophetic example would not suffice for new circumstances and to fill in those gaps the jurist would have to make generalizations stemming from those paradigms.²⁷⁷

When it comes to the *qāḍī* he would have a similar problem but this time he would be susceptible to the same shortcomings that the decision maker in the Western legal example is. Thus, in the *fiqh* example there is a double gap that exists: both at the level of the jurist and that of the judge (Figure 9). For *fiqh* the discovery of law can be contrasted with how law is ‘made’ in the Western example. This distinction is a crucial one and shall be addressed in further detail in the next chapter.

²⁷⁷ The primary mechanism used here would be analogical reasoning.

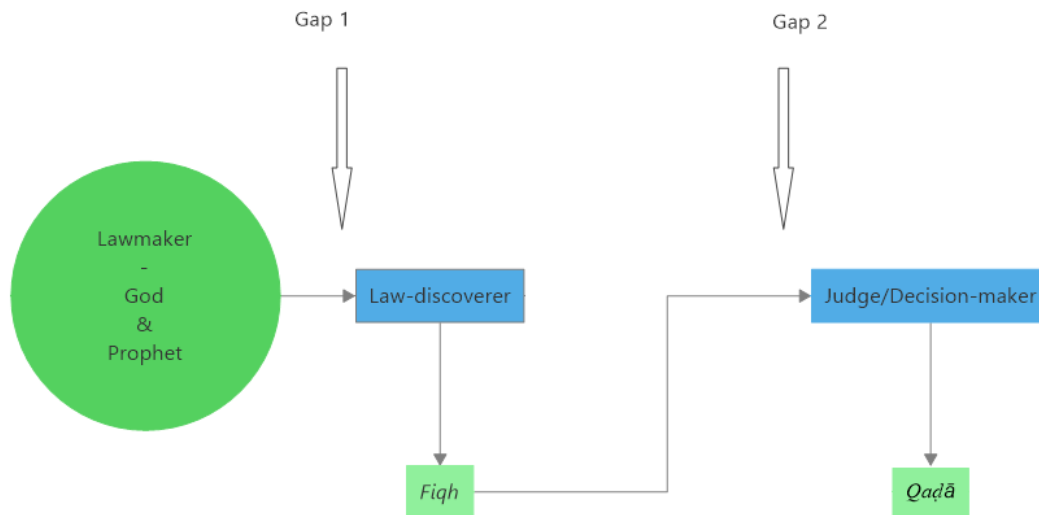


Figure 9. ‘Gaps’ in *Fiqh*

The author-jurist (*muṣannif*) is the one primarily involved in the discovery of law and the *mufī* to a lesser extent as the latter depends on the former’s works to produce his *ḥukm*. This *fiqh* production resembles practical reasoning more than theoretical reasoning as the *ḥukm* produced is provisional: only God knows the correct ruling and there remains, even though slight, the possibility of error. Ibn Nujaim affirms, in a statement often attributed to Shafī‘ī, “When we are asked regarding our opinion and the opinions of those who differ with us in *furū*’, it is upon us to say that our opinion is correct with the possibility of being wrong and the opinion of those who differ with us is errant with the possibility of being correct.”²⁷⁸ When it comes to *fiqh* the text is not *qaṭ’ī* but *ẓannī* and acceptance of this fallibility, however slight, gives due deference to the Will of God that exists in the mind of the Divine, in appreciation of its absolute knowledge. The actual justification of the rules derived from the primary sources, in most instances, is known to God alone. For the Western lawyer, law is a human construct and the legislator does not discover law but creates it. This configuration means that the gap comes into play only at the level of the decision maker who inevitably engages in practical reasoning as explained above (Figure 8).

²⁷⁸ Ibn Nujaim, *Al-Ashbah Wa’l-Nazai’r ‘Ala Madhhab Abi Hanifa Al-Nu’man*. (Beirut: Dar al Kutub al ‘Ilmiyya, 1993), 330.

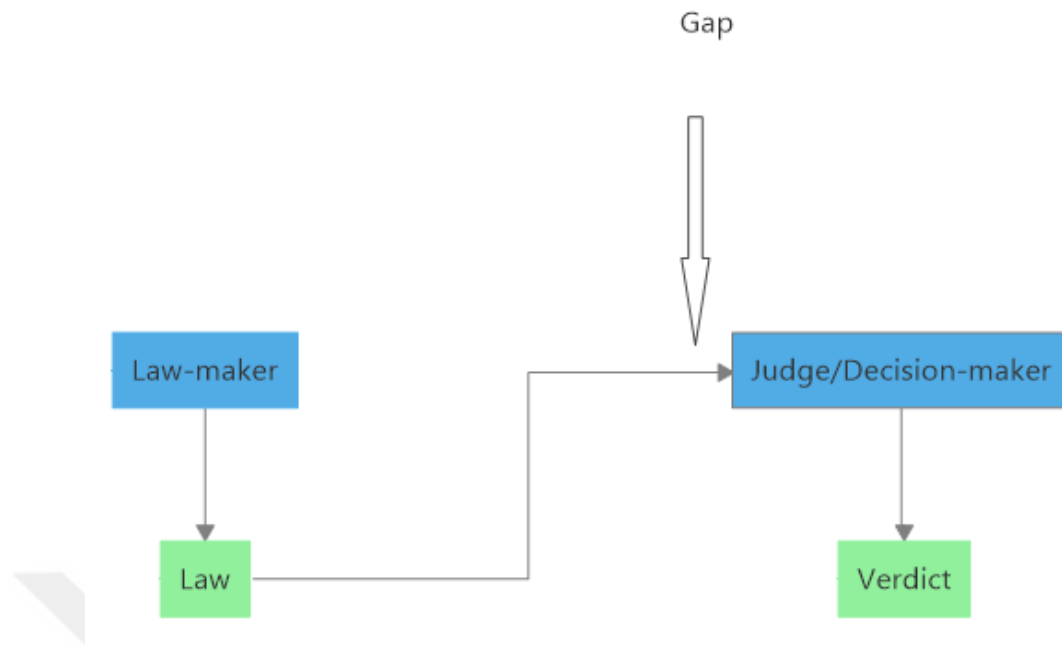


Figure 10. ‘Gap’ in Law

The ‘gap’ is an inevitable feature of any legal system and is predicated upon human limitations. What does the presence of two occasions of it in the *fiqh* paradigm tell us? One might conclude in haste that this means that such a paradigm is susceptible to a greater degree of uncertainty or other kind of shortcoming. However, the reason for the first gap lies in the presence of a source of norms that exists independent of the law-discoverer. This can be contrasted with the lawmaker who is not bound to any transcendent source that does not have human origins. (Figure 10). The first level of gap implies that as long as the emergent *fiqh* rules are the product of sound methodological principles and the epistemic link with the Divine sources is not disturbed those rules would invoke Divine authority.

6.6. Divinely Instituted Paradigms

The person of the Prophet ﷺ is critical in understanding how *fiqh* differs from law. The epitomic life lived across twenty-three years but where he assumed roles as diverse as that of a husband, father, judge, military commander, and ruler has been preserved in a unique manner through inimitable methods and not replicated by any

other civilization. Such detailed evidence exists which has come down through time to the contemporary age that we know more about the life of the Prophet ﷺ than any other individual in history. This means that his actions, words and even his silences are a source for a system of norms which is *fiqh*. This system not only provides the effective rationale or *'illa* for many of the rulings or *aḥkām* but where the *'illa* is not available the jurists may look for it.

The example of the Prophet ﷺ serves as the basis of the legal system is interesting as it posits a paradigmatic life at the apex of the system, at the point which is the source of all norms. In other words, when it comes to the 'gap' in *fiqh* system, the presence of a human life that is meticulously documented and which in itself has run the gamut of human experience serves as a rich source for the jurists who seek to create more universal norms from the ones of Prophetic experience. This clearly contrasts with the position of the lawmaker in the other paradigm who has only prior human experience and calculated conjecture for possible future behavior to arrive at universally encompassing legislation (see Figure 10). Divine knowledge of the future expressed through revelation can pre-empt many of the human dilemmas that may possibly occur in individual cases and contexts.

Since this is a complicated matter and the issues articulated earlier are founded upon problem that needs more elaborate explanation I will try and develop it in the next chapter.

6.7. Conclusion

It is evident that the derivation of *fiqh* is distinct from the creation of law. Unlike the law paradigm, which involves lawmakers creating laws in anticipation of potential 'gaps' and where it is left to the judge to deal with any gaps that emerge in individual cases, *fiqh* presents two instances where such a gap may arise. This contrast can be attributed to the Prophetic example, which serves as the primary source and reference for any discovered laws. Consequently, *fiqh* offers a more comprehensive elaboration of life's details, making it more thorough and founded on stronger moral principles than law. For this reason, a *qāḍī's* task is simplified when referencing *fiqh* rather than exclusively making legislation as the source for his reasoning.

CHAPTER SEVEN

THE MAJALLA AND THE USES OF RULES II: PERFORMATIVITY

7.1. Introduction

The *Majalla* has been well studied with respect to its substantive content as well as its historical context. However, the implications of having a text such as the *Majalla* as a positive legislation in the contemporary world has not been examined in any depth. The form and function of the *Majalla* and its enactment are topics that require a more profound philosophical discussion if we are to understand the implications of this seminal text. The first feature of the *Majalla* is its enactment by political authority. This is interesting insomuch as *fiqh* texts were rarely, if ever, *legislated* by the political authority of the time.²⁷⁹

This brings us to an examination of the issue of what sort of reality *fiqh* holds in the world. Also connected are similar questions pertaining to the pronouncements of the *qāḍī* and the *mufīī*. Is the *Majalla* a text that is performative or does it just describe the rules already in existence? How does the utterance of the ruler differ when compared to that of the *mufīī* or the *qāḍī* and what are the implications of these differences? What are the lines that separate the political from the legal in the *Sharī'a*, if any? Would a text that is a creation rather than a description of a past reality have political implications? In this chapter I will try and develop the argument that I started in Chapters Two and Six, starting with the existential dimension of *fiqh* and then proceeding to how the *fiqh* paradigm allows for the creation of new realities.

In Chapter Two, I discussed the ontology of *fiqh*. According to what was stated there, *fiqh*, in the realm of texts or in the mind, signifies the reality but does not construct it as legislation does in a Western legal paradigm. The existence of *fiqh* in the domain of *diyāna* before it is realized in the domain of *qaḍā* has also been mentioned earlier. The norms of *fiqh* exist in three domains, i.e., texts, minds of individuals and, lastly, in

²⁷⁹ See Wood, "Legislation as an Instrument of Islamic Law."

another kind of texts, which have a certain different sort of status, infused with an authority imparted by the ruler (or any executive figure or body). These norms are then realized or brought into a different kind of existence from the previous one that is on the level of potentiality. This latter existence manifests in the actions of individuals (*a‘māl* sing. *‘aml*), or when it appears in the different types of *ḥukm*: the *mufīṭ*’s responsum and the *qāḍī*’s verdict. I include the *ḥukm waḍ‘ī* under the category of the subject’s actions because it is individuals who through their agency and under the prescribed conditions, occasion them. This separation of the norms from their realization is depicted in Figure 11. *Fiqh* norms exist potentially when the legal subject or *mukallif* has not yet acted upon them and are realized when he does.²⁸⁰

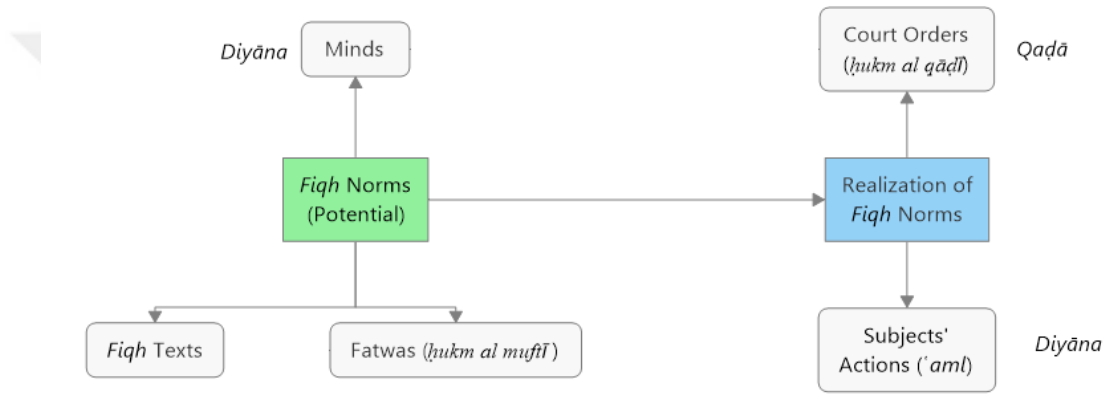


Figure 11. Separation of *Fiqh* Norms from their Realization from the Perspective of Subjects

Considering this paradigm, there are certain other niceties that must be addressed. What sort of reality do actions in this paradigm *reflect* or *create*? An individual working within such a paradigm may, through his utterance, in text or deed, either report what that reality is or augment that reality through further construction through his agency. In *The Construction of Social Reality*, Searle depicts how ‘institutional facts’ or Y’s are created when certain ‘performative’ acts are made in a particular context C, so that a ‘brute fact’ or a physical object X is now considered Y.²⁸¹ The *ḥukm waḍ‘ī* along with the *ḥukm al qāḍī* resembles performative acts under the *Sharia*. Reinhart explains this as follows

²⁸⁰ The mukallif is obliged through taklīf or the obligation that God puts upon those that are Muslim, of sane mind and of the age of maturity. For details see D. Gimaret, “Taklif,” in *Encyclopaedia of Islam*, 2nd ed., vol. 10, 13 vols., Encyclopaedia of Islam (Brill, n.d.), 138–39; Mustafa Sinanoğlu, “Teklif,” in *TDV İslâm Ansiklopedisi* (TDV İslâm Araştırmaları Merkezi, 2011).

²⁸¹ Searle, *The Construction of Social Reality*, 43–52.

Both the determination of judicial fact (1) and the determination of validity (2) have in common that they are “performative” [. . .] In another sense both kinds of determination are “indexical,” that is, they point from the visible [. . .] to the invisible or the more abstract [. . .]. As indices or signs, both kinds of determination are accepted conventions. They do not guarantee that the *qāḍī*’s judgment is a reflection of actual truth, for that is God’s knowledge alone. Nevertheless, the *qāḍī*’s determination must be acted upon.²⁸²

Let us start with the notion of performativity and how it has been understood in the Islamic tradition.

7.2. Performativity and *Inshāʾ*

A performative utterance is a statement that performs an action or brings about a change in the world by virtue of being spoken. For example, saying “I promise” when making a commitment or “I do” during a wedding ceremony, are performative utterances because they create obligations on the speaker: respectively, to fulfil the promise and to actually create the marriage bond. Other examples of performative utterances include “I apologize,” “I pronounce you married,” and “I declare the meeting adjourned.” Similarly, when a judge says “I sentence you to 10 years in prison,” the sentence is immediately enacted. Performative utterances are context-dependent, meaning that they can only be effective in certain situations and under certain conditions. These are called felicity conditions by Austin.²⁸³ There must be a procedure where certain words have certain effects conventionally. The individuals and circumstances must be as specified in the procedure. This procedure must be performed both correctly and completely with the person uttering the performative doing so with the specified intention.

McCormick conceptualizes ‘institutions of law’ such as contract, trust and so on as being constituted and regulated by three types of rules: institutive, consequential and terminative rules.²⁸⁴ Institutive rules are those which operate to create an instance of

²⁸² Reinhart, “Islamic Law as Islamic Ethics,” 194.

²⁸³ J. L. Austin, *How to Do Things with Words* (Cambridge: Harvard University Press, 1962), 14–15.

²⁸⁴ Neil MacComick, “Law as Institutional Fact,” in *An Institutional Theory of Law: New Approaches to Legal Positivism*, ed. Neil MacCormick and Ota Weinberger (Dordrecht: Springer Netherlands, 1986), 52–53.

the institution to which they are essential. For that institution there are certain consequential rules that attain operation when the institution comes into existence. Lastly, are terminative rules that provide for the mechanism to discontinue that institution. This categorization of rules that regulate the formation and continuation of an institution are directly comparable to the *ḥukm waqʿī*.²⁸⁵ A determination of this sort of *ḥukm* implies that an act of sale, for example, is valid (*ṣaḥīḥ*) if it meets the conditions for validity, such as the presence of acceptance and offer, and defective (*fāsid*) or invalid (*bāṭil*) if it does not.

7.2.1. *Inshāʾ*

The notion of *inshāʾ* has been present in the Islamic scholarly discourse since long. Starting out as a term of art in *fiqh* it passed into the linguistic sciences through the work of Ibn Hajib.²⁸⁶ *Inshāʾ* has been used in a variety of senses and meanings but the relevant one here would be the sense that it has in *fiqh*. The distinction between *inshāʾ* and *khabr* can be in four aspects.

1. *Inshāʾ* does not have the capacity for confirmation (*tasdīq*) or repudiation (*takdhīb*).
2. *Inshāʾ* does not have a meaning that corresponds exactly to its words and comes into existence simultaneously with it unlike *khabr*.
3. For *inshāʾ* speech does not have an external referent that corresponds to it unlike *khabr* which does have such a referent.
4. In the case of *inshāʾ* it is itself the cause (*sabab*) for its referent, while *khabr* is the manifestation (*muzhir*) of its referent.²⁸⁷

How does *inshāʾ* relate to performative utterances? *Inshāʾ* can be said to subsume the concept of performative utterance which was discovered in the Western academia by Austin in his *How to Do Things with Words*.²⁸⁸ It is a more inclusive concept and subsumes other concepts like demand (*ṭalab*): it is constitutive of all the types of

²⁸⁵ See Chapter Two.

²⁸⁶ C. H. M. Versteegh and Mushira Eid, eds., *Encyclopedia of Arabic Language and Linguistics* (Leiden ; Boston: Brill, 2005), 359.

²⁸⁷ ‘Abd al-Raḥīm ibn al-Ḥasan Isnawī and ‘Abd Allāh ibn ‘Umar Bayḍāwī, *Nihāyat al-sūl fī sharḥ minḥāj al-uṣūl / Wa-ma’ahu ḥawāshiyuhu al-mufīdah al-musammāh Sullam al-wuṣūl, li-sharḥ Nihāyat al-Sūl ; Jamāl al-Dīn ‘Abd al-Raḥīm ibn al-Ḥasan al-Isnawī*, vol. 2 (Bayrūt: ‘Ālam al-Kutub, 1982), 161.

²⁸⁸ Austin, *How to Do Things with Words*.

utterance other than *khabr*.

7.3. Is *Qaḍā Inshā'* or *Khabr*?

Let us take the example of *nikah* – which is a type of action that straddles the categories of transaction (*mu'āmalah*) and worship (*'ibādah*). The *fiqh* rule states that there needs to be an offer and acceptance for the *nikah* to be valid. Suppose that a Muslim man of sound mind and ripe age comes together with another who is the guardian of a Muslim woman of sound age and ripe age and the latter says to the former, “I married you to my ward”. The latter replies, “I accepted.” This dialogue takes place in the presence of two Muslim males also of sound mind and mature age. The presence of the witnesses and the capacity of the parties are necessary conditions which enable the utterances of the two parties to the contract, the groom and the bride, through her agent, to create a reality that did not exist before, the legally valid contract of marriage. In these particular settings, these particular words have a magical effect: a union of two with each accruing rights and responsibilities with respect to the other.

This example is an utterance originating in individuals who are subject to the rules of *fiqh*. This is one of several possibilities where individuals interact with *fiqh* in different ways. Other situations could be utterances by the ruler, *qāḍī*, *muftī*, author-jurist or law professor.²⁸⁹

When these words are uttered, this legal and indeed *shar'ī* reality comes into being. This reality exists not only in the temporal world but is present also in the world of prescription i.e., both in the courts of this world and the court of the Hereafter it attains a ‘real’ existence. Thus, in the case of a dispute, were one to arise, and the *qāḍī* declared the *nikah* contract to be valid the *qāḍī*’s pronouncement would be a declaration that this reality exists. This judgement would not create a new reality but merely inform as to the pre-existence of the said rights. This is evident from the commentary on clause 1801 of the *Majalla* as stated by Rashid Pasha.

Qaḍā is from the category of *ikhbār*. Meaning that the *qāḍī* gives a report

²⁸⁹ Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge ; New York: Cambridge University Press, 2009), 8–13.

(*khabr*) of the right accruing to the party in favour of whom the judgement is given (*maḥkūm lahu*) as against whom it is given (*maḥkūm alaihi*). Correspondingly, he does not establish a new right for the *maḥkūm lahu* through the *ḥukm*. If *qāḍī* had been from the category of *inshāʾ* it would have been necessary for it not to acquiesce to limitation (*taqyīd*) and specification (*takhaṣṣuṣ*).²⁹⁰

This refers to the *ḥukm* of the *qāḍī* and how it can be specified by the ruler in certain ways. The argument is that such a *ḥukm* is not, in fact, an origination, but merely a report or description of the rule that already exists. To bring a rule into existence would be to establish or affirmatively assert (*ithbāt*) or originate (*inshāʾ*) it by uttering it in specific circumstances.

Now, the *Majalla* also cites a rule stating that the ruling of the *qāḍī* may be specified or restricted, meaning that the powers of that judge may be limited with respect to time, place and even with respect to certain disputes.²⁹¹ This ability to restrict the powers of the judge stems from the power of the ruler as principal over the judge who is his agent whereby the former has the right to bind the latter in ways that the principal prescribes and this limitation extends to the functions of the *qāḍī*. From this principle, Rashid Pasha derives the second principle that pronouncement of the judge is a mere report and not an original utterance creating reality. The utterance of the judge is by nature of his subservience to his principal also an utterance that inferior, as it were, describing the right of one of the parties as against the other. The resultant question would be to ask what is the location of the creation of the original right. Was the right created when the text of the Qurʾan was revealed and the Divine revelation served to originate all rights in the world? Or was it when the *muftī* utters the ruling of a case or is it when a jurist pens a *furū* text? Or is it indeed when a text like the *Majalla* is enacted by the political authority?

7.3.1. The Status of the Judicial Pronouncement: that which Manifests, not that which Originates

²⁹⁰ Reşid Paşa, *Ruhü'l-Mecelle*, vol. 7 (Dârülhilâfetilaliyye: Istanbul: Matbaa-i Hayriye, 1910), 209. The *maḥkūm* is the party against whom the ruling takes place. The *maḥkūm lahu* is that party in favor of whom the judge rules.

²⁹¹ See article 1801 of the *Majalla*.

This postulate is used often in the books of Hanafi *fiqh*. I have found two types of statements with the identical predicate, i.e., *that which manifests (or describes) not that which originates (muḏhirun la muthbitun)*. The formula used is ‘X is *that which manifests not that which originates*’.

This is used in by Ibn Abidin in his *Radd al Muḥtār* as “*Qaḍā* is *that which manifests, not that which originates* because the right of the party in favor of whom the judgment is given (*maḥkūm bihī*) was established (already originated) and the judgment (*ḥukm*) manifests it...”²⁹² He quotes Ibn al Ghars referring to his elaboration of the term *qaḍā*.²⁹³ Ibn al Ghars, while defining what a *ḥukm* is in its technical or terminological sense (*iṣtilāḥ*) and thereby in the context of *qaḍā*, mentions that it is the “apparent (*fi alẓāhir*) binding in the form of a specific quality, in a matter that is deemed to have occurred according to the Sharī‘a.”²⁹⁴ The ‘apparent’ nature of the *ḥukm* is explained as the element that distinguishes this species of bindingness from that which is effected by the *Sharī‘a* (or *Sharī‘a*) in the realm of things as they are (*naḥs al amr*) without the ‘interference’ or the presence of the judge. He describes this latter type of bindingness as referring to the meaning that is the Divine address (*khiṭāb*). Thus, through this explication of the judicial utterance or *ḥukm al qāḍī*, it is made clear that, at least in the Hanafi juristic discourse, this type of utterance is no more than a descriptive one, merely manifesting a reality that antedates it.

It is significant that the same formula, ‘X is *that which manifests not that which originates*’ is used also as a postulate to declare the nature of *qiyās* (analogical deduction).²⁹⁵ Since *qiyās* is one of the principal methods used in juristic reasoning which is the larger part of *fiqh*, we can infer that the *ḥukm sharī‘ī*, the product of the *fiqh* process is also in the nature of being a manifestation or report (*ikhbār*) and not an origination (*inshā‘*).²⁹⁶ The Hanafi view of the *ḥukm sharī‘ī* also defines the *ḥukm*

²⁹² Muḥammad Amīn Ibn ‘Ābidīn, *Ḥāshiyat Radd Al-Muḥtār*, vol. 8 (Riyadh: Dār ‘Ālam al-Kutub, 2003), 113.

²⁹³ Muḥammad Ibn al Ghars (833/1429 – 894/1489) was a Hanafi jurist who lived in 14-century Cairo. See Khayr-ad-Dīn al-Zarkali, *Al-A‘lām: Qāmūs Tarājīm Li-Ashhar Ar-Rijāl Wa-‘n-Nisā’ Min Al-Arab Wa-‘l-Musta‘ribīn Wa-‘l-Mustashriqīn*, vol. 7 (Beirut: Dār al-‘Ilm li’l-Malāyīn, 2002), 52.

²⁹⁴ Muḥammad ibn Muḥammad Ibn al-Ghars, *Al-Fawākih al-Badriyya Fī al-Aqḍiyah al-Ḥukmīyah*, ed. Bayan Mahmud Sada (Trabzon: Kalem Yayınevi, 2018), 34.

²⁹⁵ For *qiyās* see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd rev. and enl. (Cambridge, UK: Islamic Texts Society, 2003), 197–228; Wael B. Hallaq, “Non-Analogical Arguments in Sunni Juridical Qiyās,” *Arabica* 36, no. 3 (1989): 286–306.

²⁹⁶ Zarkashi, *al-Bahr al-muhit fi usul al-fiqh*, 14.

shar'ī as ‘the effect that is necessitated by the Divine speech in action’²⁹⁷ and “what is established (*thabata*) from the speech of the Lawgiver”.²⁹⁸ All this makes clear that the Hanafis perceive the judicial pronouncement of the *qāḍī* as a manifestation, a reporting of the rule that was originally established by the speech of the Divine. What is the reasoning that is given to declare the nature of the *qāḍī*’s *ḥukm* as an *ikhbār*? Rashid Pasha attributes this to the capacity of being limited or specified. This opinion is given as an elaboration of the rule of *fiqh* articulated in the *Majalla* whereby the “jurisdiction of a judge is limited by time, and place, and by the exception of certain matters”.²⁹⁹ The potential to be limited is the reason given and apparently that stems from the capacity of the principal to limit his agent.³⁰⁰ The corollary is that his agency may be restricted and this subordinate character brings with it an ancillary status with respect to speech. The power of the subordinate’s words may be limited. This would imply that the principal’s words, being the other side of the coin, are of a different character and are capable of origination (*inshā’*). The ruler, according to this reasoning, can utter and not be subject to any specification of his speech. The restriction of the rule is tied to the role and character of the person from whom it emanates. Now, what is the relevance of this observation to the text of the *Majalla* as it is enacted by the ruler? Since it is a *fiqh* text, the category it would be closer to would be a *ḥukm shar'ī* and not a *ḥukm al qāḍī*.

7.4. The Sultan’s Command as Performative?

The sultan or the imam is important in the scheme of *fiqh*. As the locus of temporal power, his legitimacy is acquired by his willingness and ability to enforce the *Sharī‘a*. Historically, the ruler was granted a sphere of authority by the *Sharī‘a* and this prerogative to lay down executive decree was termed *siyāsa*, and in the Ottoman context subsumed under the notion of *qānūn*.³⁰¹

²⁹⁷ Abdul Wahab Khalaf, *Ilm Usul al Fiqh Wa Khulasatu Al-Tashri al-Islami* (Cairo: dar al-Fikr al-‘Arabi, 1996), 97; Muhammad Ala ibn Ali. Tahanawi Ajam, Rafiq., Khalidi, Abdallah al-, *Mawsu‘at kashaf istilahat al-funun wa-al-‘ulum*, vol. 1 (Beirut: Librarie du Liban, 1996), 698–99.

²⁹⁸ Mevlânâ Mehmed İzmirî, *Hashiya al Fadil al Izmiri Ala al Miraat* (Istanbul: Shirkat Sahafiyya Uthmaniya, 1891), 31; Mas‘ūd ibn ‘Umar Taftāzānī and ‘Ubayd Allāh ibn Mas‘ūd Maḥbūbī, *Sharḥ Al-Talwīḥ ‘alā al-Tawḍīḥ Li-Matn al-Tanqīḥ Fī Uṣūl al-Fiqh : Wa-Bi-al-Hāmish Sharḥ al-Tawḍīḥ Lil-Tanqīḥ*, vol. 1 (Beirut: Dār al-Kutub al-‘Ilmiyah, n.d.), 25–27.

²⁹⁹ Article 1801, *Majalla*.

³⁰⁰ The preceding article seems to present the reason for this limitation: the judge is the representative (*wakīl*) of the Sultan, having a mandate to try cases and give judgments. See Article 1800 of the *Majalla*.

³⁰¹ *Qanūn* is *kanūn* in Turkish transliteration.

Findley has asserted that the provenance of the *Majalla*'s 'legal force', 'in shari terms' was the command of the sovereign as the 'imam al-muslimin' to determine which of multiple opinions needs to be followed in a particular matter.³⁰² It would be beneficial to examine the nature of the legitimacy averred here because it underpins the entire claim of transformation of the text into the 'law'. Findley's entry cites three references for this claim. Cevdet Pasha has explained that in issues where a legitimate dispute exists (*masā'il mujtahid fihā*) the Imam of the Muslims can mandate a rule among many.³⁰³ Heidborn affirms stating that the sultan used his prerogative, which exists in case of difference of opinion among the authorities.³⁰⁴ Anderson states, in the same vein that

although it is true that the freedom of choice enjoyed, in theory at least, by an individual Muslim in following the precepts of this school or that – either in general, or in some specific matter – was not normally enjoyed by the *qāḍī* or *muftī* in their public capacity which they were commonly regarded as- bound to follow the dominant doctrine of their own school in every particular), yet there was authority, in both the Shāf'ī and Ḥanafī schools, for the proposition that it was within the competence of the Ruler to instruct his judges to apply one particular doctrine, to the exclusion of all others, should the public interest so demand.³⁰⁵

Furthermore, Onar, like Findley, attributes the 'obligatory character' of the *Majalla* to the Sultan's resolution of a controversy.³⁰⁶ He, however, cites as reference the report of the committee that prepared the *Majalla* as justifying the sultan's seal thus,

[S]ince in questions which admit of different interpretations we ought according to our duty to act at all times in accordance with His Imperial Majesty our Highest Spiritual Ruler, we ask your Highness that, if you

³⁰² Carter V. Findley, "Medjelle," *Encyclopédie de l'Islam* 6 (1991): 971.

³⁰³ Adliye Nezâreti and Ahmed Cevdet Paşa, *Düstur (İlk Tertib)*, vol. 1 (Dersâdet : Matbaa-i Âmire, 1289), 29. The quote is as follows: *Masail i muctehid fiha da imam al muslimin hazretleri her herhangî kavil ile amel olunmak uzere emer ederse mucibince amel olunmak vacib olduğundan maruzat i mabsuta nezd i hakayık vefd i vekalet penahelerinde dahi karin i tasvip buyurulduğı halde mecelle i melfufenin balasi hat i humayun hazreti hilafet i penahi tevşih buyurulmak babında.*

³⁰⁴ A. Heidborn, *Manuel de Droit Public et Administratif de l'Empire Ottoman*, vol. 1 (C.W. Stern, 1908), 286. The statement is as follows: En efiet, le Sultan en la promulguant, a fait usage, d'une des prérogatives, que la Loi divine confère au souverain des musulmans (imâm ul-muslimîn), soit la faculté de prescrire au juge, en ces de divergence entre les autorités, sur quelle opinion il doit se régler

³⁰⁵ Anderson, *Law Reform*, 48.

³⁰⁶ Onar, "The Majalla," 295.

approve of the work presented to you to-day, you will take measures that the present Code may be adorned with the Imperial Autograph.³⁰⁷

The rule apparently referred to when justifying the assumption of ‘legal force’ or ‘obligatory character’ by the text known as the *Majalla* is a rule posited in the *fiqh* texts which envisages the occurrence of a dispute or the presence of a controversy. Does this rule justify the assumption of legal force by an entire code or body of rules? In other words, it is a right of the Executive in a Shariah paradigm to limit the diversity of rules in a specific matter to a single one based upon the public interest of the time. Does acceptance of this fact which stems incontrovertibly from a juristic understanding of *fiqh* imply that the executive has the absolute liberty to impose a corpus of rules in the fashion of a code upon a populace? The language of the report of the *Majalla* committee seems to suggest that it would. It would not be contentious to assume this to be an explicit admission by the framers of the *Majalla* that it is the proclamation of the Executive that *makes* the law qua law. This is apparently an occasion of legislation in the modern sense and can be distinguished from the premodern sense of the qualification of the scope of *qāḍī*’s vocation.

Reference to the *fiqh* rule by Findley and the others indicates that it is the aspect of exclusion that is in mind. Resembling codification where the code excludes all other texts to assume sole authority, the *Majalla* seems to have acquired a similar status through the decree of the sultan. Codification, as Scarman states, imparts three features to the text; the latter becomes thereby “within its field the authoritative, comprehensive and exclusive” source. So here in the *Majalla* we have the confluence of two issues, assumption of authority and the denial of authority to other texts. This latter act is accomplished through the act of qualification as the justification offered by Findley, Heidborn and Ahmet Cevdet Pasha and clearly mentioned in the prolegomenon to the *Majalla*.³⁰⁸ It is the aforementioned Hanafi rule that gives the prerogative to sultan to bring about certainty and public interest by inclining towards a particular interpretation at the cost of others.

Authority and exclusivity are mutually intertwined, the single act of executive decree

³⁰⁷ Ahmet Cevdet Pasha, *The Medjellè*, IX–X.

³⁰⁸ See the Prolegomenon and Article 1801 of the *Majalla*: Akgündüz, *Karsilastirmali Mecelle*, 46, 375.

transforms the *Majalla* as the *only* text that is to be followed in the *Nizāmiye* courts in the civil realm. The comparison with a code, however, needs to be further delved into as there are niceties that possibly differentiate the two cases. A code exists in a realm where all law is in the form of legislation. *Fiqh* is different. *Fiqh* exists in the books of *fiqh* but becomes *enacted* only in a few limited situations: in the responsum of a *muftī* or the ruling of the *qāḍī*. This ‘enactment’ is, of course, only partly similar to that which takes place in a legislative setting. Here the operative word, in the case of the *qāḍī* is *ilzām* or compulsive imposition. This means that a new reality takes form as a result of the *qāḍī*’s pronouncement. The *muftī*’s fatwa, on the other hand, is merely a declaration which makes manifest the will of God. The word used here by Qarafi is *ikhbār*.³⁰⁹ He defines *qaḍā* as *inshā*’ to distinguish it from fatwa which is merely an articulation of what God’s determination is in the matter under advisement.

Therefore, to claim that *when the same fiqh rules or expressions are used in a codified text it would somehow result in the rules acquiring a different character* seems to be a farfetched claim. This claim might be reinforced by saying that the same form of language used in the *fiqh* rules persists even in the codified text. The argument is that since it is the structure of the language itself that gives existence to a certain type of reality and the language is similar in form before and after the transformation, one cannot expect a difference type of reality to now be created. This assertion sounds persuasive until we consider that the performative effect of any utterance depends upon the felicity conditions that are present. In other words, the effects that words have differ according to who speaks them and the context in which they are spoken even though they be the same words. Their effect is determined by a set of rules that give power to the speaker. The question that we are interested in here is to ask whether *fiqh* rules would have a different effect when they are placed in a codified text, as opposed to being written in a *fiqh* book consulted by a *muftī* or a *qāḍī*. The apparent answer would be in the negative as the rules acquire performative force only through the operation of natural language expressed in a certain context. If the language is identical the effects would be too as long as the felicity conditions are met in either case.

³⁰⁹ *Ikhbār* is from *khabr* which is explained earlier.

7.5. The Ruler, *Muftī* and *Qāḍī*

In order to understand what the *Majalla* represents in terms of its discursive nature, another possibility is to delve into the roles of the formants of the law and this is what Qarafi (626/1228-684/1285), a Maliki jurist, does in his book *al-Iḥkām fī tamyīz al-fatāwā 'an al-aḥkām wa-taṣarrufāt al-qāḍī wa-'l-imām*.³¹⁰

According to Qarafi, the similitude of the Imam or ruler's and to his followers can be likened to the relationship between a whole and its individual parts, or a composite body and its elements. As the head of state, the ruler holds the authority to issue judicial decisions and provide legal counsel. However, the ruler also possesses the power to undertake actions that fall beyond the purview of judicial rulings and legal opinions. For instance, the ruler can amass armies, declare war, take possession of public property, allocate funds for lawful objectives, appoint governors, and punish wrongdoers. The ruler is unique in many aspects, and while every imam is a judge and a *muftī*, neither of the latter can assume the mantle of being the imam, who represents the Muslim community as its head of state.³¹¹

When we look at the offices of the *muftī* and the *qāḍī* we observe that they are marked by several features and differences. Qarafi states that the *muftī* and the *qāḍī* follow different roles and their respective roles mean that their respective pronouncements have similarly varied consequences.³¹² The concept of the *muftī* different from that of the *qāḍī* and their roles or functions are not identical even though sometimes there is an overlap in roles. The *muftī* is a vocation that does not derive authority from the political ruler or imam whilst the *qāḍī* does. The latter assumes his normative and legal authority by appointment. The responsum of the *muftī* is not legally binding but is so in a moral and *diyāna* sense. The *qāḍī* gives his verdict which is binding and is enforced upon one party or both, backed by the power of the state meaning that the parties are physically obliged by the decision.³¹³ The person seeking the *muftī*'s

³¹⁰ This book has been translated: Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī al-Mālikī Al Qarafi, *The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers*, trans. Mohammad H. Fadel (Yale University Press, 2017).

³¹¹ Shihabuddin Ahmad Ibn-Idris Al Qarafi, *Al-Iḥkām fī tamyīz al-fatāwā 'an al-aḥkām wa-taṣarrufāt al-qāḍī wa-'l-imām*, ed. Abd-al-Fattah Abu-Ghudda (Beirut: Dar al-Bashair al-Islamiya, 1995), 46.

³¹² Al Qarafi, 43–45.

³¹³ Usmani, *Fatwā*, 34.

responsum (called the *sā'il* or *mustaftī*) is not compelled to follow the *fatwā* given to him by force of law. To follow it rests upon his good conscience. The responsum of the *muftī* is based upon the formulation of the question presented to him. He imagines the case as presented and renders his conclusion but does not have the responsibility to investigate the actual circumstances of what transpired. The *qāḍī* does bear this burden and needs to be satisfied that the facts of the case as presented by one party or both are in accordance with reality.³¹⁴

Qarafi gives a metaphor for the *muftī*: he is the translator (*tarjumān*) for the Chief Judge (read God), and is tasked to convey whatever the latter says to human beings and cannot introduce anything in it from himself or keep back anything from what he has been entrusted with. If he is a master jurist (or *mujtahid*) he has to follow the derived meanings of the indicants (*'adilla*) in the Divine text without addition or subtraction; if he is a follower (*muqallid*) of the master jurist he should just render the intent of the jurist faithfully acting as his tongue, a conduit of his inner purport.³¹⁵ The *qāḍī*, on the other hand, is the delegate of the ruler (*nā'ib*) and must give his judgement acting in such a capacity.

The *ḥukm* of the *qāḍī* concerns the application of the law to the determination of the facts of a case (*ḥijaj* plural of *ḥujja*). The main task of the *qāḍī* is to determine the facts. On the other hand, the *fatwā* (or responsum) is a theoretical exercise in response to a question about a case where the *muftī* gives a *ḥukm al shar'ī* declaring the status of a human act.³¹⁶ There are three types of *fatwā*:

1. *Fatwā tashrī'īyya* or the type of *fatwā* that have emanated from the Ultimate Lawgiver or *shāri'*, God (in the real sense) and his Prophet ﷺ (in the figurative or *majāz* sense).³¹⁷
2. *Fatwā fiqhiyya* or the type of *fatwā* that is not in response to a question about a specific incident but is made while going into details when delving into the different aspects of a matter, or is in response to a general question not any specific incident. This *fatwā* is produced usually by those jurists who engage in compiling the

³¹⁴ Usmani, 34–35.

³¹⁵ Al Qarafi, *Al Ihkām*, 43.

³¹⁶ For details on the sources, form, composition and issuance of the Ottoman *fatwā* see Uriel Heyd, "Some Aspects of the Ottoman *Fetvā*," *Bulletin of the School of Oriental and African Studies, University of London* 32, no. 1 (1969): 35–56, <https://doi.org/10.2307/613387>.

³¹⁷ Usmani, *Fatwā*, 31.

different *fiqh* problems and as a result of conceptualizing different imaginary scenarios which he has not been queried about, and which he writes down as a response to a general or theoretical question. An example might be to ask what would be the *ḥukm* for a person who utters a specific linguistic formula to his wife. Here, as is apparent, there are no other details or reference to an incident.³¹⁸

3. *Fatwā juz' iyya* which is the sort of *fatwā* that is the response to a question about a specific occurrence which has its own historical details. An example might be to ask what would happen in the case of inheritance where the deceased has left behind a wife, a son and a daughter.³¹⁹

After understanding the types of *fatwā*, it behooves us to fathom the types of indicants in the realm of the *Sharī'a*, which are three according to Qarafi.³²⁰ They are (in order of decreasing determinative force):

1. Proofs or '*adilla*
 - a. Proofs that follow from facts ('*adilla wuqū' al aḥkām*). An example would be the descent of the sun from its highest point (*zawāl*) indicating the onset of the mid-day prayer (*ẓuhr*).
 - b. Proofs that determine *Sharī'a* status ('*adilla mashrū' iyya*). Examples would include the Qur'an, Sunna, *ijma'*, *qiyās*, and *istiḥsān*.
2. Proofs that validate rules (*ḥijāj* sing. *ḥujja*), which may be called judicial indications. These would include testimonial evidence (*bayyina*), acknowledgement (*iqrār*), witness (*shāhid*) and oath (*yamīn*) among others.

The three categories have a hierarchical relationship with respect to the determinative force of each starting with the third and going up to the first: the facts being the most cogent in establishing a ruling and the judicial indicants being the least. The *qāḍī* as decision maker depends upon the third category. The jurists (and specifically the master jurists) deal with and depend upon the second and the subject of the law depends upon the first category.³²¹ The *fatwā* pertains to acts that could be in the realm of the recommended or disliked, the obligatory or forbidden and the valid or invalid, while the *qāḍī's ḥukm* deals with all except the recommended or disliked matters.

³¹⁸ Usmani, 33–34.

³¹⁹ Usmani, 34.

³²⁰ Ahmad Ibn-Idris al-Qarafi, *Kitāb al-Furūq anwār al-burūq fī-anwā' al-furūq*, ed. Muḥammad Aḥmad Sirāḡ and Alī Ġum'a Muḥammad, vol. I (al-Qāhira: Dār as-Salām, 2010), 302.

³²¹ Qarafi, I:302.

Thus, we can see that *fiqh* has this motivational aspect whilst *qaḍā* is based upon compulsion and the matters that should be regulated in society. *Qaḍā* concerns only matters of *fiqh* and not matters of belief or worship whilst *fatwā* includes those categories within its ambit. The *muftī* starts with a concrete case with unique particulars which is the situation that the questioner brings but the names of the individuals whose circumstances are the basis for the responsum are either removed or taken just as generic signs to signify the general case. The *qāḍī* resolves a controversy that is concrete.³²² A representation showing the system of relations with the subject, the *qāḍī* and the *muftī*, the imam and the Divine with the different types of proof situated according to their interrelationships is given in Figure 12.

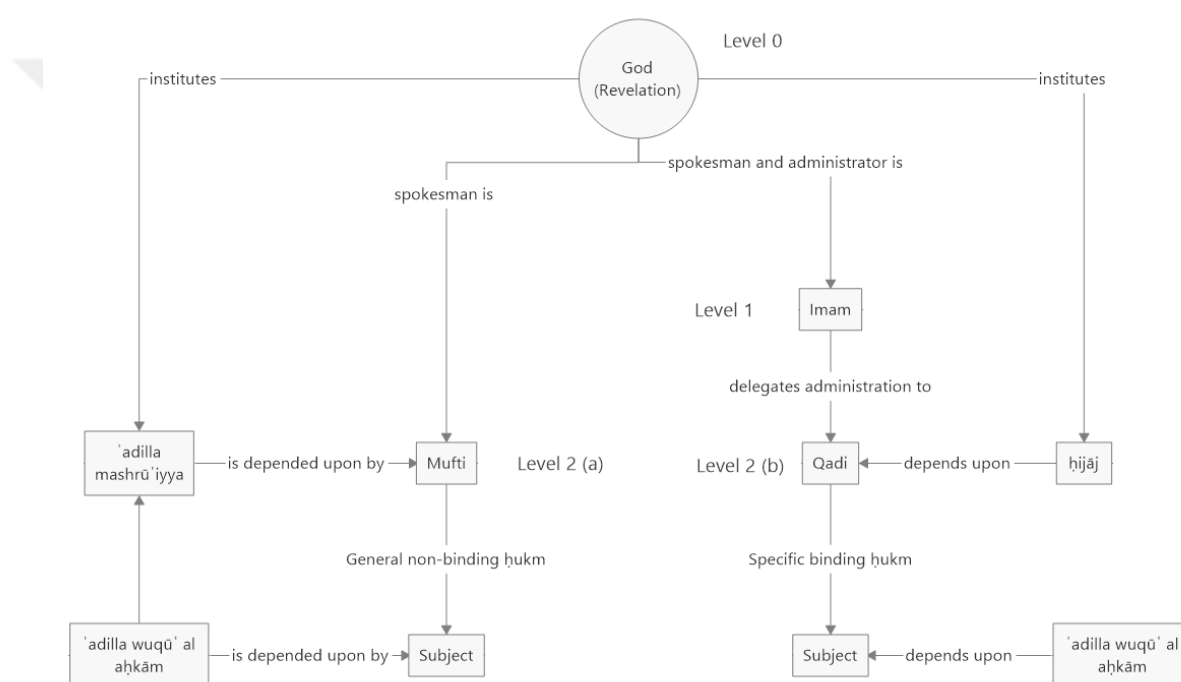


Figure 12. Roles and Relations in a *Fiqh* Paradigm

7.6. The Configuration of Roles

We have seen how a gap exists that hampers the proper functioning of rules. Such rules oftentimes over-include non-deserving cases or under-include deserving ones. A solution or at least a mitigation of the problem has been suggested by Schauer in his

³²² Guy Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 2015), 24, <https://doi.org/10.1017/CBO9781316106341>.

Playing by the Rules.³²³ He states that human shortcomings limit people to a certain number of factors to take into account when making a decision and the more that these factors are multiplied the more confusion and misestimation is probable on the part of the decision maker. Specialized education increases the capacity to deal with increasing factors of complication. The more a specific functionary is equipped to deal with the issues confronting the subjects of the law before him with respect to knowledge regarding the particularities of each case the better that functionary will be able to address the unique features of that case.

When it comes to *fiqh*, the *mufī* is an expert in the proofs that determine *Sharī'a* status (*'adilla mashrū'yya*). He is informed of any necessary facts of the case through the question that is put to him (*istiftā*). His opinion is valid with the condition that the facts that are mentioned there are true in reality. He does not have the responsibility to go into the world and investigate the truthfulness of those facts. His role is that of spokesman of the Divine, a mediator between God and his subjects, and his task is to analyse the Divine directives using the proofs at his disposal, the *'adilla*. The *mufī* works at level 2(a) offering individuals decisions that are based upon given circumstances that are set by the person asking the question (see Figure 12). His opinion is not binding upon the one who asks for it, i.e., *fatwās* are only obligatory to the extent that that person obliges himself to follow them. The rule that the *mufī* gives is by its nature a *khabr* and is universal, and may be taken as obligatory for anyone whose circumstances match those in the given facts.

The *qāḍī*, pace the *mufī*, has the power to investigate the circumstances in question to settle the truth of the matter before him and may summon witnesses towards that end. The *qāḍī* is not restricted with respect to the facts of the case and has a different repertoire than the *mufī* to determine those to obtain the best picture of the reality of the case. He deals not with the proofs that determine *Sharī'a* status but with the judicial indicants or *ḥijāj*. The *qāḍī* is empowered as the representative of the ruler and his agent, and is actually the representative of the Divine and rules under His bidding, giving judgments through *inshā'*, or, in other words, creating a new reality for only the

³²³ Frederick F. Schauer, *Playing by the Rules : A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Law Series (Oxford, England New York: Clarendon Press ; Oxford University Press, 1991).

parties subject to that particular judgement. Thus, the rule that emanates from the *qāḍī* is particular in its nature and is valid and binding only for the named individuals that are subject to it.

The two roles are each in the proper position in the configuration of the *fiqh* system because each is entrusted individually with respective the power and capability, and to the appropriate extent, to render justice to the case at hand. If both of the utterances from either role are combined in a single text that would, of necessity, create problems.

7.7. Fiqh as Law? Implications of the *Majalla* as Codified Legislation

Having surveyed several relevant concepts and details, we come to the more pressing question: Where does the *Majalla* fit within the scheme of a regular legal paradigm? We see an interesting contrast when it comes to law that is legislated and codified by a state authority in the modern law paradigm. Such a law is not only authoritative, comprehensive and exclusive source of the legal norms but is also binding upon all the subjects whom are included in its purview. Thus, it resembles the *qāḍī*'s judgement in its binding characteristic but in its encompassing nature it more closely resembles the *mufī*'s pronouncement. To posit a *fiqh* text such as the *Majalla* as legislation in such fashion means that it is now placed in such a position to reflect a hybrid creature whose roles are muddled. In fact, the position that it is placed in, is that of level 1 or that of the imam (Figure 12). Even though the ruler or imam has a composite nature subsuming the roles of the *mufī* and the *qāḍī*, any *fiqh* pronouncements that he makes, as *tarjumān*, or judgement that he gives, as *nā'ib* each have a different nature individually and according to the forum that they are made in (and the role that he assumes). To restate the point, the composite nature inheres in the *person* of the ruler, not in his pronouncements which do not have such a character.

One might counter that since the ruler has a composite nature, as stated earlier with reference to Qarafi, implying that his executive decrees retain that character, the *Majalla* might perhaps be analogized to such *qanūns* made under the *siyāsa* jurisdiction of the ruler. The *Majalla*, as stated earlier in this chapter, was enacted precisely under such an executive prerogative. The response would be that such executive fiat is restricted to non-*fiqh* matters and the *Majalla*, being specifically a *fiqh*

text is not the domain of the ruler, especially since rulers after a certain historical period have failed to be imbued with the qualifications of *ijtihad* and thus might not pretend to embody the role of mediator between God and His subjects according to the assertion of Qarafi.

One may yet object, stating that the Hanafi madhhab allows the imam to restrict the jurisdiction of the *qāḍī* and compel him to rule according to one perspective in any particular issue due to considerations of public welfare or exigency (*maṣlaḥa*). This limitation is tantamount to the imam legislating a *fiqh* text as we see in the case of the *Majalla*. However, this ability of the ruler to restrict the jurisdiction of his agent, the *qāḍī*, only pertains to where the *fiqh* norms are realized, i.e., in the mind of the *qāḍī*.³²⁴ This is called mental speech (*kalam nafsī*) as compared to audible speech (*kalam lafẓī*) and before this occasion subsists only in the essence of God and in the minds of the subjects and the *fiqh* texts (see Figure 11). The moment that it enters the mind of the *qāḍī* and is manifested through his writing or speech it becomes obligatory to follow for the relevant party or parties. The *Majalla*, since it has already been manifested in the mind of the ruler and enacted through a resolution (*mazbata* in Turkish) of the founding committee, precedes that stage. To wit, the *fiqh* norms are realized in the mind of the *qāḍī* not when the ruler directs the *qāḍī* to rule according to the specific Hanafi norm and the *Majalla*, if enacted by the ruler pre-empts the *qāḍī* and the *muftī*'s respective roles.

7.8. Conclusion

The problems inherent in written rules are inevitable. These problems such as the 'gap' of *under-* and *overinclusion*, the inability of a single text to embody all possible present and future situations and all the rarities of human experience across time and space. This is the reason why rules must of necessity be generalizations at a certain level. Furthermore, the decision maker or judge is liable to certain shortcomings when he comes across cases which do not map wholly onto the posited rules that are expressed in the legislation. Yet another threat to justice are the human shortcomings and weaknesses where those judges might be influenced by politics, biases or worse

³²⁴ Al Qarafi, *Al Iḥkām*, 58–59.

considerations. Assuming this to be a threat to the system of justice as a whole, what mechanisms may be devised to minimise these serious problems? As Schauer proposes, in order to minimize over- and under-inclusion jurisdiction needs to be attributed to the role which is the more appropriate for this and has the more access to the facts and factors that would have a bearing on the case. Another problem with rules is the determination whether those rules are created or discovered. The notion of performativity or *inshā'* and its converse, *khabr* helps elaborate the issues related to the positing of a *fiqh* text through executive ordinance. The respective roles of the ruler, *qāḍī* and *mufī* are configured in specific ways due to their requisite functions and places in the hierarchy of the *fiqh* paradigm.

The *Majalla*, through the way it was enacted and in the fashion that any modern legal paradigm would bring such a *fiqh* text into force, presents certain difficulties because of the distortion of roles through arrogation of the functions of the *qāḍī* and the *mufī*. By emanating at the level that it does, and in the way that it is enacted, the *Majalla* serves to further the cause of *fiqh* degeneration inasmuch as a *fiqh* text is not suited to imposition through executive legislation and enactment.

CHAPTER EIGHT

CONCLUSION

The *Majalla* is a text in which there are rules that originate in the books of *fiqh*. These rules originate in the juristic texts of *fiqh* specifically the *furū' al fiqh*. The context in which the *Majalla* was instituted as legislation was through the decree of the sultan. The contemporary milieu was such that laws pertaining to transactions were needed at the time due to there being a legislative void which needed to be filled somehow and there were suggestions to have the French Civil Code used for that purpose. When the *Majalla* was finally chosen as the solution it was novel in its existence being *fiqh* rules enacted through executive ordinance. This historical happenstance is interesting as much as it is anomalous.

The existence of the *Majalla* gives us occasion to investigate the very character of *fiqh*: how does *fiqh* fare when placed in proximity to law as understood in the Western positive *codified* sense? First of all, *fiqh* does not act like law does even though both serve similar functions in the regulation of human behavior. *Fiqh* in its subsumption of moral aspects of such behavior and even serving to classify recommended and disliked acts goes above and beyond the bipartite legal division of human acts into legal and illegal, comprehending all possible human acts in its ambit. It exists in a plane that is at the level of inference rather than construction.

An important question that needs to be asked is whether *fiqh* is a science and whether, consequently, undergoes a paradigm change. Some works have established that law is not a science as it does not exist in the plane of physical existence and is not influenced by the forces of physics, as would atoms and molecules. Furthermore, its propositions are not wholly systematic or coherent and thus are not similar to that most scientific of disciplines: mathematics. On the contrary, the subject matter of law are concepts and propositions and its subjects are human beings each of whom is possessed of a mind, independent, creative and wilful. Thus, law is far from scientific. *Fiqh* resembles law in these features and is therefore not a science according to these parameters. However, *fiqh* is systematic, as much as a discipline with human subjects may be. The *uṣūl al*

fiqh, which are principles derived reflexively from *fiqh*, offer sophisticated hermeneutics that form the basis for multiple disciplines like *kalām*, philosophy, *tafsīr*, *hadīth* and so on. The *fiqh* paradigm does not undergo a scientific revolution because it is not a science. However, the advent of the *Majalla* can be understood as a rupture in the epistemic continuity of the *Majalla* inasmuch as the methodologies and substantive rationality of *fiqh* are disrupted or distorted through it.

The *Majalla*'s substantive content is preferable not only because it originates in Divine sanction but also because it caters to the welfare of human interests in a more just manner. That being so, the legal structures within which it exists is also important if there are to exist no contradictions or complications in the legal regime whereby cursory reading of certain rules can be employed to abuse others or to violate the rights of people. This problem stems from the ambition of humanity to create whole legal systems by articulating rules to cover all possible avenues. Since the *Sharī'a* exists in the essence of the Divine and in an unwritten state, any attempt to comprehend its entirety in textual form is bound to fail. Any legislation that is made need to be in harmony with the rest of the legislative structure and the norms as present in the *fiqh* texts. This is not an easy task but the more obvious problem is the elevated status of any code where it precludes all other relevant laws from being operative. As a consequence, any existing legislation or executive ordinances that touch, even tangentially upon a newly formulated code might be overlooked or interpreted away without any effort at harmonization. Furthermore, harmonization would require a certain level of judicial acumen and intellectual discernment which is not always common in the members of the judicial organ of the state.

The process of codification involves transferring the responsibility of creating new norms from the judiciary to the legislature, which clearly indicates a shift towards the political. However, in legal systems like Islamic law, where political interests ideally have minimal influence on law-making, codification can disrupt the fundamental nature of the legal system and make it vulnerable to power-based considerations. This is especially so in the domain of *fiqh* which is premised upon a knowledge of the proofs of the *Sharī'a* and a competence to derive rules from them rather than any purported democratic legitimacy. Codification in its quest for comprehensiveness seeks to include all particular rules. The *Majalla* with its scope limited to rules concerning

transactions does not fulfil that imperative as much as it might comprehend particular areas of the *fiqh* rules concerning transactions. Ideally, codification, keeping true to its spirit, would have brought all *fiqh* areas and underlying rules into a textual form, a Herculean task.

On the one hand codification of the *Majalla* supposedly gave *fiqh* a role in the existing legal system in a place where the French Civil Code was envisioned as a solution, with all of the latter's particularities, norms and origins. On the other, juridification and the modern commitment to articulate and enact all moral norms chips away at individual autonomy in action and the choice of selecting one's forum for dispute resolution.

This articulation of rules in textual form leads to a further problem, which is the inability of human beings to anticipate all possible human situations and disputes. This, again, is an obstacle against the imperative of codification for comprehension but also displays the limits of human capacity. Any rules that *are* articulated fall prey to under- or over-inclusiveness when applied to particular individuals and contexts. The need to 'tie' the judges' hands so that he does not engage in creating rules because he does not have that legitimacy (according to democratic theory) gives another impetus to the codification of laws. This stems from the modern concern for the separation of powers where only elected representatives have the right to legislate. Since in the *fiqh* paradigm the derivation of rules is the task of the *mufī* and the jurist, and that of the *qāḍī* is to apply them properly to any particular case before him, this concern does not exist, to the extent of *fiqh* 'legislation'. The existence of two 'gaps', firstly when the jurist derives rules and secondly, when the *qāḍī* applies them to the individual parties indicate that there is a dual attempt to encompass all types of human behavior. Furthermore, the Prophetic example provides an exemplary source for the jurist to elaborate normative rules and it serves to encompass even minute details of human behavior.

The polar notions of *inshā'* and *khabr* help us to understand the effects of certain utterances or rules when these are articulated by certain determinative roles in the *fiqh* paradigm, namely those of the ruler, *mufī* and *qāḍī*. These roles due to the specific function that they perform and the way that they deal with the legal subject imply that their utterances cannot have the same illocutionary effect as each other. Moreover, the

ruler who ideally combines these two functions, also cannot utter a composite utterance which has the characteristics of both a *ḥukm al qāḍī* and a *ḥukm al muftī*. The *Majalla*, if placed in the critical position of the ruler's legislation serves to distort the prescribed roles in the *fiqh* paradigm and the consequent effects that such a text would have if it emanates from either the *muftī* or the *qāḍī*. The consequences of this legal Frankenstein need to be studied further. One of these consequences is that the concept of *fiqh* is degenerated in how the obligation to obey the rules is weakened in the mind legal subject due to its perception as a construct. The ruler's role is for the most part performative and since the *Majalla* as a *fiqh* text is a descriptive text the ruler in enacting it through his utterance occasions certain contradictory effects.

So does the *Majalla* represent an improvement or degeneration of *fiqh*? It seems, from the investigation that I have undertaken in this study that the answer is not as clear and unequivocal as might be assumed. My contention is that the *Majalla* if it stays within a paradigm where the *Sharī'a* courts operate and the *qāḍī* and the *muftī* perform their respective functions as they would according to classical theory without being obstructed by a usurpation of powers or a circumscription of jurisdiction, the *Majalla* would be a *fiqh* text as any other. It might hold a slightly elevated position as a collection of opinions preferred by the ruler, as is his right under Hanafī *fiqh*. However, to posit *fiqh* as a codified legislation enacted under the authority of the executive blurs certain lines and complicates certain realities. The *Majalla*, in such a role usurps the character of the *qāḍī*'s judgment as well as that of the *muftī*'s responsum and in doing so creates an impossible hybrid resulting in complications in the subsistence of *fiqh* which need to be explored further.

The contentions put forth in this thesis are as much to do with the inability of certain forms of legal reasoning and expression to represent and enable interhuman communication and dispute resolution as it is to do with whether the *Majalla*'s formation was a cause for the retardation or degeneration of *fiqh*. This former and larger question stems directly from the aspiration of some to go beyond human abilities and is the outcome of a lack of intellectual humility.

Man's fate will forever elude the attempts of his intellect to understand it. The accidental variables which hedge us about effectively screen the future from

our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse. So far as we have been able to learn, there are no recurrent patterns in the course of human events; it is not possible to make scientific statements about history, sociology, economics—or law. . . . The idea that "law is a science" has conditioned all our responses. It has dictated to us both what we were looking for and how we were to go about looking for it. If we can rid ourselves of the illusion that law is some kind of science—natural, social, or pseudo—and of the twin illusion that the purpose of law study is prediction, we shall be better off than we have been for at least a hundred years.³²⁵

All in all, the *Majalla*'s role in the improvement or degeneration of *fiqh* stands less upon its substance than the formal structures of power and meaning that give rise to it, imbue it with authority, and determine how it is used.

³²⁵ Grant Gilmore, *The Ages of American Law*, Storrs Lectures on Jurisprudence 1974 (New Haven: Yale University Press, 1977), 100–101.

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