CRITICAL APPRAISAL OF THE PRACTICE OF CODIFICATION OF ISLAMIC CRIMINAL LAW IN THE MUSLIM WORLD: A CASE STUDY OF NORTHERN NIGERIA

BY

Usman Muhammad SHU'AIB
PhD/LAW/15188/2007 – 2008

DEPARTMENT OF ISLAMIC LAW,
AHMADU BELLO UNIVERSITY,
ZARIA.

SEPTEMBER, 2014

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BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILMENT OF THE REQUIRMENT FOR THE AWARD OF DOCTOR OF PHILOSOPHY DEGREE IN LAW PH.D

DEPARTMENT OF ISLAMIC LAW,
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SEPTEMBER, 2014

DECLARATION

I declare that this dissertation entitled '**Critical Appraisal of the Practice of Codification of Islamic Criminal Law in the Muslim World: A Case Study of Northern Nigeria**' has been produced by me and is a record of my research under the supervision of Professor Ibrahim Na'iya Sada, Professor Ibrahim Ahmad Aliyu and Professor Yahaya Yunusa Bambale. It has not been presented in any previous application for a higher degree by me or anybody else in this or any other University. All quotations and references are duly acknowledged in the footnotes and a list of bibliography.

_____ _____

Usman Muhammad SHU'AIB **Date**

CERTIFICATION

This dissertation entitled "**Critical Appraisal of the Practice of Codification of Islamic Criminal Law in the Muslim World: A Case Study of Northern Nigeria**" by Usman Muhammad SHU'AIB meets the regulations governing the award of the degree of Doctor of Philosophy of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

……. ……

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DEDICATION

This Dissertation is dedicated to the loving memory of my deceased father: Alhaji Muhammad Nasir Shu'aib (Dangulu) and my beloved Mother: Halimatus Sa'adiyya Yusuf, "***Oh Allah, have mercy upon them as they brought me up while I was Young***". Q. 17: 24

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All praise be to Allah the lord of the worlds and may His blessings continue to shower upon His beloved Prophet Muhammad Bn Abdullah, members of his house hold, his companions and those who follow their footsteps.

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Finally, while acknowledging with gratitude Mr. Samuel Kadiri and Helen Egbunu for typing this dissertation and all those who contributed, in one way or the other, towards the successful completion of this study; I and I alone bear responsiblity of all the errors, inaccuracies and discrepancies herein contained. I, thus, seek the forgiveness of Allah (SWT) on that, albeit not deliberate.

Wa akhiru da'awana 'anil hamdulillahi Rabbil alameen.

STATUTES & OTHER INSTRUMENTS REFERRED TO

1) Nigerian Laws

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Zehreddin V. the State 265 SCMR (stct) 1718, 1993 (Pakistan)

LIST OF ABBREVIATIONS

- AD - Anno Domini (in the year of the lord)
- AH - After Hijra (of the Prophet(S))
- Ante. - Before
- AS - Alaihis Salaam
- BC - Before Christ
- Cap - Chapter
- CE - Christian Era
- Cf. - Compare
- COP - Commissioner of Police
- Ed.(eds.) - Editor (editors)
- GC - Gregorian Calendar
- Ibid - Ibidem = in the same place
- IGP - Inspector General of Police
- Infra - Below
- LFN - Laws of the Federation of Nigeria
- NA - Native Authority
- NB - Nota Bene = note well
- NN - Northern Nigeria
- NWLR - Nigeria Weekly Law Report
- No. - Number
- Op cit. - Open citation
- P. - Page
- Pp. - Pages
- Post. - After
- Pt. - Part
- PBUH - Peace Be Upon Him
- RA - RadiyalLahu Anhu/Anha
- RAA - RadiyalLahu Anhuma(dual)/Anhum (pl.)
- RL - Rahimahul Lahu

- Supra - Above
- SAW - Sallallahu Alaihi Wasallam
- SWT - Subhanu Wa Ta'ala
- U.M. - Ummul Mu'mineen
- V. - Verse
- Vol. - Volume
- Vv. - Verses
- WACA - West African Court of Appeal

ABSTRACT

In the year 2000 Zamfara State Government initiated re-introduction of the application of Islamic Criminal Law on the Muslim subjects of the State. This was followed by other states of Northern Nigeria, either willingly or in response to popular pressure mounted by their subjects. The initiative of re – introduction of the Shari'ah led to the codifications of Shari'ah offences. The codification was necessitated by constitutional requirements on fair hearing which provide that acts or omissions amounting to criminal responsibility must be reduced into legislation of either National Assembly or States' Houses of Assembly. However, codification of Islamic Criminal Law is, on the other hand, alien to the classical tradition of Islamic Law. Judges under the Ideal Islamic settings are expected to refer to the primary sources consisting of Qur'an and the Sunnah as well as the secondary sources which are, bye and large, the products of Ijtihad such as Ijma' Qiyas, Masalihul Mursala, Sadduz – zaree'ah, Amalu Ahill Madina, etc for adjudcation. Based on this some Muslim Jurists vehemently opposed the codification of Islamic Criminal Law contending that it stagnates the Shari'a Law, deprives it of its dynamism as it prevents judges from making recourse to the original sources of the law. On the other hand, another group of Muslim Jurists, considering the caliber of the people manning the Shari'ah Courts, whose credentials are far below those of Mujtahidun support the codification viewing it as a child of necessity (darura) that has to be embraced. This dissertation critically examines the contending views on the codification of Islamic Law generally but with particular reference to Islamic Criminal Law. In doing this, the primary source materials of Islamic Law - Qur'an and Sunnah – as well as the classical expositions and commentaries on the same as contained in the authoritative classical works known as ***Turath*** *and other related library and on – line materials were utilized. The major finding of this dissertation shows that the view supporting codification is more in keeping with the spirit of Islamic Law. This is because codification, if carried out by qualified Individuals, could be treated as a modern form of Ijtihad that upholds the dynamism of Shari'ah and its suitability for application at all times and in all places including the Northern Nigeria where the codification of Islamic Criminal Law is a constitutional imperative. The dissertation mainly recommends that the codification of Islamic Criminal Law as contained in the various Shari'ah Penal Codes should be periodically reviewed on a continuous basis in order for Islamic Criminal Law to be in tune with the rapid development in the society. To achieve this it is further recommended that the Shari'ah Implementing States should institute a Commission comprising of Ulama', Legal Experts and other stakeholders involved in the administration of Islamic Criminal Law to handle this responsibility on behalf of the Muslim Ummah.*

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

This chapter aims at setting out the general framework of this study. The chapter, in general terms, draws out the research plan for the entire study. In pursuance of this objective, the chapter explores the historical origin of the implementation of *Shari'ah* in Nigeria which forms the theoretical background of the study. The Chapter also proposes the Statement of the research problem for the dissertation. The above was followed up with the review of the relevant and related literature to assess the existing body of knowledge on the topic at hand with a view to bringing out the gaps in the existing body of knowledge and the original contribution this study modestly makes to the literature on the subject – matter. Other issues on general research plan, such as scope and limitation, methodology, significance and justification of the study were similarly treated in this chapter. The chapter then concludes with remarks on the organizational lay out and the structure of the research work.

1.2 Historical Background of the Implementation of *Shari'ah* in Nigeria

Prior to the advent of colonialism, particularly after the Jihad of Sheikh Usman Bn Fodio, *Shari'ah*, in its pristine nature devoid of any form of codification, was in full operation in the geographical area that now forms part of the Northern Nigeria. However, when the British Colonial occupation reached this area towards the end of the eighteenth century C.E. (Christian Era), the Colonialists pretended that they would allow the application of the *Shari'ah* to continue intact and without any

interference. Hence, Governor –General Lord Lugard in an address he delivered in Sokoto in 1902 described his policy thus:

> *The alkalis and emirs will hold the Law Courts as of old, but bribes are forbidden, and mutilation and confinement of men in inhuman prisons are not lawful….Sentences of death will not be carried out without the consent of the Resident….Every person has the right to appeal to the Resident who will, however, endeavor to uphold the power of the Native Courts to deal with native cases according to the law and custom of the country.*[1]

The foregoing, however, clearly set the stage for the ouster of the application and the administration of Islamic Law in general and particularly Islamic Criminal Justice System, in Nigeria. This is so as the British Colonial Power, through an indirect rule, passed a number of proclamations[2] with the aim of extending their control over this territory through the existing administrative and judicial structures. These proclamations underwent several changes up to the time when the Native Court Ordinance of 1933 was passed into law. The 1933 ordinance also introduced a number of changes that culminated into establishment of hierarchy and appeal within the Native Courts System. Appeal from the Native or Emir Courts used to go to the then Nigerian High Court and from there it goes up to the defunct West African Court of Appeal (WACA). In hearing cases on Islamic Law, the Courts used to be assisted by the Muslim Jurists. In addition to this

[1] Karibi-Whyte, A.G. (1993) *History and Sources of Nigerian Criminal Law*, Spectrum Law Series, Ibadan, Spectrum Books Ltd, p. 177. See also Peters, R. (2003) *Islamic Criminal Law in Nigeria*, Ibadan, Spectrum Books Ltd, pp 6 - 7

[2] Such as Native Court Proclamation of 1900, 1906, etc

development, the supervisory power of Colonial Administrative Officials over the Courts continued and was further consolidated.[3]

Initially, the Native Courts were clothed with full jurisdiction over criminal cases with only one exception – *to wit*: capital sentences could only be pronounced by the Emir's Courts, the highest in the Native Courts' hierarchy, and this had to be with the approval of the Governor after review by the Resident.[4]

In retrospect, it is apposite to recall at this juncture that even after the amalgamation of Northern and Southern Protectorates in 1914 as one indivisible nation of Nigeria and the fact that Criminal Code of 1904 had been introduced in Northern Nigeria, the administration of the un-codified principles of Islamic Criminal Law was not abrogated or stopped. Hence section 4 of the then Criminal Code provides thus: "No person shall be liable to be tried or punished in any court in Nigeria, ***other than a native tribunal***, for an offence except under the express provisions of the Code or some other Ordinance or ***some law***…"[5] According to Professor Ruud,[6] this section exempted the native courts from the principle that criminal sentences had to be founded on statutory law. The native courts were, thus, allowed to try offences under Islamic Law irrespective of whether or not those offences were known to and/or punishable under the Criminal Code, such as the offence of adultery (*Zina)*.

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[3] In that The British ResIbident had the extensive powers of inspecting the Courts, suspending, reducing and/or modifying sentences as he could also make order for retrial of the case by another Native Court or even make order for transfer of the case to provincial courts applying English Common Law. See: Keay, E.A. & Richardson, S.S. (1966) *The Native & Customary Courts of Nigeria,* London, Sweet & Maxwell, pp. 20 - 22

[4] Peters, R. *Islamic Criminal Law in Nigeria*, op. cit.1, p.7

[5] Vide S.4 of the Criminal Code of 1904. All the emphases are added.

[6] Peters, R. *Islamic Criminal in Nigeria*, loc. Cit. 1, p. 9

It should also be recalled that the British Colonial Administration accorded the application of *Shari'ah*, in its Jurists – based form, very wide latitude, at that point in time, as the recognition was extended beyond the substantive Islamic Criminal Law to cover the principles of practice and procedure of Islamic Law, as well. Hence, the West African Court of Appeal while upholding the Katsina Emir Court's application of *Maliki Qasama* oath procedure in homicidal cases where there is only strong circumstantial evidence technically known as *al - lauth*, observed thus:

> *There is no desire to interfere with decisions which are in accordance with native law, the principle has been that the verdict and sentence of the Native Court which is an integral part of our judicial system carried out in accordance with procedure enjoined by native law and not obviously inequitable will be accepted even though the procedure is widely different from the practice of English Criminal Court.*[7]

However, this seeming unlimited jurisdiction enjoyed by the Native Courts to administer Islamic Criminal Justice System without reference to any codified enactment was drastically curtailed in 1933 when section 4 of the 1904 Criminal Code was amended. This was achieved by mere deletion of the phrase "other than a native tribunal". The impact of this deletion was, nevertheless, not felt until much later. This was because of the common construction placed on the phrase "some other ordinance" in the criminal code of 1904, *to wit*: It referred to Native Courts Ordinance which expressly permitted criminal proceedings under native law and custom including Islamic Law.

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[7] See **Abdullahi Kogi & others vs Katsina Native Authority** (1930) 14 NLR 49; Cited in Peters, Ibid at P. 8 Also quoted in Mahmoud, A.B. (1988) *A brief history of Shari'ah in the defunct6 Northern Nigeria*, Jos, Jos University Press, p. 18; See also Karibi-Whyte, A.G. History and Sources of Nigerian Criminal Law, op. cit, n1.

However, the decision of WACA quashing the conviction handed down by the Gwandu Emir's Court against ***Tsoho Gubba*** for culpable homicide completely altered the above perception and understanding. In that case,[8] the WACA held the principles of Islamic Criminal Law that did not recognize the defense of provocation to be inconsistent with the provisions of the Criminal Code. This decision raised a lot of confusion as it implied that a Native Court will only apply the principles of Islamic Criminal Law on issues not covered by the provisions of the Criminal Code. The tension between the unfettered application of the un-codified principles of Islamic Criminal Law and the British notion of Justice as embedded in the then Criminal Code was, thus, further heightened.

From 1948 up to 1960 the application of Islamic Criminal Law was, therefore, subjected to a lot of restrictions by the Colonial Administration to the extent that wherever there is disagreement between Islamic Criminal Justice System and the British notion of Justice the latter prevailed. The Colonialists, in this way, succeeded in trimming the scope of the application of Islamic Criminal Law by introducing some changes into the principles of *Shari'ah* law, the major ones as graphically captured by the former Chief Justice of Nigeria, Hon. Muhammad Bello, were:

a) beheading and stoning to death for the offences of homicide and adultery respectively under the principle of *Shari'ah* Law were substituted with death by hanging;

[8] See **Tsoho Gubba vs Gwandu Native Authority** (1947) 12 WACA 141; Cited and analyzed in Mahmoud. A.B. op. cit. n7, pp. 17 – 18. See also Tabi'u, M. (1986) Constraints in the application of *Shari'ah* in Nigeria in RashIbid, S.K. (ed); *Islamic Law in Nigeria: Application and Teaching*; Lagos, Islamic Publication Bureau, pp. 75 - 85

b) imprisonment replaced amputation of hand as punishment of theft under the *Shari'ah;*

c) payment of *Diyyah* in lieu of capital punishment in homicidal offences, under the principles of *Qisas,* was abolished.[9]

The position of *Shari'ah*, particularly on criminal matters, was thus effectively restricted and subjected to the provisions of the Criminal Code. This control and restriction of the application of Islamic Criminal Law came to an end in1960 when the Penal Code Law of the Northern Nigeria of 1959 was promulgated into law.[10] The Penal Code sought to establish a system of criminal law which would gain international acceptance and would advisably not be in conflict with *Qur'an* and Sunna[11]. However, instead of codifying the principles of Islamic Law of crimes, in *toto* as expected, the Penal Code of Northern Nigeria ended up as a hybrid of English and Islamic Law[12]. This Code, which was the first attempt ever made in Nigeria to codify some aspects of *Shari'ah*, remained in force until the recent re-introduction of the application of Islamic Criminal Law System initiated by Zamfara State Government in the year 2000. This initiative of Zamfara was followed by other states of Northern Nigeria[13], either willingly or in response to popular pressure mounted by their subjects.

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[9] Bello, M., (2001) Keynote Address in Yakubu, A.M., et al (eds.), *Understanding Shari'a in Nigeria*, Ibadan, Spectrum Books Ltd, pp. 7 – 14.

[10] Gledhill, A., (1963), *The Penal Codes of Northern Nigeria and Sudan*, Law in Africa; No 8, London, Sweet & Maxwell, p. 768. Also cited in Peters, R., *Islamic Criminal Law in Nigeria,* supra, n1, at p. 12

[11] Richardson, S.S. (1987), Notes on the Penal Code Law, Zaria, Ahmadu Bello University Press, p.1

[12] Chukkol, K.S. (2001), The Penal Code: Origins, Application and Limitation, in Yakubu, A.M., et al, (eds), *Understanding Shari'a in Nigeria*, Proceedings of the National Seminar on Shari'a organized by Jama'atu Nasril Islam, JNI, Ibadan, Spectrum Books Ltd, p. 159

[13] These eleven States that joined the Zamfara State Government in *Shari'ah* Implementation Project are: Kano, Kebbi, Sokoto, Borno, Bauchi, Gombe, Jigawa, Kaduna, Katsina, Niger and Yobe States.

The initiatives of re – introduction of the *Shari'ah* that led to the codifications under study were premised on the fact that the Penal Code which sought to codify some of the *Shari'ah* offences had fallen far below the expectations of the Muslims particularly, on the issue of the *Shari'ah* punishments. Many of the *Shari'ah* punishments such as in the cases of *adultery* and *Qisas* were totally abandoned, modified or reduced to the extent that there were no any Islamic flavours in them,[14] thereby making them at great variance with the principles of Islamic Law of Crimes. This, therefore, explains the popular agitations that trailed the Zamfara State's initiative of re introduction of the *Shari'ah* through which the masses of other states in Northern Nigeria mounted pressures on their governments to follow suit.

However, owing to the constitutional constraints, going back to the pre colonial period of application of *Shari'ah* in its pristine nature without any form of codification or enactment could not be possible. As the Constitution of the Federal Republic of Nigeria[15] clearly stipulates thus:

> *Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined by and the penalty thereof is prescribed in a written law; and in this subsection, a written law refers to an Act of National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.* (Emphasis added)

The above constitutional provisions made it compulsory on the *Shari'ah* implementing states to codify various *Shari'ah* Penal Codes that would be used in their respective domains in the *Shari'ah* Implementation Project. This gave

[14] See for example SS. 387 & 388 providing for punishment of adultery as misdemeanor. Similarly S221 has completely done away with Qisas, etc.
[15] Vide s. 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999.

impetus to the selection of the topic of this study: "**Critical Appraisal of the Practice of Codification of Islamic Criminal Law in the Muslim World: A Case Study of Northern Nigeria".**

The dissertation critically studies the codification of Islamic Criminal Law by the *Shari'ah* implementing States of Northern Nigeria with a view to determining the position of such codification from classical *fiqh* perspective in the first place and secondly to find out whether such codification aids or retards the application of the *Shari'ah* as a whole.

1.3 Statement of the Problem

The issue of codification is alien to the classical tradition of Islamic Law by which the provisions of *Qur'an* and *Sunnah* form the primary sources of the Law. Judges under the Ideal Islamic settings are, therefore, expected to refer to these primary sources, albeit in the light of the understanding of the *Salafus Salih*, in the application of the *Shari'ah*. Recourse are normally and usually made to other secondary sources which are the products of *Ijtihad* such as *Ijma' Qiyas, Masalihul Mursala*, *Sad al – zaree'ah, Amalu Ahill Madina,* etc when the primary sources are silent on the issue at hand. This factor of utilizing the secondary sources of *Shari'ah* via the vehicle of *Ijtihad* gave Islamic Law its dynamism paving way for juristic responses to various emerging contemporary issues facing the Muslim *Ummah*.

One of the consequences of this dynamism, however, is the rich divergent opinions expressed or maintained by the Muslim Jurists on any issue that has no explicit text (*Nass*) from *Qur'an* or *Sunnah*. Thus, divergence of opinions is one of the

hallmarks of the classical *fiqh* discourse. Hence, even in the same School of Law (*Madhhab*), such as Malik School of Law, we find a situation where Imam Ibnul Qasim and Imam As - Sahnun used to maintain different opinions on the same issue as evident in the leading books of the *Madhhab*[16].

But with the advent of modernity most of the Muslim countries embraced codification on various aspects of Islamic Law. This was further heightened by the influence of westernization and colonialism. Even the countries that were not directly affected by colonialism such as Saudi Arabia and Yemen[17] have some aspects of Islamic Law codified either by their rulers or by their *Ulama',* as the case may be. Codification (*Taqneen*), as argued by scholars opposing its practice, by its nature, makes the Law somewhat stagnant and, therefore, deprives the *Shari'ah* of its ever growing dynamism. The codification makes the Law definitive and certain and it perhaps, lend credence to the closure of the gate of *Ijtihad*. Furthermore, the codification also prevents Judges from referring to the original sources of *Shari'ah* - i.e. the *Qur'an*, *Sunnah* and the views of the Muslim Jurists – which consists of very rich legacy of both the classical and the contemporary jurists. This fact prompted these Muslim Scholars to vehemently oppose the codification viewing it as mere westernization of the Islamic legal tradition.

On the other hand, considering the caliber of the people manning the *Shari'ah* Courts, whose credentials are far below those of a *Mujtahid* (pl. *Mujtahidun*) who

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[16] See for example, Al – Azhary, *S.A,* (ND), *Jawahirul Ikleel Sharh Mukhtasaril Khaleel (Sponsored publication of Abu Sa'ud, A.A* & Addayyib, U., Kano, Vol. I, p.258; (***Babul Jihad fee Ahammil Jihhat***). This kind of divergence of views could be found in all advanced manuals of Fiqh, such as: As'halul Madarik Sharh Kitabil Askari; Madawwanatul Kubra; etc, which are all on the Maliki School of Law. Sahnun was even reported to have once prayed thus: *"Lahal – Lahul Faqra! Lawlahu lastaghanaitu bi Malikin anib Bnil Qasimi."* Signifying the extent of differences between these two great Jurists.

[17] Peters, R. (2005), Enforcement of God's Law: The Shari'ah in the present World of Islam, in Ostien, P., et al, (eds), *Comparative Perspectives on Shari'ah in Nigeria*, Ibadan, Spectrum Books Ltd, p. 120

are very difficult to come by these days, let alone make them the judges, some groups of Muslim Scholars supported the codification viewing it as a child of necessity (*darura)* that has to be embraced.

The above and other contending and divergent perspectives engendered by the practice of the codification of *Shari'ah* make an in-depth study and appraisal of this phenomenon imperative. An added conundrum to these contentions is the fact that the codification of Islamic Criminal Law in Nigeria is necessitated by the constitutional requirements that no one shall "be convicted of a criminal offence unless that offence is defined and penalty thereof is prescribed in the written law."[18] The Consititution recognizes as written law only "an Act of the National Assembly or a Law of a state" and "any subsidiary legislation or instrument under the provisions of a law"[19] only. This, therefore, further constrained the *Shari'ah* Implementing States to embark on the codification of the principles of Islamic Criminal Law within the constitutional permissibility. It was, also, on the basis of another constitutional constraint that the omission of at least one vital aspect of Islamic Criminal Offence, which is *Riddah,*[20] had to be conceeded in the codification process. This further makes analysis of such codification in the light of the Islamic Legal Traditions instructive.

[18] Vide S. 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999 (supra)
[19] Ibid
[20] *Ridda* means conversion from Islam to another religion. This is part of the hudud offences under *Shari'ah*. But due to the Constitutional guarantee of Freedom of Religion which include the Freedom to change the religion under S. 38 of the 1999 Constitution, non of the *Shari'ah* Implementing States codify *Ridda* as an Offence.

1.3.1 Research Questions

Consequent upon the foregoing, some of the nagging questions this study will grapple to find answers to include, but not limited to, the followings:

a) Is codification of Islamic Criminal Law (*Taqneen ahkam as – shar'iyyah El - Jinaa'iyyah*) in line with the *Shari'ah* principles or is it synonymous with westernization of Islamic Criminal Law? Put in another way: Does codification amounts to westernization of *Shari'ah*?

b) What are the effects or consequences of the codification of the *Corpus* of the principles of Islamic Criminal Law? In other words what are the advantages and disadvantages of such codification, if any?

c) How does the codification (*Taqneen*) promote or retard the implementation of *Shari'ah* in Nigeria?

d) Does the omission of *Riddah* in the codification process amounts to serious omission that dealt a fatal blow to the *Shari'ah* implementation project in Nigeria?

e) What is the fate of the offences punishable at the discretion of the Judge (*Ta'azeerat*) after the codification?

These and other interesting questions raised by the codification of Islamic Criminal Law in Nigeria will be the focal points around which this study revolves.

1.4 Literature Review

Numerous literatures had been developed on the implementation of *Shari'ah* in Nigeria. This is because the implementation of *Shari'ah* in Northern Nigeria has attracted a lot of attention. It engages the attention of politicians, policy makers,

legal practitioners, judges, religious leaders and scholars. However, most of the literature in Nigeria focused their attention on the Constitutionality Question. Thus, for instance, **Okunola,**[21] **Orire,**[22] **Sulaiman,**[23] **Aliyu,**[24]**Sada**[25] and **Ladan**[26] made thorough analyses of the Human Rights and other Constitutiuonal Challenges facing the Shari'ah Implementation Project under the Nigerian Constitutional Democracy. None of the above learned writers, however, adverts his mind to evaluation of the *Shari'ah* Implementation Project from the paradigm of the classical *fiqh* in their respective write ups under review. In the same vein, **Ladan,** in his various works on *Shari'ah* Implementation, such as: "Handbook on *Sharia* Implementation in Northern Nigeria: Women and Children Rights Focus"[27] as well as, "Contending Perspectives on Death Penalty in Nigeria with Special Reference to the Sharia Penal Laws in Northern Nigeria"[28] and other numerous write ups on the same theme dissected the relevant human rights and constitutional issues vis – a – vis the application of *Shari'ah* in Northern Nigeria. The learned Professor did not, however, in any where touch on the main theme of this dissertation: "***Critical Appraisal of the Practice of the Codification of Islamic Criminal Law in the Muslim World: A case study of Northern Nigeria.***"

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[21] Okunola, M., (1993),The Relevance of Sharia in Nigeria, in Alkali, N. *et al* (eds), *Islam in Africa Conference,* Ibadan, Spectrum Books Ltd.
[22] Orire, A., (1993), A Shari'ah: A Legal System and a way of Life, in Alkali, N., *et al* (eds), Ibid
[23] Sulaiman, I. (2000), The Application of Islamic Law in Multi – Religious Society: The Case of Nigeria, Journal of Islam and Comparative Law, 22
[24] Aliyu, A. A., (1999), Islam and Human Rights, ABU, Journal of Islamic Law, Vol. 1, pp. 1 - 30
[25] Sada, I. N. (1999), The Islamic Constitutional Theory According to Ibn Taymiyyah, ABU, Journal of Islamic Law, Vol. 1, Pp.75 - 89
[26] Ladan, M. T., (2004), Legal Pluralism and the Development of the Rule of Law in Nigeria: Issues and Challenges, in Ibrahim, J. (ed), *Sharia Penal and Family Laws in Nigeria and the Muslim Wopld: Right Based Approach,* Zaria, ABU Press Ltd.
[27] Kaduna – Nigeria, LEADS Publication, (2005)
[28] In Ezeilo, J. N. (ed) (2005), Human Rights Protection in Administration of Sharia Justice System, Enugu, WACOL.

Following the same trail, **Ibrahim**[29]**, Haruna**[30] **Ahmed**[31]**, Uthman**[32]**, Plang,**[33] **Alemika**[34] and **Ezeilo,**[35] in their separate but contemporaneous works tried to evaluate the Implementation of ***Shari'ah*** Project from constitutional and human rights perspectives. None of these learned authors, however, makes any attempt to conduct a critical appraisal of the practice of codification of Islamic Criminal Law as a phenomenon in the *Shari'ah* Implementation Project of Northern Nigerian.

In the same token, **Ahmad**[36] while evaluating the administration of Islamic Criminal Law in Nigeria in his recent seminal work entitled: "Evaluating the Administration of Islamic Criminal Law from the Perspectives of Nigerian Constitutional Democracy" made thorough analysis of *Shari'ah* Implementation Project in Nigeria. At the end of his in – depth study on the issue he concluded his dissertation by finding nothing unconstitutional in the current implementation of *Shari'ah* project. He, however, observed that in order to consolidate the present gains of democratic dividends in the implementation of *Shari'ah* there is urgent need for constitutional amendment to clear some remnant of constitutional impediments on the application of *Shari'ah* in Nigeria. But the learned author and

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[29] Ibrahim, B.Y.(2003), Application of the Shari'a Penal Law and Justice System in Northern Nigeria: Constitutional Issue and Implications, in Ezeilo, J. N., *et al* (eds), *Sharia Implementation In Nigeria: Issues & Challenges on Women's Rights and Access to Justice,* Enugu, Women Advocate Research and Documentation Centre.

[30] Haruna, B.A. (2003), The Application of the Shari'a Penal System: Constitutional and other Related Issues, in Ezeilo, J. N. *et al* (eds), *Sharia Implemetation in Nigeria,* Ibid.

[31] Ahmed, A. B. (2003), Administration of Islamic Criminal Law and Justice in a Constitutional Democracy: Problems and Prospects, in Ezeilo, J. N., *et al* (eds), supra

[32] Uthman, M. B. (2003), Protecting the Rights of Accused Persons through the Proper Implementation of the Shari'a Procedural Guarantees in Northern Nigeria, in Ezeilo, J. N., *et al (eds),* Ibid

[33]Plang, D. (2005), Sharia Penal Laws in Northern Nigeria: A Review, in Alimika, E.O., *et al* (eds), *infra*

[34] Alemika, E. O., *et al,* (eds), (2005), Human Rights and Sharia Penal Code in Northern Nigeria, Kaduna, Human Rights Monitor.

[35] Ezeilo, J. N., *et al,* (eds), (2005), Human Rights Protection in Administration of Sharia Justice System, Enugu, Chenglo Publications Ltd

[36] Ahmad, N. A. (2008), *Evaluating the Administration of Islamic Criminal Law from the Perspective of Nigerian Constitutional Democracy*, An unpublished PhD dissertation, submitted to the Faculty of Law, Bayero University, Kano,

those preceeding him in this academic and intellectual endeavor made no attempt to evaluate the implementation of *Shari'ah* in Nigeria from the classical *fiqh* perspective as it particularly relates to the **codification of the principles of the *Shari'ah* Criminal Law.**

The literature developed by the Leaders of *Jihad* in Nigeria: **Sheikh Usman Bn Fodio**, his brother **Sheikh Abdullahi Bn Fodio and Muhammad Bello na-Gwandu**, such as, ***Kitah al-Farq, Siraj al-lkhwan, Tanbih al-Ikhwan, Tamyeez al-Muslimeena Min al-Kuffar* and *Naseehatu Ahl az-Zaman***; gave very helpful hints in conceptualising the practical application and Implementation of Islamic Law generally in Northern Nigeria. The digest of the above *Jihad* literature was captured for us by **Sulaiman**[37]**Abdullahi**[38]and **Khani**[39] in their respective works. These works, however, focused on Islamic Law in general and did not touch the Criminal aspect of the law let alone consider our topic of study: The Practice of Codification of Islamic Criminal Law.

In their separate but related works **Bambale**[40] and **Siddiqui**[41] gave us comprehensive analyses of the Islamic Criminal Law. The two respected learned authors did not, however, make any claim of analyzing the position of the codification of Islamic Criminal Law – the subject area of this humble researchwork. Similarly, **Sa'id** in his Islamic Criminal Law and Practice in

[37] Sulaiman.1. (1987) The Islamic State and the challenge of History: Ideals, Policies and Operations of Sokoto Caliphate, London, Mansell Publishing Ltd; Vide also, Sulaiman. I. (1987); Revolution in History, London, Mnasell Publishing Ltd

[38] Abdullahi, S.U. (1984), On the Search of viable Political Culture: Reflections on the Political thoughts of Sheikh Abdullahi Danfodio, Kaduna, Nigeria, NNN Commercial Printing Department.

[39] Khani, A.M. (1405 AH)The Intellectual Origin of Sokoto Jihad, Ibadan-Nigeria, Iman Publications Ltd

[40] Bambale, Y.Y., (2003), Crimes and Punishments Under Islamic Law, Zaria, Malthouse law books, 2nd Edition,

[41] Siddiqui, M.I. (1978) The Penal Law of Islam, Islamic Press, Karachi - Pakistan

Nigeria[42] made comprehensive analyses of Crimes and Punishments under Islamic Law. However, he did not make any attempt to address the question of the codification of Islamic Criminal Law.

Similarly, **Naniya[43]** chronicled the transformation application of *Shari'ah* had gone through from 1903 – 1966 in his "Transformation of the Administration of Justice in Kano Emirate, 1903 – 1966". The author traced the history of application of *Shari'ah* in Northern Nigeria during pre – colonial, colonial and post colonial eras. Similar historical analyses were made by this author in "History of *Shari'a* in some States of Northern Nigeria to Circa 2000"[44]. He did not, however, deal with the issue of the codification of Islamic Criminal Law – the Subject matter of this dissertation. Similarly, **Last** in his "Notes on the Implementation of Sharia in Northern Nigeria"[45] gave some historical account of the *Shari'ah* Implementation in Northern Nigeria. He, too, did not delve into the theme of the present study. In a related development, **Abu Zayd** in his ***Fiqhun Nawazil,[46]*** gave incisive evaluation of the Juristic views on the legality or otherwise of the codification of Islamic Criminal Law. After collating and contrasting the contending views, the author reached the conclusion that codification of Islamic Law of Crimes is at variance with the general principles of Islamic Law. The author being a Saudi writer could not know the Nigerian

[42] Sa'id, M. I., (2011), Islamic Criminal Law and Practice in Nigeria, Sokoto, Usmanu Danfodio University Printing Press.
[43] Naniya, T.M. (1990), *The transformation of the Administration of Justice in Kano Emirate, 1903 – 1966,* An unpublished PhD dissertation submitted to Department of History, Bayero University, Kano,
[44] Naniya, T.M. (2002), *History of Shari'a to Circa 2000*, Oxford Center for Islamic Studies, Journal of Islamic Studies, 13:1 pp. 14 - 31
[45] Last, M., (2002), Notes on the Implementation of Shariah in Northern Nigeria, FAIS Journal of Humanities, 2.2
[46] Abu Zayd, B. A., (1996/1416), Fiqhun *Nawazil,* Beirut – Lebanon, Mu'assasatur Risalah Lid – Daba'ah wan Nashr.

situation and the constitutional dictates requiring such codification, hence he arrived at the conclusion he reached.

Thus, little has been written on the codification of *Shari'ah* as a current phenomenon in the implementation of *Shari'ah* in Nigeria. Some, if not most, of the relevant literature on this topic were developed from series of National and International Conferences.

The National and International Conferences on the Implementation of *Shari'ah* provided platforms for Jurists, Legal Practitioners, Academics, Religious Scholars and other stakeholders in the *Shari'ah* Implementation Project to present papers on various aspects of Implementation of *Shari'ah*. These conference papers, however, often dwelt on the debates of constitutionality of the application of *Shari'ah* in Nigeria. Some of the literatures generated in these conferences are briefly reviewed below.

National Conferences on the Application of *Shari'ah* in Nigeria: These conferences include National Conference on the Application of *Shari'ah* in a Democratic Nigeria organized by the Department of Islamic Law, Bayero University, Kano in collaboration with Ramnan Law Consult, Kano in October, 1999. This Conference sought to address the then nascent initiative of the Zamfara State Government of re – introducing the Administration of Islamic Criminal Justice System within the framework of the 1999 Constitution of the Federal Republic of Nigeria. Scholarly papers on various aspects of the constitutional debates on this initiative were presented at this Conference. This was followed by a number of National Conferences and Seminars, which include: "National

Conference on *Shari'ah* and Constitutional Process" organized by the Center for Islamic Legal Studies, Ahmadu Bello, Zaria, in November, 1999. "National Conference on *Shari'ah* and the Nigerian Federation" organized by twenty four (24) Islamic Organizations in Borno State at Imam Malik Islamic Center, Maiduguri, in January, 2000. This was followed by a "National Seminar on *Shari'ah*" organized by Jama'atu Nasril Islam, at Arewa House, Kaduna in February, 2000. Thereafter a national seminar on *Shari'ah* with the theme: "*Shari'ah* Implementation in Nigeria: Problems & Prospects" organized by the Center for the Promotion of *Shari'ah* was held at Gusau, Zamfara State in September, 2001. Recently, the Center for the Promotion of *Shari'ah* organized its second national seminar with the theme: "*Shari'ah* Implementation in Nigeria: The Journey so far and the Challenges" at Kano in February, 2009. These conferences and seminars generated a lot of scholarly write ups but mainly with constitutional focus.

Apart from the above National Conferences and Seminars, International Conferences were also held with similar theme and focus. The prominent among these is the International Conference on "Comparative Perspectives on *Shari'ah* in Nigeria." This was organized jointly by the Faculty of Law and Department of Religious Studies, University of Jos, in January, 2004. In this International Conference scholars of international repute made presentation on *Shari'ah*. It was at this Conference some scholars, such as **Peters; An – Na'im** and **Ahmad,** tried to assess the impact of the codification of the principles of *Shari'ah* Criminal Law in Nigeria.

Peters in his "Enforcement of God's Law: The *Shari'ah* in the Present World of Islam"[47] traced the origin of the codification of *Shari'ah* principles. He made an extensive analysis to establish the fact that codification is a product of western influence on the *Shari'ah*. According to the learned author, codification came to the Islamic World as a result of tension between Islamic Law and The Western notion of Justice. He, therefore, maintained that the tension was resolved through the codification of enforceable aspects of *Shari'ah* to facilitate its application within the framework of westernized legal systems. The conclusion that could be drawn from this write up is that codification will, invariably, tantamount to westernization of *Shari'ah*. It should be pointed out that Prof. Peters had thoroughly dealt with this phenomenon from classical perspectives. Thus, even if one finds it difficult to agree with his conclusions the rigors of his analysis must be appreciated. It is also worthy of mention here that the learned Professor only analyzed the codification as a phenomenon making references to "*Mujallatul – Ahkam al – Adliyya*" (The *Mejelle*)[48] being the first ever known codification in Islamic World. Similar analyses were made by the learned Professor in his lectures[49] entitled: "From Jurists' Law to Statute Law: What happens when *Shari'ah* is codified."

[47] Peters, R. (2005), Enforcement of God's Law: The Shari'ah in the Present World of Islam, in Ostien, P., et al, (eds), *Comparative Perspectives on Shari'ah in Nigeria*, Ibadan, Spectrum Books Ltd, pp. 107 - 134

[48] Tyser, B.A.L., et al, (Trans), (2003), ***The Mejelle,*** Kuala Lumpur, the Other Press. This was the Civil Code of the Ottoman Caliphate (1877 – 1926). The codification of this was spearheaded by Cevdet Pasha, an imminent Jurist of Turkish origin.

[49] Unpublished lecture sLides. Delivered both at the Faculty of Law, Bayero University, Kano and Center for Islamic Legal Studies, Ahmadu Bello University, Zaria on 17th and 18th September, 2001, respectively. Which this researcher had the privilege of attending.

The learned Professor, however, made no attempt to analyze the codification in Nigeria which resulted in various "*Shari'ah* Penal Codes" of the *Shari'ah* implementing States, which is the focus of this dissertation.

On his part, **An - Na'im**[50] contended that enactment of *Shari'ah* principles into positive law makes it to lose its essential characteristics of diversity in Juristic views. He further argued that the inevitability of human interpretation of the divine sources of *Shari'ah* that led to the development of rich intellectual heritage should not be sacrificed on the altar of legal positivism, through codification. The learned Professor tried to anchor his argument on the fact that *Shari'ah* is historically developed by the Jurists who were totally independent of state and its institutions. The learned author also wondered how *Riddah* and related offences could be enacted and enforced in the face of Freedom of religion and conscience that have been constitutionally guaranteed and legally protected nationally and internationally. He concluded his thesis by calling for religious neutrality on the part of the states urging them to hands off on the issue of enacting or enforcing the *Shari'ah* principles. It should be pointed out here that although the learned Professor tried to analyze the enactment of *Shari'ah* Principles into various *Shari'ah* Penal Codes of *Shari'ah* Implementing States in Northern Nigeria, he did not advert his mind to other relevant issues engendered by the codification, such as the position of the *Ta'azeer* punishments, errors in the codification process, etcetera, which this dissertation sets out to address.

[50] An – Na'im, A.A., (2005), The Future of Shari'ah and the debate in Northern Nigeria, in Ostien, P., et al, (eds), *Comparative Perspectives on Shari'ah in Nigeria*, Ibadan, Spectrum Books Ltd, pp. 327 – 357; See also generally on this proposition An – Na'im, A.A., (2008), *Islam and the Secular State: Negotiating the Future of Shari'a*, Cambridge, Havard University Press, pp. 101 – 131 & An – Na'im, A.A. (1996), *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law*, New York, Syracuse University Press, pp. 69 - 100

In his reaction to Prof. An – Na'im's paper, **Ahmad**[51] analytically explained some of the concerns raised by An – Na'im regarding the enactment and enforcement of Islamic Law. While agreeing with the learned Professor that the enactment of *Shari'ah* principles into positive law has no grounding in the history of Islamic Legal Tradition, he was quick to point out that no sooner than the Jurists develop some particular rules in *Shari'ah* the authorities enforce them through the state machineries. The learned author, therefore, asserted thus: "granted that enactment is unknown to Islam, this presents no support for the assertion that a modern nation state can not enforce *Shari'ah* in its jurist – based form which is known to Islam."[52] It should be noted that while the learned author defended the enforcement of the *Shari'ah* in its jurist – based form he made no attempt to evaluate the current debates among the Muslim Scholars on the position of the codification of the principles of Islamic Law. Other related questions that have not been addressed in **Ahmad**'s commentary include: What is the fate of the current codification of the Islamic Criminal Law in view of his analyses? Should the codification be reversed notwithstanding the constitutional dictates he referred to? These and related issues constitute the gaps in this literature that this dissertation makes attempt to address. Related literatures were generated in the proceedings of the International Seminar on the Harmonisation of Islamic Law with Secular Laws held in Malaysia in 2005.

Beside the above line of arguments, Muslim Scholars else where in Islamic World had since indulged in the analysis of the position of the codification (*taqneen)* in Islam. For instance **As – Shuthry** in his two important Books on this subject

[51] Ahmad, A. (2005), Commentary on Abdullahi An – Na'im's paper, in Ostien, P., et. al, (eds), *Comparative Perspectives on Shari'ah in Nigeria*, Ibadan, Spectrum Books Ltd, pp. 358 - 373
[52] Ibid, p. 364

matter entitled: *Taqneenus Sharee'ah baynat Tahleel wat Tahreem (1426 AH)* and *Taqneenul – Ahkamis Shar'iyyah baynal Maani'eena wal Mujizeen* squarely addressed the point in issue. He, in a holistic approach, tried to comprehensively gather the views of Muslim Jurists and Scholars on the codification of Islamic Law generally. He analyzed all the contending views of those who are supporting and/or opposing the codification of the *Shari'ah* principles. In the conclusion of his works he seems to lend his weight and pitch camp with those scholars who oppose the codification of any aspect of Islamic Law. These books though dealt with the codification in a comprehensive manner; they were addressing the issue from general and not specific context. Hence the relevance of the present research work which specifically contextualizes its discourse on the Northern Nigerian local phenomenon of codifying the principles of the Islamic Criminal Law with a view to satisfying the constitutional requirement for smooth implementation of *Shari'ah* in the concerned states.

Al – Qardawi in his *al – Ijtihadul Mu'asir*[53] traced the origin of the codification (*taqneen)* to the *Mujallatul ahkam al – Adliyya* of the Ottoman Empire. He analyzed the various contending views of the Muslims scholars and concluded by welcoming the idea of the codification of *Shari'ah* Principles. The great scholar, however, maintained that attempts at codification of any aspect of *Shari'ah* should have the involvement of well grounded *ulama.'* This, he opined, will ensure the credibility of the process as it will prevent some avoidable pitfalls. Qardawi's work serves as good source of literature to this study notwithstanding the fact that

[53] Qardawi, Y. (1414 AH/1994), *Al – Ijtihad al – Mu'asir baynal Indibad wal Infirad*, Cairo – Egypt, Darut – Tauzee' wan Nashrul Islamiyya, pp. 41 - 44

his work is on the general *Shari'ah* position. But such contribution is analyzed within the local context to suit the objectives of this dissertation.

Al – Zuhaily in his *Nazriyyatud Darura al – Shar'iyya*[54] analyses the theory of necessity (*al – darurah*) under Islamic Legal theory, and concluded that codification of the principles of Islamic Law today is a contemporary legal necessity. The same author in his *Juhudut Taqneen Fiqhil Islamy*[55] clearly and without mincing any word supported the legality of the codification of Islamic Law principles. The learned Scholar, however, did not address with specificity the legal position of the codification of the principles of the Islamic Criminal Law let alone address the Nigeria's approach to such codification.

Many scholars used the doctrine of *darura* to justify the phenomenon of the codification of *Shari'ah*. The argument of these Scholars is hinged on the fact that application of *Shari'ah* in its pristine nature devoid of any codification requires a versatile and intelligent person with encyclopedic knowledge about *Shari'ah*, its sources and methodology who attained the position of *Mujtahid fis Shari'ah* to man the courts. When this is no longer tenable the codification becomes imperative as a matter of necessity (*darura)*. The above argument is even more relevant to our local situation in Nigeria where most of the personnel manning the *Shari'ah* Court are grossly lacking in the requisite legal training.

[54] Al – Zuhaily, W. (1969), *Nazriyyatud – Darura al – Shar'iyyah Muqaranatan ma' al – Qanun al – Wad'ee*, Damascus, Maktabatul Faraby

[55] Al – Zuhaily, W. (1987), *Juhudut Taqneen Fiqhil – Islamy,* Beirut – Lebanon, Mu'assasatir – Risalah.

In a related analysis, **Al- Buty**, in his *Dawabidul Maslaha*[56] analytically sets out the conditions for the usage and application of *Maslaha* as a source of Islamic Law. This work is very relevant as it enabled us to assess and evaluate the contention that the dictates of *Maslaha* or public interest in the present Islamic World tilted more in favor of the codification than otherwise. This dissertation has been used as a vivid encapsulation of the Nigerian situation.

On the issue of omission of *Riddah* and related offences such as *Zandaqah* in the codification of *Shari'ah* Principles of Criminal Law by the *Shari'ah* Implementing States, **Rahman**'s analytical study on the ***punishment of Apostasy in Islam***[57] provides very rich material on the offence and punishment of *Riddah* under Islamic Law. The author made thorough analysis of all the relevant textual authorities from *Qur'an* and *Sunnah* in the light of the juristic discourse on the subject matter and then concluded by proposing his thesis on this issue. This thesis has been utilized in analyzing the local situation to determine the fatality or otherwise of non inclusion of *Riddah* and related offences in the codification of Islamic Criminal Law in Nigeria.

Lastly it should be pointed out that in an interesting work entitled: *Shari'ah* Implementation in Northern Nigeria 1999 – 2006: A Sourcebook, **Ostien**[58] gathered all the relevant documentary evidence dealing with *Shari'ah* Implementation in Northern Nigeria. This Sourcebook truly constitutes a reservoir of historical accounts and documentation of *Shari'ah* Implementation Project in

[56] Al – Buty, M.S.R. (1410/1990), *Dawabidul Maslaha fis – Shari'atil – Islamiyya*, Beirut – Lebanon, Muassatul – Risala

[57] Rahman, S. A. (1996), *Punishment of Apostasy in Islam*, New Delhi – India, Kitab Bhavan Printers.

[58] Ostien, P. (2007), *Sharia Implementation in Northern Nigeria 1999 – 2006: A source book*, Ibadan – Nigeria, Spectrum Books Ltd, Vols I - V

Northern Nigeria. This is because this dissertation has relied on most of the documents sourced from this work.

The foregoing and other literatures on this subject matter are utilized in analyzing the position of the codification of Islamic Criminal Law Principles by the *Shari'ah* Implementing States in Northern Nigeria, from the classical *Fiqh* perspectives.

1.5 Scope and Limitation of the Study

There is no gainsaying that this study deals with an extensive and intricate area of interface between Islamic Law and other conventional legal systems. Thus, the field of this study covers such wide range of legal issues that cannot be exhaustively dealt with in a single study. Hence, this study makes no claim of covering all the germane issues that are related to this research field. Consequently and for the sake of consistency the study mainly focuses on the issue of the codification (*Taqneen*) of the *Corpus* of the principles of Islamic Criminal Law. This is so notwithstanding the fact that in the greater parts of Islamic world the areas of Islamic Personal Status (*Al - ahwalus – Shakhsiyya*), the Islamic Law of Transactions (*Mu'amalat*), etcetera, have been the focus of their codification efforts. However, for the obvious reason that this type of codification is yet to receive the attention of the Shari'ah Implementing states in Northern Nigeria only passing references were made to them in this study.

Another limitation of this study relates to the constitutional issues. Thus, although the codification of Islamic Criminal Law is necessitated by the constitutional dictates, only a modest attempt was made to evaluate the conformity of the codes with the constitutional dictates and provisions. Emphasis was, however, placed on

the analysis of the codifications (*Taqneen*) from the classical Islamic jurisprudential discourse. The various juristic views, both opposing and supporting this issue were canvassed and analyzed and thereafter evaluated and appraised in this study. This led us to draw the conclusion of this dissertation in which a precise answer to the main research question[59] was attempted.

1.6 Objectives of the Study

This study on "***Critical Appraisal of the Practice of Codification of Islamic Criminal Law in the Muslim World: A Case Study of Northern Nigeria***" seeks to achieve the following objectives:

1. Exploration, examination, evaluation and appraisal of the contending perspectives on the codification of the *Corpus* of the principles of Islamic Criminal Law in Northern Nigeria using the classical *fiqh* paradigm as a frame of reference; and also determination of the extent to which the codification either retards or promotes the application of *Shari'ah* in Nigeria.
2. Determination of the extent of the influence of westernization on the codification process, if any;
3. Evaluation of the extent of conformity or otherwise of the *Shari'ah* penal codes with the Nigerian Constitution;

[59] The main research question is whether codification aids or retards the implementation of Islamic Criminal Law in the Northern Nigeria?

1.7 Justification/Significance of the Study

Most of the controversies surrounding the implementation of *Shari'ah* in Nigeria centered on the constitutionality of the initiative. However, another dimension to this controversy is whether the *Shari'ah* Principles are amenable to codification as a positive law. This aspect of the *Shari'ah* controversy has not gained much prominence owing to its technical nature but it has more serious implication on the *Shari'ah* Implementation generally and Islamic Criminal Law in particular. This is because it is a well settled fact, based on the constitutional constraints, that the Islamic Criminal Justice System could not be administered within the framework of Nigerian Legal System without codification. Thus, any work that seeks to evaluate and critically appraise the position of the codification may be useful to the members of academia, policy makers, judges, legal practitioners and members of the general public as a whole.

Another justification or significance of this study lies in the fact that clarification of the position of the codification of Islamic Criminal Law (*Taqneen ahkam al – Shar'iyya El - Jinaa'iyyah*) may assist in demystifying the position of *Shari'ah* Implementation in the contemporary Nigeria. This is because the question of codification goes to the root of the re introduction of the administration of Islamic Criminal Justice System in this country.

1.8 Methodology of the Study

This Study, being exploratory in nature, was conducted through doctrinal research method. Thus, relevant Literature on the subject matter of the research were accessed, studied, reviewed and analyzed. Through this method the classical nature

of the *Corpus* of the principles of Islamic Criminal Law was examined, analyzed and then evaluated against the provisions of the contents of the *Shari'ah* Penal Codes currently being applied in the *Shari'ah* Implementing States of the Northern Nigeria. This, therefore, enabled the study to analyze the contending perspectives on the codification of the Principles of *Shari'ah* generally and Principles of Islamic Criminal Law in particular thereby reaching a fair conclusion on the subject matter. Thus, the research was mainly carried out with the use of the primary sources of Islamic Criminal Law - *Qur'an* and *Sunnah* – as well as the classical expositions and commentaries on the same as contained in the authoritative classical works known as ***Turath***. This was followed up with studying the intellectual works of the modern scholars on the subject matter in order to gauge, evaluate and critically appraise the current debates on the issue.

Other relevant materials used are Statutes, Laws and Journal articles. Relevant websites of the internet were also accessed and used to analyse the current debates on the issue at hand. The foregoing methodological description constituted the chief and main sources of information for this study.

The information gathered through the above methodology were carefully studied, reviewed, evaluated and analyzed with a view to finding out a concrete and convincing answer to the main research questions, to wit: Is the codification of Islamic Criminal Law (*Taqneen ahkam as – shar'iyyah El - Jinaa'iyyah*) in line with the *Shari'ah* principles? And how does it promote or rather retard the ideal and proper implementation of *Shari'ah* and administration of Islamic Criminal Law in the *Shari'ah* Implementing States of Northern Nigeria?

1.9 Organisational Lay Out/Structure of the Study

This study was divided into seven (7) separate but closely interrelated chapters, viz: **Chapter One** is wholly devoted to the general introductory issues and framework of the study. In that, it deals with the general introduction of the research consisting of the Background of the Study, Statement of problem and the research questions. It also embodies the Review of the relevant Literature, Scope and Limitations of the study as well as purpose, methodology, significance and the justification of the Study. This is with a view to laying down a solid foundation for the study as well as analytical frame of reference. In the same token, **Chapter two** deals with Conceptual Clarifications of key terminologies and phrases of the study. **Chapter three** discusses the Nature, Sources and Development of Islamic Law generally but with particular emphasis on Islamic Law of Crimes. This accords the study a theoretical frame of reference.

Chapter four briefly sketches out the history and development of the codification of Islamic Law (*Taqneenu ahkaamis Shar'iyyah) as* a concept. This affords the study an opportunity of determining the origin of the codification process and thereby provides a plank of analyzing its conformity or otherwise with the classical *fiqh* principles. Consequently, the western influence and the impact of the colonization process are studied, assessed and evaluated under this chapter.

Chapter five highlights the various contending perspectives on the legality of the Codification of Islamic Criminal Law from the Classical *Fiqhi* point of view. The Chapter attempts to analyze the general and specific issues raised in relation to codification of the principles of Islamic Law of Crimes. Therefore, the chapter

canvasses and collates the Juristic Opinions for and against the codification of the Principles of Islamic Law generally and Islamic Law of Crimes in particular. This enables the study to evaluate and critically appraise whether or not the codification of the Islamic Criminal Law aids or retards the *Shari'ah* Implementation Project in the *Shari'ah* Implementing States of the Northern Nigeria.

Chapter six on the other hand focuses on the Case Study of this Dissertation by highlighting the methods and styles adopted by the *Shari'ah* Implementing States of Northern Nigeria in codifying the principles of Islamic Criminal Law in their respective domains. It, thereafter, explores and restates, albeit summarily, the contents of the codification of the *Corpus* of the principles of Islamic Criminal Law as contained in the *Shari'ah* Penal Codes of the *Shari'ah* Implementing States of Northern Nigeria, using the Zamfara State *Shari'ah* Penal Code as a model[60]. The Chapter concludes with an attempt to address some specific issues bordering on limitations of the codification of the Principles of Islamic Criminal Law in the *Shari'ah* Implementing States of Northern Nigeria. These include the omission of *Riddah* and *Riddah* related offences in the codification process. It also studies the position of the discretionary punishments (*Ta'azeerat*) after the codification. The Chapter, thus, deals mainly with the nagging question of the constitutionality of the codification of the Islamic Criminal Law carried out by the *Shari'ah* Implementing States in their Implementation of *Shari'ah* Project in Northern Nigeria. It analyses the legislative competence of state to codify the principles of Islamic Criminal Law and enact same into their laws. The chapter also contrasts

[60] The choice of Zamfara State Penal Code was informed by two fundamental consIbiderations. First and foremost it was the pioneering code in this regard and secondly it is the most comprehensive of all the *Shari'ah* Penal Codes now in application in all the *Shari'ah* Implementing States of Northern Nigeria.

the constitutional requirements on fair hearing against the codification of Islamic Criminal Law. As a follow up to the above, the chapter also seeks to assess the Impact of other irregularities and errors in the codification process[61].

Finally, **Chapter Seven** deals with the concluding issues of this study. In that it embodies a concise summary of the researchwork. Thereafter, the chapter brings out the main findings of the research work and makes some recommendations thereon. Finally the conclusions of the research work were drawn.

[61] See the constant application of the procedural principle of *Yamenut – tuhmah* by the *Shari'ah* Courts in virtually all the *Shari'ah* implementing states. This leaves much to be desired as most of the Courts misapply this principle, particularly in Criminal Matters.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1 Introduction

This study deals with a specialized and technical aspect of Islamic Law. Hence, it is naturally replete with references to some technical terminologies. For the avoidance of confusion and to enhance clarity of the subject matter of discussion in this dissertation, some of these terminologies are clarified in this chapter. Unless otherwise stated or admitted by the context the usage of these terminologies in this dissertation shall be understood within the context of these clarifications.

2.2 Concept of the Codification of Islamic Law (*At – Taqneen)*

Codification of Islamic Law is technically known as '*Taqneen El - Ahkam El – Shar'iyyah'*. The operative word of this phrase that requires definition, analysis and clarification here is '*Taqneen'* which literally means "to enact, to promulgate" or "to establish and to pave a new way."[1] Etymologically, *Taqneen* is derived from the word '*Qanun'* which literally means measurement and rules of doing things generally. The author of *Muheedul A'zam* maintained that it is a borrowed word and of non Arabic origin.[2] It was, therefore, maintained to be either of French or Greek origin.[3] Thus, from the literal point of view *Taqneen* is a derivative of the word *Qanun* which is a non Arabic word that refers to collection, compilation, arrangement and enactment of legal rules on a particular branch of Law in one book popularly referred to as a Legal Code.

[1] The Arabic words used for these are '*Wada'a wa Sanna'*.
[2] Ibnu Sayyidah, A. I., Al – Muheedul A'zam fil – Lughah 86/6
[3] Al – Murtada, Z., *Tajul Arus,* 9/315

2.2.1 *At – Taqneen* as a legal Terminology

From technical point of view the concept of the codification of Islamic Law (*at - Taqneen)* has been a subject of variety of definitions all of which point to the act of writing, collecting, arranging and enacting legal rules in a particular order with a view to making them easily and readily accessible for application in adjudication of cases in the law courts. To this end, Mahmasany defined *at - Taqneen* as a "new legal terminology referring to writing down the legal rules."[4] In a more detailed manner, Mustapha El- Zarqa' defined '*at - Taqneen'* to mean "collections of the various injunctions and legal rules of Islamic Law dealing with any given field related to social interactions under various chapters in a clearly lucid but authoritative language arranged in a sequentially numbered sections for application in adjudicatory matters".[5] Closely related to this is the all encompassing definition advanced by Jamaluddeen Atiyyah when he said *At – Taqneen* means "collection of variety of legal injunctions from various legal sources and judicial rulings and their compilation in a single code for each branch of the law such as civil, commercial or criminal codes, etcetera,… and their arrangement in each code in parts and chapters containing series of articles, sections and sub sections on a related subject matter".[6] A contemporary Jurist, Sheikh Salih Bn Fauzan Al – Fauzan in a very concise manner sought to blend the above definitions into a single one when he maintains that *At – Taqneen* means "codifying the legal rules for

[4] Al – Mahmasany, Z., *Al – Auda'ut – Tashree'iyyah fid – Duwalil – Arabiyyah: Maadeeha wa Haadiruha,* p.149

[5] Al – Ashqar, U. (2005), *Al – Madkhal ilas – Sharee'ah wal Fiqhil Islamy,* Al – Urdun, Daarun Nafa'is, 1/313, Al – Qardawy, Y., (1991) *Madkhal Li Dirasatis – Sharee'ah* Cairo - Egypt, Maktabatu Wahabah, p. 297 (Al – Madkhal Fiqhiyyul Aam, 1/313)

[6] Atiyya, J. (1995), *Tareekhut – Taqneenit - Tashree' El – Islamiyyah*, Mujallatul Muslim El - Mu'asir, Vol. 11 (4), p. 37

judicial application by the judges who have no rights to adjudicate beyond the codified rules."[7]

To sum it up, *At – Taqneen* as a legal concept and terminology, according to the various definitions we have seen above, means the act of writing, collecting and arranging legal rules in a particular order with a view to making them readily accessible for ease of application and adjudication among people and their subsequent enactment and promulgation into Law by the appropriate authority.

2.2.2 *Taqneenul Ahkamis Shar'iyyah* as a compound terminology

The compound terminology of *Taqneen El - Ahkam El – Shar'iyyah* (Codification of the Rules of Islamic Law) has also been a subject of careful consideration and meticulous analyses in the literature of the contemporary Islamic Legal Theory. This phraseology, being a product of the nineteenth century, was not known to the earlier Muslim Jurists and linguists hence it does not appear in their writings. However, modern scholars and contemporary Muslim Jurists meticulously study this phenomenon and therefore attempt to give it a precise definition with a view to delimiting its entailments as a legal concept. The various definitions given to this phraseology by the modern scholars and the contemporary Muslim Jurists will be the subject matter of this sub – heading of our study.

To begin with, Wahabah Az – Zuhaily defined this phrase as "compiling the rules of *Mu'amalat* [Islamic Law of Contracts] and the theories surrounding same in the

[7] Alfauzan, S. F., *Taqneenus – Sharee'atil Islamiyyah baynat Tahleel wat Tahreem,* 11

form of modern legal codes for ease of reference [in adjudication]".[8] In a more detailed definition, Muhammad Zakiyyu Abdul – Barr defined the term as the act of "couching the rules and principles of Islamic Jurisprudence in the form of modern legal codes after selecting the most authentic and authoritative view on any aspect of the Law and promulgating same into Law. Provided this will neither lead to changing the Law of Allah nor adding as an appendage unto it what has no valid basis in the recognized sources of *Shari'ah*."[9] Allamah Mustapha Zarqa' shed more light on this definition when he said "codification of Islamic Jurisprudence (*Taqneen El – Fiqh El – Islamy)* means codifying Islamic Jurisprudential rulings from a particular School of Law/Jurisprudence (*Madhhab*) and arranging them into parts, chapters, sections and subsections sequentially numbered and compiled into a single code that will be enacted and promulgated into Law as criminal, civil or commercial code…etcetera."[10]

From the foregoing definitions it is crystal clear that for any codification of Islamic Law to be acceptable it must fulfill two basic and essential elements, *to wit:*

1) Form: This is a requirement that the codification has to conform to the structural formats of writing the Islamic Legal Principles.

2) **Substance:** This entails that the codified principles have to be derived from the established and accepted sources of Islamic Law.

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[8] Az – Zuhaily, W. (1987), *Juhud Taqneenil Fiqhil Islamy,* Beirut - Lebanon, Mu'assasatir – Risalah, (Al – Risalah Publishing House), p. 26
[9] Abdul – Barr, M. Z., *Taqneenul Fiqhil Islamy,* 21, vide Az – Zuhaily, Ibid
[10] Az – Zarqa, M., Al – Madkhalul Fiqhiyyul Aam, 1/313

Furthermore it should be pointed out that all the definitions propounded by the Muslim Jurists regarding the codification of *Shari'ah* are indicative of the fact that the only principles of Islamic Law susceptible to codification are those principles dealing with legal and not ritual acts of worship (*Ibadat)* as these later ones are purely spiritual matters which are usually established by clear cut textual authorities (*Nusus El - Qat'iyyatid Dalalah*) that are not amenable to *Ijtihad* and therefore not codifiable. This is the position, although some scholars argued that some aspects of spiritual acts are amenable to *Ijtihaaad.*

Thus codified principles of *Shari'ah* in its various branches are known as *Al – Ahkaam Al – Muqannanah;* while the codes containing them are known as *Qawaneen.* Hence, the title *Qawaaneenul Wad'iyyah* is given to any man – made – law generally. In more specific term any legal code containing principles and doctrines of Islamic Law of Crimes and Punishments or Offences and their Punishments (i.e. *Shari'ah* Penal Laws) are known as *Qanuunul Janaa'eey El – Islamy.*

2.2.3 *Qanunul Janaa'eey El - Islamy*

Experts in Islamic Criminal Law referred to Islamic Code of Crimes as *Qanuunul Janaa'eey El - Islamy.* This literally means "Islamic Penal Code" or "*Shari'ah* Penal Code".[11] *Qanun* is a word of non Arabic origin. It was said to have originated either from French, Roman, Ethiopian or Greek languages. It was also attributed to Latin language. However, recent research in the history of legal

[11] El – Khalaayalah, M. Y., (2001), *Taqneenu Ahkaamis Shari'ah El – Islamiyyah Baynan Nadhariyyah wat Tadbeeq: Dirasatun Muqaranah Litajribati Pakistan wa Mashrou' Misra fit Ta'azeer,* Unpublished PhD Dissertation, Submitted to the Faculty of Law, International Islamic University, Islamabad – Pakistan, p. 94

theory revealed that it is of *Yunan* origin but crept into Arabic language through *Siryaaniyyah.*[12] Despite its non Arabic origin Arabic Experts defined the word in various terms. *Ibnu Mandhur*[13]*,* for instance defined it as *Al – ASL* meaning the root. *Al – Fayruzy Abady*[14] in a more detailed definition rendered the word as *"Al – Qanun Miqyaas Kulli Shay'".* Meaning: "*Qanun* is the measurement of every thing". *Imam Al – Jurjaany*[15] on the other hand defined *Qanun* as "*amrun kulli mundabiqun ala jamee'i juz'iyyatihi allaty yu'urafu ahkaamiha minhu".* That means "a source of general rule that encompasses all its kindreds and their rulings are derived therefrom (i.e. the source)."

In the final linguistic analysis, Dr. Hassan Keerah[16] defined the word in a more legalistic way when he postulated thus: "*Al – Qanun* literally refers to the rule that indicates continuity, stability and system; hence the phrase *Qanunul Kaun* means law of the universe that is its permanent and constant system that is not amenable to changes and therefore not alterable. This could be illustrated with a number of scientific examples such as the cosmic system and the movement of days and nights. Similarly *Qanunul Jaazibiyyatil Ard* as a scientific phrase refers to the Law of Gravitational Force or Law of Friction" discovered by Sir Isaac Newton.

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[12] Ibid, see also *Lisaanul Arab,* vol. 3, p. 350; *Mukhtaarus Sihaah,* p. 231 & *Qamuusul Muheed,* vol. 4, p. 361.

[13] He was one of the leading authorities on Arabic Language. Born in Tripoli in the year 630 AH and died at Egypt in the year 711 AH. Vide Az – Zarkaly, I. (ND), *Al – A'alaam,* Alexanderer – Egypt, vol. 7, p. 329

[14] His full name is Muhammad Bn Ya'aqub Bn Muhammad Bn Ibrahim Bn Umar Abu Tahir Majdud Deen Ashayraazy Al – Fayruzy Abady. A leading icon in Arabic Language and Literature; Born in a village of Shayraz year 729AH and died at ZubaIbid in 817AH – Az Zarakly, I., Ibid, vol. 8, p. 19

[15] See *Al – Qamusul Muheed,* vol. 4, p. 361 & El – Khalaayalah, M. Y., (2001), op. Cit, p. 99

[16] Keerah, H., (ND), *Al – Madkhal Ilal Qanun,* Alaxanderer – Egypt, Mansha'atul Ma'aarif, 5th Edition, p. 11

Muslim Jurists and Scholars, old and new, used the word *Qanun* to refer to an established rule of law. Thus, Ibnu Qayyimul Jauziyyah used the word in the following context:

"The affairs of contemporary people could not be straightened except with some additional rules beyond the classical *Shari'ah.* It is therefore imperative to promulgate new rules (*Qawaneen)* that will guide the affairs of the new world."[17]

Imam Al – Qurtaby in his commentary on verse 105 of *suratun Nisa'* particularly on the *Qur'anic* Phrase (*Bi maa Araakal Lah)* meaning "…by that which Allah has shown you…"[18] said: "…By that which Allah has shown you based on the rules of *Shari'ah* (i.e. *Qawaneenis Shar'iyyah)* either by way of revealation and textual authority or by way of deduction based on the spirit of the revealation."[19]

Imam Fakhrur Razy[20] also used the word *Qanun* in his *Tafseer* where he said:

> "Note that Allah (SWT) had explained the major rules (*Qanunul A'adham)* and the most just system (*Qistaas al – Aqwam)"*[21]

Ibnu Khaldun in his *Muqaddimah* used the word *Qanun* in the following context:

> "It should be noted that one of the essential duties of a ruler is to protect the rules (*Qawaaneen)* designed by his subjects" [22]

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[17] Ibnu Qayyim, A. J., (1996), *Badaa'i'il Fawaa'id* Makkah – Al – Mukarramah, Maktabatun Nazaar Mustapha, 1st Edition, vol. 3, p. 674
[18] Suratun Nisa', Q.4: 105
[19] Qurtaby, I., (ND), *Jaami' Li Ahkaamil Qur'an,* vol. 5, p. 376
[20] His full name is Imam Fakhrud – Deen Muhammad Bn Umar Bn Hussain Bn Al – Hassan Al – Bakry Ar – Razy, Born in the year 445AH and studied under his father and other teachers. One of the leading commentators of the Qur'an and he was also learned in Islamic Jurisprudenc (*Usulul Fiqhi)* and Islamic Theology (*Ilmul Kalaam)*. He authored a lot of authoritative books, such as *Al – Mahsoul fee Ilmil Usoul; Surajul Quloub, etcetra,* besIbides his seminal work on *Qur'anic* Exigis known as *At – Tafseerul Kabeer.*
[21] Ar – Razy, F. I., (ND), *Tafseerul Kabeer,* vol. 27, p. 163
[22] Khaldun, I., (ND), *Muqaddimatu Ibni Khaldun, Deewanul A'amal wal Jabayaat*, Beirut – Lebanon, Mu'assatul A'alaamy, p. 243

Abu Ya'ala[23] in his *Ahkaamus Suldaniyyah* used the term *Qawaneen* thus:

> "…In protecting the rules of Islamic Law (*Qawaaneenis Sharee'ah)*, there are issues that will no be disregarded deliberately."[24]

Ibnu Rushd[25] in his Bidaayah used the word *Qanun* as follow:

> "In order to be like a law (*Litakuna kal Qanun Lil Mujtahid)* for the *Mujtahid"*[26]

The above quotations are but just few examples of the usage of the word *Qanun* in the writings of the Muslim Jurists. For more detailed discussions on the origin and usage of the word (*Qanun)* in Islamic Legal Theory the work of Dr. Muhammad Abdul Jawwad Muhammad[27] is relevant. It should also be noted that Muslim Jurists used the word to denote both Islamic Rule and Islamic Law; the fact that it etymologically originates from non Arabic Language notwithstanding. This is because in Islamic Law it is the meaning and intent or imports behind words that matter and not their etymological origins and lexical structures.[28]

Jurisprudentially, however, it refers to collections of chapters in the Books of Islamic Jurisprudence containing detailed explanations on various offences or

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[23] His full name is Muhammad Bn Hussain Bn Muhammad Bn Khalaf Al – Farra' Al – Baghdaady. Born in 380AH he studied *Hadeeth* and reported it. He mastered Islamic Jurisprudence and issued legal opinions. He is very knowledgeable in commentary of the *Qur'an.* He was appointed as a Judge. He died in Baghdad in the year 458 AH. He authored a lot of authoritative books including, albeit not limited to, *Al – Mu'utamad fil Usul, Ahkaamul Qur'an* and *Kitaabus Sifaat* to mention but a few. Vide El – Asqalaany, I., (ND), *Seeyar A'alaamun Nublaa'* vol. 11, p. 168 & *Mu'ujamul Mu'allifeen,* vol. 9, p.254.

[24] Abu Ya'alah, I., Al – Ahkamus Suldaniyyah, p. 37

[25] Ibnu Rushd's full name is Muhammad Bn Ahmad Bn Muhammad Bn Rushd Al – Andalusy Abul Waleed Al – Failasoufy (520 – 595AH). He hailed from Cordava in Spain. He authored more than fifty books which include, but not limited to, *At – Tahseel, Al – Haywaan* and the famous *BIbidayatul MuktahIbid.* He also rendered into Arabic the book of Aristotle. Vide *Al – A'alaam,* vol. 6, p. 212

[26] Ibnu Rush, A.,(1996), *Bidaayatul Mujtahid wa Nihaayatul Muqtasid,* Beirut – Lebanon, Al – Risalah Publishing House, vol. 2, p. 131

[27] Abdul – Jawwad, M.M., (1977), *At – Tadawwurut Tashree'i fil Mamlakatil Arabiyyah As – Sa'oudiyyah,* Cairo – Egypt, Jaami'atil Qahirah, especially from p. 15

[28] See for instance Bukur, Z., (926 – 970AH), *Al – Baharur Raa'iq,* Beirut – Lebanon, Daarul Ma'arifah, vol. 7, p. 46. See also Ameerul – Hajj, I., (1996), *Attaqareer wat Tahbeer,* Beirut – Lebanon, Daarul Fikr, vol. 1, p. 172

crimes and their punishments particularly in respect of offences whose punishments are left to the discration of the *Imam,* legislature or judges. The government in cases of this nature has the right to prescribe the punishments it deems fit. The punishments may be varied from time to time as it may differ from one place to another. These types of crimes and their punishments are technically known as *Ta'azeeraat.* The code may also contain crimes or offences with fixed punishments technically known as *Hudud.*

2.2.4 Evolution of codification as a legal concept

In the beginning there was omly the process and much later came the word codification. Historically speaking, the practice of codification dates back at least to Babylonian times; the Code of Hammurabi is believed to have been promulgated in *c.* 1700 BC and may have had Sumerian and Akkadian antecedents. In contrast, the *term* codification was coined as recently as 1815 by Jeremy Bentham in a letter to Tsar Alexander I.[29]

Etymologically the term derives from the Latin words *codex* (book) and *facere* (to make). In its broadest legal signification it is usually used to refer to the process of drawing up a written compilation of laws. In this sense the Ten Commandments are a sort of Code, as were the laws of Draco and Solon and the XII Table.[30] Similarly, this usage comfortably comprehends the early medieval redactions of customary law, such as the *lex Salica* and the *lex Burgundionum*, whereby the laws of the Germanic tribes which overran the ruins of the Roman Empire were

[29] Anonymous (2004), Codifying the Criminal Law, Report of Expert Group on the Codification of the Criminal Law, Department of Justice, Equality & Law Reform, Dublin, p. 28
[30] Ibid

originally written down, as well as the Roman practice of digesting and distilling the law either from the *corpus* of religious discourse or customary practices.[31]

2.2.5 **Other Terminologies of the Study**

Some of the other often used terminologies in this study that require further clarifications here include, but not limited to, the followings:

Furu'a: This refers to that branch of Islamic Law that deals with the dos and don'ts. It literally means branches and it is so named to show that it does not include that field of Islamic Knowledge that deals with ideological issues (*Aqeedah*), which is the root of Islamic belief.

Madhaahib: This is the plural form of ***Madhhab*** meaning Schools of Law. There are now four orthodox Islamic Schools of Law, viz: Hannafi, Maliki, Shafi'i and Hanbali Schools of Law. They are named after their founders.

Maslaha: Other terminologies having similar technical connotations with this are: ***Maslaha Mursalah; Masalihul Mursala;*** meaning public interest. This is used by the Jurists as sources of deriving Islamic Rules according to the dictates of the circumstance and human needs. It should be noted that there are some disparities in the meanings of the above terms but they can all be subsumed in the foregoing overarching definition.

Mujtahid (Pl. Mujtahidun); Meaning Independent Jurists; these are Jurists who distilled the *Shari'ah* rules from the textual authorities in the light of the understanding of the righteous predecessors (*Salafus Salih).*

[31] Ibid, at p. 39

Qawaneen: This is the plural form of ***Qanun*** meaning law as in canon law. It is often used to denote laws other than *Shari'ah* principles

Taqneen: This is the Arabic terminology for codification. By codification in this dissertation we mean enacting the principles of *Shari'ah* Law into statutory style with sections and sub – sections.

Talfeeq: This refers to reconciliation, synchronization and standardization of various juristic opinions, often than not, from different schools of law (*Madhaahib*).

Takhayyur: This refers to the techniques employed by the Muslim Jurists to choose a view from various divergent opinions maintained by the Jurists across the *Madhaahib*

The foregoing terms are just a few out of many terminologies that the study uses in its analysis on the theme of the codification of the principles of Islamic Criminal Law.

Similarly, terms such as "Implementation of *Shari'ah* in Nigeria", "Re – Introduction of Islamic Criminal Law" & "Expansion" or "Enlargement of the Application of *Shari'ah*" are interchangeably used to refer to the Zamfara State initiative that was followed by other Northern States of Nigeria while re - introducing the administration of Islamic Criminal Justice System in their respective domains. Any of the above terms used in this dissertation or others such as "*Shari'ah* Implementation Project" refer to these initiatives.

These conceptual clarifications are meant to guard against any misgivings or misconceptions on the theme and analyses of this dissertation and to further drive

the point home accurately. In the proceeding chapter, the study focuses on the theoretical framework of this research by treating the sources, nature and development of *Shari'ah* with particular reference to Islamic Criminal Law with a view to putting the whole discourse on the propriety or otherwise of the Codification of the principles of Islamic Penal Laws within the right perspective and proper analytical frame of reference.

CHAPTER THREE

3.0 NATURE, SOURCES AND DEVELOPMENT OF ISLAMIC CRIMINAL LAW

3.1 Introduction

This Chapter examines the nature, sources and development of Islamic Criminal Law. It lays down the theoretical frame of reference for this research work. Consequently, the chapter explains the nature of Islamic Law. It also explores the primary and subsidiary sources of Law making process in Islamic Law this enables the research to trace the specific source of Islamic Law which allows or disallows the codification under study in this research work. The chapter also identifies the process Islamic Law passes through in the course of its development. One important issue dealt with in this chapter is the closure of the gate of *Ijtihad* and the development of Islamic Criminal Law. Therefore, the chapter sets down the theoretical background for this study.

3.2 Nature of Islamic Criminal Law

Islamic Law generally and Islamic Criminal Law in particular is, by nature, a text based or text intensive legal system, in that, it is rooted in the divine revelations. Hence the primary sources of Islamic Law generally, and Islamic Criminal Law in particular, are *Qur'an* and *Sunnah* both of which are believed to be revelation from Allah (SWT). However, since revelation deals with fundamental issues, there is need for some supplementary sources to compliment the primary sources and deal with the new emerging phenomena. Thus, *Ijtihad* which serves as the dynamic vehicles that gives the *Shari'ah* relevance to all times, epochs and places was

legalised and recognised as a valid source of extending the frontiers of the *Shari'a*. It is, however, necessary for a *Mujtahid* to have a thorough understanding of the nature and characteristic of the *Shari'ah* so as to keep his *Ijtihad* within its spirit. Some of the basic and salient features of Islamic Law that should always be kept in mind in the Law making process of *Ijtihaad* are identified and discussed below.

3.2.1 Simplicity and Consistency with pristine human nature (*Fitra*)

Islamic Law having originated from Allah (SWT), the Creator of the universe and all the creatures therein, never impose obligation on its subject beyond their ability. Textual authorities abound, from both *Qur'an* and *Sunnah*, in support of the above assertion. Allah (SWT), in chapter 2 verse 286, states: "Allah does not charge a soul except [with that within] its capacity. It will have [the consequence of] what [good] it has gained and it will bear [the consequences of] what [evil] it has earned.

Elsewhere while dealing with fasting, the *Qur'an* in chapter 2 verse 185, declares thus: "Allah intends for you ease and does not intend for you hardship and [wants].

Similarly, in chapter 4 verse 28, Allah (SWT) says: "And Allah wants to lighten for you [your difficulties]; and mankind was created weak."

Likewise, in the course of explaining the requirement of ablution before performing prayers, *Qur'an*, in chapter 5 verse 6, states as follows: "Allah does not

intend to make difficulty for you, but He intends to purify you and complete His favour upon you that you may be grateful."[1]

Lastly, Allah (SWT) states, in *chapter* 22 verse 78 of the *Qur'an*,[2] thus:

> And strive for Allah with the striving due to Him. He has chosen you and ***has not placed upon you in the religion any difficulty.***

From the *Sunnah* perspective, the Prophet (peace be upon him) was reported, *inter alia,* saying: "This *Deen* is simple."[3]

In yet another place the Prophet (peace be upon him) says: "I am sent with simple but pure religion (*Hanafiyyatus Samha.)*"[4]

The above and numerous other authorities with similar imports led the Muslim Jurists to develop a jurisprudential maxim of general application in *Shari'ah*, *to wit:* Difficulty necessitates ease and relaxation (*Al – Mushaqqatu tajlibut Tayseer)*. This clearly shows that ease and relaxation are the hallmarks of the *Shari'ah* and wherever constraint exists it must be removed (*Ad – Dararu yuzaal).*

3.2.2 Equality before the Law

Another notable feature of Islamic Law is that it treats all its subjects equally. There is no superiority of one Individual above other except on the point of piety and fear of Allah. Hence, in chapter 49 verse 13 of the *Qur'an*, Allah (SWT) says:

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[1] All the translations of the quotations from *Qur'an* as earlier indicated are from Al – Muntada Al – Islamy & Saheeh International, (eds), (1997), *THE QUR'AN: Arabic Text with Corresponding English Meanings*, Riyad, Abul Qasim Publishing House.

[2] Ibid, emphasis added.

[3] Transmitted by Imam al – Baihaqi, in the chapter dealing with "Shu'bul Imaan"; vide Al- Jami'us – Sageer, vol. 2, p. 18. See also: Ali – Ar – Rabee'ah, A. A., (1402H/1982M), *Al – Adillatit – Tashree' Al – Mukhtalif fil Ihtijaaj biha (Al – Qiyas, Al – Istihsan, Al – Istislaah, Al – Istis'haab)*, Beirut – Lebanon, Mu'assatir – Risalah, pp. 202 - 204

[4] Transmitted by Ahmad and Daylamy on the authority of A'isha (may Allah be pleased with her). Imam As – Sakkhawy says its chain of transmission is good (*Hassan).* Another version of this *Hadeeth* was narrated by Imam Al – Khateeb in the history of Baghdad on the authority of Jabir, but Imam Suyuty opined that its chain of transmission is weak, vide Jami'us Sageer, vol. 1/126.

> O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing Acquinted.[5]

The Prophet (peace be upon him) practically demonstrated this Islamic equality in the case of a noble lady from the clan of *Banu Makhzum* when she committed theft and the Prophet's Companions (may Allah be pleased with them) tried to intercede on her behalf through Usmah Bn Zaid (R.A.), on which occasion the prophet (peace be upon him) declared: "By Allah! Even if it were Fatimah the daughter of Muhammad that committed theft Muhammad would have cut off her hand...."[6]

3.2.3 Personal Responsibility of Individuals

Each Individual under the *Shari'ah* is personally responsible for his/her deeds as provided in chapter 53 vv 38 – 39 of the *Qur'an*: "[N]o bearer of burdens shall bear the burden of another. … [A]nd that there is not for man except that [good] for which he strives."[7]

3.2.4 Protection of public interest and morality

The main goal of the *Shari'ah* is protection of public interest and public morality. Thus, whenever Individual interest crosses public need the later prevails. Most of the criminal acts were criminalised in order to safeguard public morality. Hence, though we are enjoined to be firm in application of the *hudud* punishments, spying

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[5] Al – Muntada & Saheeh (eds), op. Cit.
[6] Reported by both Bukhary and Muslim, see As – San'any (Al – Kahalaany), M. S., (1059 – 1182AH) *Subulus Salaam Sharh Bulughul Maraam; (Kitaabul Hudud)* Cairo – Egypt, Darul – Fikr, vol. 3, p. 20
[7] Al – Muntada & Saheeh, supra. Verses with similar imports are numerous such as: [Q17: 15]

on the privacy of the suspected criminal is outlawed.[8] Similarly, the high standard of proof prescribed by *Shari'ah* in proving the *hudud* offences particularly, *Zinah*[9] further strengthens this point.

3.2.5 Non retroactivity of its penal provisions

Non – retroactivity of Islamic Penal Laws is another hallmark of this legal system. This was derived from chapter 17 verse 15 of the *Qur'an* which states thus: "And never would We punish until We send a messenger."[10] Thus, whenever a particular practice is outlawed *Qur'an* used to declare that there is no blame for what was done in the past.[11]

However, some Muslim Jurists having regard to certain instances maintained that if retrospective laws will better serve the interest of the society nothing stops a ruler from passing such laws on the basis of *Maslaha.*[12] They reasoned that in most cases incident took place and subsequent to it revelations came and the Prophet (peace be upon him) used to apply the revelation to the incident.

The above point was illustrated by the cases of *Li'an* and *Zihar* respectively. In the former a man complained to the prophet (peace be upon him) that if he meets his wife with another man in illicit affairs if he talks about it he is punished and if he

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[8] It was reported that Caliph Umar once peeped over a wall of certain house and saw some people drinking alcohol when he tried to bring them to justice they argued that he committed trespass against them and the charges had to be dropped in their favour. See AsSan'aany, M.S. (ND); *Subulus Salaam Sharh Bulughul Maram,* op.cit., vol. 3, pp. 28 - 36

[9] Q24: 4

[10] Al – Muntada & Saheeh, op. Cit.

[11] See Q4: 22 – 23 dealing with women within the prohibited degree of marriage at the end of which the phrase except what is past was used. That also appears in the verse dealing with usury Q2: 275. The Prophet (peace be upon him) also told Amru Bn Al – As that "Islam annuls what was done before it."

[12] See Sa'id, M. I., (2011), Islamic Criminal Law and Practice in Nigeria, Sokoto – Nigeria, Usmanu Danfodio University Printing Press, p. 109 where the learned author identified two instances in which retrospective laws could be promulgated.

maintains silence he fell into psychological trauma. Thereafter the verses dealing with *li'aan* were revealed[13] and the Prophet (peace be upon him) allowed him to undergo the *li'aan* process.

Similarly, Khaulah Bint Tha'alaba came to Prophet (SAW) complaining that her husband Aus Bn Samit divorced her using *Zihaar* formula and the Prophet (peace be upon him) confirmed the divorce. However, when she kept on complaining the whole of Chapter of *Mujadalah*[14] was revealed and the Prophet (peace be upon him) applied the provision thereof to her case.

More direct to the point, is the case of the people of ***Urayna*** who came to Madina with skin ailment and the Prophet (SAW) prescribed to them as cure the milk and urine of his camel being taken care of by a shepherd at the outskirt of Madina. However, when they used the prescription and regained their health they killed the shepherd and drove away the camel. There and then revelation dealing with robbery came to the Prophet (peace be upon him)[15] and they were pursued and the reveled provisions were applied against them.

It should, however, be pointed out that the first and the second instances cited against this feature of non retroactivity of penal laws are purely matrimonial matters and in any case the new revelations brought about ease and relaxation over the difficult state of affairs prior to that. This is in line with the *Shari'ah* objective of removing constraints wherever it exists. As for the last case the application of

[13] The verses that provide for li'aan are in Q24: 6 – 10.
[14] Mujadalah is chapter 58 of the *Qur'an*.
[15] That is Q5:33 which provide: "Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that they may be exiled from the land. That is for them a disgrace in this world; and for them in the hereafter is a great punishment."

the revelation to ***Urayna*** people was more of Qisas than robbery as they reportedly killed the Shepherd. Thus, the feature of non retroactivity of criminal law remains unshaken in spite of the above critique.

3.2.6 Dynamism and Immutability *(A/ – Murunah wal Thabat)*

Another important feature of Islamic Law, that is relevant and germane to our study, is the dual nature of dynamism and immutability[16]. While *Shari'ah* is text intensive legal system on the one hand, thereby making it to have some fixed, constant and specific principles and objectives that are not susceptible to changes based on its nature of Immutability *(Al – Thabat);* It also responds to new emerging issues and changing conditions based on its feature of dynamism encapsulated in the technical term of *al -Murunah* on the other hand. This means that although some principles of Islamic Criminal Law are constant and unchangeable others are flexible and dynamic and therefore respond to new emerging issues at any given time. These twin natures of Islamic Criminal Law are illustrated by *Hudud* which are fixed punishments that could not be altered or modified, on the one hand; and *Ta'azeerat* that are discretionary punishments that could be modified at will by a ruler or a judge depending on the circumstances of each case, on the other hand.

[16] *Aliyu, I. A. (2009), Shari'ah* and Electoral Act: Conflicting or Complimentary, (An unpublished paper presented at a two day National Conference on Islam, Democracy and Electoral Reforms in Nigeria, organized by International Foundation for Electoral Systems (IFES/Nigeria) in collaboration with Aminu Kano Center for Democratic Research and Training, Mambayya House, Bayern University, Kano, held at Dankani Palace Hotel, Sokoto, March 18 — *19, p. 3.*

3.3 Sources of Islamic Law

The Sources of Islamic Law, technically known as *Masaadirul Usulut tashree' al Islamy,* are traditionally classified into two broad categories, *to wit:* Primary (also known as `Divine') Sources and Secondary Sources (also referred to as human component). The Primary/Divine Sources consisting of the *Qur'an* and Hadeeth (Kitab & *Sunnah)* are technically referred to as *"al - Nass" (i.* e. textual authorities). Both *Qur'an* and Hadeeth are revelations from Allah (SWT). The only difference being that, the *Qur'an* is direct revelation *(wahyus - sareeh)* while *Hadeeth* constitutes indirect inspirations from Allah (SWT) *'wahyul – khafy'(i.* e. hidden revelation). This is in accordance with the verse of the *Qur'an* which provides that whatever the Prophet (SAW) says is inspiration from Allah (SWT). "He speaks not out of his desires. It is not but a revelation revealed."[17]

The Secondary/Human Component of the *Shari'ah* Sources, on the other hand, consist of a number of means and juristic techniques of both deduction *(Istidlal)* and induction *(Istiqra)* leading to the discovery of Juristic Rulings on some particular issues. These sources which could be broadly categorised into two based on their recognition by various Schools of Islamic Jurisprudence include, albeit not limited to, the followings:

a) *Ijma'* (consensus of legal opinions) and *Qiyas* (analogy): Whereas Qiyas (analogy) could be treated as '*ijtihad al – fardi*' (Individual juristic reasoning) *ijma'* is *ijtihad al – jama'i* (collective juristic reasoning/effort).

[17] *See Q53: 3 — 4.*

This category of source are unanimously accepted and recognised by most *Sunni* Schools of Law[18] as valid sources of Islamic Law.

b) Other sources, under this sub - head which are subject matter of juristic controversies, include: *Istihsan* (juristic preference); *Qawlus – Sahabi* (opinion of the Prophet's Companions (may Allah be pleased with them); *Masalihul – Mursalah* (jurisprudential interest); *Saddudh – Dharee'ah* (blocking means to unlawful end); *Istis'haab* (presumption of continuity); *Urf* (custom); *Shar'u man qablana* (Earlier Scriptural Laws);[19] and *Amalu ahlil Madinah* (Practice of Madinan people).[20]

All the above secondary sources could be subsumed under the generic term of *Al – Ijtihad* (i.e. intellectual effort/reasoning). This is because, even the transmitted ones among them such as *Qawlus – Sahabi,* the opinions of the Prophet's Companions (may Allah be pleased with them) and *al – urf* (custom) depend, by and large, on *ijtihad* for either authentication of the source and/or attribution, in the case of the former or compliance with the general framework of the other established principles and sources of *Shari'ah*, in the case of the later.

The Focus of the research here is, however, on the four traditional sources of *Shari'ah* for which Muslim Jurists are virtually unanimous in their acceptance and

[18] All the four *Sunni* Schools of Law in Islamic Jurisprudence, viz: Hannafi, Maliki, Shafi'i & Hambali Schools of Law accdepted this as valid source of *Shari'ah*. They were named after their founders who mostly lived in the second century of Hijra. Thus, Imam Abu Hanifah the founder of Hannafi School of Law died in 150 AH, while Imam Malik – Imam Dar al – Hijra lived between 97 & 179 AH; Imam Shafi'i died in Egypt in the year 204 After Hijra. Imam Ahmad Bn Hambali died in 241AH. It is to be noted that it is the *Zahiri* School only that repudiate *Qiyas* as a valid Source of *Shari'ah.*

[19] Abu – Zahara, M. (1957), *Usulul Fiqhi,* Beirut – Lebanon, Darul Fikr El – Araby, pp. 274 – 275; see also the English version in Nyazee, I.A.K., (2006), *Islamic Jurisprudence (Usul al – Fiqh)*, New Delhi, Adam Publishers & Distributors, p. 144

[20] Al – Qattan, M. (1422H/2001), *Tareekhut – Tashree' al – Islamy*, Cairo, Maktabatu Wahba, p. 353

recognition as valid sources of Islamic Law in general term although there may be some points of divergence on matter of details.[21] Thus, many scholars of Islamic Law regard these four sources of *Shari'ah* as consensus sources. The chapter also explained other relevant sources which are peculiar to Maliki School of Law for the obvious reasons that the main focus of the dissertation the codifications of the Islamic Criminal Law (i.e. *Taqneenu ahkamis – Sahar'iyya al -El - Jinaa'iyyah*) was presumably done in accordance with the sources, principles and doctrines of the Maliki School of Law. This is because the Nigerian Laws allow for the application of Islamic Law according to Maliki School of Islamic Jurisprudence.[22]

3.3.1 The Glorious *Qur'an*

Qur'an, literally, means to recite, to collect or to unite.[23] It is technically rendered as the miraculous speech of Allah (SWT) revealed to the Messenger of Allah Muhammad (peace be upon him) as written in the *masahif* and transmitted to us through an authentic continuous narration (*tawatur*) without any doubt.[24] *Qur'an* was revealed to the Prophet Muhammad (peace be upon him) through angel Jibreel (AS) piecemeal over a period of twenty – three years spanning the prophetic mission.[25] Hence Allah (SWT) says:

> *And [it is] a Qur'an which We have separated [by intervals] that you might recite it to the people over a*

[21] It should, however, be pointed out that some Islamic Sects such as: Mu'tazilah & Khawarij are contesting the principle of Ijma' as a source of Islamic Law. Similarly Zahiri School rejects Qiyas in its entirety and at times challenges the attainability of Ijma' which the School, often than not, insist must be the consensus of the generality of the ummah. See for instance: Ibn Hazm, A. (ND), ***Al – Muhallah bil athaar***, Cairo, Makhtabatu Ibn Hazm.

[22] See S. 34 of the High Court Law of Northern Nigeria; see also s....of the Court of Appeal Act.

[23] Malekian, F. (1994), The Concept of Islamic International Criminal Law, London, Graham & Trotman Publishing Ltd, p. 30

[24] For further details on this definition, see Abdul'Azeez, A., *Kashf al – Asraar 'an Usul – al – Bazdawi*, vol. 1, p. 23 as quoted in Nyazee, op. cit., at p. 156

[25] Hamidullah, M. (1961), *Muslim Conduct of State*, Lahore, Ashraf press, p. 6

> *prolonged period. And We have sent it down progressively. [Q17: 106]*[26]

This even led the unbelievers to challenge the Prophet (peace be upon him) thus:

> *And those who disbelieve say, "Why was the Qur'an not revealed to him all at once?" Thus [it is] that We may strengthen thereby your heart. And We have spaced it distinctly [Q25: 32]*[27]

At times, the revelation came as answer to a question put to the Prophet (peace be upon him). Hence the *Qur'an* discouraged the first generation of the Muslims from asking too many unnecessary questions, when it says:

> *O you who have believed, do not ask about things, which, if they are shown to you, will distress you. But if you ask about them while the Qur'an is being revealed, they will be shown to you. Allah has pardoned [i.e. that which is past] and Allah is Forgiving and Forbearing. [Q5:101]*[28]

The revelation, sometimes, came as a solution to particular problem facing the then nascent Muslim Ummah.[29] Another reason for the revelation of the *Qur'an* piecemeal is the gradual implementation of the Law as in the case of the prohibition of alcohol.[30] The question that arises from the above discussion is: How and when the *Qur'an* was recorded and compiled in the book form that we are having today? This question will be dealt with in the proceeding paragraphs.

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[26] Al – Muntada al – Islami with Saheeh International (Eds), (1997), *The Qur'an: Arabic Text with Corresponding English Meanings,* Riyadh, Abul – Qasim Publishing House. All translations of Quranic verses are taken from this source. However, where different version of translation is used this will be indicated accordingly.

[27] Ibid.

[28] Ibid, emphasis added.

[29] See for instance the occasion of the revelation of the [**Q5: 06**] dealing with dry abulation (*Tayammum*), which was as a result of the problem that Muslim Ummah faced when they were in the forest on a course of journey during which the necklace of the prophet wife, A'isha (R.A.) was missing and the Prophet (peace be upon him) ordered the companions (R.A.) to wait until A'isha finds her necklace. As they were waiting the time for prayer came and there was no water. There and then the verse in Suratul Ma'ida (Q5:6) was revealed legalising the *Tayammum*.

[30] Series of verses verse where revealed to deal with alcoholism gradually, starting with Q2: 219 then Q4: 43 until the final prohibition were revealed in Q5: 90 – 91.

3.3.1.1 *Recording and Compilation of the Qur'an*

The Prophet (peace be upon him) used to memorize the verses of the *Qur'an* no sooner than they were revealed. So much so that, he used to move his tongue quickly as revelation was coming to him in order to commit it to memory. It was against this backdrop that Allah (SWT) says:

> *Move not your tongue with it [O Muhammad], to hasten with it [i.e. revelation of the Qur'an]. Indeed upon Us is its collection [in your heart] and [to make possible] its recitation. So when We have recited it [through Gabriel], then follow its recitation. Then upon Us is its clarification [to you]. [Q75: 16 – 19]*[31]

As soon as the revelation is over, the Prophet (peace be upon him) recites the revealed verses to his companions (may Allah be pleased with them) who would then memorise the verses almost instantly. There were also scribes among the Prophet's Companions (may Allah be pleased with them) Such as Zaid Bn Thabit, Aliyu Bn Abi Dalib, Mu'awiyya Bn Abu Sufyan, etcetra who used to record the verses after their revelation to the Prophet (peace be upon him) and his recitation to them.[32] These written records of the revealed verses of *Qur'an* were kept at the Prophet's house though the scribes used to make copies for their personal use and preservation. Angel Jibril (AS) informs the Prophet (peace be upon him) of the exact place and location of the revealed verses in a particular chapter of the *Qur'an*. In order to consolidate this arrangement, Angel Jibril (AS) used to descend to the Prophet (peace be upon him) every Ramadan to recite and go over the whole of the revealed portion of the *Qur'an* as of that year in its proper order

[31] Saheeh International, op. cit.
[32] Nyazee, I. K., supra, p. 159; Abu – Zahara, M., (1958), *Usulul – Fiqhi,* op. cit, pp. 76 - 90

and the Prophet (peace be upon him) used to recite after him.[33] But in the last Ramadan of the Prophet's life Angel Jibril descended upon the Prophet (peace be upon him) twice for the recitation of the whole *Qur'an* in its divinely ordained form and order. The Prophet (peace be upon him) thus memorised the whole of the *Qur'an* in its proper arrangement and recited it repeatedly to his companions (may Allah be pleased with them) who also memorised it in this original form as taught by the Prophet (peace be upon him) himself.

The *Qur'an* was, therefore, completely recorded before the demise of the Prophet (peace be upon him). The complete records of the *Qur'an* were available during the caliphate of Abu-Bakr (R.A.). But these records, owing to the dearth of writing materials, were on parchments, leaves, bones and skins of animal, etcetera. It should, however, be pointed out that this records were reinforced by the memories of the Prophet's Companions (may Allah be pleased with them) who memorised the whole of the *Qur'an* as recited by the Prophet (peace be upon him).[34] That is why when over seven hundred *huffaz* (i.e. memorisers of the *Qur'an*) were killed at the battle of *yamamah* during the reign of Caliph Abu-Bakr (R.A.), Umar Bn Khattab (R.A.) strongly advised and insisted that the preserved but yet to be codified records of the revelation should be compiled. When Caliph Abu-Bakr (R.A.) accepted this advice, he commissioned Zaid Bn Thabit (R.A.) and other *Huffaz* among the Prophet's Companions (may Allah be pleased with them) for the job. This marked the first stage of the compilation of the *Qur'an*'s project.[35]

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[33] Ibid.
[34] Al – Ameen, M.S.M. (1418H), ***At - Tabsirah fee Uluomuil Qur'an,*** Madeenatul Munawwarah, Islamic University Press, pp. 29 – 41
[35] Ibid

The second stage of the compilation of the *Qur'an* took place during the era of Usman Bn Affan (R.A.) as the Caliph. The reason for this was the expansion of the Islamic Territory at that time. Many converts to Islam were reciting the *Qur'an* differently. Caliph Usman (R.A.), in a bid to unify the Ummah, commissioned Zaid Bn Thabit (R.A.), once again, to undertake the project. This mission was painstakingly accomplished by Zaid who used to compare the written records with what was in the memory of the *Huffaz*. Six official copies of the *Qur'an* were produced by the taskforce and Caliph Usman (R.A.) sent a copy each to the then components of the then Islamic Territory.[36]

3.3.1.2 *Qur'an as a Source of Law*

Qur'an is considered as the basic and the main source of Islamic Law. It is the word of Allah (SWT) revealed to the Prophet Muhammad (peace be upon him) for the guidance of humanity. *Qur'an* is not exclusively a law book, but it contains some verses with legal connotations known as *Ayatul Ahkam*. Imam Suyuti[37] identified over five hundred verses with legal import. This, however, is a small percentage when compared with the total number of the verses of the *Qur'an*. But the verses with legal connotations are, often than not, much longer than the other verses.[38]

Muslims are generally unanimous that *Qur'an* is the word of Allah (SWT) revealed for the guidance of humanity and therefore its authority is supreme. A UN

[36] Qurtaby, I. (ND), ***Jami' Li – Ahkamil Qur'an: Tafseerul Qurtaby***, Beirut, Majma' Turath, vol. 1, pp. 44 – 45; See also Qardawy, Y. (2001), *Madkhal Li Dirasatis – Sharee'atil Islamiyya*, Cairo, Maktabatu Wahabah, pp. 223 – 225 for detailed discussion on the compilation of the *Qur'an* generally.
[37] Suyuti, I.J., ***Al – Itqan fee Uloumil Qur'an***,
[38] See for instance *Ayatud Dayn* the longest in the *Qur'an*. It occupies a whole page of the *Qur'an*.

Document[39] accurately captured the position of the *Qur'an* to Muslims when it asserts thus: "***The Qur'an, the word of God, is perfection itself – it is unchallengeably true, infallibly just."***[40]

Each text of the *Qur'an* contains layers of meaning that only learning and devotion can reveal. Hence, it is not uncommon to find one verse of the *Qur'an* of a few lines taking a whole volume of treatise to expound.[41] This explains the reasons for the divergence of opinions among the Muslim Jurists when it comes to distilling rules and *Shari'ah* principles (*al – Ahkam*) from the *Qur'an*ic texts. *Qur'an* becomes the preoccupation of some of the best minds and talents among the Muslims particularly the science of the *Qur'an*ic interpretation (*Tafseer*).[42]

3.3.2 *Hadeeth/Sunnah*

Hadeeth, literally, means new. Another synonym of *hadeeth* is *Sunnah* which literally refers to a 'well – beaten – path' or 'well – known path' or 'well – trodden path' that is repeatedly followed. It may be a way that people tread or a practice they respect.[43] Technically, however, it refers to detailed accounts of the deeds, sayings or prophecies and approval or acquiescence of the Prophet (peace be upon him),[44] which though not in the *Qur'an*, are inspired by the divine revelation.

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[39] A UN Doc. Vol. XIV pp. 375 – 9, cited in Weeramantry, G.C. (1988), Islamic Jurisprudence: An International Perspective, p. 32; Vide also Ahmad, A. (2001), *Cosmopolitan Orientation of the International Environmental Law Making: An Islamic Law Genre*, Maryland – USA, University Press of America, p. 23

[40] Ibid, Emphasis added.

[41] Ibid

[42] Ibrahim, A.M. (1965), *Sources and Development of Muslim Law*, Singapore, Malayan Law Journal, pp. 10 - 11

[43] Abu – Zahara, M, (1958), *Usulul Fiqhi,* op. cit, pp. 105 – 107; see also Nyazee, I.A.K., (2006), *Islamic Jurisprudence (Usul al – Fiqh*), New Delhi – India, Adam Publishers & Distributors, p. 162

[44] Abdul – Kareem, H., et al, (1413AH), *Min adyab al – Minh fee ilm al – Mustalahil – Hadeeth,* Madinatul Munawwarah, Kingdom of Saudi Arabia, Islamic University Press, p. 6

Hadeeth is a necessary appendage to the *Qur'an* that gives details about its contents, specifies its general provisions as it particularizes and restricts it seeming unlimited provisions. It also provides practical application of the *Qur'an*.[45] Hence the greatest mission of the Prophet (peace be upon him) according to the *Qur'an* is to explain the divine revelation to the mankind. Thus, the *Qur'an* states:

> *With clear signs and Books, (We sent the messengers). And We have also sent down unto you (O Muhammad) the Dhikr [reminder and the advice (i.e. Qur'an],* ***that you explain clearly to men what is sent down to them and that they may give thought****. [Q16: 44]*[46]

It should be pointed out, here, that while *Qur'an* deals with fundamentals of the *Deen;* Hadeeth provides the required details thereof. Thus *Qur'an* enjoined the Muslims to pray & the *Sunnah* supplies the details in terms of the timings, types: Obligatory and Supererogatory, number of raka'at and how it will be generally performed. Hence the Hadeeth 'Pray as you see me praying'. The same explanation applies to Zakat, Fasting, Hajj, etcetra.

3.3.2.1 *Compilation of Sunnah*

The Collection and compilation of *Sunnah* passed through series of stages.[47] However, the actual collection and writing of the *Sunnah* started in the lifetime of the Prophet (peace be upon him). This was further developed and expanded during the time of the Prophet's Companions (may Allah be pleased with them). Thus it continued to be developed and be expanded until the time of writing and

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[45] Qardawi, Y. (2001), *Madkhal Lidiraasatis Shari'atil – Islamiyyah,* Cairo – Egypt, Maktabatu Wahbah, pp. 48 - 52

[46] Muhammad, M.K. & Muhammad, T.A. (1966), *Interpretation of the Meanings of the Noble Qur'an in English Language*, Riyadh, Kingdom of Saudi Arabia, Darussalam Publishers, Emphasis and italicisation are mine.

[47] For detailed analysis of these stages, see: An – Nadwy, S.A. (ND), ***Arisalatul Muhammadiyya***, Cairo, Dar Salafiyya, & Qardawy, Y., Madkhal, op.cit, p. 51

compilation of the Islamic knowledge and heritage known as *Asru Tadweenil Ulum.* During the period, *Sunnah* was collected, verified and compiled in Hadeeth Collections' Books. The most popular and important of these are: Muwatta Imam Malik, Kutubs Sitta (Sittu Sihah)[48]; Musnad Imam Ahmad and Sunanud Darumy.

The Muslim Jurists, however, concentrate on the Ahadeethul ahkam. These were compiled in separate volumes, such as: *Muntaqal Akhbaar min Ahadeeth Sayyidil Akhyar by Imam Abdus – Salam Bn Taymiyya*[49]. Imam Shawkany later annotated and wrote commentary on this important source material which he entitled *Naylul Autaar.* Secondly, there is *Bulughul Maramy min adillatil Ahkaam* by Sheikhul Islam, Hafiz Ibnu Hajar al – Asqalany – the author of *Fat'hul Baary.* Annotation and commentary on Bulugh was subsequently written by Imam San'any under the title of *Sublus – Salaam Sharh Bulughul Maraam*[50]. These are two important source material that any student or scholar of Islamic Law cannot do without them.

3.3.2.2 *Hadeeth/Sunnah as a Source of Law*

In number of places in the *Qur'an*, Allah (SWT) instructed the believers to obey the Prophet (peace be upon him) in whatever he commanded them to do.

> *...And whatsoever the messenger (Muhammad) gives you, take it; and whatsoever he forbids you, abstain (from it). And fear Allah; verily Allah is severe in punishment. [Q59: 07]*[51]

[48] The six books of collection of ahadeeth refered to as *sittu Sihaah* are Saheehul Bukhari, Saheehul Muslim, Sunan Abi Dawoud, Sunan Nasa'i & Sunan Ibnu Maajah and Jami'ut - TirmIbidhy.
[49] This is the grandfather of Sheikhul Islam Ibnu Taymiyya
[50] See Qardawy, Y., Madkhal, supra, at p. 52.
[51] Ibid

Indeed Allah (SWT) makes obedience to the Prophet (peace be upon him) as obedience to HIM when He states thus: "Who obeys the Messenger has obeyed Allah" [Q4: 80][52]. "..Obey Allah and Obey the Messenger..." [Q24: 54][53].

Elsewhere in the Noble *Qur'an*, Allah (SWT) sternly warns against disobeying the Prophet (peace be upon him) thus:

> *...So let those beware who dissent from his [i.e. Prophet's] order, lest fitna [trials, affliction, dissension, etc.] strike them or a painful punishment. [Q24: 63]*[54]
> *But no, by your Lord, they will not [truly] believe until they make you [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission. [Q4: 65]*[55]
> *Indeed we have revealed to you [O Muhammad], the Book in truth, so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate. [Q4: 105]*[56]
> *And We have not revealed to you the Book, [O Muhammad], except for you to make clear to them that wherein they have differed and as guidance and mercy for a people who believe. [Q16: 64]*[57]

The Prophet (peace be upon him) himself emphasised this point when he said: "Listen attentively, I have been given this *Qur'an* and something similar to it...."[58]

Based on the above *Qur'an*ic verses and the Hadeeth, the Prophet (peace be upon him), as the bearer of the divine message to the humanity is clothed with the authority to explain and make clear the message he brings to the mankind. The

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[52] Ibid, see also Abu – Zahara, M. (1958), *Usulul Fiqhi,* op. cit, p. 108
[53] Ibid
[54] Ibid
[55] Ibid,
[56] Al Muntada & Saheeh International (Eds), Ibid
[57] Ibid
[58] Ahmad & Abu Dawoud narrated this Hadeeth on the authority of Miqdam Bn Ma'adee – karab. Vide *Saheeh Jami'is Sageer*, Hadeeth No. 2643.

explanation and the practical application of the divine message by the Prophet (peace be upon him) serves as appendage to the message itself, hence, it forms part of the authoritative source of Law. Furthermore, *Qur'an* sanctions whatever the Prophet (peace be upon him) says, does and/or approves. This is even regarded as coming from Allah by way of inspiration as the Prophet (peace be upon him) does not "speak of his own desire, it is only a revelation revealed." [Q53: 3 – 4][59]

3.3.3 *Ijma'* (Juristic Consensus)

Ijma' technically means consensus or agreement of the Prophet's Companions (may Allah be pleased with them) or Muslim Jurists of a particular age, after the demise of the Prophet (peace be upon him), on a particular issue for which neither *Qur'an/Kitab* nor *Hadeeth/Sunnah* makes an explicit provisions.[60] It should however, be pointed out here, that *Ijma'* is of two kinds: Explicit and implicit *Ijma'*. It is an explicit *Ijma'* (*Al – ijma'al Qauly/Bayany)* where all the qualified contemporary jurists express their support orally or in writing to the consensus. Or better still participate in the consensus making process. On the other hand, Consensus is regarded as implicit ijma' (*Al – Ijma'as Sukuty/Taqreery)* where only a section of the qualified contemporary jurists participated in the Ijma' making process whilst others remained silent in spite of their knowledge about such development.[61] It is also apposite to point out, at this juncture, that, whereas *Ijma'al Qauly/Bayany* (the Explicit Consensus) is authoritative source of Law

[59] Ibid
[60] El – Naysabury, I.I.M. (1420H/1999), Al – ***Ijma': Ma ajma' alaihil Ummah minal ahkamil Fiqhiyyah;*** Cairo – Egypt, Maktabatul Safa, pp. 5 – 6.
[61] Ibid, p. 6

(*Qat'iyyul Hujjiyya) Ijmas Sukuty/Taqreer (*the Implicit *Ijma'*) is speculative source of Law (*Dhanniyyul Hujjiyyah)* and, therefore, contestable.[62]

3.3.3.1 ***Ijma' (Juristic Consensus) as a Source of Law***

Ijma', as a Source of Islamic Law, derives its authority from both the *Qur'an* and the *Sunnah* (i.e. the two divine sources of Islamic Law). In the noble *Qur'an*, Allah (SWT), in *Suratun Nisa'*, says:

> *And whoever contradicts and opposes the messenger (Muhammad) after the right path has been shown clearly to him, and* ***follows other than the believers' way, We shall keep him in the path he has chosen, and burn him in Hell – what an evil destination! [4: 115]***[63]

The Prophet (peace be upon him) was also reported to have said: "My nation will never be unanimous on error."[64]

Majority of the Muslim Jurists consider *Ijma'* as the third most authoritative source of Islamic Law, though some minority jurists are contesting the feasibility of its attainment. It is against this background that Professor Abu Zahra observed thus:

> *The very validity of Ijma' is not a matter of consensus among Muslims. There are prominent jurists who explicitly denied its very existence. There are others who admitted its validity, but when an issue came with a claim of previous Ijma' they denied its very existence. [However], it was for the maintenance of national unity and as a check against Individual deviations, that Ijma' was legalised as an authority after the sacred texts.*[65]

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[62] Ibid
[63] Emphasis supplied.
[64] Abu Dawoud, Sunan Collections, see also El – Naysabury, op cit and Ibrahim, A.M., supra, p. 20
[65] Abu Zahra, M. *(*1955);, Abu Hanifa, Cairo – Egypt, *Daral – Taba',* See also Ibrahim, A.M., op cit, at p. 20 citing Ramadan, S. (1961), Islamic Law, London – England, Sweet & Maxwell, p. 85

It should be noted that the controversy surrounding *Ijma'* is not in relation to its recognition as a valid source of Law but rather about the possibility of its attainment. This is because Jurists, more often than not, express divergent opinions on issue for which there is no explicit provisions in either of the two textual authorities (*al – Nass*) – a composite term referring to both the *Qur'an*/Kitab and Hadeeth/*Sunnah*. It was on this ground that Imam Ibn Hazm al – Zahiry recognized only the *Ijma'* reached by the Companions of the Prophet (may Allah be pleased with them) as feasible and therefore authoritative in *Shari'ah*.[66] Furthermore, while majority of Jurist (*Jamhur*) are of the opinion that what matters, regarding the Ijma', is the consensus of qualified Muslim Jurists; Imam Shafi'i, in his later view, holds the view that the agreement of the entire Muslim nations (Communal Consensus) of a particular age is required.[67] This even makes attainment of consensus exceedingly difficult if not impossible.

From the Shi'ah perspective, consensus (*Ijma'*) is not regarded as definitive source of Islamic Law except where it is reached by the members of the of the Prophet's family or where an infallible Imam endorses it. Thus, *Ijma'* to Shi'ah is a consensus that embodies the views of the infallible Imams and not mere convergence of juristic opinions on a particular issue.[68]

It should be pointed out, here, that *Ijma'* of a particular generation may be reversed by a subsequent *Ijma'* of the same age. However, an *Ijma'* of the previous

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[66] Ibn Hazm, A., *Almuhalla bil – Athaar, op. cit.*

[67] Al – Ghazali, A. I. (1322H); *Al – Mustafa Fee Usulil – Fiqhi;* Cairo – Egypt, Dar al – Taba', See also Sachet, J. (1955); Islamic Jurisprudence; Oxford, The Clarendo Press, p. 88; See also Ibrahim, A. M.; supra, p. 23

[68] Mahmasani, S. (1961), The Philosophy of Jurisprudence in Islam; Ziaden, F. J. (trans); Leidin, UK, See also AbdurRaheem, M. (1911), *Muhammadan Jurisprudence*, London – England, London & Madrasa, p. 127, Vide also Ibrahim, A. M. Op cit, p. 22.

generation particularly that of the Companions of the Prophet (may Allah be pleased with them) carries a binding force on the subsequent generation and, therefore, cannot be repealed as per Imam Shafi'i.[69]

Finally, although *Ijma'* is regarded, in Islamic Legal Theory, as a third source of Islamic Law; in practice, it is the mainstay of Islamic Legislation. This is so, as correct interpretations of the *Qur'an* and proper authentications of Hadeeth are, to some extent, dependent upon the *Ijma'*. *Ijma'* is, also, a dynamic tool for juristic responses to various contemporary emerging issues challenging Muslim Community of any given age. Indeed the main theme of this dissertation, *to wit:* Codification of Islamic Criminal Law (*Taqneen ahkam as – Shar'iyyah al -El - Jinaa'iyyah)* is a good example of a subject matter of *Ijtihad*, [i.e. *Mas'alah al - ijtihadiyya*], hence the intricate juristic controversies over it. Thus through *Ijtihad* the continuity of *Shari'ah* is guaranteed and herein lies the beauty and importance of *Ijma'* as a source of Islamic Law.

3.3.4 *Qiyas* (Analogy)

Qiyas in its restrictive sense refers to analogical deduction of Islamic Rulings from the preceding sources. It is a juristic technique of expanding an established rule of the *Qur'an*, *Sunnah* and/or Consensus of the Companions of the Prophet (may Allah be pleased with them) to cover some contemporary emerging issues not previously covered by the texts. This technique is usually employed in cases where there is similarity between the original subject matter of the textual rule,

[69] Ibid

technically known as *al-asl* and the emergent issues to which the rule is sought to be extended known as *al-far'* due to similarities between them in cause (*al – Sabab*) or in effect (*al – illah*). It is, however, apposite to cite here that a popular jurisprudential maxim emphatically warns that "there is no analogy in the face of disparity."[70]

From the preceding discussions it could be safely asserted that the bottom – line of any valid *Qiyas* in Islamic Law is existence of common and shared feature known, technically, as *al – illah* between the original case technically referred to as *al – asl* and the new case technically known as *al – Far'*.

3.3.4.1 Qiyas (Analogy) as a Source of Law

Authorities abound in both *Qur'an* and *Sunnah*, the primary sources of Islamic Law, sanctioning the use of *Qiyas* as a source of Islamic Law. From the Glorious *Qur'an*, Muslim Jurists often make reference to a verse in *Suratut Taghabun* which says: "...then take admonition, O you with eyes (to see)[71] as the lead textual authorities permitting the use of Qiyas to derive Islamic rulings on new and emergent issues.

From *Sunnah* perspective, the popular point of reference is a Hadeeth[72] of Mu'adh Bn Jabal (R.A.) who, on the occasion of his appointment as a judge of Yemen, told

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[70] Abu – Zahara, M. (1958), *Usulul Fiqhi,* op. cit., p. 251

[71] Q. 59: 02. Numerous verses with similar import could be found in the *Qur'an* such as the one in *Suratu* Muhammad (SAW), where Allah (SWT) says: "Then do they not reflect upon the *Qur'an* or are there locks upon their hearts?" *Suratu Muhammad,* Q 47: 24

[72] This received contradicting verdicts regarding its authenticity from the scientists of Hadeeth. Ibn Katheer, Ibnu Qayyimul Jauziyya in his I'ilamul Muwaqqi'een & Imam Adhdhahaby in his Mukhtasirul Ilal al – Mutanahiya treat it as fair report (***Jayyid***) other scholars of Hadeeth, particularly the modern scholars regard it as an apocryphal report, in that Allamah Nasirudden Albany has rated it as *Munkar.* According to the

the Prophet (peace be upon him) that he will use his personal opinion (*ajtahidu ra'ayi*) to adjudicate in matters upon which neither *Qur'an* nor Hadeeth provide categorical and clear cut solutions. The Prophet (peace be upon him) was reported in this Hadeeth to have given an express approval to this.[73] The authenticity of this hadith, however, is controversial, but Muslim Jurists usually rely upon it as a basis of Qiyas. This, notwithstanding the practice of the Companions of the Prophet (may Allah be please with them), tends to support and uphold the authority of *Qiyas* as a source of Islamic Law. The eighty lashes punishment for wine – drinking (*Shurbul – Khamr*), for instance, owes its origin to Aliyu Bn Abi Talib's *Qiyas* though later ratified by the other Companions of the Prophet (may Allah be pleased with them) and thus becomes an *Ijma.*"[74] Furthermore, the instruction of the second caliph Umar Bn Khattab to Abu Musa al – Ash'ary is enough to establish a clear and sound basis of Qiyas as a source of Islamic Law, whence it provides thus:

> *"When you are in doubt on a matter and find nothing about it in the Qur'an or in the Sunnah of the Prophet (peace be upon him),* ***think about the issue repeatedly. Ponder over the precedents and analogous cases, and then decide by analogy.***"[75]

Qiyas, it should be pointed out here, unlike the previous sources, bears only presumptive authority and therefore does not carry a binding force. It must not be

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Scientists of Hadeeth, ***Munkar*** hadeeth means a narration of unknown origin that is to say it is tainted with jahalah. This is one of the weakest forms of hadeeth narration that could not be relied upon in distilling the Islamic rules of law. For detailed discussions on this intricate area of Islamic Law vide: Albany, M.N. (1995), *Silsilatul – ahadeeth al – Da'eefah wal Maudu'ah wa atharuha as – Sayyi' fee al - Ummah,* Damascus - Syria, Maktabah al – Islamy, vol. II, p.273

[73] Doi, A. (1984), *Shari'ah*: *The Islamic Law*, London, Ta – Ha Publications Ltd., p.71

[74] Audah, A. S. (ND), *At – Tashree' al – Jina'eey al – Islamy Muqaran bil – Qawaneen al – wada'iyyah,* Berut – Lebanon, Mu'assasatur – Risalah, vol.II, p. 506

[75] Nu'mani, S. (1957), *Umar the Great*, Lahore – Pakistan, Matba'atul Islamy, vol.II p. 67; See also Schacht, J., op. cit, pp. 104 - 105

acted upon whence it conflicts with the letter or even the essence of any *Shari'ah* text. This is what the juristic maxim of "no analogy in the presence of a clear text (*al – Nass*)" seeks to encapsulate. In fact Caliph Umar (R.A.) categorically directed Abu Musa al – Ash'ary to reverse any decision he reaches on the basis of an erroneous *Qiyas* when he says:

> *[A]fter giving judgement, if upon reconsideration you come to a different opinion, do not let the judgement that you gave to prevent you from retraction; for justice cannot be disregarded, and you should know that it is better to retract than persist in injustice.*[76]

Similarly, it is apposite to point out here that according to Shi'ah Imamiyya doctrines *Qiyas or Ra'ay* (opinion of a scholar) as they call it, has no value whatsoever unless they scholar issuing the ruling by analogy attains the status of a *Mujtahid* in which case he derives authority from the Imam and acts on his behalf. The doctrines of Qiyas, therefore, like that of *Ijma'* as understood within the circle of Sunni Muslim Jurist is not acceptable to the Shi'ah.[77]

3.3.5 Other Sources of Islamic Criminal Law

Beside the above four generally accepted sources of Islamic Law, various Schools of Islamic Jurisprudence have some other subsidiary sources of Law. In Maliki School of Law, which is the prevailing *madhhab* in Nigeria, and according to which the codification under study is supposedly carried out, there are other recognised sources of Islamic Law. These include: *Qawlus- Sahabi* that is, opinions of the Prophet's Companions *(may Allah be pleased with them); Amalu*

[76] Ibid
[77] Fyzee, A.A. (1974), Outlines of Muhammadan Law, New Delhi, Oxford University Press, p. 47

Ahlil Madina; *Saddudh Dharee'ah; Urf and Shar'u man Qablana; Masaalihul Mursalah.* These sources will be briefly treated below to provide an analytical frame of reference for detailed discussions and analyses of the position of the codification of the Penal Law under the Islamic Law.

3.3.5.1 *Qaulus –Sahabah (Opinions of the Prophet's Companions (may Allah be pleased with them)*

Muslim Jurists defined a ***Prophet's Companion*** as a person who met the Prophet (peace be upon him), believed in him and associated with him for some time to enable him learn something from him about *Shari'ah*[78]. Thus opinions of the Prophet's Companions (may Allah be pleased with them) are considered by some Muslim Jurists as a binding source of *Shari'ah*. The Muslim Jurists who maintained this standpoint treat such views of the Prophet's Companions (may Allah be pleased with them) as silent narration from the Prophet (peace be upon him) as they witnessed the occasions of revelations and they had seen and heard what others are not privileged to witness. Sheikhul Islam Ibnu Taymiyya maintained that recourse must be had to the opinions of the Prophet's Companions (may Allah be pleased with them) in matters of *Shari'ah* and interpretation of the *Qur'an* because of their thorough understanding; deep knowledge about this *Deen* and above all their fear of Allah (*Attaqwa)* in addition to the fact that they were witnesses to the revelation itself.[79] This is even more apparent in the case of the

[78] Al – Sarakhsi, I., Kibal Usul, vol. 2, pp. 108 – 109. See also Nyazee, I.A.K., (2006), Islamic Jurisprudence (Usul al – Fiqh), New Delhi – 2 – India; Adam Publishers & Distributors, pp. 253 - 254

[79] Ibnu Taymiyya, I. A., Usulut – Tafseer, pp. 95 – 97; vide: Qardawi, Y. (2001), Al – Marja'iyyatul Ulya fil Islam Lil – *Qur'an* was *Sunnah*: DawabIbid wa Mahaadheer fil – Fahmi wat – Tafseer, Cairo, Maktabatu Wahbah, pp. 52 – 53.

leading Jurists among the Prophet's Companions (may Allah be pleased with them), such as: The four rightly guided caliphs and the Four *Abadalah*.[80]

From the foregoing, it is clear that the basis for recognising the opinion of the Prophet's Companions (may Allah be pleased with them) as a source of Islamic Law is that chances are that such opinions may be based on a narration of revelation. Imam Al – Sarakhsi beautifully summarizes this point thus:

> *It appears from the practice [of Prophet's Companions (may Allah be pleased with them), that if one of them possessed a text, he would either narrate it or he would base his opinion on it. There is no doubt that the opinion in which there is a chance of transmission from the Prophet (peace be upon him) (the possessor of the revelation) is to be preferred over mere opinion.... Even their view was based upon analogy; their view is stronger than all who are not companions. The reason is that they were witness to the practice of the Prophet (peace be upon him) in the elaboration of the ahkam and they saw the events that were the cause of the revelation. It is on this basis that their view is to be preferred over the view of those who do not witness any of these things.*[81]

It is based on the above reason that most of the Orthodox Schools of Islamic Law including the Maliki School recognise and accept opinion of the Prophet's Companions (may Allah be pleased with them) (*Qawlus Sahabi)* as a valid source of Islamic Law.

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[80] The four rightly guided Caliphs (*Khulafa'ur – Rashideen)* are: Abubakar as – Siddeeq; Umarul – Farouq; Uthman Dhin – Nurayn & Aliyu Abis – Sibdayn (may Allah be pleased with them). The Abadalah or four (4) Abdullah popularly referred to as Al – A'immatul Mahdiyyeen are: 1) Abdullahi Bn Mas'ud, who says: 'By Allah besIbide whom there is no deity worthy of worship, there is no single verse that was revealed in the *Qur'an* except I know where, when and for what it was revealed.' 2) Abdullahi Bn Abbas, for whom the Prophet (peace be upon him) prayed thus: 'Oh Allah grants him thorough understanding of the religion and give him knowledge of the revelation.' Consequently, Abdullahi Bn Mas'ud used to call him '*Tarjimanul Qur'an* that is interpreter of the *Qur'an*. 3) Abdullahi Bn Umar; 4) Abdullahi Bn Zubair

[81] Ibid

3.3.5.2 *Amalu Ahlil Madina (The practice of the people of Madina)*

The Practice of Madinan people is another recognized source of Islamic Law in Maliki School of Law. This Source is not recognized by the *Jamhurul Fuqaha'*. The basis for Malikiya's recognition of this is the fact that Prophet (may the peace and blessings of Allah be upon him) spent the last lap of his life and died at Madina. Furthermore, sizeable number of the Prophet's Companions (may Allah be pleased with them) remained in Madina even after the demise of the Prophet (peace be upon him). Thus an established practice of the Madinan people may likely have root in the *Sunna* of the Prophet (peace be upon him) even though it may not be expressly attributed to him by way of *raf'u.*[82]

3.3.5.3 *Saddudh - Dharee'ah (Blocking the Means)*

This literally means blocking the means. Technically, however, it means 'blocking lawful means that leads to an unlawful end.' It is in contrast with what some Jurists refer to as *Fathadh Dharee'ah* that is 'permitting the unlawful means that leads to lawful end.'

For the purposes of *Saddudh – Dharee'ah* principle acts are generally categorised into three classes, viz:

1) **Acts that may but rarely lead to injury/harm**: In this case the benefit usually outweighs the injury, hence *Shari'ah* permits it. This could be exemplified with the act of looking at woman for the purposes of marriage

[82] Qardawy, Y. Madkhal, supra,

proposal (*Khitba)*. *Shari'ah* gives allowance to this act because it usually leads to marriage notwithstanding the risk that may also lead to illicit affairs.

2) **Acts that, often than not, lead to injury/harm:** In this situation the resultant injury and/or harm from the act is much higher than any expected benefit from it. A handy example on this is renting a premises to a company that runs brothel establish brewery. Thus, using the principle of *Saddudh – Dharee'ah* such acts are completely prohibited.

3) **Acts in which the probable harm and benefit are equal:** This is an intricate area for legislation on the basis of *Saddudh – Dharee'ah*. Muslim Jurists illustrate these acts with *Nikahut – Tahleelil Mudalliqah,* that is marriage with intent of immediate divorce to enable the divorcee to return to her former husband. Another example is *Bay'ul inah,* that's buy back transactions.[83]

Saddudh - Dharee'ah (Blocking the Means) as a Source of Law:

This Source of Islamic Law is peculiar to Maliki School of Law. It is, however, supported by the *Hanbali* School of Law. *Saddudh – Dharee'ah* had been severely

[83] *Bay'ul inah* takes many forms. But the more rampant one is the buy – back arrangement which is a kind of transaction within another transaction. In that a person may buy an item from another at the cost of one million naira (N1, 000,000.00), only and then sell it back to the seller on credit basis for deferred payment at the cost of one million, two hundred thousand naira (1,200,000.00), only. This arrangement resembles usurious transaction that has been emphatically prohibited by *Shari'ah* on the basis of *Riba.* The difficulty involved in this kind of arrangement sharply divided the Muslim Jurists regarding the position of *Shari'ah* on this. Whereas Imam Maliki with support from Imam Hanbali treated this type of contract as prohibited based on the application of the principle of *Saddudh – Dharee'ah* and using the subjective theory of the Law, Imam Shafi'i, on the other hand, regarded this arrangement as validly lawful based on his principle of *Istis'haab* and the objective theory of the Law.

criticised by the *Shafi'* Jurists.[84] This is understandable, because it frontally clashes with the doctrine of *Istis'haab* which is an established and accepted source of the *Shafi'* School of Law. The area of this conflict lies in the fact that while *Saddudh – Dharee'ah* seeks to prohibit a lawful act that may result into unlawful end, the *Istis'haab* principle considers everything lawful unless there is evidence of interdiction from the Law Giver.

3.3.5.4 Al – ***Urf (Custom)***

Al – Urf literally means custom, convention, tradition, usage and/or practice. From technical point of view it is, often, treated as a synonym of the word '*Al – Ma'aruf*'. Hence the use of the word in the *Qur'an* where Allah (SWT) says: (*Khudhil afwa.wa amur bil* ***urfi*** *wa a'rid anil Jahileen.*) "Take what is given freely, enjoin what is ***good***, and turn away from the ignorant." [Q7:199][85]

Urf in association with *ma'aruf* means good in which case it will be what *Shari'ah* considers to be good and not what human reasoning,[86] convention or prevailing practice deem to be so as in the western sense.

From the standpoint of Islamic Law, *Al-urf* is generally divided into two broad types: *Urf al- Qawli & Urf al- fi'ili.*[87] Whereas the former refers to usages generally the later denotes the prevailing practices.

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[84] Nyazee, I.A.K., (2006); Islamic Jurisprudence (Usul al – Fiqh), New Delhi, Adam Publishers & Distributors, , pp. 248 - 251
[85] Saheeh International, op. Cit., p. 227
[86] Vide Nyazee, I. A.K., op. Cit. pp. 256 - 259
[87] Ibid.

Al – Urf al – Qawli comprises the ordinary, conventional and literal usage of words during the lifetime of the Prophet (peace be upon him), technical meaning attributed to the words latter by the Jurists known as *Urf as – Shar'i* and even the local traditional usage of the word with regard to some specific trades or transactions. All these assist a *Mujtahid* to deal with *Shari'ah* texts (*Al – Nass*) with accurate precision and specificity in the process of uncovering and distilling the *Shari'ah* rules and governing principles from them.[88]

Al – Urf al – Fi'ili, on the other hand consists of the customary practices prevalent during the time of the Prophet (peace be upon him) which the Prophet (peace be upon him) approved and the practices that were subsequently introduced by the succeeding generations.[89]

From the foregoing discussions and upon close analysis, it will become crystal clear that *Urf,* in both its two broad ramifications of *Qawli* and *Fi'ili,* may not constitute a source of law strictly so – called. This is because custom in its usage form serves only as a tool or a vehicle of uncovering the exact import of a legal text (*Al – Nass)*. Similarly, custom as a prevailing practice needs to pass some validity tests before it can be applied as a Source of Law in Shari'a. Thus, where the custom was a prevailing practice during the time of the Prophet (peace be upon him) and who approved of it then the source of the law in this case is the *Sunnah Taqririyyah* rather than the custom itself. However, where the custom in issue covers a practice that evolved after the demise of the Prophet (peace be upon him)

[88] Ibid
[89] Ibid

then that practice must pass the twin tests of compatibility and consistency with the letter and spirit of *Shari'ah* before it applies, thereby recycling the custom within the framework of the other established and accepted sources of Islamic Law.

3.3.5.5 *Shar'u man Qabalana* (*Previous Scriptural Law*)

Shar'u man Qablana literally means the Laws of the earlier Scriptures that were revealed before the revelation of the *Qur'an*. This is, therefore, the *Corpus* of laws and rules ordained by Allah (SWT) for the nations before the mission of the Prophet Muhammad (peace be upon him).[90] Muslim Jurists are divided over the acceptability of the previous laws as a source of *Shari'ah* Law. While one group maintained that all the previous laws and revelations had been abrogated by the *Qur'an* others insist that any portion of the previous laws that had not been explicitly abrogated and our law is silent about it, *Shar'u man qablana* could be used to supplement the other established sources of *Shari'ah*.

Based on the above controversy regarding this source, Muslim Jurists categorized *Shar'u Man Qablana* into four:

1) Previous Laws that have been mentioned in the *Qur'an* and the *Sunnah*; these were made binding on this *Ummah* as was the case with the preceding nations, as in the case of fasting [Q2:183]. In this case the obligation arose from the *Shari'ah* texts themselves and not the previous laws.

[90] Nyazee, supra, pp. 255 - 256

2) The previous Laws that have been mentioned and abrogated by the *Shari'ah* texts, here also the laws are derived from the abrogating text and not the laws of the preceding nations.

3) Previous Laws cited in the *Shari'ah* texts (*Qur'an* & *Sunnah*) only without any evidence that they should be followed or not.

4) Rules that are not mentioned in *Qur'an* or Sunna but are found in the previous scriptures. These are not binding on the Muslims.

Looking at the totality of the foregoing categorisation and juristic analyses on this source, it is evidently clear that this source could only bind Muslims when *Qur'an* or *Sunnah* so prescribed. That the real source of obligation in matters of this nature are the primary sources of *Shari'ah* and not the *Shar'u man Qablana*. The position taken by Sarakhsi on this will aptly conclude our discussions on *Shar'a man Qablana* when he says:

> *The most authentic statement in our view is that what is confirmed as an earlier law through the Book of Allah, or the elaboration by the Prophet (peace be on him), becomes a law for us, unless it is abrogated. As for what is transmitted by the people of the Book or is understood by the Muslims from their Scriptures is not binding on us, because of the established evidence that they altered their Books.*[91]

[91] Al – Sarakhsi, I., Kitabal Usul, vol. 2, 108 – 109. Cited in Nyazee, op. cit. P. 256

3.3.5.6 *Masalihul Mursalah*[92]

Masalihul Mursalah or *Istidlalul Mursal* literally means acquisition of benefit (*manfa'ah)* or the repulsion of injury or harm (*mudarrah).* It technically refers to "preservation of the purposes of Islamic Law in the settlement of legal issues".[93] *Masalihul Murasalah,* therefore, is an advanced form of *Qiyas* where a *Mujtahid* is allowed to speculate within the letter, spirit and purposes of the Law (*Maqasidus – Shari'ah)* in order to discover Islamic ruling on a particular thing that could not be accommodated through the normal *Qiyas* process. Hence the other term "*Istidlalul Mursal".*[94]

Masalihul Murasala is applied on issue upon which other established sources of *Shari'ah* are silent. Thus, for a Muslim Jurist to employ this source as a tool for discovering Islamic Rules, such jurists must attain the position of a *Mujtahid fis – Shari'ah* as it requires looking at the texts of *Shari'ah* collectively and comprehensively. This will enable the Jurist who wants to have recourse to *Masalihul Mursalah* to formulate a new principle to deal with the issue at hand.

Masalihul Mursalah as a Source of Islamic Law*:*

Masalihul Mursala that involve a process of formulating new proposition in Law to cover a particular situation upon which other established sources of *Shari'ah* are

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[92] This is the most relevant source to this study. This is because all the debates that are raging on the codification phenomenon revolve around *al- Maslaha*. For this reason the study will dwell at some length on this.

[93] Al – Ghazali, *Al – mustasfa min ilm al – usul,* vol. 1, p. 286. See also Nyazee, Ibid, at pp. 240 – 248; See also Ar – Razi, I., *Al – Mahsoul*, Cairo, Dar – Kutub, MS, p. 194 cited in Al – Buty, M.S.R. (1990), *Dawabidul – Maslaha Fis – Sharee'atil Islamiyyah,* Beirut, *Mu'assasatir Risalah & Ad – Darul Muttahidah* , p. 27

[94] Ibid

silent is duly recognised by the jurists provided the newly formulated principle satisfies some three conditions, to wit:

1) The new principle shall not be in conflict with an established text of the *Shari'ah* (*al – Nass)* or even tamper with the implication of such text.

2) The new principle shall not contradict the existing established principles or even practices (*tasarrufat)* of Islamic Law.

3) The new principle shall not be alien to or incompatible with (*Ghareeb)* the recognised norms and purposes of Islamic Law.[95]

Some of the typical examples that illustrate these situations as provided by the Jurists[96] include, but not limited to, the followings:

1) Compilation of the *Qur'an* after the demise of the Prophet (peace be upon him). Notwithstanding the fact that the Prophet (peace be upon him) has shown the complete arrangement of the chapters of the *Qur'an*, he did not order for its compilation in a book form. Thus the Companions (may Allah be pleased with them) were not sure whether the compilation is in order or otherwise but they finally decided in favour of the compilation for the purposes of preserving the *Deen.*

2) The original rule in intentional homicidal cases is: 'Life for life'[97]. It was, therefore, not clear whether a group of killers could be killed for taking one

[95] Ibid
[96] Generally see Nyazee, I.A.K., op. Cit., pp. 240 – 248 for more detailed discussions on this point.
[97] [Q5: 45] & [Q2: 178]

life. Caliph Umar (R.A.) in the interest of preservation of life decided that even if all people of San'a' will conspire and kill one person he will put all of them to death on the basis of *Qisas.*[98] This is also supported by the case of *Urayniyyun* who killed the shepherd of the Prophet (SAW) and they were put to death by the prophet (SAW) following the revelation of Q.5:38.

3) The rule of indemnity imposed upon artisan in respect of goods given to them by customers. The original rule was that of bailment whereby the recipient of the goods being deposited was not liable to indemnify the owner. However, when the artisans became grossly negligent Caliph Ali (R.A.) shifted the burden of proving lack of negligence on the artisans or else they will be liable for indemnity. This decision was taken in the interest of preservation of wealth.

It was in line with the above examples and on the basis of *Masalihul Mursalah* that levying taxes was allowed for a leader when there is no sufficient funds in the government's coffers to enable the state prosecute *Jihad* and ensure the security of the nation or carry out other similar state activities.

All the preceding situations may not be problematic as they do not offend any of the three conditions set out above. However, problem is bound to arise when a case decided on the basis of *Maslaha* contradicts a text (*Nass)*, alters or attempt to tamper with its implication. It will also be problematic when the new *Maslaha* is in conflict with the general principles and practices of *Shari'ah* (*tasarrufatus* –

[98] This will guarantee the statement in the *Qur'an* 'And there is for you in *Qisas* [saving of] life,' [Q2:178] in part. Otherwise people will be using mob to commit homicidal offences with impunity.

Shar'iyyah). It will even be more problematic when it is incompatible with the fundamental purposes of Islamic Law (*Maqaasidus Sharee'ah)*, thereby becoming strange or alien (*Ghareeb)* to *Shari'ah*.[99]

It should, however, be pointed out that some scholars maintained that cases could be decided on the basis of *Masalihul Mursalah* even where those three conditions could not be fulfilled. The important thing, according to these scholars, is that such decision is necessary and will better enhance the achievement of the fundamental objectives of *Shari'ah* (*Maqasidus – Sharee'ah)*. This Scholars buttress their position with certain decisions taken, on the basis of *Maslaha,* by the Prophet's Companions (may Allah be pleased with them), particularly Caliph Umar Bn Khattab (R.A.) and the righteous predecessors of the Ummah (*A'immatus Salafis Salih)* which seem to clash with established *Shari'ah* texts. Following are examples of such decisions:

1) Suspension of the *hadd* of cutting off the hand of thieves in the year of famine. This decision was taken by Caliph Umar (RA) in spite of the verse *Suratul – Ma'idah* which says: "As for the thief, the male and the female, amputate their hands in recompense of what they earned [i.e., committed] as a deterrent [punishment] from Allah. And Allah is exalted in might and wise." [Q5: 38][100].

2) Making triple divorces in a single pronouncement as ultimate/major irrevocable divorce, notwithstanding the verse in *Suratul - Baqarah* that

[99] Ibid, at p. 243
[100] Al Muntada & Saheeh International (Eds), (1997), *The QUR'AN: Arabic Text with Corresponding English Meaning,* Riyadh – Kingdom of Saudi Arabia, Abul – Qasim Publishing House, p. 143.

says: "Divorce is twice. Then [after that], either keep her in acceptable manner or release her with good treatment..." [Q2: 229]. Similarly, this decision seems to go against the practice during the time of the Prophet (peace be upon him) based on the report of Abdullahi Bn Abbas which goes thus: "Triple divorce in a single pronouncement or sitting used to be treated as a single revocable divorce during the time of the Prophet (peace be upon him), so was the case during the reign of Caliph Abubakar (R.A.) and the first two years of the Umar Bn Khattab caliphate. Then when it became rampant Caliph Umar said people tend to hasten things in which they were given respite. Then why not enforce it against them? Thereafter such triple divorce was enforced as ultimate irrevocable divorce."[101]

The above two cases and some other ones, such as denying *Muallafatu Qulubihim* a portion in Zakat, were the main thrust of the argument of those Scholars who do not subscribe to restricting *Masalihul Murasalah* with the three conditions mentioned earlier. However, on close scrutiny and analysis of their reasons it will be manifestly clear that the cases they are relying upon do not contradict any of the three conditions attached for using *Maslahah* as a source of Islamic Law, as could be seen below.

Looking at the issue of suspension of *haddus Sariqah* in the year of famine (*Majaa'ah),* it is believed that the provision in the *Qur'an* on punishments generally and punishment for theft in particular are couched in general terms, hence they were particularised by a number of *ahadeeth.* Thus, when *Qur'an*

[101] Transmitted by Imam Muslim, vide *Kitabud – Dalaq,* Saheeh Muslim.

provides for the cutting off of the hand of thief, it remains silent on the place of cutting in the hand and other conditions precedent to the infliction of the penalty, such as the *Nisab, Hirz*, etcetra. It was the *Sunnah* and juristic analyses that provide those details. Similarly a Hadeeth narrated separately by Abdullahi Bn Abbas and A'isha (may Allah be pleased with them)[102] provides that: "*Hadd* punishments should be averted upon existence of the slightest doubt."

Another version of this report[103] goes thus:

> Avert infliction of *Hadd* punishment against the Muslims as much as you could. As soon as you get an excuse for a Muslim leave him alone. It is better for Imam to make error in pardoning than in punishing.

This report qualifies all the *Shari'ah* texts dealing with penalties. Thus, Muslim Jurists seem to be unanimous that a slightest doubt prevents the infliction of *hadd* against a person accused of committing any capital offence including theft. The Jurists were only divided on the nature of the doubt that prevents infliction of the punishment and other details.[104] This, therefore, clearly indicate that Caliph

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[102] Transmitted by TirmIbidhi in his *Sunan* & Ahmad Bn Hanbal in his *Musnad*

[103] This report is *Mauquf* meaning it is more of pronouncement of the prophet's companion that has not been elevated to the statement of the prophet (peace be upon him).

[104] For instance Muslim Jurists are unanimous that no amputation in cases of theft among spouses or a man and his children if they share the same shelter but they maintained divergent opinions in cases of theft between brothers when they live separately. Hannafi School maintained that the hand of the thief in such case will not be cut off. Imam Shafi'i opined that cutting off of hand does not apply only in cases of the theft of ascendants against the property of their descendants and vice – versa (*Al – Usul wal Furu').* Maliki School, however, maintained that it is only the hand a father that will not be cut off when he commits theft against the property of his son based on the Hadeeth 'You and your property are for your father.' But in the case of spousal theft, Hannafi School opined that no amputation should be applied. Maliki School on the other hand maintained that if the spouses share same shelter no amputation but where they live separately the *hadd* will be imposed. Imam Shafi'i maintained two views on this issue, the predominant one according to Imam An – Nawawi is that the *hadd* should be applied regardless of whether they live together or separately provided the stolen property was kept away from the thief in a proper custody (*Mahrouz)*. Vide: Sarakhsy, I., *Kitabul – Mabsut,* vol. 9, p. 151 & *Nihayatul – Muhtaj,* vol. 7, pp. 423 – 424; Ibn Rushd, I., *BIbidayatul – Mujtahid wa nihayatul – Muqtasid,* p. 442. See also, Al – Buty, M.S.R., (1410H/1990M), *Dawabidul – Maslaha fis – Sharee'atil Islamiyyah,* Beirut, *Ad – Darul MuttahIbidah and Mu'assatur – Risalah,* pp. 127 - 140

Umar's ruling did not in any way clash with the conditions of using *Maslaha* as a source of Islamic Law.

Turning to the issue of triple divorce in a single pronouncement, plethora of *ahadeeth* were in support of the position taken by Caliph Umar (R.A.) on this issue. These include the followings:

1) The report of Uwaymir al - Ajlaany[105] who after undergoing the process of *Li'aan* against his wife he confessed to the Prophet (peace be upon him) that he was lying against her but added that even if she were still his wife he pronounced triple divorce at once against her[106]. The Prophet (peace be upon him) did not tell him that triple divorce in single pronouncement is single revocable divorce notwithstanding the fact that such may not have any significant impact on his case as he had already done the *Li'aan*. This is because the prophet (peace be upon him) never remain silent where explanation is needed as in the instant case.

2) Another narration was from A'isha (may Allah be pleased with her)[107], that the wife of Rifa'ah Al- Quradhy came to the Prophet (peace be upon him) complaining that her husband divorced her irrevocably and she married Abdurrahman Bn Az – Zubayr Al – Quradhy who was not strong enough to satisfy her. The Prophet said perhaps you want to go back to your former husband which he said was not possible until after the consummation of the

[105] Transmitted by Shaikhany: Bukhari & Muslim in their chapters on Li'aan.
[106] The use of this phrase by Uwaymir also indicated that its usage is known to the Arab & it was treated as irrevocable divorce otherwise he would not have resorted to it in a bid to get rid of his wife.
[107] Transmitted by Shaikhany: Bukhari & Muslim.

second marriage. Imam Shafi' emphasized that it was a triple divorce in single pronouncement.[108]

3) There is also the report of Fatimah Bint Qais[109] in which she said her husband divorced her irrevocably and the Prophet (peace be upon him) did not grant her the right of maintenance over him.[110]

4) Similarly, the case of A'isha Bint Fadl[111] - the wife of Hassan Bn Ali – when she celebrated her husband ascension to the throne of *Khilafah,* he said are you celebrating the death of *Ameerul Mu'mineen*?[112] Then you are triply divorced. He, thereafter, lamented thus: 'If it were not for a report I heard from my grandfather or he said on the authority of my father from my grandfather (peace be upon him), saying if a man divorces his wife thrice at different intervals (*indal aqra')* or he pronounces triple divorce at once against the wife, she will not be lawful to him until she marries another man, I would have returned her.'

5) Finally, the case of Rukanah who divorced his wife irrevocably in a pronouncement and the Prophet (peace be upon him) said can you bear witness in the name of Allah that you only intended single revocable

[108] See *Ikhtilaful Hadeeth,* pp.314 – 315 & Al – Buty, op. Cit. At p. 138
[109] Reported in Saheehayn: Bukhari & Muslim
[110] Thus Imam Ibnu Majah entitled a Chapter (*Baab)* in his *Sunan* thus: *Baabun man dallaqa thalaathan fee majlisin waahIbidin.* Meaning Chapter on a man that pronounce triple divorce against his wife in a single place/sitting). Under this chapter Ibnu Majah mentioned the Hadeeth of Fatimah Bint Qais as follows: On the authority of Amir As – Sha'aby who said to Fatimah Bint Qais teach me a hadeeth and she narrated to him thus: My husband divorced me irrevocably while he was going to Yemen and the Prophet (peace be upon him) approve of it.
[111] Narrated by Imam Baihaqi in his *Sunan* and Imam Dabarany with authentic chain of narration
[112] Meaning Caliph Aliyu Bn Abi Dalib (R.A.) – the father of Hassan

divorce? He said by Allah I intended only single revocable divorce. Thus, the Prophet (peace be upon him) returned his wife to him.[113]

From the preceding discussions it will be clearly understood that the decisions of Caliph Umar Bn Khattab (R.A.) though may be rooted in *Maslahah* they are not, in any way, in conflict with any text of *Shari'ah* from either *Qur'an* or *Sunnah*[114].

It should also be noted that *Malikiyya* is the leading School of Law that uses *Masalihul Mursalah* as a source of Islamic Law. This made some writers to erroneously assume that this source is peculiar to the Maliki School of Law.[115] But as we have just discussed above the use of *Maslaha* was even employed by the Prophet's Companions (may Allah be pleased with them).

3.4 Development of Islamic Criminal Law

Islamic Criminal Law, like any other branch of Islamic Law, passes through several stages of development. This is because, historically, the era of rigorous intellectual development of Islamic Law spanned a period of about three centuries of *hijra.* This was right from the era of the Prophet (peace be upon him) who used to guide the then nascent Muslim nation (*Ummah*) on any issue confronting them while at the same time practically dispensing Islamic Criminal Justice System, according to the dictates of *Shari'ah,* whenever the need arose; to the time of *Tab'ul atba'a* (i.e. the third century of *Hijra*) when the intellectual developmental

[113] Abu Dawoud, Tirmidhy, Ibnu Majah, Daru – Qutny and Imam Shafi' i reported this Hadeeth.
[114] For further analysis on this point, see: Shalaby, M.M.(ND), *Ta'aleelul Ahkaam,* Beirut - Lebanon, *Darun – Nahdatil Arabiyyah,*, pp. 58 – 59; See also Qardawy, Y. (1419/1998), *Assiyasatus – Shar'iyyah fee dau'i Nususis – Shar'iyyah wa Maqasidiha,* Cairo - Egypt, Maktabatu Wahabah, p. 213
[115] See al – Buty, M.R.S. (1410/1990), Dawabidul *Maslahah fis – Sharee'atil Islamiyyah,* Beirut - Lebanon, *Darul – MuttahIbidah & Ar – Risalah,* pp. 307 – 357, for analytical refutation of this erroneous assumption.

activities of Islamic Juridical Sciences reached its zenith. It was at that point in time that various branches of Islamic knowledge generally, and Islamic Juridical Sciences including Islamic Criminal Law in particular, were meticulously developed and written down.[116]

The Muslim Jurists, during that period of glory, using the dynamic tool of *Ijtihad* developed a robust *Corpus* of intellectual heritage known as *Turath*. Many books and manuals of *fiqh* were developed and written over this period of time. Specialisation in various fields of knowledge was also established at this point in time.

All these developments, however, took place through Individual juristic activities without any governmental positive intervention.[117] However, notwithstanding this coupled with the fact that at times those in authority used to meddle or interfere with the pure intellectual activities of the Muslim Jurists negatively which, at times, even led to serious conflict between those in authority and *Ulama'*[118] no

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[116] Zaidaan A.K., (2011); *Nazraat fis Sharre'atil Islamiyyah wal Qawaneenil Wada'iyyah;* Damascus, Syria, Resalah Publishers; pp. 14 – 16; see also As – Suyuty, J.D., (ND), *Tareekhul Khulafa'* Beirut – Lebanon, *Darul Fikr Lit – Taba' wan Nashr, pp.* 125 - 136

[117] See detailed discussions and arguments on this point in: An – Na'im, A.A. (2008), *Islam and the Secular State: Negotiating the future of Shari'a*, Cambridge, Havard University Press, pp. 45 - 65

[118] The case in point here is the inquisition known as *Mihna* which led the power that be at that point in time to subject a lot of eminent jurists (*Fuqha')* and (*Ulama')* to torture in order to affirm a deviant idea adopted by the leaders regarding the status of the *Qur'an*. The idea was whether *Qur'an* as a speech of Allah (SWT) is the attribute of God with all transcendental qualities or it is rather ordinary linguistic expression of the wish of Allah that was conveyed to humanity in Arabic Language and Alphabet and therefore creature itself. History showed how all the founders of the *Sunni* Schools of Law were severely tortured and beaten in order to adopt the idea of creation of *Qur'an* and to issue legal opinion *(fatwa*) on that basis. This inquisition was said to have been initiated by the Abbasid Caliph al – Ma'amun in the year 218H (833M). Although Caliph Ma'amun died shortly thereafter the inquisition continued for about sixteen years when Caliph Mutawwakil brought it to an end by releasing the non complying *Ulama'* from prison and even appointed some of them to positions of authority. The above event led some writers to draw conclusion thus: "The struggle over the createdness of the *Qur'an* confirmed the institutional separation of the caliphate and the community, the division of authority between them, and the separate roles for each as bearers of part of what had been the legacy of the prophet. Henceforth, the caliphate would evolve contrary to the Muslim ideal, as a largely military and imperial institution legitimated in neo – Byzantine and neo – Sassanian terms, while the religious elites would develop a more complete authority over the communal, personal, religious, and doctrinal aspects of Islam." Vide Lepidus, I. M., State and Religion in Islamic Society: Past Present, *International Journal of Middle East Studies,* 151 (May), pp. 3 – 27; See also, An –

sooner than the jurists developed juristic principles and doctrines, those in authority would implement them using state machineries either willingly or upon popular pressure from their subjects.

Despite the interference of the authority in the intellectual activities of Jurists, the development of the doctrines and principles of Islamic Law continued up to a point in time when some of the powers that be started using unscrupulous and deviant scholars to develop some principles and doctrines supposedly under Islamic Law either in support of their positions or even to counter an established principle or doctrine that is not consistent with their policies or standpoint. This dangerous development led to what was called a consensus (*Ijma'*) for the closure of the gate of *Ijtihad.*

3.4.1 Development of Islamic Criminal Law and the Closure of the Gate of Ijtihad

At the close of the fourth century of *hijra,* after the formation and recognition of the Four Islamic Schools of Law/Jurisprudence (*Madhaahib)*[119] the door of *Ijtihad* was purportedly shut. This was partly due to the assumption that the then existing *Corpus* of Islamic Jurisprudence had fixed the main and the most needed contours of Islamic Juridical Sciences in both *Fiqh* and substantive law and, therefore, left no room for any further *Ijtihad*.[120] Another reason for this supposed closure of the

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Na'im, A.A., Islam and Secular State, op. cit, at p. 63 Even prior to this *Mihna* history had that Imam Malik was subjected to torture and beating when one of the *Umayyad* Caliphs forced people to pledge allegiance to his son in a succession bid. The caliph forced the men to swear an oath of allegiance to the child with proviso that their wives stand divorced if they retract the allegiance. It was on that occasion Imam Malik issued a legal opinion to the effect that the allegiance was not valid and the threatened divorce was ineffectual. This really pitched this great Imam against the Caliph and landed him in trouble.

[119] That is the Hannafiyya, Malikyya, Shafi'iyya and Hanbaliyya Schools of Law. It should be noted that many Schools of Jurisprudence were founded and developed at that time but only these four survived and are still subsisting in the Muslim world. It should also be noted that the Shi'a sect has its own schools of Law, such as Imamiyya, Ja'afariyya, Zaidiyya Isma'iliyya, etc.

[120] Sami, Z.,(2003), *Law and Power in Islamic World*, London – England, I.B. Tauris & Co Ltd, p. 26

gate of *Ijtihad* was the need to sanitize the Law governing the affairs of the then rapidly expanding Islamic State from the confusion that an unrestricted *Ijtihad* might breed, particularly as the rulers had started engaging some unscrupulous scholars (*ulama)* to use and employ the tool of *ijtihad* in developing legal opinions (*Fatawa* sng. *Fatwa)* in support of their policies as we have earlier pointed out.

Thenceforth, following the authority of the previous Jurists technically known as *Taqleed* was institutionalized in the *Ummah* and it started to gain currency in the Islamic world as a whole. Consequently, rather than exercising independent reasoning and judgments through *Ijtihad,* arguments and rulings on contemporary emerging issues would have to be sought within the existing *Corpus* of Islamic Jurisprudence. This, therefore, renders development of legal theory, particularly in the field of Law of Crimes (*al – Jareemah wal Uqubah* and *al – Jinayat*) moribund. With this stagnation jurists had to increasingly resort to principles of public interest (*Istislah, Istihsan* & *Masalihul Murasalah*) to address new emerging issues that could have been addressed through the dynamic process of *Ijtihad.*[121] It is to be noted, however, that modern scholars and thinkers are now vigorously challenging this notional closure of the gate of *Ijtihad.* This, perhaps, explains the current surge of reinterpretation efforts of Islamic Law.[122]

[121] For analytical discourse on this consequence of the closure of the gate of *Ijtihad* on the development of Islamic Law generally, see Sohail, H., Interpreting the ethics of War and Peace, available @ www.ecca.org/ijie/articles/contemporaryissues/article.Hashimi_sohail h s.html. See also Sohail, H. (2003), The *Qur'an* and Tolerance: An Interpretive Essay on verse 5: 42, *Journal of Human Rights,* vol. 2, No. 1, March, 03 p. 32

[122] The current tide of challenging this closure of the gate of *Ijtihad* has its negative consequences. In that many an unqualified person seeks to re – interpret the doctrines and principles of *Shari'ah* to suit their unsavoury views. Many human rights movements and women activism are now trying to take advantage of this challenge to promote their agenda. Thus, there is need for caution in pursuing this challenge particularly taking into account the onslaught of New World Order and Globalisation.

It is, however, interesting to note that this juristic closure of the gate of *Ijtihad* is more theoretical than real. This is because the real Jurists and scholars had never, at any point in time, stopped their intellectual activities. Thus, they continue to exercise *Ijtihad* at least through Four (4) main ways, *to wit:* Legal Rulings (*Fatawa),* Commentaries (*Shuruh*), Selection of the best juristic view (*Takhayyur)* and Reconciliation or Synchronization of the divergent views (*Talfeeq*).

3.4.1.1 *Legal Ruling* (*Fatwa* pl. *Fatawa*)

Muslim Jurists and even Scholars are always confronted with questions from their students and even general public that necessitates the use of *Ijtihad* by them. The rulings that may be given in response to a particular question may depart largely from the position taken by the earlier Jurists depending on the versatility of the scholar issuing such *fatwa.* In the modern time, there are even various Committees and Councils on Islamic Affairs established by organisations such as Muslim World League and charged with the responsibility of addressing contemporary issues by way of *Fatawa.* This, in a way, kept the development of Islamic Law in its various ramifications to continue unabated.

3.4.1.2 *Commentary on the early literatures* (*Sharh* pl. *Shuruh*)

Commentary on the legal texts is another way that ensured the continuity of intellectual activities of the Muslim Jurists notwithstanding the notional closure of the gate of *Ijtihad.* Many Books on Islamic Law were subjected to a number of commentaries upon commentary, so much so that at times the original Ideas and concepts in the Book are completely altered or blurred. No serious Islamic text of

the past that has not received commentaries. The Commentaries may be in separate volumes or attached to the original book either as an appendix or footnotes (*Hawamish)*. At times the commentaries are adumbrated on the margins of the original book as (*Hawashi)*. Hence we have books such as '*Hashiyatud – Dasuki'; Jawahirul Ikleel sharh Mukhtasarul Khaleel,* etc.

3.4.1.3 *Reconciliation/Synchronization of divergent views* (*at - Talfeeq)*

At - Talfeeq refers to juristic attempts at synchronizing and establishing synergy between seeming contradictory positions of either textual authorities or juristic opinions. It is the first mechanism a jurist or scholar of Islamic Law resorts to in his/her juristic formulations before having recourse to principle of *takhayyur* discussed below. An illustrative example of this is usually given in the two authentic traditions of the Prophet (peace and blessings be upon him) dealing with vitiation of ablution on account of a man touching his private parts. Whereas one of these narrations affirms vitiation of ablution on the mere touching of private part directly without any cover as insulator[123] the other held that the private part is just like any other organ when it comes to touching and therefore could not be said to spoil the ablution.[124] Islamic Law experts synchronized these two traditions of the Prophet (peace and blessings be upon him) by explaining that if the touching was done with the motive of satisfying sexual urge and desire the ablution of such a person stand vitiated otherwise the ablution will not be vitiated by mere touching

[123] The Hadeeth was narrated by Talq Bn Aliyu in which the Prophet (SAW) responded to the question whether a man has to perform another ablution if he touches his private part by saying: "No, for it is just a part of you (*Bud'atan mink*)". Reported by five Imams, Ibnu Hibban authenticated it.

[124] This second Hadeeth was narrated by Basrah Bint Safwaan and it goes thus: "Whoever touches his penis must perform ablution." Reported by five Imams, Imams at - Tirmidhy and Ibnu Hibban graded it as *Saheeh* (authentic). Imam Bukhari said it is the most authentic tradition on this topic.

of private part. By using this technique or mechanism a scholar of Islamic Law can deal with juristic divergence of opinions on any principles of Islamic Law. Where, however, the divergence is irreconcilable and therefore no synergy could be attained then the proceeding mechanism of selection of the best and most suitable opinion to the local exigencies and prevailing circumstances (*at – Takhayyur)* shall be resorted to.

3.4.1.4 *Selection of the most appropriate juristic view* (*al - Takhayyur)*

At - Takhayyur is a generic Arabic terminology referring to selection. It is etymologically derived from the word *Khayyara* or *Ikhtara* meaning to select or to choose, with *Khiyaar* and/or *Ikhtiyar* as the nominal form respectively. An illustrative example of the process of *Takhayyar* is provided by the *Mujallatul Ahkam Al – Adliyya* of the Ottoman Empire where variant views of the Hannafi Schools alone were selected, synthesized and then written as the selected doctrines or Laws.[125] The *Takhayyur* process in most cases started with consideration of the juristic views of other three orthodox schools of Islamic Jurisprudence to find an alternative to the dominant position of the School that is holding sway in a particular jurisdiction. This could be illustrated with the reform that was needed to be effected to the doctrine of Hannafi School of Law by which a wife could only obtain judicial annulment of her marriage on two grounds, *to wit:* (a) Impotence of the husband that leads to total incapability to consummate the marriage, and (b) Putative widowhood in which the husband is declared missing (*Mafqoud*) and

[125] For incisive analysis on this procedure vide, Coulson, N. J. (1991), *A History of Islamic Law*, Edinburgh, University Press, pp. 182 - 201

ninety years had elapsed since his birth date, based on the principle of *Istis'haab* (presumption of continuity). Apart from these two grounds a wife can not obtain a divorce except perhaps, through mutual agreement and *Khul'*.[126] However, in other schools (*Madhaahib*), particularly the Maliki School of Law a wife can successfully bring her petition for divorce on many grounds, such as cruelty of the husband, his refusal or inability to maintain her, desertion or the husband's affliction by some serious and contagious disease which renders the continuity of the marital tie harmful to the wife and harm (i.e. *darar)* generally. This provides opportunity for the followers of Hannafi School, using the *Takhayyur* device, to take advantage of the views from sister schools of Law to effect reform to their doctrine.[127]

In the preceding paragraphs of this chapter attempt has been made to discuss the Sources of Islamic Law with particular emphasis on Islamic Criminal Law (*Al – Jareemah*) with a view to laying down a theoretical frame of reference that will enable this study to properly and adequately analyze and evaluate the overall theme of this dissertation, *to wit:* Codification of the principles and doctrines of Islamic Criminal Law in the *Shari'ah* implementation states of Northern Nigeria.

The Chapter, in retrospect, also dwelt at some length in looking at the nature of Islamic Law generally and Islamic Law of Crimes in particular in order to drive

[126] Ibid, *Khul'* is a form of divorce at the instance of wife in which she pays some amount of money, usually the dower, to the husband in order to ransom herself from the marriage union.
[127] Thus, in the words of Coulson, "the first monumental reform to the traditional family law – The Ottoman Law of Family Rights, 1917 – provided for judicial dissolution of marriage in the case of wives whose husband were suffering from some serious disease or had disserted them without providing for their maintenance." This represents selections from Maliki and Hanbali Schools of Law respectively. Other instances of reform by selection process *Takhayyur* could be seen in the areas of stipulations in the marriage contracts, waiting period (*Idda)* of a divorcee who reaches menopause after the divorce, etcetera which could be found in the Ottoman Law of Family Rights, 1917.

the point home while unraveling the main question of the dissertation as to whether the codification of Islamic Criminal Law (*Taqneen El – Ahkamis – Shar'iyya El – Jinaa'iyyah*) under study in this dissertation aids or retards the implementation of *Shari'ah* in Nigeria.

In the final analysis, this chapter made an attempt to study the development of the *Corpus* of the principles of Islamic Law with particular emphasis on the principles of Islamic Criminal Law. This was historically analyzed in this chapter highlighting the challenges encounted by the early jurists in their efforts at developing the principles of Islamic Law which the succeeding generations proudly inherited as part of a collective heritage (*Turath*). The phenomenon of the closure of the gate of *Ijtihad* and its impact on the development of Islamic Law was also treated under this chapter.

Now, having laid down the above theoretical frame of reference, the next chapter focuses on the history of the codification of the principles of Islamic Law (***Taqneenu ahkamis Shar'iyya***), generally but with particular emphasis on Islamic Criminal Law. This affords the study a historical framework for determining the origin of the codification, its processes and impacts. This, in turn, gives the study a plank of analyzing the conformity or otherwise of the codification with the classical *fiqh* postulations. Consequently, Juristic opinions supporting and opposing the codification will be canvassed and analyzed in the next chapter.[128]

[128] Detailed analysis on this issue will be in chapter five of this dissertation, *infara.*

CHAPTER FOUR

HISTORICAL ORIGIN AND SURVEY OF THE PRACTICE OF THE CODIFICATION OF ISLAMIC CRIMINAL LAW IN SELECT MUSLIM COUNTRIES

4.1 Introduction

This chapter aims at studying and examining the conceptual foundation and processes of codification of Islamic Criminal Law. Codification of the Principles of Islamic Criminal Law (*Taqneenu ahkumis Shar'iyya El – Jinaa'iyyah)* as an act of writing down and compiling the rules of Islamic Criminal Law in the form of modern statutory arrangement of sections and sub sections, is relatively of recent origin in the history of Islamic Legal Theory. Thus, the practice had been and remains a bone of contention among the scholars of Islamic Legal Theory. The scholarly debates over this phenomenon of codification of the principles of Islamic Law generally and Islamic Criminal Law in particular may not lack nexus or connection with the origin and circumstances through which the practice of the codification comes to the Muslim World. Hence it is apposite at this stage of our study to examine the historical origin and development of the concept of the codification of Islamic Law (*at-Taqneen)* in the Muslim World generally with particular emphasis on some select Muslim Countries.

The main focus of this chapter, *inter alia*, includes exploration of the historical origin of the concept of the codification of the principles of Islamic Criminal Law (***Taqneenu ahkamis Shar'iyya El – Jinaa'iyyah***) and its development. The chapter explained the processes of the codification of Islamic Law generally and Islamic Criminal Law in particular. Thereafter, the Chapter concluded with some

remarks on the influence and impact of the colonization on the codification of Islamic Law processes.

4.2 The Origin of the Codification of Islamic Law (*Taqneenul ahkamis Shar'iyya El – Jinaa'iyyah)*

Most of the scholars writing on the codification of Islamic Law generally traced its origin to the *Mejelle* (*Mujallatul ahkam El - Adliyyah*) of the Ottoman Empire. All the preceding efforts along this line were considered or treated as mere attempts at unifying the Muslims on one School of Islamic Jurisprudence (*Madhhab)* or the other and not codification *per se*.[1] However, after the production and enactment of the *Mejelle* by the authorities of Ottoman Empire series of official attempts were made across various Muslim countries in a bid to codify one aspect of Islamic Law or the other. It is, therefore, germane to briefly examine the historical origin of the *Taqneen* right from the era of high caliphate to the period of Ottoman Empire and thereafter consider the developments recorded in this direction from various Muslim Countries.

[1] These efforts include the attempt of Abu Ja'afar El – Mansour who, at the behest of Abdullahi Bn El – Muqqafah, commissioned Imam Malik to collect, collate and compile the rulings and adjudications of the *Sahabah* with a view to making them accessible for ease of reference. See Hamzat, A. Z., Rasa'ilul Arab fil Usuril Arabiyyah Az – Zaahirah, 3/30 – 48. It was also along this line that Abu Ja'afar tried to make the Muwatta of Imam Malik, written in response to his request on the advice of Abdullahi Bn Muqaffa, a book of reference for adjudication throughout the Islamic State. Hence it was considered as the first attempt at the codification of Islamic Law. Imam Malik, however, resisted the attempt of caliph Abu Ja'afarul Mansour to impose Muwatta upon the entire Islamic State as a code of reference in adjudicatory matters. Vide Al – Asfahany, A.N., *Hilyatul Auliya' wa wadheefatul Asfiya*' 6/331 – 332 & Atiyya, J., *Tareekh Taqneen El – Sharee'ah El – Islamiyyah,* op. cit., p. 39

4.2.1 Codification of Islamic Criminal Law in the High Caliphate period[2]

Some historians of the development of Islamic Legal Theory (ILT) tried, albeit unsuccessfully, to trace the history of the codification of Islamic Criminal Law to the first attempt for the compilation of the *Qur'an* in Book form during the reign of Abubakar El – Siddiq as the first Caliph (R.A.). This is the beginning of the codification they argued as the *Qur'an* is the first and fundamental source of Islamic Law generally and Islamic Law of Crimes, in particular. The second stage of this is the compilation that took place during the era of Uthman Bn Affan as the third caliph (R.A.).[3] This was followed by the collection and codification of the traditions of the Prophet (peace and blessings of Allah be upon him) in the book forms. This led to the production of the six (6) authoritative books of *Sunnah* known as *Usulus – Sittah* and/or *Ummuhatus - Sittah.*[4]

However, the real history of what could properly be termed as the codification of Islamic Law could be traced to the attempt of El – Waleed Bn Abdul Malik[5] when

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[2] This refers to the period of the caliphate of the Rightly guided Caliphs and the two succeeding dynasties: *Umayyad and Abbasid* dynasties. See Abu – Sulayman, A. A. (1993), *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought,* Herdon – Virginia, International Institute for Islamic Thought, p. 25; See also Abu – Sulayman, A. A. (2002), *Al – Unf wa Ibidaratus – Sura' Fil Fikril Islamy: Baynal Mabda' wal Khiyaar,* Cairo – Egypt, Darus – Salaam, pp. 4 -5.

[3] In fact this second compilation by Uthman Bn Affan Dhun – Nurayni was seen as the actual beginning of *Taqneen* because after the taskforce he entrusted with the assignment under the headship of Zaydi Bn Thabit had completed its task, six copies of the *Qur'an* were made which were then sent to the then continents of Islamic State and all other variant versions of the *Qur'an* were collected and burnt thereby leaving the Ummah with only one version of writing the *Qur'an* popularly known as *Rasmul Uthmany.*

[4] These six (6) collections of the traditions of the Prophet (peace and blessings of Allah be upon him) are: Saheehul Bukhari, Saheehul Muslim (these are the two most authentic collections of the sayings, deeds and approvals of the Prophet peace and blessings of Allah be upon him). Then *Sunan Tirmidhi, Sunan Ibnu Majah, Sunan Nisaa'i* and *Musnad Imam Ahmad.* See Shalaby, M.M., *El – Madkhal fit Ta'areef bil Fiqhil Islamy,* p. 230 and Badran, D., *Assharee'atil Islamiyyah,* p. 243.

[5] Al – Waleed Bn Abdul – Malik Bn Marwaan Abul Abbas was one of the caliphs from the Ummayyad Dynasty who ruled the Islamic State from Syria (*Shaam)*. Under his rule the Islamic State expanded to India. He was the first Muslim Ruler that established hospitals and rebuilt the holy mosques of Quds. He also built the biggest Damascus Mosque known as *MasjIbidul Amawy.* He died in Damascus in the year 715 AH. The inscription on his ring reads: "Oh Waleed you will die." Vide Tareekud Dabary, vol. 8, p. 97 & El – Kaamil fit Tareekh, vol. 5, p. 3.

he wrote to his judges instructing them to abide by the views of KhalIbid Bn Ma'adan El – Kallaa'iy[6] in their adjudications.[7]

Similarly the attempts of the *Ummayad* Caliph, Umar Bn Abdul - Azeez[8] to compile and codify the *Sunan* that will govern the then Islamic State as a whole was seen as an attempt at codification of Islamic Law in its contemporary connotation. This attempt of Caliph Umar Bn Abdul – Azeez was variously reported through authentic chains of transmission. Two of these reports are reproduced below:

1) Narrated Abdur – Rahman Bn Ibrahim on the authority of El – Waleed Bn Muslim from Kulthum Bn Zayad from Sulaiman Bn Habeeb who said Umar Bn Abdul – Azeez wanted to codify the civil and military rules into codes (*Arada an yaj'ala hukman Naas wal ajnaad hukman waahidan).* He then had a rethink and said the Prophet's companions (may Allah be pleased with them) had dispersed in various cities and military contingents and there was among them judges who adjudicated upon matters brought before them and the prophet's companions accepted their judgements and

[6] This was a great *Tabi'* who was said to have seen seventy (70) of the Companions of the Prophet (PBUH). He was very generous and use to treat scholars with magnanimity. He was an authority in Hadeeth and highly devout person. He died in the year 103 AH. See El – Bukhary, M. I. (ND), El – Tareekh El – Kabeer, El- Nadwy, H.S., (ed), Damascus, Daar El – Fikr, vol. 3, p. 176

[7] El – Damashqy, *Tareekh Abi Zar'ah,* supra, vol. 1, p. 601

[8] He is Umar Bn Abdul – Azeez Bn Marwaan Bn El – Hakam El – Umawy, El – Qurayshy. He was nick named as Abu Hafsin. He was a very just Caliph so much so that a proverb was coined in Arabic pairing him with the second Caliph Umar Bn El- Khattab as the most just rulers. The proveb is used for any subsequent just ruler as the third of the two previous just rulers – the two Umars, (*Anta thaalithul Umarayn).* He was popularly referred to as the fifth caliph after the four rightly guided caliphs – Abubakar, Umar, Uthman & Aliyu Bn Abi Talib, Even though he was born in the sixty – first year after hijra (b. 61H) and died of poisoning in the year one hundred and one after hijra (d. 101 H.). He ascended the throne of the caliphate in the year ninety – nine after Hijra (99 H) after the demise of Sulaiman Bn Abdul – Malik. He was crowned in the central mosque of Damascus were he took allegiance of the Muslim faithful as their caliph. See Siyaar A'alam El – Nubla' , vol. 5, p. 50.

enforced same among their fellows, thus he rescinded his decision to codify the rules.[9]

2) In another version the report runs thus, narrated Yazeed Bn Haroun that Umar Bn Abdul – Azeez wrote to Abubakar Bn Muhammad Bn Amru Bn Hazm[10] directing him to look into the traditions of the Prophet (peace and blessings of Allah be upon him) and the practices of the past and the sayings or decisions of Caliph Umar Bn El – Khattab and codify them for fear of disappearance of knowledge after the death of its possessors.[11]

From these narrations the proponents of this view contended that the attempts of Umar Bn Abdul – Azeez to get the traditions of the Prophet (PBUH) written down was intended to serve as codification as could be clearly gathered from the first version of the report. However, these attempts did not succeed, chiefly due to the then prevailing juristic custom according to which Muslim Jurists mainly engaged in intellectual activities independent of the state and the rulers. This view, however, is contestable considering the fact that both the two attempts of El – Waleed and Umar Bn Abdul – Azeez did not qualify as codification within the meaning of the term as earlier discussed in this chapter. The attempts could be best described as efforts aimed at collecting the traditions of the Prophet (peace and

[9] El – Faujaany, S. N., (ed), (1972,) *Tarekh Abi Zur'ah El – Damashqy,* Damascus, Majma' Lughah El – Arabiyyah, , vol. 1, p. 202

[10] He was the Judge of Madinatul Munawwarah during the time of Umar Bn Abdul – Azeez as a Caliph. He is a Tabi' and was made the Governor of Madinah. He died at Madina in the one hundred and twenty after Hijra (d. 120 H.) at the age of eighty – four. May Allah have mercy upon his gentle soul. Vide, Abul – Farj, A. A. M., (1979), *Safwatus Safwah,* Beirut, Dar El – Ma'arifah, 2nd Edition, vol. 2, p. 132; See also El – Kufy, A.A.A., (1985), *Ma'arifatus Thiqaat,* Madinatul Munawwarah, Maktabatud Daar, vol. 2, p. 22

[11] As – Subaa'ey, *Assunnah wa makaanatiha,* p. 122; Al – Mahmasaany, *Falsafatut Tashree'* p. 59; Al – Asqalaany, I., Fat'hul Baary, vol. 1, p. 208; Az – Zurqaany, I., Sharh El – Muwatta' Malik, vol. 1, p. 9; See also Dabqaat Ibni Sa'ad, vol.2, p. 34.

blessings of Allah be upon him) and codifying them in a book form which is far from being coextensive with codification of laws in its contemporary technical legal sense.

Besides the above attempts, some historians of Islamic Legal Theory traced the root of the codification of Islamic Law to the Idea Abdullahi Bn Muqqaffa'[12] tried to sell to *Abbasid* Caliph El – Abbas Abu Ja'afar El – Mansour.[13] The Idea was to the effect that the caliph should codify the principles of *Shari'ah* and enact them into law with a view to confining judges to the application of the code in their adjudications. In fact, he wrote to the Caliph Abu Ja'afar El – Mansour urging him to cause the Laws of Islamic State to be codified in order to attain a semblance of uniformity in adjudication of cases throughout the then Islamic State. The relevant portion of this historic letter read thus:

> *It is high time for the Ameerul Mu'mineen to look into the affairs of the two major cities of his caliphate (i.e. Kufah and Basrah) as well as other cities of Islamic State in relation to the conflicting decisions that are being handed down [by our judges]. The conflict reached such awful proportion to the extent that what is considered and pronounced as lawful in relation to marriages, blood and properties in one city is treated as unlawful and was so held in another city of the same State....It is therefore befitting for the Ameerul Mu'mineena to look into this matter and cause all the established principles of Shari'ah, precedents and decisions to be codified for him in one book which will*

[12] Abdullahi Bn Muqaffa' was a well – known writer & Arabic orator. He was a Persian by origin. He authored a lot of books including *Ad – Durrah El – Yateemiyyah.* For further details on his personality, see Abul – Abbas, Shamsuddeen, A. K., (1343AH), *Wafiyyat El- A'ayaan wa abna' abna'iz Zaman,* Qum – Iran, Ar – Rida' Publishers, 2nd Edition, vol. 2, p. 151

[13] His full names are: Abdullahi Bn Muhammad Bn Aliyu Bn El – Abbas, Abu Ja'afar El- Mansour. The second of the Abbasid caliphs, he was very knowledgeable in Islamic Jurisprudence, Philosophy and Arabic literature. Thus he had great deal of respect for scholars and Jurists. Born in El – Hanmeemiyyah in the year 714 AH and died on his way to Hajj at Bi'ri Maimun in the 775. See *El – Kaameel fit Tareekh,* vol. 5, p. 172 & El – Tabri, *Tareekh,* vol. 9, p.292

> *encompass all what your subjects will require with regards to the traditions of the prophet (peace and blessings of Allah be upon him) as well as Qiyas (analogical deductions). Then the Ameer should study the code and sanction it appropriately so that it shall be the reference point in adjudicatory matters....*[14]

This letter that came to be known as *Risalatus Sahabah* (the letter of the prophet's companions) among the researchers[15] of the history Islamic Legal Theory was considered by many a scholar as the origin of the Idea of the codification of Islamic Law generally. The letter was named *Risalatus Sahabah* because it urges the then Caliph - Abu Ja'afar El Mansour to cause the decisions, legal rulings and the general precedents of the Companions of the Prophet (May Allah be pleased with them) to be codified with a view to promulgating them into law for application by the Judges, thereby unifying the Muslim *Ummah* on the important issue of judicial adjudication.

Although Abu Ja'afar El – Mansour bought this idea it was not successfully implemented consequent upon the refusal of the Muslim Jurists to allow their views and doctrines of their Schools of Jurisprudence to be imposed on the then Islamic State for application. This factor then served as the biggest obstacle against

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[14] Ibnu Muqaffa, A., (1944), *Rasa'ilul Bulagha' Risalatun fis Sahabah,* Muhammad, K (ed), Cairo, *Lajnatut Ta'aleef wat Tarjamah,* pp. 126 – 127; See also Safwat, A.Z., *Jamharat Rasa'il El- Arab,* vol. 3, pp. 37 – 38 & El – Mahmasany, Z., *Falsafatut – Tashree',* op. cit., p. 60

[15] This is the consensus view of the following prolific scholars and researchers in Islamic Legal Theory in their various write ups: El – Ashqar, U., *Tareekh Fiqh El –Islamy,* p. 60; Maududi, A.A., (ND), *El – Khilaafa wal Mulk,* Lahore, Daar Qalam, p. 161; See also As – Saahy, S. A., (1989), *Al – Madkhal Lidirasatil Fiqhil Islamy,* Damascus, Darul Uluom, 1st Edition, p. 134; Atiyya, J. D., (1977), *Tareekh Taqneen El – Sharee'ah,* Beirut, Mujallatul Muslim El – Mu'asir, vol. 11, p. 39; El – Mahmasany, S., *Falsafatut Tashree'il Islamy;* Mujallatul Muslim El – Mu'asir, Ibid, p. 60; Azzarqa', M., (1970), *Mujallatul Ahkaam El – Adliyyah wa harkatut Taqneenil Wada'eey,* Kuwait, Mujallatul Qada' wal Qanun, 1st Edition, p. 22.

the codification of *Shari'ah* generally as maintained by many scholars of the history of Islamic Legal Theory.[16]

It should, however, be pointed out that the Idea of Ibnu Muqaffah contrary to what many scholars suggested regarding its failure, as we have seen above, had partially succeeded. This is because, Caliph Abu Ja'afar El – Mansour intimated Imam Malik[17](may Allah have mercy on him) with the Idea during the hajj rites of the year 147 AH seeking the permission of the Imam to promulgate a law that will impose Imam Malik's School of Jurisprudence as codified in *Muwatta' Imam Malik* and other source materials of the School on the then entire Islamic State. Imam Malik, however, raised serious objection to this idea based on the fact that each segment of Muslims community has its Jurists and it is better to allow every community to follow the principles and doctrines of their Schools of Islamic Jurisprudence (*Madhaahib)* than to impose his book (*Muwatta)* on the then Islamic State in its entirety.

The above episode was well documented in a narration reported by Imam Malik himself which goes thus: Ibnu Abdul – Barr reported from El – Hareeth Bn Abi Usamah on the authority of Muhammad Bn Sa'ad from Muhammad Bn Umar El – Waaqidy who said: I heard Malik Bn Anas saying: When Abu Ja'afar El –

[16] Vide for instance the arguments of the following prolific writers on the history of Islamic Legal Theory: Abu Talib, S.H. (1990), *Tadbeequs – Sharee'atil Islamiyyah,* Beirut, Darun Nahdatul Arabiyyah, 3rd Edition, p. 233 & El – Mahamasany, S. (1962), *Al – Audaa'ut Tashree'iyyah,* Beirut, Daarul Ilm, 2nd Edition, p. 161

[17] That is Imam Malik Bn Anas Bn Malik El – Asbahy El – Humairy Abu Abdullahi. He is nicknamed Imam Darul – Hijrah as he spent all his life in Madinah dealing with intellectual issues and scholarship. He was one of the founders of the four Sunni Schools of Islamic Jurisprudence. He was born in the year 93AH and died in Madinah in the year 179 AH. He was devout in his religion and maintained a distance from the rulers of his time. He authored some books, such as: Muwatta', Kitabul Masa'il & Risalah fee radd alal Qadariyyah; See Az – Zarkaly, S., *Al ' Alaam,* vol. 6, p. 127 for detailed biography of Imam Malik.

Mansour came on pilgrimage he invited me and I went and narrated the sayings of the Prophet (peace and blessings of Allah be upon him) to him. He asked me some questions for which I gave him answers. The Caliph then said I intend to cause this your book [i.e. Muwatta'] to be produced in many copies and send a copy to each city of the Muslims State and direct them to apply it in their rituals and judicial matters and they shall not go beyond it. This is because of the fact that, he (Abu Ja'afar) reasoned, the origin of all Islamic knowledge is Madinan narrations and practices. Upon hearing this from the Caliph, I said: "Oh *Ameerul Mu'mineen*! Do not do that because authentic reports of the prophet's deeds, sayings and approvals had reached people in their various localities…They should therefore be left with what is at their disposal of this knowledge! Then the Caliph said had the Imam (i.e. Imam Malik) accepted this Idea I would have imposed the Mawatta' for general application throughout the Islamic State."[18]

In fact, Caliph Abu Ja'afar El – Mansour insisted on his resolve to make *Muwatta* a sort of a codified Law for the then Islamic State to the extent that when he returned on hajj in the year 164 AH he repeated his request to Imam Malik in the following terms:

> *Codify the principles of Shari'ah in a book form avoiding therein the rigidity (Shadaa'id) of Ibnu Umar and the cheap concessions (Rukhas) Ibnu Abbas and the strange views (Shawaaz) of Ibnu Mas'ud. Follow the moderate views and the consensus of the prophet's companions (may Allah be pleased with them)*[19].

[18] Abdul – Barr, H. Y. (1350H), *Al – Intiqa' fee Faddaa'ilil A'immatil Fuqha'* Cairo, Maktabatul Qudsy, p. 41

[19] Qutaibah, A. M. (1969), (213 – 276AH), *Al – Imamah was Siyasah* , Egypt, Maktabatu Mustapha Baba, vol. 2, p. 179

Imam Malik, however, persisted in his resistance and objection to this idea and he, therefore, replied the Caliph thus:

> *The Companions of the Prophet (peace and blessings of Allah be upon him) spread through the land to various towns [and cities of the Islamic State]. Each one of them issued legal rulings [Fataawa] in his town and maintained a view on variety of issues. Thus Madinan people have a view so also Iraqi people have their views……*[20]

From the foregoing, it becomes manifestly clear that the Idea of codification mooted by Abdullahi Bn Muqaffah had gone into the head of the Caliph Abu Ja'afar El – Mansour and he tried vigorously, as we have seen in the preceding paragraphs, to persuade Imam Malik to allow his Muwatta' to be adopted as the first legal code of Islamic State. Imam Malik did not, however, accept this Idea for fear of truncating knowledge that was spread across the Islamic State with the spread of the prophet's companions (may Allah be pleased with them) after the demise of the Prophet (peace and blessings of Allah be upon him). Thus, the Idea of codification remained in abeyance during the time of Imam Malik up to the period when Haroun El – Rasheed became the Caliph and he also tried to persuade Imam Malik to allow his Muwatta' to be adopted as the legal code of Islamic State but Imam Malik persisted in his rejection of this request.

4.2.2 Codification of Islamic Criminal Law in the era of Ottoman Empire

Codification of Islamic Law generally reached its peak during the Ottoman Empire (c.1299 – 1856AD). The rulers of Ottoman Empire issued out several royal decrees codifying various aspects of Islamic Law. The Ottoman Empire adopted the

[20] Ibid

Hannafi[21] School of Islamic Jurisprudence in its codification of Islamic Law. At the beginning, however, the Ottoman Empire was applying Islamic Law without adopting any of the Schools of Jurisprudence. It was during the era of Sultan Saleem El – Awwal[22] that a royal decree was issued adopting the Hannafi School of Isalamic Jurisprudence as the official *Madhhab* in both ritual and judicial matters in the Empire.[23] This was regarded as the foundational origin of the codification of Islamic Law in the Ottoman Empire, as it paved way for the codification to be carried according to one School of Islamic Jurisprudence.

The first attempt at introducing codification in Ottoman Empire was made through the royal decree issued by Sultan Muhammad Faatih after the conquest of Constantinople in the 1455 AD. This Law contained, as it were, administrative rules and some aspects of Criminal Law. It made several references to Islamic Law and borrowed a number of concepts there from. It, however, completely substituted Islamic Criminal Law with a Criminal Code in which *hudud* punishments were substituted with payment of fines.[24] Thereafter, Sultan Sulaiman El – Auwal also promulgated another royal decree dealing with administrative and commercial matters as well as some aspects of Criminal Law.[25] However, Sultan Sulaiman El – Auwal (aka Sulaiman *El – Kabeer* or *Qanuny*)[26] was considered as

[21] The School is named after its founder, Imam Abu Hanifah: Nu'uman Bn Thabit. He was born in Kufah in the year 80 AH. He was appointed as a Judge by Caliph El – Mansour and he declined the appointment, consequently he was detained. He died in detention in the year 150 AH. See *A'alam,* vol. 9, p. 4

[22] Sultan Saleem El – Awwal is the 9th Caliph of the Ottoman Empire. He reigned between 1512 – 1520 G. See Da'iratul Ma'aarif El – Islamiyyah, vol. 12, p. 121

[23] El – Mahmasany, S., *El – Auda'ut Tashree'iyyah,* op. cit., pp. 162 & 167; See also El – Ashqar, U., *Tareekhul Fiqhil Islamy,* op. cit., p. 191

[24] Shafeeq, Sh., *Al – Ittijahatit Tashree'iyyah,* op. cit., p. 16

[25] Ibid

[26] Sultan Sulaiman El- Qanuny ruled between 1520 and 1566AD. Born in 1494 AD he partook in no less than 13 wars. Thus he was nicknamed by the western scholars as Sulaiman the great.

the greatest legal reformer of the Ottoman Empire. He ordered *Sheikhul Islam* Abu Sa'ud to compile legal code for the Empire. Thus, Abu Sa'uod[27] compiled a legal compendium known as *Ma'arudat Abi Sa'oud Afandy* containing legal rulings issued by him on various matters that were presented to him. Sultan Sulaiman also on the other hand ordered Ahmad Halaby to compile a book on Islamic Jurisprudence this led to the production of the book *Multaqal Abhaar.* [28] This book though not binding for application throughout the Empire, it was a great intellectual work that paved the way for the application of *Shari'ah* in the Empire on the basis of *Hannafi* doctrines after the adoption of *Hannafi* School of Law as the official *Madhhab* for the Ottoman Empire. Thus, the *Mejelle* which constituted the turning point on the codification of Islamic Law drew heavily on the *Hannafi* Jurisprudence as we are going to see below.

4.2.2.1 Mujallatul Ahkamis - Shar'iyya Al – Adliyyah (The *Mejelle)*

The *Mejelle* was promulgated by the Ottoman Empire towards the end of the thirteenth century after *hijra*. It was modeled after the French Civil Code. The *Mejelle* is a collection of rules and principles of *Shari'ah* dealing with *Mu'amalat* (Islamic Law of Contracts/Transactions). The authors of the *Mejelle* relied heavily on the sources of Hannafi School of Law[29]. At times, however, they relied on the

[27] Abu Sa'oud Bn Muhammad El – Aamidy was the leading Islamic Jurist of the Ottoman Empire. He held the post of *Sheikhul Islam* and juriconsult of the Empire for over thirty years. He was born in 1490 AD and died in 1574 AD. Vide Shantanawy, A., Khoursheed, I., (eds), (ND), *Da'iratil – Ma'areef El – Islamiyyah,* Cairo, Dar El – Fikr, vol. 1, p. 348

[28] The authors of *Mejelle* derived most of its contents from the Book of *Al- Ashbaah wan – Nazaa'ir* by Ibnu Nujaim (d. 970H/1563G) and *Kitaabul Majaami'* by Aby Sa'eed El – Khaadimy (1168H/1755G).

[29] Ibid

views of other schools of law other than Hannafi view.[30] This style was adopted with a view to providing facility and ease in the Law according to the exigency of the situation. It should, however, be pointed out that in spite of the innovative style of writing the *Mejelle*, its chapters were arranged in accordance with the traditional arrangements of *Fiqhu* Manuals. The main distinguishing feature of the *Mejelle* being its sequential arrangement in numbered sections in the formats of the modern law codes. This fact makes its contents easily accessible to all.

The *Mejelle* contains one thousand, eight hundred and fifty – one (1851) articles or sections, known as (*Mawaad,* sing. *Maadah).*[31] It also covers ninety – nine (99) Jurisprudential Maxims (*Qawa'id El – Fiqhiyya)* spread over the sixteen (16) chapters of the *Mejelle* all of which are treating issues pertaining to *Mu'amalat.*[32] The *Mejelle* is modeled on the format of the western law codes but it differs from the code in that it provides examples and explanatory notes within the text for ease of comprehension.[33]

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[30] This can be illustrated with the rules on stipulations in contract where the authors of *Mejelle* used the views of Abdullahi Bn Shubrima one of the leading jurists of Kufah (d.144H/761G). Vide Al – Asqalany, I.H., *Tahzeebut Tahzeeb,* vol. 5, p. 25.

[31] Az – Zarqa', M.M., *Al – Madkhalul Fiqhiy,* Supra, vol. 1, p. 240; As – Sabouny, A., et al, *Al – Madkhalul Fiqhy wa Tareekhut Tashree'il Islamy,* p. 365; Abu Zahra, M., *Al – Musi'atul Fiqhiyyah,* vol. 1, p.99; Mustapha, S., *Al – Madkhal ilal Fiqhil Islamy,* p. 159; Fareed Bik, M., *Tareekh Daulatul Uthmaniyya,* p.298; Al – KhuwaiLidy, A.S., *Al – Khasaa'isul Manhajiyya li Mujallatil Ahkaam El – Adliyyah El – Uthmaniyyah* (Tunis, *Al – Mujallatul Arabiyyah El – Tareekhiyyah lid – Dirasatil Uthmaniyya),* No. 13 – 14, October, 1996, p. 130; Al – Mahmasany, S., *Falsafatut – Tashree' fil Islam,* p. 85.

[32] Thus, despite the vastness and richness of the *Mejelle*, it does no cover other vital aspects of Islamic Law, such as: *Ahwaalus – Shakhsiyya* (Islamic Family Law); *Mawaareeth* (Islamic Law of Succession); *Al – Jareemah wal Uqubat* (Islamic Law of Crimes); etcetera.

[33] El – Mahmasany, S., *Al – Auda'ut – Tashree'iyyah,* supra, p. 170

The *Mejelle*, owing to the importance attached to it since its enactment by the Ottoman Empire, became a subject matter of various commentaries and annotations by many scholars.[34]

4.2.3 Post *Mejelle* Developments in the Codification of Islamic Criminal Law

Many Muslim Scholars after the enactment and promulgation of *Mejelle* by the Ottoman Rulers lent their support to the phenomenon of the codification of *Shari'ah* for the simple reason that it brings together in one code the rich principles of Islamic Law that were hitherto dispersed across various books of Islamic Jurisprudence, thereby making them more accessible and easily applicable. This scholarly endorsement of the *Mejelle* project led to other post *Mejelle* developments in the codification of Islamic Law efforts across various Muslim countries and states.

It should, however, be pointed out that most of the post *Mejelle* developments in the codification of *Shari'ah* project were not based on the principles of any particular School of Islamic Jurisprudence *(Madhhab)*. The subsequent codification of Islamic Law projects, using the technique of *takhayyur* (selection of the most suitable opinion from the divergent juristic views), adopted the views that best suit their local circumstances. In doing that they took into cognizance the peculiarities and exigencies of their localities in their drive for codification of

[34] Vide for example, Al – Lubnany, S.R.B., *Sharh El – Mujallah* this is a concise but comprehensive commentary on the *Mejelle* in Arabic published in 1888. Al – Ghazy, M.S.M., *Kitabu El – Adillah El – Asliyyah Sharh Mujallah El – Adliyyah* this is another Arabic commentary on the *Mejelle* that runs into three volumes. This is a comparative analysis of the contents of the *Mejelle* against the classical Islamic Law sources. These were followed by a number of commentaries, such as: HaIbidar, A., *Durr El – Ahkam Sharh Mujallah El – Ahkam;* Al – Muhaseeny, S., *Sharhu Mujallah El – Ahkam El – Adliyyah.* There are also two other important commentaries on the *Mejelle* simply entitled *Sharhul Mujallah* separately carried out by both Al – Anaasy, Kh. & Al – Qady, M.

various aspects of Islamic Law.[35] This was meant to guarantee ease in the application of the Law. Thus, it was not surprising that some scholars even went further to suggest that in the codification process the enacting and promulgating authority should not be confined to the four classical schools of Islamic jurisprudence (*Madhaahib* sing. *Madhhab)*. But such enacting authorities can even go beyond the four (4) classical schools of Islamic Jurisprudence provided the intention is to achieve facility and ease in the implementation of the Islamic Criminal Law.[36]

In the next paragraphs of this dissertation a brief examination of some of the post *Mejelle* codifications across the Muslim world will be surveyed. The study is, however, focusing on examination of the African part of the Muslim world for the obvious reason that these countries have a number of things in common with Nigeria particularly regarding their colonial experience and the methods of their codification of Islamic Criminal Law.

4.2.3.1 Codification of Islamic Criminal Law in Egypt

The real history of the codification of Islamic Law in Egypt, however, is traceable to the reign of Muhammad Aliyu Baasha who commissioned a great Islamic Scholar and Jurist Sheikh Muhammad El – Jazaa'iry to compile the principles of Islamic Law on civil matters in a form of Babylonian Code.[37] This first attempt at

[35] Abdur – Rahman, Q., *Al – Islam wa Taqneenul Ahkam,* p.255; available at www.alwarqa.com; last accessed on 12th December, 2012.
[36] Abdul – Mun'im, S., *Nahwa Taqneenin Islamiyyin Saheeh,* Manarul Islam Journal (Vol. 10 of 8th Shawwal, 1408), p. 93
[37] See Shalby, M.M., *Ahkaam El – Usra fil Islam,* p. 16 and Rida, M. R., *Tareekh Muhammad Abduh,* vol.1/620 both cited in Imam, M.K., *Al – Khalfiyyah El – Fikriyyah wat Tashree'iyyah wal Ijtimaa'iyyah*

codifying the principles of *Shari'ah* in Egypt was sought to be made not on the bases of any particular Islamic School of Law/Jurisprudence (*Madhhab).* However, the prevailing circumstances and conditions in Egypt at that time did not permit that project to take off successfully.[38]

Further attempts at codification of Islamic Law in Egypt were thus halted until the era of Khiddiwy Isma'eel as an Egyptian Ruler. During his reign in Egypt, Khiddiwy Isma'eel requested the Scholars of the famous Azahar (*Ulama'ul Azahar)* to undertake the task of compiling various branches of Islamic Law each in a separate code.[39] The emphasis then was on the codification of the Islamic Principles on Crimes and Punishments. But the scholars turned down this royal request on the basis that it was novel and alien to Islamic Legal Traditions.[40] History also repeated itself during the time of Khiddiwy Taufeeq when the Azhar's Scholars objected to the royal proposal of codifying Islamic Law for ease of access and application.[41] However, after the time of Khiddiwy Taufeeq, Muhammad Qadry Basha in 1306H/1888G successfully commissioned the codification of *Shari'ah* project which led to the production of the following codes:

1) Code of Civil Transactions (*Al – Mu'amalat El – Madniyyah)* entitled *Murshidul Hayraan ila ma'arifati ahwaalil Insaan*. This is a very comprehensive code in its field which contains one thousand and forty –

Lis tib'aad Tadbeeqis Sharee'ah, Journal of Contemporary Muslim (*Muslim Mu'aasir),* vol. 5 of 1995, p. 55

[38] Ibid

[39] The royal request to Azahar proposed having at least five (5) different codes for application in Egypt. These were Criminal code, Civil Code, Code of Personal Status, Code of Financial Transactions & Property Rights Code.

[40] Rida, M.R., *Tareekh Muhammad Abduh,* Op. cit, p. 621

[41] Ibid

nine (1,049) articles, covering financial transactions generally, ownership of property, credit based transactions and the like.

2) Code of Islamic Personal Status (*Ahwalus – Shakhsiyyah).* This was entitled *Al – Ahwalus – Shakhsiyyah ala Madhhab Abi Haneefah El – Nu'uman.* It contained six hundred and forty – seven (647) articles dealing marriage, divorce, lineage, succession and bequest.

3) Code on Islamic Endowments (*Al – Awqaaf)* under the title of *Kitabul Adli wal Insaf fi halli Mushkilat El – Awqaaf.* This code contains six hundred and forty – six (646) articles on endowments and the rulings thereof. Though this code was not officially promulgated into law it was published as a book in 1893.[42]

The move for codification of *Shari'ah* in Egypt which, as we have seen in this study, which started long before the attainment of self rule in that country takes a decisive shape and focus in the early sixties. The codification of Islamic Law was done in accordance with the doctrines of Hannafi School of Law.[43] The main reasons behind this move, among others, include the agitation by the Islamists such as '*Ikhwanul Muslimeem'* fully supported by the leading *Ulama'* in Egypt. This could be illustrated by a famous speech delivered by Dr. Muhammad Abdur – Rahman Baysar, the former Vice – Chancellor of Al – Azhar University and the

[42] See generally Atiyyah, S., *Tareekh Taqneen,* op. cit., pp. 42 - 45

[43] Interim Report of the Steering Committee (*Lajnah Tahdeeriyyah)* on the Codification of the principles of Islamic Law; Introduction on the Codification of Islamic Law according to Hannafi School of Law under the supervision of Azhar Centre for Islamic Research; (Al- Azhar, Majma' Buhuthil Islamiyya, 1392Ah/1972), Quoted in Hindy, S.A. (1987), *Adwa' Ala Taqneen As- Sharee'atil Al – Islamiyyah,* Cairo, Darul – Hidaya, vol. 1, pp. 45 – 50.

then Secretary of Azhar Center for Islamic Research in which he made the following moving statements:

> *The most worrisome aspect of our life as a nation to a very conscious Muslim is the fact that the Muslim Ummah of this nation is constrained to adopt man made laws [Qanunun wada'ee] in running its collective affairs. It is even more worrisome when such laws are of foreign legislative origin and their makers do not share the worldviews and religious beliefs of our people. To add insult to the injuries, some people started to accuse – baselessly – the Islamic Law of incapability to deal with the contemporary challenges which were not known to the first Islamic generation.*[44]

The learned *Sheikhul Azhar* went ahead to refute the claims of the modernists in Egypt in the following words:

> *The reality of the situation is that all the so called modernists are in great error in their conception of Islamic Law as they are grossly uninformed about the history of their Islamic nation. If they have followed the history of [Islamic] Ummah through out its development across various epochs and places right from its first rise to the penetration of Islam into Roman and ancient Persian Empires as well as some other parts of the Europe the beauty of Islamic Law would have become crystal clear to them.*[45]

Thus, *Majma'ul Buhuth Al – Islamiyya* of Azhar resolved[46] that its efforts should be geared towards accomplishing the project of codifying Islamic Law in all its ramifications. Consequently, the communiqué of the Conference[47] organized by the Center on the codification of *Shari'ah* principles recommended the formation of a Committee consisting of Islamic Scholars (*Fuqha'*) and Lawyers that will carry out the project of codifying the principles of Islamic Law with a view to

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[44] Ibid
[45] Ibid
[46] Vide the minutes of the 27th Meeting of the Center held on 8th March, 1968
[47] Held on the 29th day of September, 1968 at Cairo

making them available to the leaders, judges, lawyers, students and the generality of Muslims Ummah for the purposes of implementation, application, observance, compliance and studies.

4.2.3.2 Codification of Islamic Criminal Law in Pakistan

The effort of codification of Islamic Criminal Law in Pakistan took a very serious shape during the reign of Zia'ul Haqq 1977 – 1988. It was at that period in time that certain agencies charged with the codification of Islamic Law were established by Ziaul Haqq's Government.[48] Among these agencies are Institute for Islamic Research (*Ma'ahadul Buhuth Al – Islamy)* and Council for Islamic Thoughts (*Majlisul Fikril Islamy).* These agencies started the ground work for codification of Islamic Law generally.[49]

The Codification of Islamic Criminal Law in reality, however, started in 1979 when the then President Zia'ul Haqq established a high powered Judicial Committee, under the Chairmanship of Pakistan's Chief Justice, consisting of representatives of *Ulama',* Lawyers and other legal experts. He also established *Shari'ah* Benches in all the Federal Courts of Pakistan. This was achieved through constitutional amendment effected in 1979. But the *Shari'ah* Benches were abolished in May, 1980 and were substituted with the the Federal Supreme Court (FSC) that was empowered to administer the *Shari'ah* Law.[50]

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[48] Anonymous, (1985), Report of Shari'ah Implementation Committee in Pakistan, p. 9, Ministry of *Awqaaf,* Islamabad – Pakistan.
[49] Ibid
[50] Amin, M. (1998), Islamization of Law in Pakistan, Lahore – Pakistan, Rubya Publishers, pp. 172 - 180

No sooner than the agencies saddled with the codification of Islamic Criminal Law completed their assignments validation conferences were convened to review and validate their works. These validation conferences were held in August, 1980; July, 1983 and finally in July 1984. All the validation conferences were presided upon by the President himself and all the relevant stakeholders were invited and they participated in reviewing the codified laws.[51]

The outcomes of the validation conferences were then presented to the Pakistani Parliament for promulgation into law. The Parliament after heated debates and deliberations and series of public hearings in which Clerics from various religious sects made submission passed into law "Enforcement of *Shari'ah* Ordinance of 1988". However, before implementation of the Ordinance that codified the principle and doctrines of Islamic Criminal Law President Zia'ul Haqq was assassinated.[52]

The assassination of President Zia'ul Haqq put on hold the implementation of the Enforcement of *Shari'ah* Ordinance, 1988. The methodology adopted by the Zia's Administration in promulgating the Ordinance (the Code) was severely criticized as amount to usurpation of the power of the legislature by the Executives.[53]

It should be pointed out here that these criticisms are legally not valid as Zia'ul Haqq Administration was a Military Government under which usually there is a fusion of both legislative and executive arms of government in one single body.

[51] Ibid, p. 203
[52] Ibid, p. 219
[53] Ibid

4.2.3.3 Codification of Islamic Criminal Law in Libya

Following the rich developments and successes recorded in the Egyptian codification of *Shari'ah* efforts, many other Muslim countries followed suit. In the African continent the first of such Muslim countries to embrace the codification of *Shari'ah* phenomenon was Libiya. That was in 1937 when Sheikh Muhammad Aamir began to compile the rules of Maliki Jurisprudence on the contractual obligations generally in a form of the modern law code. The work entitled *Mulakkhasul – Ahkamis – Shar'iyyah alal Mu'utamad min Madhhabi Malikin* was the first of its kind.[54]

This great work on Maliki Jurisprudence, containing nine hundred and twenty – eight (928) articles/sections (*mawaad)*, was divided into four (4) main parts, *to wit:*

1) *Qada' El – Shar'eey wa Muta'alliqaatihi* (Adjudicatory and related issues)

2) *Al – Ahwal El – Shakhsiyyah* (Islamic Law of Personal Status)

3) *Al- Mu'amalat wat – Tabbarru'at* (Islamic Law of Transactions)

4) *Al – Mawaareeth* (Islamic Law of Succession).[55]

In October, 1971 the Libyan authorities issued an official decree (*Qararur Rasmy)* establishing various committees for legal reform with particular emphasis on the review of the Islamic laws on capital punishments (*Hudud),* poor dues (*Zakat),*

[54] Dasuki, M., *Al – Ijtihad wat – Taqleed fis – Sharee'atil Islamiyyah,* op. cit., p. 191
[55] Ibid at p. 192

usury *(Riba),* vitiating elements of contract (*Gharar)* and endowment *Waqaf.*[56] The end products of these committees' works were subsequently enacted and promulgated into law codes for application throughout the country.

4.2.3.4 Codification of Islamic Criminal Law in Tunisia

The next Muslim country on African continent to embrace the codification of *Shari'ah*, as an emerging phenomenon, was Tunisia. A lot of efforts were invested in the codification of *Shari'ah* project since the time of *Aman.* These efforts, however, reached their peak and attained fruition in 1965.[57]

The most important attempt made during the era of *Aman* towards the codification of *Shari'ah* was the project initiated by Muhammad Basha Baya in 1857 which led to production of a code containing eleven jurisprudential rules (*Qawa'Ibidul Fiqhiyya).*[58] Thereafter, several attempts were made aimed at codifying the principles of Islamic Law in accordance with Imams Maliki and Hannafi Schools of Jurisprudence. Notable among the products of those sustained efforts in Tunisia are the following codes:

1) *Mujallatul Iltizamaat wal Uqoud* (Code of Contractual Obligations)

2) *Mujallatul Ahwalus – Shakhsiyyah* (Code of Personal Status)

3) *Mujallatul Huquqil Ayniyya* (Code of Property Rights).[59]

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[56] Az – Zuhaily, W., *Juhudut – Taqneen Fiqhil Islamy,* op. cit., p. 53. See also Atiyya, S., *Tareekhut Taqneenit Tasharee'il Islamy,* supra, pp. 42 – 43.
[57] Bouzughybah, M. (1998), *Harkatu Taqneen El - Fiqh El - Islamy fi El - Bilaadi Tunisia,* Tunis, Ahliyyah publishers, pp. 63 - 99
[58] Ibid
[59] Ibid, at 69

The above codes were couched in general terms in accordance with Islamic Jurisprudential Traditions.

4.2.3.5 Codification of Islamic Criminal Law in Algeria

The Algerian approach to the codification of Islamic Law phenomenon presents an interesting case, in that the move for Islamic Law codification only begun after colonization of the country. Prior to the French colonialism over Algeria the Judges drew on the classical jurisprudential manuals and other source materials (*Turath)* from both Maliki and Hannafi Schools of Jurisprudence in their adjudication. However, after the colonization of Algeria, the French colonial masters abolished the application of *Shari'ah* in virtually all aspects of human endeavors except in the areas of marriage and divorce.[60]

The Algerian codification of Islamic Law was, thus, colonially driven. This is because after separating religion from the state the colonial masters in Algeria, through their Administrator General – Dominic Louisiana, issued out imperial decree/order on the 22nd day of March, 1905 for the codification of Islamic Law in Algeria for easy application on Muslims.[61] Based on this imperial order Mr. Merisel Morand was commissioned to prepare an Islamic Law Code for Algeria. Mr. Morand, at the end of his assignment, produced a draft code entitled *El - haytheeyat wal khususiyyat fis – Sharee'atil Islamiyyah El – Mudabbaqah alal Muslimeena fil Jaza'ir.* This was accepted by the Colonial Administration and was

[60] Abu Qasim, S.A., *Tareekhul Jaza'ir El – Thaqafy*, vol. 4, p. 528 & vol. 7, p. 104
[61] Atiyya, J.D., *Tareekhu – Taqneenis – Sharee'ah,* op.cit., p. 45; See also Bouzughybah, M., *Harkatut Taqneenil Fiqhil Islamy Bi Bilaadit Tunisia,* supra

subsequently promulgated into Law under the title of *Mujallatul Ahkaam El – Saariyyah El – Jaza'iriyyah.*[62]

In 1906 the Algerian colonial Administration set up a twenty – two (22) man committee, under the leadership of Mr. Morand, for codification of Islamic Law in the areas of Family matters, Endowments, Property Rights as well as Evidence and Procedural Laws in accordance with Hannafi, Maliki, Shafi'i and Abady[63] Schools of Islamic Jurisprudence. The committee was composed of sixteen (16) French scholars and six Algerians learned in Islamic Law.[64] The Committee swung into action immediately and completed its assignment in 1914 over a period of a decade. It submitted its reports in four (4) volumes containing seven hundred and eighty – one (781) articles.[65]

It is pertinent to point out, here, that despite the great role played by the French Scholars and colonialists in the process of *Shari'ah* codification in Algeria, the code in its official version only bears the names of two great Algerian Islamic Scholars, Mustapha Bn Ahmad El – Sharshaaly and Abdur – Razaq Bn Muhammad El – Ashraf, as its authors.

The code, however, remained of persuasive authority and a source of reference and guidance for judges in Algeria for quite a while albeit it was never promulgated into Law. Thus the authority of this code remained persuasive and on a number of occasions the Algerian Supreme *Shari'ah* Court declined to apply it on the ground

[62] Abu Qasim, S.A., *Tareekh El – Jaza'ir El – Thaqaafy,* op.cit. vol. 7, p. 105
[63] Abady is one of the numerous sects of Shi'ah movements. It has a lot of followers in ancient Yemen and other parts of the Kuufah, Basra and Turkey – *El Milal wan Nihal*
[64] Ibid, See also Atiyya, J.D., *Tareekhut – Taqneen,* op. cit., p. 45.
[65] Abu Qasim, Ibid, vol. 4, pp. 535 - 536

of its inconsistency with the classical Islamic Law sources.[66] This further eroded the authority of this code though it remained open for consultations by Lawyers and Judges alike until the attainment of Algerian Independence in 1962.

After the Algerian attainment of self – rule and specifically in 1984 an indigenous project for the codification of Islamic Law was commissioned which led to the codification of some aspects of Islamic Law dealing with Personal Status, Inheritance and Endowments according to Maliki School of Islamic Jurisprudence. This was subsequently enacted and promulgated into Law in the same year. This remains, up to the present time, the official Islamic Law code being applied in Algeria.[67]

4.2.3.6 Codification of Islamic Criminal Law in Sudan

Attempts at codification of the principles of Islamic Criminal Law in Sudan have a very long history. Apart from the colonial penal codes, series of intellectual efforts were exerted towards codifying Islamic Law with a view to returning the country on the path of full application of Islamic Law. Howbever those intellectual efforts remained at individual level without any governmental backing. In the early 1980s series of enactments on the codification of one aspect of Islamic Law or the other were promulgated.[68]

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[66] Ibid
[67] Ibid
[68] Atiyya, J.D., *Tareeku Taqneenis Sharee'atil Islamiyyah,* Mujallatul Muslimil Mu'asir, (1977), No 11, p. 35

The legislation that were passed into Law to usher in the renewed application of *Shari'ah* in Sudan during the reign of Ja'afar Nnemeri, include but not limited to the followings:

1) *Qanunul Janaa'iyyil Islamy* (Code of Islamic Criminal Law)[69]

2) *Qanunul Mu'amalaatil Madaniyyah* (Code of Islamic Civil Law)[70]

One distinguishing feature of the Sudanese codification of Islamic Law efforts lies in the fact that galaxy of learned jurists brought their learning to bear in the codification process. Thus the Sudanese Islamic Codes drew heavily from the rich juridical sciences as contained in the classical works on Islamic Jurisprudence.

The current Law codifying Islamic Criminal Law in Sudan, the Sudanese Criminal Act of 1991 which repealed and replaced the 1983 Penal Code, has one hundred and eighty – five (185) sections divided into seventeen (17) parts with two (2) schedules[71].

4.2.3.7 Codification of Islamic Criminal Law in Saudi Arabia

To round up our historical voyage and survey on the post *Mejelle* developments in the codification of Islamic Law around Muslim World, it will be interesting to study the development in Saudiyya. In contrast to the developments in Algeria and other Muslim countries which tasted the experience of colonialism, Saudi Arabia that was never under any imperial domination was also not spared the scourge of codification. The codification in Saudi Arabia began as purely intellectual exercise

[69] This Code was enacted and promulgated into Law in Sudan in 1983
[70] It was enacted as a legal Code in 1984
[71] Vide The Criminal Act, 1991 of the Republic of Sudan

under taken by private scholars. Thus Sheikh Ahmad Abdullahi El – Qary El – Makky[72] was regarded as the father of Saudi Arabian codification of *Shari'ah* in that he undertook a great herculean task of codifying the principles of Shari'a according to Hanbali Jurisprudence. This work entitled *Mujallatul Ahkam El – Shar'iyyah ala Fiqhil Madhhabil Hanbali* containing two thousand, three hundred and eighty – two (2382) articles and divided into eleven (11) volumes followed and adopted the format of the Mejlle of the Ottoman Empire.[73] This code covers Islamic Law of Transactions generally (*Mu'amalat)* and Legal Procedures (*Masa'il El – Qada).*

It is to be noted that the general Ulama' of Saudi Arabia are averse to the idea of codification as we are going to see when analyzing the legality of the codification of Islamic Criminal Law (*Taqneen Ahakamis Shar'iyya El – Jinaa'iyya)* in the next chapter.[74]

4.2.3.8 Codification of Islamic Criminal Law in Northern Nigeria

Virtually, all the federating states that made up the current Northern Nigeria were the constituent parts of the defunct Sokoto Caliphate which was established in the 19th century through a jihad movement led by Shaikh Uthman bin Fodio. Sokoto Caliphate was, thus, founded on the tenets and principles of Islamic governance. It had as its cardinal objectives the revival of the pristine *Shari'ah* as the official law of the caliphate. Consequently, *Shari'ah* flourished very well under the Sokoto

[72] He was the President of the *Mahkamatul Kubra* of Saudi Arabia.
[73] This work was only published in 1420H/1998G - El – Zarkaly, S., *El – A'laam,* 1/156; See also Fu'aad, A.M., *Nahwa Taqneenin Islamiyyin Saheeh,* supra, p. 96 & Az – Zuhaily, W., *Juhudut – Taqneen,* op. cit., pp. 54 - 55
[74] Vide chapter, *infra.*

caliphate both in terms of administration and judicial structure of courts. Qadis were appointed in this caliphate to dispense justice strictly according to the principles of Islamic Law[75]. This is particularly so in the area of Islamic Criminal Justice System. The Islamic Penal System comprising *Hudud, Qisas* and *Ta'azir* were duly applied and administered in the entire territory of the caliphate. To this end, Chukkol remarked thus:

> *The Islamic Criminal Justice, before European arrived has been well entrenched. Not only were Islamic offences clearly defined and punishments provided, but also the emirs courts were the appellate courts and could hear and determine appeals in most cases involving homicide. That explains how we came to have the expression Sarakunan Yanka i.e. emirs with powers to impose death sentences on convicted murderers.*[76]

This is clear evidence that Islamic Criminal Law in its classical form continued to be the sole applicable penal system in the area up to the advent of the British Colonialism. Upon their arrival, the colonialists found a highly centralized and sophisticated system of administration with an elaborate legal system under which all aspects of Islamic Law (including Islamic Criminal Law) were being administered by the *Quddat (*sngl. *Qadi) i.e. Shari'ah* Judges in formal court structures established in cities and towns.[77] Thus, Lord Lugard, who became the first Governor General of the then area under the Sokoto Caliphate, according to Abdul – Malik Bappa Mahmoud, found that:

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[75] Yadudu, A.H., Colonization and Transformation of the Substance and Forms of Islamic Law in Northern Nigeria, Journal of Law and Religion, IX, 1 (1991), p. 24

[76] Chukkol K. S. (2001), The Penal Code: Origin And Application, In Yakubu A.M. et al (eds) Understanding Shariah in Nigeria, Ibadan, Spectrum Books Ltd. p.163.

[77] Yadudu, A.H. supra p. 17. This point was earlier stressed by Bappa Abdulmalik when he submitted that the administration of Sharia continued unabated despite the political wranglings among the Emirs which were brought down by the weakness of the central government at Sokoto. Mahmud, A.B. (1988) A Brief History of Sharia in the Defunct Northern Nigeria , Jos, Jos University Press, p.1.

> *Islam was well established in the North with Sharia and Islamic religion well entrenched in the lives and affairs of the inhabitants. In fact, in all the areas colonized by the British, nowhere was Islam being observed as thoroughly as in the case of Northern Nigeria, except perhaps in some parts of the Arab world. The Emirs courts were filled with learned and pious Jurists whose decisions were always based on authorities from the Quran, Hadiths or other Islamic Law books and such proceedings were always recorded in Arabic. Existing side by side were the Alkali Courts, which were also engaged in the administration of Justice based on the Sharia.*[78]

Based on this the British Colonialists opted to rule the area falling under the then Sokoto Caliphate through a system that came to be known as 'indirect rule'. Under which the existing native institutions and machineries of government were retained in the Emirates and continued to function within the limits prescribed by the Colonial administration overseeing the affairs of the then Northern Protectorate. The system of indirect rule gave Colonial Administrators the power of control and supervision over the Emirates. Through this system the Colonial administration tolerated the continued application and administration of *Shari'ah* in the protectorate up to a point in time[79].

Nevertheless, no sooner than it was conducive, the colonial administration embarked on *Shari'ah* reforms generally but with particular emphasis on reforming Islamic criminal law. These reforms were subtly carried out through Orders in Council and Proclamations.[80] This culminated in substantial reduction of the application of Islamic principles of Criminal Justice System which were deem

[78] Mahmud, A.B. supra p.1
[79] Ahmad, N.A., (2011) Administration of Islamic Criminal Law Under the Nigerian Constitutional Democracy, Zaria ,Ahmadu Bello University Press Limited p.3
[80] Such Proclamations included the Native Court Ordinances 1900, 1906, 1933 and the Native Court Law, 1956.

to be repugnant to natural justice, equity and good conscience[81] and the subsequent total abrogation of most Islamic Law punishments that were regarded by the Colonialists as torture and mutilations[82] and therefore inhuman and degrading punishments.

As opposed to what is obtainable in other Muslim countries, the Nigerian history offers a clear case of the official codification of Islamic Criminal Law. It all started in 1958 when the Colonial administration conceded to an independent Nigeria and a federal system of government was chosen for the country. This, *inter alia*, entails a unified criminal code for the whole country. This would have left Northern Nigeria with a purely British model of criminal code without due regard and consideration to the religion and culture of the people of this part of the country (Northern Nigeria).[83] Thus agitations for separate criminal code that will be in conformity with religious beliefs and cultural heritage of the people of Northern Nigeria were mounted. These agitations yielded some results when the Penal Code for Northern Nigeria, which supposedly codifies the Islamic principles of criminal law, was drafted and promulgated into law[84].

Upon the attainment of self – rule and the commencement of the administration of the Penal Code, the Muslims were disillusioned when they came into the grim reality that not only the Penal Code was used to put the final stop on the

[81] In the cases of Tsoho Gubba V. Gwandu N. A. (1947) 12 WACA, 141, Maizabo V. Sokoto N. A. (1957) NRNLR, 133 and Jallo Gurin V. Hadejia N.A. (1959) 41 Sc 44, some principles of Islamic Criminal Law were declared as repugnant to natural justice, equity and good conscience.
[82] Ahmad, N.A., op. cit, p. 3
[83] Okonko and Naish, (1980), Criminal Law in Nigeria, London Street and Maxwell, p.9
[84] Ahmad, N.A., op. cit, p. 4

administration of Islamic Criminal Law,[85] but its contents were not what they actually bargained for as it was far below the expectations of the Muslims.[86] It, therefore, proved quite unsuitable for the predominant Muslim community[87] as it turned out to be a reproduction of the common law principles of crimes and, thus, a replica of its rejected counterpart, the Criminal Code. This fact has been attested to by Justice Karibi Whyte, when he observed thus:

> *It is indeed an easily forgotten and ignored fact that the two codes of criminal law in the country have a common origin, namely, the English common law. The fact that the Criminal code traces its origin directly to Queens land, Australia and the Penal Code to Sudan and ultimately to India should not obscure the fact that both codes are codification of English common law crimes to suit the circumstance of the respective countries*[88].

Certainly, a cursory glance at the content of the Penal Code would, contrary to the wide belief, reveal that it has not taken the principles of Islamic Criminal Law into consideration[89]. For instance, punishment for offences such as extra-marital sex, drinking of wine and the law of retaliation, which were included in the Code are not in the manner prescribed by Islamic criminal law[90].

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[85] It was held in Numan Federation V. Samari Numan (1961) N.N.L.R. 15 that after the commencement of Penal Code, Native Courts could no longer try, convict or punish any offender under the native law and custom (which included the Islamic criminal law).

[86] Okonko and Naish, Criminal Law in Nigeria, London, Sweet and Maxwell (1980) P. 9.

[87] Mahmud, A.B. supra pp.43-61.

[88] Karibi Whyte A.G. History of the Sources of Nigerian Criminal Law Ibadan, Spectrum Books Ltd. (1993) P. 232.

[89] K. S. Chukkol, supra pp.161–162.

[90] Extra-marital Sex is punished under sections 387 and 388 by imprisonment of two years and conviction can only be secured where the act was performed without the consent of the husband or wife. Section 401 Punishes a person who has been convicted of taking alcohol, not for medicinal purpose, with one year imprisonment. The punishment of homicIbide under Section 221 is death without any option for the family of the deceased to settle the death sentence with the payment of compensation (diyya). See Ahmad, N. A. (2011), *Administration of Islamic Law Under the Nigerian Constitutional Democracy,* op. cit. at p. 5 for detailed analysis on this point

Since the realization of the inadequacies of the Penal Code of Northern Nigeria as discussed in the preceding paragraph, the Muslims of Northern Nigeria had never given up their efforts and struggle towards returning to Islamic Law for conducting their affairs in accordance with *Shari'ah* principles generally and for re-introducing the administration of the Islamic criminal justice system to govern their public lives as was the case before the advent of the British rule.[91]

The return of democratic rule to Nigeria in 1999 offered a golden opportunity to the Muslim Ummah in the Northern Nigeria to re-assert their Islamic Ibidentity by submitting themselves to the Islamic legal system which was relegated to the background for a very long period of time as we have seen in the previous chapter[92]. This is because the constitutional democracy, which the country practices, recognizes, *inter alia,* the twin principles of legal pluralism and freedom of religion.

Thus, the agitations for re introduction, in full scale, of the application of Islamic Criminal Law in the North emanated from the general belief among the Muslims that Islamic Law is the only viable panacea to all the vices and the evils bedevilling the society. Thus, Islamic Legal System to the Muslims is the only system believed to have the capability of nipping in the bud all sorts of anti social behaviours, ranging from immoralities and corrupt practices to all other criminal acts. Furthermore, the Islamic Criminal Justice System being simple and straight

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[91] This was manifested in all the constitutional debates/conference designed to precede Nigeria's return to civilian rule from 1978 – 1995. During these debates, the Muslim demanded for the wIbider implementation of Shariah. See Kumo, S. (2001), Shariah And the Nigerian Constitution: Issues and perspective In Yakubu A. M. et al (eds) *Understanding Shariah in Nigeria,* Pp. 172 - 173. See also Iwobi A.U, Tiptoeing Through a Constitutional Minefield: The Great Shariah controversy in Nigeria, Journal of African Law, 48, 2 (2004) pp. 111 – 120.

[92] Vide Chapter three, supra.

forward legal system is regarded as a means of dispensing quick justice devoid of any delays occasioned by procedural technicalities in the common law system. Hence it is preferred by the common people in the Muslims dominated north.[93] This fact, therefore, precipitated the mounting of popular pressure against the governors of the North by their subjects.

It was in response to those popular pressures that the Governors of the concerned states[94] yielded to the *Shari'ah* implementation project with particular emphasis on Islamic Criminal Justice System. Consequently, a number of legal reforms were effected which climaxed with the codification of Islamic criminal law in the twelve states of Northern Nigeria implementing *Shari'ah*. However, as the conditions and circumstances of the *Shari'ah* Implementing States vary, the methods and approaches adopted in effecting the legal reforms that ushered in the full application and administration of Islamic Criminal Justice System markedly differ from one state to another.

To recapitulate, the study of the scholarly writings on the phenomenon of codification of Islamic Law Principlesestablished that it started with the *Mujallatul Ahkam Al – Adliyyah* of Ottoman Empire in 1876. From this development, other Islamic countries, old and new, followed suit.

Most of the Muslim countries, under review, used the concept of the codification (*at - Taqneen)* as a vehicle for the codification of the civil aspects of Islamic Law for ease of consultation and enforcement.

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[93] Peters, R. (2003), Islamic Criminal Law in Nigeria, Ibadan, Spectrum Books Limited. , p.14.

[94] These are: Zamfara, Kano, Kebbi, Sokoto, Borno, Bauchi, Gombe, Jigawa, Kaduna, Katsina, Niger and Yobe.

Interestingly, however, it is in Nigeria the codification of Islamic Law centered only on the principles of Islamic Criminal Law.

Many factors led to the emergence of the codification of the principles of Islamic criminal Law as a phenomenon to be reckoned with. Prominent among them are the impact of colonialism and westernization on Islamic world, modernity and sophistication of modern societies, intellectual efforts of Individual scholars, popular agitations and constitutionalism, among others.

CHAPTER FIVE

5.0 AN APPRAISAL OF THE CONTENDING JURISTIC VIEWS ON THE CODIFICATION OF ISLAMIC CRIMINAL LAW

5. 1 Introduction

The phenomenon of the codification of Islamic Criminal Law though relatively a recent development in the Islamic Legal Theory as we have seen earlier in this dissertation,[1] it attracted a lot of studies and analyses. Most of the scholarly debates and discourse on this phenomenon revolves around its legality or otherwise from the Classical *Fiqhi* perspective. Going by the rich nature of the Islamic Legal Theory (*Al – Fiqhul Islamy)* and the fact that Islamic Legal Scholars (*Ulama')* are the ones saddled with the responsibilities of interpreting and analyzing the *Corpus* of that knowledge of Islamic Legal Theory with a view to determining the legal position of any new or emerging issue, divergence of opinions becomes inevitable and thus it becomes the hallmark of *Shari'ah* discourses generally. Thus, Umar Bn Abdul – Azeez was reported to have said:

> *I have never wished that the companions of the Prophet (May the peace and blessings of Allah be upon him) had not maintained divergent views on issues. This is because if there were only one view [on every legal issue] people would have been under great constraint [to adopt such view]. They [the companions may Allah be pleased with them] are models for emulation.*[2]

It is in line with this nature of Islamic Legal Theory, that Muslim Scholars expressed divergent views on the issue of the legality of the codification of Islamic Criminal Law. This is not in any way blemish as divergence of opinions, on any

[1] Vide Chapter three of this dissertation, *infra.*
[2] Asshatiby, I. A. (ND), *Al – I'itisaam,* Cairo - Egypt, Matba'atul Manaar, vol. 3, p. 11

matter in Islamic Legal Theory, is in keeping with the spirit of the injunctions of the primary sources of *Shari'ah*: *Qur'an* and *Sunnah,* and is bound to provide facility for the Muslim *Ummah.*[3] The only caveat being that such expression of divergent views should be borne out of sincerity of purpose (*Al – Ikhlas)* and true scholarship.

This chapter, therefore, explores the contending views expressed by the Muslim Scholars and others on the legal position of the codification of Islamic Law. The chapter also evaluates the effect of the codification of Islamic Law on certain specific issues raised against the codification of Islamic Criminal Law in Northern Nigeria, as we have seen in the preceding chapter,[4] with a view to reaching a fair conclusion on this phenomenon and also finding satisfactory answers to the research questions of this study.

5.2 Juristic Views on the Legality of the Codification of Islamic Criminal Law

As we have noted above, opinions are sharply divided on the legality or otherwise of the codification of the principles of Islamic Law. While some Muslim Jurists and Scholars consider it as innovation and therefore illegal others see it as a child of necessity and therefore legal and imperative in order to facilitate the implementation of *Shari'ah* in the present time. Both the proponents of these contending views buttressed their positions with authorities deeply grounded in the *Shari'ah* sources either directly or by necessary implication. Attempt will be made

[3] See Abu Zahra, M. I. (1996), Al - *Mulkiyyah wa Nadhariyyatul Aqd,* Cairo - Egypt, Dar El- Fikr El – Araby, at p. 22.
[4] See Chapter four, *infra.* These issues are non – inclusion of *Ridda* and related offences as well as the position of Ta'azeerat after the codification of the Law.

to present these contending views below and thereafter a critical appraisal and evaluation of the opinions will be attempted with a view to taking an authoritative position on the Legality or otherwise of the codification of Islamic Law generally and Islamic Criminal Law in particular.

5.2.1 Juristic Views Opposing the Legality of the codification of the principles of Islamic Criminal Law

Some Jurists and Scholars of Islamic Law vehemently maintained that codification of any branch of Islamic Law is not permissible. Some of these scholars went even further to opine that codification is nothing other than westernization of Islamic Criminal Law.

Distinction should, however, be drawn between the Muslim Scholars who oppose the codification out of sheer concern to preserve Islamic tenets[5] and the orientalists (*Mustashriquun)*[6] and occidentalists (*Mughtaribuun)*[7] who are opposing the codification of the principles of Islamic Criminal Law out of sheer opposition to the implementation of *Shari'ah*.

The main thrust of the argument against the codification of *Shari'ah* was hinged on the principle and the premise that Judges should not be tied down to a view of a particular school of Islamic Law which is one of the unwholesome repercussions

[5] Such as: Sheikh Bukur Bn Abdullahi Abu Zayd vide his book *Fiqhun Nawaazil;* Sheikh Abdullahi Bn AbdurRahman Bn Bassam in his *Taqneenis Shari'ah: Idraarihi wa Mafaasidihi;* Sheikh Alaal El – Faas in his *Difaa' 'anis Shari'ah;* Sheikh Dr. Muhammad Sa'eed Ramadaan El – Buty in his *Alla Madhhabiyyah akhdaru Bid'atin Tuhaddidu Shari'atil Islamiyyah* & Dr. Muhammad Sa'eed El – Ashmawy in his two books: *El – Islamiyyus Siyaasy* & *El –Shari'atil Islamiyyah wal Qanunil Misry.*

[6] Such as: Prof. Peter Ruud vide his: From Jurist Law to Statute Law: What will happen after the codification of *Shari'ah*; Prof. N. J. Coulson in his short history Islamic Jurisprudence; & Prof. Joseph Sachet.

[7] Such as: Prof. Abdullahi An – Na'im vide his: Negotiating the future of *Shari'ah*;Towards Reformation of Shari'a, Civil Liberties, op. cit.

of the codification of *Shari'ah*. The contention of this group of jurists and scholars as well as their arguments and authorities are summarily presented below.

5.2.1.1 The power of the ruler to enact laws in Islam is limited to ma'aruf

The scholars opposing the codification of *Shari'ah* contended that obedience to a ruler is dependent upon the rulers' obedience to Allah and His messenger. Hence the prophetic tradition "There is no obedience in sin, obedience is only in *Shari'ah* compliant commands."[8]

They argued that codification by its nature compelled judges to apply the provisions of the codified law (*Al – Ahkaam Al – Muqannanah)* even if they have contrary views stemming from their considered understanding of Islamic Sources. They cited the famous statement of Imam Shafi' in which he maintained that whoever has clear understanding from the tradition of the prophet (peace be upon him) shall not leave such understanding for the statement of any other person". This they contend includes the provisions of the codified law. It was also contended that codification promotes blind imitation (*Taqleed)* which has been condemned by Ibnu Qudaamah[9] and Ibnu Qayyimul Jauziyyah[10] who made incisive rejoinder against blind imitation in his *I'laamul Muwaqqi'eena 'an Rabbil 'Alameen* from eighty – one angles. All these, if anything, point to non permissibility of the codification of Islamic Law and imposition of such codified laws for judicial application.

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[8] Narrated by Imam Bukhari, in the book of ***Ahkam, Baab ma ja'a fi ijazati khabril wahidis Sadouq***, Hdaeeth no. 683

[9] Ibnu Qudaamah, A.A., (1405H), *El – Mughny,* Beirut – Lebanon, Dar El- Fikr, , vol. 9, p. 106

[10] Ibnul Qayyim, J.I., *I'laamul Muwaqqi'een,* supra, vol. 2, p. 191

It was further contended that legalizing codification on analogy with the caliph Usman's compilation of the *Qur'an* is analogy with disparity which, as it were, cannot stand. This is because Caliph Usman Bn Affan (R.A.) only tried to unify the *Ummah* on the letters (*harf)* and mode of writing the *Qur'an* which does not amount to abrogation of the various versions of recitations (*Qira'at*) of the *Qur'an* endorsed and approved by the Prophet (peace and blessings of Allah be upon him).

They further argued that there are other areas of disparity between the two cases which include, though not limited to, the followings:

1) The compilation of the *Qur'an* during the time of Caliph Usman Bn Affan (R.A.) was done with the approval of all the *Sahabah* (may Allah be pleased wih them) and therefore it attains the status of the consensus of the prophet's companions (may Allah be pleased with them) which in its self is a binding source of Islamic Law that is unanimously accepted and recognized by all the Muslims regardless of their sectarian persuasions.
2) All other variant versions of the *Qur'an*ic recitations endorsed and approved by the Prophet (peace and blessings of Allah be upon him) are still recognized as acceptable even after the compilation of the *Qur'an* in a single book form by Caliph Usman Bn Affan (R.A.); whereas in the case of the codification of the principles of Islamic Law no judge has the right to go beyond the codified provisions of the Law (*El – Ahkaam El – Muqannanah)* in his adjudication.
3) The *Mus'haf* compiled by Caliph Usman Bn Affan (R.A.) with the support of the companions of the Prophet (peace and blessings of Allah be upon

him) (*Sahaba, R.A)* was hundred per cent correct[11]; whereas any other man made codification could not attain such standard as it could not be free from errors. This is because any human endeavor is prone to errors and common discrepancies.

5.2.1.2 The provisions of Islamic Criminal Law are fully developed by Independent Muslim Jurists and require no further codification

A lot of arguments were canvassed under this head by all the three camps of those opposed to the codification of Islamic Law. To begin with, it was contended that *Shari'ah* is a written law and its sources are accessible to all those who are trained to access the Law, hence it needs not be codified again. It was also argued that *Shari'ah* is meant for application in all epochs, places and a circumstance thus leaving it in juristic speculative form, as it were, is what will guarantee its dynamism and applicability to all generations up to the end of time. Since the later generation will only be reformed by what reformed the earlier generation.

It was also argued that *Shari'ah* is usually developed by autonomous jurists who are independent of the rulers codifying the *Shari'ah* into positive law will only lead to confusion and chaos and deprives the *Shari'ah* of its legitimacy.[12]

[11] This is because the Prophet (peace and blessings of Allah be upon him) had guaranteed the correctedness of any consensus freely arrived at by Muslim *Ummah* generally what more of the *Sahaba (RA)* including the four rightly guided Caliphs (may Allah be pleased with them). Hence the Prophet (peace and blessings of Allah be upon him) reportedly said my nation will never converge on error. Thus, consensus of Muslim *Ummah* is error free (*Ma'asoum*).

[12] An – Na'im, A. (2008), Islam and the Secular State: Negotiating the Future of Shari'a, Cambridge, Harvard University Press, p. 125 & The Future of *Shari'ah* and the Debate in Northern Nigeria, in Ostien, P., et al, (eds), Comparative Perspective on *Shari'ah* in Nigeria, Op. cit. n1. P. 234

5.2.1.3 Codification of the principles of Islamic Criminal Law retards the development of Shari'ah as it makes the law rigid and static

Those opposing the legality of the codification of the principles of Islamic Criminal Law argued that codification (*at – Taqneen),* by its nature, makes the Law static and rigid. This consequently deprives the *Shari'ah* of its flexibility and rich divergence of opinions (*al – Ikhtilaaf)* thereby retarding the development of *Shari'ah* through *Ijtihad*. This, it was contended, is contrary to the principle of Islamic Law which, among other things, dictates that a judge should not abandon his own personal understanding of the basic *Shari'ah* sources for the views of any other mortals.

The above principle was rooted in the *Hadeethus - Saheefah* in which a man reportedly asked Aliyu Bn Abi Talib (R.A.) thus: Do you have anything of the revelation apart from what is in the *Qur'an*? Aliyu Bn Talib replied: "No, by Allah who causes germination of the plant and gestation of fetus, I know nothing except a thorough understanding Allah gives to a man in the *Qur'an* and what is in this paper." The man said: "What is in the paper?" Ali replied "Blood wit *(Al – Aql)* and emancipation of slaves and that a Muslim shall not be killed for killing a non – Muslim."[13] This understanding (*al – Faham)* gave rise to the rich divergence of opinions on certain principles of *Shari'ah* which gives Islamic Law its unique and peculiar dynamism.

One of the consequences of the dynamism of Islamic Law is the rich divergent opinions expressed or maintained by the Muslim Jurists on any issue that has no

[13] Bukhari, I., *Saheehul Bukhari – Bab Fikaakul Aseer,* vol. 3, p. 1110, Hadeeth no. 2882

explicit text (*Nass*) from *Qur'an* or Sunna. Thus, divergence of opinions is the hallmark of classical *fiqh* discourse even in the same School of Law (*Madhhab* pl. *Madhaahib*), such as Malik School of Law, where Imam Ibnul Qasim and Imam As - Sahnun used to maintain different and divergent opinions on the same issue as evident in the leading books of the *Madhhab*[14]. However, with the advent of modernity most of the Muslim countries embraced codification of the principles of *Shari'ah* on various aspects of Islamic Law.

It was also further argued that codification negates the principles of custom (*Urf*) as a source of Law. Because there are various customs and conventions for various transactional and interactional dealings of human beings; referring a judge to a particular custom of a given locality in the legal code will amount to stating the obvious[15] and codifying a particular custom will deprive all other customs and conventions of their legal validity.

5.2.1.4 Codification of the principles of Islamic Criminal Law is synonymous to westernization of Shari'ah

Those opposing the codification of the principles of Islamic Law argued that the idea of the codification is essentially western in origin. This is because right from the nineteenth century when increasing intimate intercourse between the Islamic and Western civilizations begun, the Islamic Law became under intense pressure

[14] See for example, Al – Azhary, *S.A,* (ND), *Jawahirul Ikleel Sharh Mukhtasaril Khaleel (Sponsored publication of Abu Sa'ud, A.A* & Addayyib, U., Kano), Vol. I, p.258; (*Babul Jihad fee Ahammil Jihhat*). This kind of divergence of views could be found in all advanced manuals of Fiqh, such as: As'halul Madarik Sharh Kitabil Askari; Madawwanatul Kubra; etc, which are all on the Maliki School of Law. Sahnun was even reported to have once prayed thus: *"Lahal – Lahul Faqra! Lawlahu lastaghanaitu bi Malikin anib Bnil Qasimi."* Signifying the extent of differences between these two great Jurists.

[15] El – Faas, A., *Difaa'un 'Anis Shari'ah,* supra, p. 264

of the European influence.[16] This could be indisputably seen through careful exploration into the annals of colonization of the Islamic world.

Thus in the medieval era when the structure and nature of Muslim State and Society remained relatively stable Islamic Law was able to respond to all the internal demands and requirements of the Muslim *Ummah*. Western civilization, on the other hand, was based on concepts and institutions totally strange and alien to the Islamic traditions. When these two civilizations have to co - exist in one place as a result of colonialism the reception of Western Laws was introduced to the Muslim States in the area of Public Law, particularly in the domain of Constitutional and Criminal Laws. This was first initiated through the system of capitulation and subsequently through various legal reforms to the *Corpus* of the principles of Islamic Law.

Furthermore, it is an incontestable fact that the colonization of Islamic world that begins in the eighteenth century impacted greatly in the evolution of the codification of Islamic Law principles. The main lesson drivable from this phenomenon, however, remains the fact that it puts together in one place and in a precise, simple and handy legal code the principles governing a particular aspect of the applicable laws in any given area of Islamic Jurisprudence.

The tension generated by the coexistence of the two legal traditions was further heightened by the influence of westernization and colonialism. Resultantly, even

[16] Coulson, N.J., (1991), A History of Islamic Law, Edinburgh, Edinburgh University Press, pp. 149 - 152

the countries that were not directly affected by colonialism such as Saudi Arabia and Yemen[17] have some aspects of the Islamic Law codified by their rulers.

Finally this group of Jurists and Scholars outrightly and vehemently rejected the codification of any aspect of Islamic Law (*Taqneen*) on the premise that codification, by its nature, makes the Law somewhat stagnant and therefore deprives the *Shari'ah* of its ever growing dynamism. The codification makes the Law definitive and certain and it perhaps, lend credence to the closure of the gate of *Ijtihad*. They concluded by arguing that the codification of the principles of Islamic Law is nothing other than mere attempt aims at westernization of the Islamic legal tradition.

5.2.2 Juristic Views supporting the Legality of the codification of the principles of Islamic Criminal Law

The Proponents of the codification of Islamic Law[18] relied heavily on authorities derived from the practice of the past righteous generation (*Salafus Salih), Siyasatus – Shar'iyyah* and *Masaalihul Mursalah.* This is partly due to the fact that this is a new emerging issue on which no clear textual authorities could be found

[17] Peters, R., *Enforcement of God's Law: The Shari'ah in the present World of Islam*, in Ostien, P., et al, (eds), Comparative Perspectives on *Shari'ah* in Nigeria, (Ibadan, Spectrum Books Ltd, 2005), p. 120

[18] The proponents include, albeit not limited to, the followings: 1) Imam Muhammad Abu Zahara [vide his book: *Al – Islam wa Taqneenul Ahkam fees Sa'udia*]; 2) Abul – Ala Maududi [as per his opinions cited in *Al – Islam wa Taqneenul Ahkam,* supra, and also his book Islamic Law and Constitution]; 3) Sheikh Abdul – Azeez Bn Abdallah Ali – Sheikh in his *Fatwa* cited in *Al – Islam wa Taqneenul Ahkam,* supra. 4) Sheikh Ahmad Mahmoud Shakir in his book: *Hukumul Jahiliyyah;* 5) Al – Allamah Sheikh Mustapha Zarqa' in his books: *Al – Madkhal feel Fiqhil Islamy* and *Al – Fi'ilud Daar wad Daman feeh;* 6) Dr. Yusuf El – Qardawy [vide his book: *Al – Fiqhul Islamy baynal Asalah wat Tajdeed*]; 7) Dr. Wahaba Az – Zuhaily in his *Juhudut Taqneeni Ahkamil Fiqhil Islamy;* 8) Dr. Abdul Kareem Zaydaan in his *NIbidhamul Qada' fee Sharee'atil Islamiyyah;* 9) Dr. Muhammad Abdul – Jawwad in his *Tadawwurut Tashri'eey; 10) Ustadh* Ahmad Abdul Ghafour , in *Inhisaar Tadbeeqis Sharee'ah;* 11) Dr. Zakiyyu Abdul Barr in his *Taqneenul Fiqhil – Islamy* & 12) Dr. Yahayya Muhammad Iwad Al Khalayalah in his dissertation: *Taqneenu Ahkamis Shar'iyya banyan Nazariyyah wat Tadbeeq: Dirasatun Muqaranah li tajribati Pakistan wa Mashru' Misra feet Ta'azeer.*

in *Shari'ah*. The arguments and reasoning of this Jurists and Scholars are briefly captured and presented below.

5.2.2.1 Legality of the Codification of Islamic Criminal Law on the basis of Just Legal Policy (*Siyasatus Shar'iyya)*

Siyasah El – Shar'iyyah, in a nutshell, refers to the act of running the affairs of the Islamic state based on certain directive principles from the ruler which aimed at maximizing benefits for the subjects and repelling injuries from them and the state as a whole. Provided, however, that such directives and principles do not run contrary to any established legal rule (*Hukmus Shar'eey).* Ibnu Qayyim Al - Jauziyya[19] gave it an even wider definition when he defined it as all such measures taken by a ruler and the fundamental directives issued by a leader aimed at and practically drew people closer to benefits and farther away from harms and vices even if such measures and directives did neither originate from the Prophet [peace and blessings of Allah be upon him] nor reveal by Allah (SWT).[20]

Using the above all encompassing definition of *Siyasah El – Shar'iyyah,* the proponents of the legality of the codification of Islamic Law argued that going by the complexities and intricacies of the modern governance coupled with the dearth of the qualified jurists – who attained the level of *Ijtihad* – to man all the courts in various Muslim states and nations all over the globe; codification of the applicable *Shari'ah* principles, at least, for application in courts becomes not only a

[19] He is Muhammad Bn Abibakar Bn Ayyub Bn Sa'ad Az – Zar'eey El – Damashqy. He was born in Damascus in the year 691 AH. He was one of the leading disciples of Shaikhul Islam Ibnu Taymiyyah to the extent that he went to prison with him when he (Ibnu Taymiyya) was jailed. He authored a lot of books including ***I'ilaamul Muwaqqi'een 'an Rabbil Alameen; Zaadul Ma'aad fee hadyi khayril Ibaad & Ad – Duruqul Hukmiyyah, etcetra.*** He died in the year 751 AH. (Vide Az – Zarakly, I., ***I'ilaam,*** vol. 6, p. 280)

[20] Jauziyya, I.Q., (1961), *Ad – Durqul Hukmiyyah,* Cairo, Mu'assasatul Arabiyyah, p. 15 & Ditto, *I'ilaamul Muwaqqi'eena 'an Rabbil – Alameen,* vol. 4, p. 372

welcomed development but rather a legal imperative. It was further argued that since the codification of Islamic Law do not contradict any established legal rule it is justifiable on the basis of the Just Legal Policy (*Siyasah As – Shar'iyyah).* Consequently once an established authority of Islamic State enact a law promulgating certain *Shari'ah* code for application in courts obedience to such codified law is obligatory based on the saying of Allah the most High:

> *O you who believed, obey Allah and obey the Messenger and* ***those in authority among you.*** *And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and the best in result. [Q4:59]*[21]

Imam Ar – Razi and Imam Az – Zamakhshary in their separate commentaries on the above verse argued that obedience to the rulers and any constituted authority is tied to the ruler's obedience to Allah [the most High] and His Messenger [peace and blessings of Allah be upon him]. Such obedience of the ruler and constituted authority necessarily entails rigid abidance by the *Shari'ah* commandments *(Iltizamil Awamir)* and strict avoidance of all the *Shari'ah* interdictions *(Ijtinabin Nawahy)*. As it also engeanders working towards achievement of the goals of *Shari'ah* and actualization of its objectives (*Al – Amalu ala Tahqeeq wa Kafalatu ghayatis Shaari'i wa ahdafihi*).[22] It was, therefore, contended that the ruler, once obedient to Allah and His Messenger, has all the rights to codify the Islamic Law under the principle of *Siyasah As – Shar'iyyah for* the purposes of safeguarding the laws from judicial abuse and for the protection of the interest of the state and its

[21] Al – Muntadah & Saheeh International (eds), (1997)THE *QUR'AN*: Arabic Text with Corresponding English Meanings, Saudi Arabia, Abul – Qasim Publishing House, p. 110

[22] Ar – Raazy, I., *Mafaateehul Ghayb,* vol. 3, p. 242 & Az – Zamakhshary, J.M.U. (ND), *Al – Kasshaaf 'an Haqaa'iqi Ghawamidit Tanzeel,* Beirut, Nashru Adabil Hawzah, , vol. 1, p. 525

subjects.[23] It was further argued that if codification is meant to protect public interest and to guard the Muslim populace from evils it becomes part and parcel of *Siyasah* that aims at promotion of virtues and elimination of vices.[24] In the same vein, it was further contended that any law having as its objectives safeguarding the integrity of Islamic State even if it is not backed by any clear textual or legal authority from *Shari'ah* sources provided that it is in line with the fundamental objectives of *Shari'ah* (*Maqaasidus - Sharee'ah)* and did not contradict any establish legal rule (*Hukmus - Shar'eey)* shall be treated as valid legislation that shall be obeyed. The codification of Islamic Criminal Law by its nature seeks to facilitate the implementation of the rules of *Shari'ah* and does not, as it were, introduce any new legislation in contravention of the established *Shari'ah* principles. Codification from this perspective is to be treated as part of State policy known as *Siyasah Aadilah*[25] which duly constituted authority has all the right to have recourse to whenever the need of so doing arises.[26]

Based on the foregoing reasoning, this group of Muslim Jurists and Contemporary Scholars seem to reach a consensus that *Siyasah Aadilah* is only achievable through codifying certain principles and doctrines of Islamic Law to meet the challenges of the contemporary time and newly emerging issues. Thus, the

[23] Al – Muqayrazy, A.,A. (1325AH), *Al – Mawaa'eedh wal I'itibar bi zikril Khudad wal Aathaar,* Egypt, Madba'atun Neel, vol. 3, p. 357

[24] Khallaf, A.W., (1988) , *As – Siyasatus Shar'iyyah fees shu'unid Dasturiyyah wal Kharijiyyah wal Maliyyah,* Kuwait, Darul Qalam, p. 20

[25] This the description given to *Siyasatus Shar'iyya* by Ibnu Qayyim, Imam Ala' El – Deen Abul Hassan Aliyu Bn Khaleel At – Tarabulusy – a Hannafi Jurist/ Judge at Quds and Imam Burhanud – Deen Abu Is'haq Ibnu Sheikh Abul – Hassan Aliyu Ibnu Farhoun El – Madny – The Madinan Judge. He authored a lot of books including *Tabsiratul Hukkam & Deebaajil Madhhab*….Died at Madina in the year 799 AH; Vide: Makhlouf, M.M. (ND), *Shajaratun Nur El – Zakiyyah fee Dabaaqaatil Malikiyyah,* Beirut, Darul Kutubul Araby, p. 222.

[26] Ibnu Qayyim, J. I. (ND), *I'ilaamul Muwaqqi'eena 'an Rabbil 'Alameen,* vol. 4, p. 373; See also: At – Tarabulusy, A. D.(ND), *Mu'eenul Hukkam feema yataraddadu baynal Khasmaini minal Ahkaam,* Egypt, Madba'atil Baby El – Halaby, p. 169.

codification should be carried out by Scholars well grounded in the classical sources of Islamic Law. Once this is done the ruler has all the rights as per the *Siyasatul Aadilah* to order for the application of a legal code within the Islamic State.

5.2.2.2 Legality of the Codification of Islamic Criminal Law on the basis of public interest (Maslaha)

The supporters of the codification of Islamic Criminal Law further contended that the whole *Corpus* of Islamic Criminal Law is meant to protect the public interest. This cardinal objective of *Shari'ah* is only achievable through the twin pillars of promotion of virtues by maximizing benefits within the nation and suppression of vices by eliminating harms and vices among the *ummah.* Codification by its nature, they argued, aims at achieving the above objective and shall, therefore, be embraced as not only legally valid but also as a legal necessity and therefore imperative.[27]

Imam Ghazali, thus, argued that if *Maslaha* serves as a vehicle for attainment and actualization of the fundamental objectives of *Shari'ah* (*Maqasidus - Shar'i*), there is no room for any controversy as to whether it should be employed in the running of the affairs of an Islamic State or not. But rather it becomes obligatory to treat *Maslaha* as sufficient authority in such regards.[28]

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[27] Khallaf, A. W. (ND), *Masadirut Tashree' feema la Nass Feeh,* Kuwait, Darul – Qalam, p. 85; Abu Zahara, M. I., *Usulul Fiqhi,* p., 279; Abdul – Jawwad, M., *Buhuthun Fee Sharee'atil Islamiyya wal Qanun,* p. 103; El – Qardawy, Y., *Wujubu Tadbeeqis Sharee'ah,* p., 78; Ar – Raysouny, A. (1995), *Nadhariyyatul Mafasid 'Inda Imam As – Shaadiby,* Virginia, IIIT, 4th Edition, p. 375.

[28] El – Ghazaly, A. M., (450 – 505 AH), (1413AH) *El – Mustasfaa,* Beirut – Lebanon, Darul – Kutub El – Ilmiyyah, , vol. 1, p.179.

It was further contended, in this regard, that notwithstanding the fact that the Prophet (may peace and blessings of Allah be upon him) and his companions (may Allah be pleased with them) had never have any cause to codify the principles of *Shari'ah* there is no harm, if the exigencies of the time demand so doing, for the ruler to codify the principles of *Shari'ah* for implementation in his domain. This is because *Maslaha* is, by and large, dependant on the best interest of the nation. Thus virtually all the Caliphs at one time or another during their reign have to device new policies and implement them in the Islamic State on the basis of *Maslaha.* This could be buttressed by the following instances:

a) Caliph Abubakar (may Allah be please with him), using the principle of *Maslaha,* made Caliph Umar (RA) his successor to the throne before his death even though the Prophet (S.A.W) did not do that.

b) Similarly, Caliph Umar (R.A.) imposed taxes and established ministries on the basis of *Maslaha*. He also built prisons and introduced some new *ta'azeer* punishments such as confiscation of property from public servants who engaged in trade in the course of their official assignments all on the basis of *Maslaha.*

c) In the same token, Caliph Usman Bn Affan (R.A.) also introduced a number of new policies on the basis of *Maslah*. Some of those policies include giving a divorcee a share of inheritance in the estate of her deceased husband who divorced her in his death sickness.

d) Caliph Aliyu Bn Abi Talib also utilized *Maslaha* when he instructed Abu Aswad El – Du'ly to write down the rudiments of the rules of Arabic

grammar (*An – Nahwu)* to guard against mistakes in especially recitation of the *Qur'an*. He also made artisans and crafts men liable in tort for whatever they misplaced or got loss in their custody from the materials entrusted to them by their customers unless they can prove lack of negligence on their parts.[29]

It is therefore on the basis of *Maslaha* that many Islamic countries utilized codification in their implementation of *Shari'ah* project. This is chiefly because of the numerous benefits codification brings to the nation and the people as well as the vices it suppresses from the Ummah coupled with the fact that it is not at variance with any of the objectives of *Shari'ah* (*Maqasidus – Shari'ah).* Thus, through the codification the dynamism of *Shari'ah* as encapsulated in its nature of *Murunah* which makes it suitable for application at all times, places and epochs becomes even clearer.[30]

Public interest based on the foregoing dictates that each Islamic Country should have a council of knowledgeable *Ulama'* learned in both *Shari'ah* and common law that will be saddled with the responsibility of codifying the principles of Islamic Law for the *Ummah*. This is because the need for such codification is very obvious and ignoring it often than not create room for the proliferation of western laws in the Muslim Communities.

It was further submitted that the fact that most *Shari'ah* judges have not attained the status of being *Mujtahideen* it is necessary to codify the principles of *Shari'ah*

[29] Ibnu Qayyim, J.I., *I'laamul Muwaqqi' een,* supra, vol. 4, p. 373
[30] Faudah, A.Z., (1987), *Al-hukmu Bima Anzalal Lah,* Cairo, Darus Sahwah, p. 92; See also El – Buty, M. S. R. (1986), *Dawaabidul Maslaha,* Beirut, Mu'assasatir Risalah, p. 78

to facilitate its application by those judges. Furthermore, codification makes the law to be accessible to all and thereby eases the application of *Shari'ah*.[31]

The Constitutional imperative also made it necessary for any principles of Shari'ah to apply in some Muslim Countries[32], in today's Muslim World, they must undergo the codification. Refusal to codify Islamic Criminal Law in such countries will amount to denying the vast Muslim majority subjects of the countries with such constitutional order from having their public lives governed by the *Shari'ah.*

5.2.2.3 Legality of the Codification of Islamic Criminal Law on analogy with compilation of Qur'an in a book form

The proponents of the legality of the codification also cited the consensus of the Prophet's companions (may Allah be pleased with them) on the compilation and codification of the *Qur'an* in a book form. They argued that codification of the principles of Islamic Law is analogous to the compilation of the *Qur'an* in a book form during the reign of both Abubakar Siddiq and Umar Bn Khattab as caliphs.

The Prophet (peace be upon him) used to memorize the verses of the *Qur'an* no sooner than they were revealed. So much so that, he used to move his tongue quickly as revelation was coming to him in order to commit it to memory. It was against this backdrop that Allah (SWT) says:

> Move not your tongue with it [O Muhammad], to hasten with it [i.e. revelation of the *Qur'an*]. Indeed upon Us is its

[31] See generally, Abdul – Barr, M.Z., *Taqneen Fiqhil Islamy,* p. 49; Abdur – Rahman, S., *El – Islam wa Taqneen El – Ahkam,* p. 87

[32] This argument clearly captured the situation of the Muslim populace of Northern Nigeria. This is because without codification Islamic Criminal Law will be inapplicable in Nigeria as per the provision of s.36 (12) of the 1999 Constitution of the Federal Republic of Nigeria.

> collection [in your heart] and [to make possible] its recitation. So when We have recited it [through Gabriel], then follow its recitation. Then upon Us is its clarification [to you]. [Q75: 16 – 19][33]

Thereafter, no sooner than the revelation is over, the Prophet (peace be upon him) used to recite the revealed verses to his companions (may Allah be pleased with them) who would then memorize the verses almost instantly. There were also scribes among the Prophet's Companions (may Allah be pleased with them)[34] who used to record the verses after their revelation to the Prophet (peace be upon him) and his recitation to them.[35] These written records of the revealed verses of *Qur'an* were kept at the Prophet's house though the scribes used to make copies for their personal use and preservation. Angel Jibril (AS) informs the Prophet (peace be upon him) of the exact place and location of the revealed verses in a particular chapter of the *Qur'an*. In order to consolidate this arrangement, Angel Jibril (AS) used to descend to the Prophet (peace be upon him) every Ramadan to recite and go over the whole of the revealed portion of the *Qur'an* as of that year in its proper order and the Prophet (peace be upon him) used to recite after him.[36] But in the last Ramadan of the Prophet's life Angel Jibril descended upon the Prophet (peace be upon him) twice for the recitation of the whole *Qur'an* in its divinely ordained form and order. The Prophet (peace be upon him) thus memorized the whole of the *Qur'an* in its proper arrangement and recited it repeatedly to his companions

[33] Saheeh International, op. cit
[34] Such as Zaid Bn Thabit; Aliyu Bn Abi Dalib; Mu'awiyya Bn Abu Sufyan; etc
[35] Nyazee, I. K., supra, p. 159
[36] Ibid.

(may Allah be pleased with them) who also memorized it in this original form as taught by the Prophet (peace be upon him) himself.

Although the *Qur'an* was completely recorded before the demise of the Prophet (peace be upon him) it was not compiled in a codified book as we have it today. Thus, the complete records of the *Qur'an* were preserved and available during the caliphate of Abu-Bakr (R.A.). But these records, owing to the dearth of writing materials, were on parchments, leaves, bones and skins of animal, etcetera. It should, however, be pointed out that this records were reinforced by the memories of the Prophet's Companions (may Allah be pleased with them) who memorized the whole of the *Qur'an* as recited by the Prophet (peace be upon him).[37] That is why when over seven hundred *huffaz* (i.e. memorizers of the *Qur'an*) were killed at the battle of *yamamah* during the reign of Caliph Abu-Bakr (R.A.), Umar Bn Khattab (R.A.) strongly advised and insisted that the preserved but yet to be codified records of the revelation should be compiled. When Caliph Abu-Bakr (R.A.) accepted this advice, he commissioned Zaid Bn Thabit (R.A.) and other *Huffaz* among the Prophet's Companions (may Allah be pleased with them) for the job. This marked the first stage of the compilation of the *Qur'an*'s project.[38]

The second stage of the compilation of the *Qur'an* took place during the era of Usman Bn Affan (R.A.) as the Caliph. The reason for this was the expansion of the Islamic Territory at that time. Many converts to Islam were reciting the *Qur'an* differently. Caliph Usman (R.A.), in a bid to unify the Ummah, commissioned

[37] Al – Ameen, M.S.M. (1418AH), ***At - Tabsirah fee Uluomuil Qur'an***, Madeenatul Munawwarah, Islamic University Press, pp. 29 – 41
[38] Ibid

Zaid Bn Thabit (R.A.), once again, to undertake the project. This mission was painstakingly accomplished by Zaid who used to compare the written records with what was in the memory of the *Huffaz*. Six official copies of the *Qur'an* were produced by the taskforce and Caliph Usman (R.A.) sent a copy each to the then components of Islamic Territory. [39]

From the foregoing narration, it was contended that issues should be treated contemporaneously as they arise. Thus even though the Prophet (may the peace and blessings of Allah be upon him) had not ordered for the compilation of the *Qur'an* during his time, largely due to the fact that there was no need for such compilation; but it was so done during the reign of Abubakar (R.A.) because of the needs for so doing at that moment. In the same vein, codification of the principles of *Shari'ah* is a child of necessity that was dictated by the modern and contemporary challenges to the implementation of *Shari'ah*.

The second compilation during the time of Usman Bn Affan is even more analogous to the modern codification of *Shari'ah* because at that stage authoritative copy of the *Qur'an* was made and all other variants were burnt thereby uniting the *Ummah* on the same copy of the *Qur'an*. Ibn Qayyim maintained that the decision to unify the *Ummah* on single version of *Qur'an*ic writing during caliph Usman and to burn the other forms of writing the *Qur'an*

[39] Qurtaby, I., (ND), ***Jami' Li – Ahkamil Qur'an: Tafseerul Qurtaby***, Beirut, Majma' Turath, vol. 1, pp. 44 – 45; See also Qardawy, Y.,(2001), Madkhal Li Dirasatis – Sharee'atil Islamiyya, Cairo, Maktabatu Wahabah, pp. 223 – 225 for detailed discussion on the compilation of the *Qur'an* generally.

was based on the *maslaha* of preventing the *Ummah* from differences even in the recitation of the *Qur'an*.[40]

Similarly, at the beginning of the revelation the Prophet (peace and blessings of Allah be upon him) did not allow the Companions (RA) to write anything down from him except the *Qur'an* that was being revealed for fear of confusion and mix up. The Prophet (SAW), however, subsequently allowed the Companions to record the traditions when the fear of the mix up was allayed. These developments and the subsequent writing of Islamic Jurisprudence which took place after the demise of the Prophet (peace and blessings of Allah be upon him) were considered as good basis for the codification of the principles of Islamic Law by way of analogy.

5.2.2.4 Legality of the Codification of Islamic Criminal Law on the basis of contemporary Fatwas

Many contemporary Jurists and Scholars of Islamic Legal Theory, in addition to the foregoing, issued legal opinions (*Fatwas*) in support of the legality of the codification of the principles of Islamic Criminal Law. Some of these *fatwas* are reproduced below.

First and foremost, Sheikh Aliyul Khafeef and Sheikh Imam Abu Zahra maintained that codification of *Shari'ah* principles is a necessity in the modern contemporary time. This is because, the two eminent jurists further argued, that justice and *maslaha* dictated the codification and there is no any clear authority against it. They further contended that failure to codify create room for the proliferation of the western legal codes into Islamic nations. They, therefore,

[40] Ibnu Qayyim, J.I., *Duruqul Hukmiyyah,* p. 20

suggested that those in position of authority shall refer the issue of the codification to a council of learned *ulama'*. The choice of the applicable principles by such a council of learned *ulama'* is more appropriate than leaving it to the present judges who are not *Mujtahideen.*[41]

Similarly, Dr. Yusuf El – Qardawy, a leading contemporary jurist, further re – iterated the necessity of the codification of the principles of Islamic Law in the present time. He maintained that *Ijtihad* can only be resuscitated in the modern time if codification is embraced. This is because, he maintained, codification will offer opportunity for in-depth study of the comparative jurisprudence across the various Islamic Schools of Law as well as across various legal systems.[42]

Sheikh Mustapha Zarqa' while supporting the necessity of codification in the contemporary time maintained that, it is the right of the rulers to choose for their nations the most suitable principles of *Shari'ah* for accessibility and ease of application within their domains and they should not abdicate such rights and responsibilities to anyone.[43]

Sheikh Ahmad Muhammad Shakir,[44] on his part, considered the codification of the principles of Islamic Law as the only way through which *Shari'ah* could be implemented in the contemporary time. He maintained that a call for codification of *Shari'ah* is a call for implementation of *Shari'ah* and unification of judicial

[41] Al – Islam wa Taqneenul Ahkam, p. 24
[42] El – Qardawy, Y., *El – Fiqhul Islamy Baynal Asaalah wat Tajdeed,* pp. 51 & 60
[43] El – Madkhalul Fiqhiyyil Aam, vol. 1, p. 203; El – Fi'ilid – Daar wad Daman, p. 11
[44] Shakir, A. M., (1992), Hukmul Jahiliyyah, Cairo, Maktabatus *Sunnah*, pp. 122 - 123

adjudication. He therefore opined that once codification is properly done let anybody be a judge for he has to operate within the codified principles.

Earlier than all the above scholars, Abul Ala Maududi had already issued a legal opinion to the effect that codification of Islamic Law is permissible as there is no any clear authority in *Shari'ah* to the contrary. He, therefore, maintained that it is Islamically alright for a rule to enact a *Shari'ah* code for application within his domain, provided the codification was carried out by pious, well grounded and learned *Ulama'*[45].

Sheikh Dr. Abdul Kareem Zaydan also maintained that codification of Islamic Law by way of choosing the most suitable principles and doctrines across the various Islamic Schools of Jurisprudence for application in the light of *Qur'an* and *Sunnah* is permissible. He also emphasized the proviso that such codification should be referred to well versed scholars who are also reputable in piety and knowledge.[46]

Dr. Muhammad Abdul Jawwad[47] regarded codification of *Shari'ah* as a legal imperative in the modern time. He, therefore, called for immediate commissioning of the codification of *Shari'ah* project that will lead to the production of a global model Islamic Legal Code for adoption throughout Islamic World.

Dr. Wahaba El – Zuhaily also subscribed to the legal necessity of the codification of Islamic Law in the contemporary time. He maintained that the rich principles of

[45] El – Maududi, A. A., (1983), *Haula Tadbeeqis Sharee'ah fil Asr El – Hadith,* Riyadh, Maktabatur Rasheed, , p. 17
[46] Zaidan, A.K., (2001), *Nizamul Qada' Fee Sharee'atil Islamiyyah,* Beirut – Lebanon, Mu'assasatir Risalah, , p.251
[47] El – Tadawwurut Tashri'eey, p. 228

Shari'ah embedded in the Islamic Jurisprudence need to be distilled and arranged in sections and sub – sections (*maadatum – maadatun wa faqratun – faqratun*)[48] in tune with the modern arrangement of legal codes in order to make them accessible not only to judges, lawyers but also to ordinary citizens of the state.

In lending his support to the argument that codification of Islamic Law is legally permissible, Ustadh Ahmad Abdul – Ghafour El – Adar[49] maintained that If these books (of Islamic Jurisprudence) were written in the form of sections easily accessible to researchers it would have been better. This is because there is no any interdiction from *Shari'ah* provisions against such act.

Finally, Sheikh Abdul – Azeez Bn Abdallah Bn Hassan Ali Sheikh – the Juriconsult of Saudi Arabia (as he then was) opined that codifying the principles of Islamic Law in the form of modern code is permissible as there is no known interdiction on this. Provided the codification project was carried out by learned and trusted *Ulama'* against whose knowledge and erudition there is no doubt.[50]

The above are the opinions of some of the contemporary Jurists and Scholars of Islamic Law on the legality of the codification of Islamic Law.

5.3 An Appraisal of the Contending Juristic Views on the Codification of Islamic Criminal Law

From our exploration of the contending juristic views on the codification of the principles of Islamic Criminal Law, we have seen the arguments and reasoning of both sides of the debates. Attempt will modestly be made under this head to

[48] El – Zuhaily, W., *Juhudut Taqneenil Fiqhil Islamy,* op. cit., p.29
[49] El – Adar, A.A., *Inhisaar Tadbeeqis Shari'ah,* p. 38, quoted in Khayly, op. cit. at p. 198
[50] El – Islam wa Taqneeni Ahkamis Shar'iyyah, supra, p. 15

analyze, evaluate and critically appraise the arguments from both sides and thereafter arrive at the thesis of this dissertation by taking a position on the issue of the codification of Islamic Law generally and Islamic Criminal Law in particular.

From the above exploration of the contending juristic positions on the practice of the codification of Islamic Criminal Law, it appears that both the proponents and opponents of the codification are relying on the same authorities but looking at them from different angles and perspectives. For instance on the issue of promulgation or enactment of an Islamic Legal Code, both sides argued that obedience to the constituted authority is obligatory in Islam. But whereas the opponents of the idea and the practice of the codification emphasized the fact that obedience is required in *Shari'ah* compliant commands and enactment of an Islamic code is not *Shari'ah* compliant, the proponents of the codification viewed it as a legitimate act of *Ijtihad* which if properly undertaken by the legitimate authority it shall and must be obeyed as required by the *Qur'an*: "Obey Allah and Obey His Messenger ***and those in authority among you…"*** [Q4:59]

Critically assessing and appraising the above position it will become crystal clear that sweeping condemnation of the codification of the principles of Islamic Criminal Law on the basis of its being non – *Shari'ah* compliant may not be correct because it forms part of issue of *Ijtihad* upon which there is no clear textual authority. Issues of this nature in Islamic Law are within the discretionary power of the ruler and once such discretion is judiciously exercised the citizens and subjects of Islamic State have to obey their ruler or else they become sinful for disobeying the constituted authority.

Furthermore, codification of the Law does not in any way prevent the scholars from criticizing the codes and pinpointing its lapses. This process will effectively checkmate any error and personal interest that may creep into the codified law.

Thus, while the Imam or Ruler has the power, authority and discretion attached to him on the one hand; the *Ulama'* have the responsibility of guIbiding the nations to what is right according to the classical sources of Islamic Law, on the other.

Thus, all that is required, in a setting of this nature, is the synergy between the rulers and *Ulama'* in order to actualize the successful implementation of *Shari'ah*. This truism is clearly captured by the *Qur'an*ic verse[51] which states:

> *We have already sent our messengers with clear evidences and sent down with them the Scriptures and the balance that the people may maintain [their affairs] in justice. And We have sent down iron, wherein is great military might and benefits for the people, and so that Allah may make evident those who support Him and His messengers unseen. Indeed Allah is Powerful and Exalted in Might.*

Consequently, codification of Islamic Criminal Law using the talents of pious *ulama'* well grounded in Primary and Classical Sources of Islamic Criminal Law and the subsequent promulgation of the code by the rulers for implementation by the judiciary is the best way to actualize justice in the contemporary Muslim community as maintained by Ibnu Qayyim El – Jauziyyah.[52] It is, therefore, in keeping with the tenets of Islam and the ruler shall command obedience on this issue.

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[51] *Al – Hadeed* 58: 25; Saheeh International (eds); The *Qur'an*: Arabic Text with Corresponding English Meanings, op. cit. pp. 779 - 780

[52] Ibnul Qayyim, J., *Atturuqul Hukmiyyah,* op. cit., p. 15

Secondly, the lengthy arguments canvassed by those opposed to the legality of the codification of the principles of Islamic Criminal Law to the effect that codification tends to force judges to abandon their personal understanding and appreciation of the *Shari'ah* Sources for the provisions of the codified law can not stand either. This is because the judge in this circumstance is not leaving his understanding for an inferior view. Rather he is leaving his Individual personal view to the consensus opinions of the well grounded jurists of his time; certainly the consensus opinion that was sifted from the digest of qualified jurists' views shall be better than an Individual opinion of a particular judge.

Furthermore, this argument might hold some water if it is premised on the ideal situation under which the office of a judge only goes to well versed jurists deeply grounded in Islamic Sources and who have attained the status of *Mujtahid*. However, looking at our situation today and the qualifications of our judges[53] one will be left with no option other than embracing the codification to ensure justice is not only done but seen to be done in our *Shari'ah* Courts.

Another dimension to the above argument is the fact that imposing a code on the *Shari'ah* Judges turns them into blind imitators which should not be the case as ibnu Qayyim maintained in his numerous rejoinders to blind imitation. However, the understanding here is that codification of the *Shari'ah* principles on crimes and punishments is a challenge to the status quo ante and therefore it is a direct opposite to blind imitation as it is a call for developing the *Corpus* of *Shari'ah* by

[53] The statutory qualification of a *Shari'ah* Judge is School Certificate.

codifying its principles and doctrines on crimes through the process of *Takhayyur* (i.e. selection of the best and most suitable view).

It could also be further argued that history of legal development reveals that judges in the previous generation were imitators of the views of one Islamic School of Jurisprudence or the other depending on the direction of the rulers of the day and locality therefore introduction of a codification of Islamic Legal Principles on crimes and punishments will change even less.

On the issue of analogy with disparity (*Al – Qiyas Ma'al Faariq)* regarding compilation of the *Qur'an* by the Caliph Usman (R.A.), in that, *Mus'hafiul Uthmany* is hundred per cent correct and the modern codification of Islamic Law of Crimes can not and will not enjoy such a guarantee. It could be argued that what is required is a codification of Islamic Criminal Law by the leading *Ulama'* by way of consensus of opinions. Thus, where they got it right they will earn double rewards and where they went wrong they will be rewarded once. Furthermore, other *Ulama'* and scholars will be handy to correct all the errors in the codification process. Likewise where there is divergence of opinions among the scholars the ruler's choice shall be decisive authority in such a situation.[54]

On the issue of differences between what Caliph Usman (R.A.) did of unifying the *Ummah* on letters (*harf* pl. *huruf*) and not the actual recitations for which varieties were maintained. It is our considered argument that mere unification of the *Ummah* on the *harf* and burning down any varying records is sufficient to give credence to codification of the principles of Islamic Law of Crimes and

[54] *Fa hukmul Haakim yar fa'ul khilaaf.* Moreso none of the Jurists, save perhaps Imam Shafi', says the consesnsus required in public affairs is the communal consensus in which unanimity is indispensable principle.

Punishments. Therefore, the codified principles are those upheld in analogy to *Mus'haf El – Usmany* and the uncodified ones are analogous to the burnt down varying versions of writing the *Mus'haf.*

It should, also, be pointed out that both the proponents and the opponents of the codification of Islamic Criminal Law are unanimous – save perhaps the orientalists (*Mustashriqoun)* and their supporting 'occidentalists' (*Mutagharriboun)* – on the necessity of the implementation of *Shari'ah* in the contemporary period. The only different between them is that of style and methodology thereby reducing the differences to secondary and subsidiary issues.

On the debate that Islamic Law in its juristic form is already a form of codification is simply missing the point. This is because what codification actually signifies is the process of producing an authoritative code arranged in modern form of sections and sub – sections which the ruler – through legislative machinery - imposes on the state for judicial application. The Islamic Law of Crimes and Punishments in its juristic form, as earlier noted, is full of divergent opinions. The choice of the applicable view or law in any given case (*Tamheesul ahkam*) is a rigorous process the judges used to pass through in the absence of the codification. Thus, the call for codification of Islamic Law of Crimes and Punishments is simply to relieve the judges of the burden of choosing the applicable view by shifting same to the *ulama'* of the *Ummah* with the sanction or backing of the duly constituted authority.

On the issue of westernization of Islamic Law through codification owing to the origin of the codification, it should be appreciated that Islam embraces and

promotes whatever is good and beneficial as it seeks to combat whatever is bad and injurious. This was precisely the mission of the Prophet (Peace and blessings of Allah be upon him). As Allah (SWT) says:

> Those who follow the Messenger the unlettered prophet whom they find written [i.e., mentioned] in what they have of the Torah and the Gospel, ***who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them***. So they, who have believed in him, honored him, supported him and followed the light which was sent down with him – it is those who will be successful.[55]

Thus, the origin of the idea of the codification should not be a barrier to its application to Islamic Law of Crimes and Punishments, particularly when such codification is referred to right and appropriately qualified people; as it is the content rather than the form of any legal code that matters in Islamic Legal Theory. Codification of Islamic Criminal Law, therefore, from this perspective, in such a sense and for that purpose is far from being coextensive with the Idea of westernization of the Law.

Furhermore, using the utilitarian theory, some researchers went even farther to the extent of suggesting that if the righteous predecessors of this *Ummah* were alive they could not help but to embrace the phenomenon of codification of Islamic Law of Crimes and Punishments in order to bring succor to the intellectualism and development of Islamic Legal Theory. It was to this end that Ibnu Hajar El – Asqalany maintained that if we carefully studied the style and methodology of the Jurists among our righteous predecessors we will find that they kept pace with the

[55] *Suratul A'araf, Q 7: 157*

intellectual development of their time. Hence they were able to competently deal with issues as they arose. Their juristic analyses, however, was only guided by the consideration of the best interest of both the *Ummah* and the State.[56]

It is, however, apposite before finally taking a position on the legality or otherwise of the codification of Islamic Law generally and Islamic Criminal Law in particular, to examine the advantages and disadvantages of the Codification phenomenon. This will, undoubtedly, help in arriving at a fair conclusion in the final analysis on this issue.

5.3.1 Advantages of the Codification of Islamic Criminal Law

To begin with, it is crystal clear that Codification of Islamic Criminal Law has numerous advantages in the implementation and practical application of the Law in the contemporary time. The impact of the codification is even and undoubtedly heavier in the area of Islamic Criminal Law. Some of the advantages of the codification are captured in the following points.

1) Codification of the principles of Islamic Criminal Law aids in determining the applicable law to any given situation thereby greatly reducing the volumes of litigation before the courts. This is because the law is known and accessible to all. People will consult the law before taking any step in their transactional or interactional dealings.
2) Codification of the principles of Islamic Criminal Law assists judges in their adjudication of cases as it eases reference to the basis, authority and ground of any verdict return by the judges in any give case.

[56] El – Asqalaany, I. A. (1379H), *Fat'hul Baary Fee Sharh Saheehil Bukhary,* Abdul – Baaqy, M. F., & Khateeb, M. D., (eds), Beirut – Lebanon, Daar El – Ma'arifah, vol. 1, p. 204

3) Codification of the principles of Islamic Criminal Law facilitates the practical application of Islamic Criminal Law in the modern contemporary time in which most of our judges do not attain the status of *Ijtihad.* The legal code drafted by experts in Islamic Law remains the only tool for effective and efficient application of Islamic Criminal Law by such caliber of Judges.
4) Codification of the principles of Islamic Criminal Law is even a constitutional imperative in certain jurisdictions such as ours. This is because according to the Nigerian Constitution which is the grundnorm no person shall be punished except for an offence defined in a written law passed by the appropriate legislative houses.[57] Thus the implementation of *Shari'ah* is wholly dependent on the codification of the principles of Islamic Criminal Law.
5) Codification of the principles of Islamic Criminal Law serves as means to a noble end of proper implementation of Islamic Law. It fills the vacuum in our statutes and therefore leaves no room for the proliferation of western laws in Islamic countries.
6) Finally, codification of the principles of Islamic Criminal Law proves the dynamism of Islamic Law and its suitability for application at all times, places and epochs. This is because the codification presents the law in its distilled form devoid of usual juristic controversies and divergence of opinions.

[57] Vide s. 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999, Laws of the Federation of Nigeria, 2010, Cap. C27.

5.3.2 Disadvantages of the Codification of Islamic Criminal Law

However and in spite of all the numerous advantages of the codification of the principles of Islamic Criminal Law in the implementation and practical application of *Shari'ah* highlighted above; it is, like any other human endeavor, not without some defects and shortcomings. Some of the defects and shortcomings of the codification of the principles of Islamic Criminal Law which constitute the disadvantage of this phenomenon are identified below.

1) Codification of the principles and doctrines of Islamic Criminal Law makes the Law somewhat stagnant and therefore deprives the *Shari'ah* of its ever growing dynamism. The codification makes the Law definitive, rigid and certain and it perhaps, lend credence to the closure of the gate of *Ijtihad*. This, in turn, renders development of the Law moribund.
2) Codification of the principles and doctrines of Islamic Criminal Law promotes stagnation in the development of the Law. This is because a Jurist or a Judge has no right to engage in *Ijtihad* in the presence of an established text such as the provisions of an Islamic Criminal Code.
3) Codification of the principles and doctrines of Islamic Criminal Law curtails the discretion and the latitude given to the judges to thoroughly study the sources of *Shari'ah* and arrive at a fair conclusion on any case that was brought and laid before them for adjudication.
4) Codification of the principles and doctrines of Islamic Criminal Law entails following a lengthy chain of legal processes that are highly complex

thereby leading to compromising the beauty of *Shari'ah* as depicted in the *Corpus* of Islamic Jurisprudence.

5) Codification of the principles and doctrines of Islamic Criminal Law likens and equates Islamic Law wih the western legal codes which in itself is a kind of desecration of Islamic Criminal Law.

Finally and considering the foregoing discussions relating to the contending perspectives on the phenomenon of the Codification of the principles and doctrines of Islamic Law of Crimes and Punishments as well as their evaluation and critical appraisal this phenomenon, it may not be easy to conclude, at this juncture, by taking a position on the legality or otherwise of the Codification of Islamic Law. However, having regard to the advantages and disadvantages of this phenomenon, it seems that the advantages outweighed the disadvantages thereby swinging the pendulum in favour of pitching tent with the supporters of the appropriateness and the legality of the codification of Islamic Criminal Law. This will even become clearer after dealing with the case study of this research work which is the subject matter of the next chapter[58]. Consequently the final verdict on this juristric and scholarly debates should be reserved to the concluding chapter[59] when it will be returned in a fairer and more just manner having studied all aspect of the subject at hand.

[58] Chapter six, *Infra*.
[59] Chapter seven, *Infra.*

CHAPTER SIX

6.0 CODIFICATION OF ISLAMIC CRIMINAL LAW IN NORTHERN NIGERIA AS A CONSTITUTIONAL IMPERATIVE

6.1 Introduction

In the Nigerian constitutional democracy, the Constitution of the Federal Republic of Nigeria adopted by the citizens of the country in whom sovereignty resides[1] occupies the position of supreme and overrIbiding law of the land technically known as *grund norm.* The implication of this is that the constitutional provisions bind all persons, authorities and institutions throughout the country.[2] Consequently, the constitution regulates structure and devolution of power among all tiers of government and their institutions.[3] The constitution, in this respect, divides the powers of the federation amongs the tiers of government and empowers each tier of the federating units to, among other things, make laws for peace, order and good government of their domains within their constitutional legislative competence[4].

Similarly, the constitution guarantees certain basic fundamental rights in favour of the Nigerian citizens.[5] Key among these guaranteed rights is the right to fair hearing[6].

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[1] Vide preamblular paragraph of the 1999 Constitution of the Federal Republic of Nigeria
[2] S. 1(1) and (3) of the Constitution, Ibid.
[3] S. 1(2) and s. 4 of the Constititution, Ibid
[4] S. 4 (7) of the Constitution of the Federal Republic of Nigeria, 1999.
[5] See Chapter 4 of the Constitution, Ibid.
[6] S. 36 of the Constitution, Ibid

This chapter examines the constitutional requirements and procedure for the exercise of the legislative power of a state government to make laws on criminal matters.

6.2 Legislative Competence of State Governments In Criminal Matters

Under our constitutional democracy, the legislative powers of the federation are divided between the federation[7] and the constituent units comprising of states[8] and local government councils.[9]Similarly, the legislative competence of each tier of government has been clearly defined by the constitution.[10]

The legislative powers of the federation are provided under the exclusive legislative list in Part I of the Second Schedule to the 1999 constitution; while the legislative powers of a state government are contained in the concurrent legislative list in Part II of the Second Schedule to the 1999 constitution of the Federal Republic of Nigeria. Additionally, a state has legislative competence over any issue outside the exclusive and concurrent legislative lists. This is what is termed as Residual matters.

Crimes and punishments fall both within the current legislative list as well as residuary. This implies that both the federation and states are constitutionally vested with the powers of making laws on crimes and punishments.

By the constitutional provisions, the exercise of the constitutional legislative power is through the passing of a law by National Assembly in case of the federation or by House of Assembly in case of a state.

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[7] S. 4 (1) of the constitution
[8] S.7 (1), Ibid
[9] Vide s. 4 of the constitution, Ibid.
[10] Ibid

Most of *Shari'ah* Implementing States in Northern Nigeria enacted *Shari'ah* Penal Codes Laws which promulgate various *Shari'ah* Penal Codes of the concerned States, pursuant to their constitutional legislative powers. The *Shari'ah* Penal Codes, in turn, codified the *Corpus* of the principles of Islamic Criminal Law.

Legal Scholars seem to be unanimous that there are constitutional backings for states in Nigeria to codify the Islamic Criminal Law by way of legislation. This is chiefly because penal or criminal laws feature neither in Exclusive nor Concurrent Legislative Lists. Consequently this aspect of legislative item falls within the realm of Residual matters upon which states have legislative competence.[11] Thus any state in Northern Nigeria has the legal competence to enact its own code of crimes.[12] The various *Shari'ah* Penal Codes were enacted into laws pursuant to the legislative powers of the concern states[13].

It is pertinent to point out, at this juncture, that even the scholars[14] who vehemently argued against the constitutionality of the application of Islamic Criminal Law upheld the competence of States in Northern Nigeria to make laws on offences or criminal matters. Thus, there was no any scholarly argument that contest or successfully challenge the powers of states to codify and enact the principles of Islamic Criminal Law into their laws.

Right Honourable Muhammad Bello, CJN (as he then was) beautifully summarized the position of the law when he states thus:

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[11] Peter, R., (2003), *Islamic Criminal Law in Nigeria,* Ibadan, Spectrum Books Ltd, p. 34.

[12] Chukkol, K. S. (2000), The Application of Islamic Criminal Justice System in Zamfara State: Problems and Constitutional Implications, in Nwauche, N., et al (eds), *Essays in Honour of C.O. Okonkwo,* Ibadan, Spectrum Books Ltd, p. 73

[13] See Generally Ahmad, N.A. (2011), *Administration of Islamic Criminal Law Under the Nigerian Constitutional Democracy,* Zaria – Nigeria, Ahmadu Bello University Press Ltd., pp. 34 - 35

[14] See for instance, on this issue, the view of Nmehielle, V.O., (2004), *Shari'ah* Law in Nigeria: To Implement or Not to Implement, Constitutionality is the Question, *Human Rights Quarterly,* 26 (3), p. 743.

> Section 4 of the constitution has divided the legislative powers of governments between the federation and states in its Second Schedule; it specifies the exclusive legislative lists, on which only the federation can make laws and also the concurrent legislative list on which both the federation and states can make laws. In addition it empowers states to make laws on any other matter not included in the two lists. *Shari'ah* falls within the residue and, consequently a state has the constitutional power to make law relating to *Shari'ah.*[15]

6.3 Codification and Constitutional Requirements of Fair Hearing

Fair hearing is one of the key fundamental human rights which every Nigerian citizen is guaranteed of its enjoyment. Part of issues designated as fundamental right to fair hearing is the requirement that a person can only be tried and convicted for any of his act or omission when such act or omission has been criminalized by a written law and the punishment thereof is equally prescribed by a written.

The constitution, while dealing with this requirement, stipulates thus:

> *Subject as otherwise provided by this Constitution, a person shall not be convicted of acriminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of a law*[16]

This section of the constitution requires every offence and its corresponding punishment to be prescribed in a written law. The Constitution regards an Act of the National Assembly and Law of a House of Assembly of a State and any

[15] Muhammad, B. (2001), *Sharia* and the Constitution, in Yakubu, A.M. et al (eds), *Understanding Sharia in Nigeria,* Abuja, Spectrum Books Ltd, p. 12
[16] S. 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999; emphasis added.

subsidiary legislation or instrument under the provision of a law to satisfy the meaning of a "written law"[17].

The Constitutional requirement on any criminal offence and its penalty to be in a "written law" entails that state must follow the legislative process of passing into law a piece of legislation criminalizing certain acts, behavior or omission before it could constitutionally be a criminal law in Nigeria.

This is to say where any state of the federation decides to administer Islamic Criminal Law, the *Corpus* of Islamic Criminal Law principles must be in a codified form. To emphasize this point, the principles of Islamic Criminal Law as they are in Islamic Jurisprudence (*Fiqhil Islamy*) cannot be directly applied. They have to be in a codified form as required by thy above cited provision of the Constitution.

Historically, when the Penal Code of Northern Nigeria was to be drafted the Muslim *Ummah* of Northern Nigeria at that time realized that Islamic Criminal Law in its Jurisprudential form as applied by the Native Courts would cease to be applied a compromise was reached for some of the principles of Islamic Criminal Law to be included in the Penal Code. It was through that codification of the principles of Islamic Law in the Penal Code that their application was guaranteed.

When the twelve states of Northern Nigeria embarked on re – introduction and administration of Islamic Criminal Law on the Muslims of their respective states in

[17] Ibid,

early 2000, it becomes constitutionally imperative to satisfy this principles of fair hearing.

Based on the forgoing constitutional requirement on fair hearing, the states passed into law the *Shari'ah* Penal Codes[18] containing the principles of Islamic Criminal Law as distilled from the *Corpus* of Islamic Jurisprudence.

In the final analysis and by the implication of the constitutional supremacy, administration of Islamic Criminal Law has to be within the constitutional permissibility. To drive this point home, it will not be constitutionally permissible to apply the principles of Islamic Criminal Law as they are in the primary sources of the *Shari'ah.* What is constitutionally permissible is codification of the principles of Islamic Criminal Law and promulgation of same into a positive law of a state.

From this, it is clear that the views of the supporters of the codification of Islamic Criminal Law is more in keeping with this constitutional dictates as Islamic Criminal Law has to be codified through the legislative process before it becomes implementable. Similarly, owing to varieties of settings of *Shari'ah* Implementing States some are homogeneous and others are heterogeneous in their populations; various methods and approaches were employed by the states of Northern Nigeria in the process of their efforts at codification of Islamic Criminal Law.

However, majority of the *Shari'ah* Implementing States simply adopted the Zamfara State's method in codifying the Islamic principles of Criminal Law in

[18] Such as Zamfara State Shariah Penal Code Law, No. 10 of 2000

their respective domains. Apart from the approach of Zamfara state to the codification Islamic Criminal Law two other approaches to the codification and implementation of Islamic criminal Justice System[19] had been Identified in the previous chapter, *to wit*:

1) Kaduna and Gombe States' Approach and

2) Niger and Kebbi States' Approach.

What mainly accounted for the diversity in approaches among the *Shari'ah* implementing states, as we have pointed out at the onset, was the variety in the driving forces, factors and conditions of these states[20].

Based on the foregoing, the approaches and styles of the codifications of Islamic Criminal Law in all the *Shari'ah* Implementing States of the Northern Nigeria currently had been clustered into three main approaches,[21] *viz:*

1. Zamfara State's Approach
2. Kaduna/Gombe States' Approach
3. Niger/Kebbi States' Approach

This part of our study, therefore, focuses at examining the methodology and contents of the codification Islamic Criminal Law in the *Shari'ah* Implementing States of Northern Nigeria.

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[19] States that fall under the Zamfara State Approachl include Bauchi, Borno, Kano, Katsina, Sokoto and Yobe.

[20] Yadudu, A. H. (2000), The Shariah Debate in Nigeria: Time for Reflections, The Shariah issue: Working Paper for Dialogue pp. 34 at 38.

[21] Ahmad, N.A. (2011), Administration of Islamic Criminal Law Under the Nigerian Constitutional Democracy, Zaria – Nigeria, Ahmadu Bello University Press Ltd, p. 26 see generally on the three classification of approaches to Implementation of Shari'a in Northern Nigeria Ladan, M.T., (2004), Legal Pluralism and the Development of the Rule of Law in Nigeria: Issues and Challenges in Development and Application of the Shari'a in Ibrahim, J. (ed), Shari'ah Penal and Family Laws in Nigeria and in the Muslim World, Right Based Approach, Zaria, ABU Press Ltd, p. 77

6.4 Various Approaches to the Codification of Islamic Criminal Law

As earlier pointed out in the introductory segment of this chapter, various methods and approaches were employed by the states of Northern Nigeria in the process of their codification and implementation of Islamic Criminal Justice System. However, majority of the *Shari'ah* Implementing States simply adopted the Zamfara State's method in codifying the Islamic principles of Criminal Law in their respective domains. Apart from the approach of Zamfara state to the codification and implementation of Islamic Criminal Law two other approaches to the codification and implementation of Islamic criminal law[22] had been identified, *to wit*:

Kaduna and Gombe States' Approach and

Niger and Kebbi States' Approach

What mainly accounted for the diversity in approaches among the *Shari'ah* implementing states was the variety in the driving forces and conditions of these states[23].

From the foregoing, the approaches and styles to the codifications of Islamic Criminal Law by the twelve states of the Northern Nigeria now implementing the *Shari'ah* had been clustered into three main approaches,[24] *viz:*

Zamfara State's Approach

Kaduna/Gombe States' Approach

[22] States that fall under the Zamfara State Approachl include Bauchi, Borno, Kano, Katsina, Sokoto and Yobe.
[23] Yadudu, A. H. The Shariah Debate in Nigeria: Time for Reflections, The Shariah issue: Working Paper for Dialogue (2000) pp. 34 at 38.
[24] Ahmad, N.A. (2011), Administration of Islamic Criminal Law Under the Nigerian Constitutional Democracy, op. cit; & Ladan, M.T., (2004), Legal Pluralism and the Development of the Rule of Law in Nigeria: Issues and Challenges in Development and Application of the Shari'a in Ibrahim, J. (ed), Shari'ah Penal and Family Laws in Nigeria and in the Muslim World, Right Based Approach, op.cit.

Niger/Kebbi States' Approach

6.4.1 The Approach of Zamfara State

Zamfara State pioneered the process of codification of Islamic Criminal Law in the Northern Nigeria. The process started when the then Governor of the State, Alhaji Sani Ahamed Yariman Bakura, set up an eighteen man Law Reform Committee which recommended, among other things, the passing of relevant laws that would codify the principles of Islamic Criminal Law.

Based on the recommendation of the Law Reform Committee, the Zamfara State government enacted the Shariah Penal Code Law No. 13 of 2000 which seeks to codify the substantive Islamic criminal law for the State. This is the pioneering initiative and was therefore emulated by most of the states of Northern Nigeria[25] in their codification of the principles of Islamic Criminal Law efforts. Hence we will concentrate on this initiative in our study of this phenomenon.

6.4.2. The Approach of Kaduna and Gombe States

The heterogeneous nature of the people of Kaduna and Gombe states necessitates the adoption of an entirely different approach to the codification of Islamic criminal law in these states. These states enacted laws that established two distinct criminal systems – Islamic criminal law and appropriate customary criminal law[26].

For the people of these states who profess the Islamic faith, separate Shariah Penal Codes, which contained the principles of Islamic Criminal Law, were promulgated into law for them.

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[25] This was the approach adopted by Kano, Katsina, Sokoto, Bauchi to mention a few.

[26] Ladan, M. T. (2004), Legal Pluralism And the Development of the Rule of Law in Nigeria: Issues And Challenges in Development And Application of the Shariah, In Ibrahim, J. (ed.) *Shariah Penal and Family Laws in Nigeria And in The Muslim World, Right Based Approach*, Zaria – Nigeria, Ahmadu Bello University Press Ltd, p. 77

6.4.3 The Approach of Niger and Kebbi States

Niger and Kebbi States, on the other hand, adopted an entirely unique approach in their codification of Islamic principles of criminal law. This is because, unlike what was done in other states, in Niger State there was no legislation for enactment of a new and separate Shariah Penal Code. Rather, the existing Penal Code was only amended and the principles of Islamic Criminal Law covering *hudud* and *Qisas* were inserted in the existing Penal Code.[27]

6. 5 Contents of the Codes of the Islamic Criminal Law

From the onset, it should be made clear that the *Shari'ah* Penal Code, though very central to the administration of Islamic criminal law, does not only contain the codified Islamic penal law and their corresponding punishments, but also codifies other offences not known to Islamic Law. Thus, notwithstanding the name of the Code, its inspirations were drawn from the Penal Code of Northern Nigerian. It is virtually a copy of the old Penal Code[28]. In that it retains almost all the offences and punishments under the Penal Code of Northern Nigeria. The only difference being that some amendments were effected to the provisions of the Penal Code in order to accommodate the followings:

a) The provisions of the *Qur'an*ic offences technically known as *Hudud*.

[27] For instance, see the Law to provide for the establishment of Shariah Courts in Kaduna State 2001 and the Law to establish a Shariah Penal Code in Kaduna State, 2002. See also the law to establish Customary Courts in Kaduna State, 2001. In case of Gombe State, see the Gombe State Shariah Penal Code Law 2001 and also Gombe State Customary Code Law, 2001. See Ahmad, N.A., Administration of Islamic Criminal Law Under the Nigerian Constitutional Democracy, op. cit., pp. 10 – 15 for detailed analysis on this point.

[28] Haruna B. A. The Application of Islamic Criminal Law and Justice in a Constitutional Democracy: Problems and Prospects, In Ladan M.T. et al (eds) Shariah Implementation and Challenges on Women's Right and Access to Justice, (Enugu, WACOL, 2003) p.144.

b) The provisions of homicides, hurts and corporal punishments in the forms of canning or flogging as a penalty for manslaughter and other offences[29].

Furthermore, the Zamfara State Shar'ah Penal Code seems to be more comprehensive in codification of the principles of Islamic Criminal Law. In fact, all the subsequent *Shari'ah* Penal Codes derived their contents from the Zamfara Code. Hence, our study on the contents of the codified principles of Islamic Criminal Law will mainly focus on the Zamfara initiative in this regards, as earlier pointed out.

6.5.1 The Contents of the Shariah Penal Code of Zamfara State

The Shariah Penal Code of Zamfara State, which has 409 Sections, is divided into ten (10) chapters. Chapters I – VII deal with preliminary issues (as substantially provided by the Penal Code). This ranges from issues bordering on general explanations, definitions of words phrases and terminologies to issues dealing with punishments and compensations. These chapters also cover other offences which include abatement of crimes, attempts to commit crimes as well as what generally amounts to criminal responsibilities under the Law.

Chapter VIII of the *Shari'ah* Penal Code, on the other hand, fundamentally deals with one of the classification of Islamic penal system technically termed as *Hudud*. *Hudud* are acts which have been prescribed as offences either by the *Qur'an* and/or the *Sunnah* and their designated punishments are similarly provided by these primary texts of the Shariah (*Qur'an* and *Sunnah*). Hudud has been defined as "acts prohibited by Allah and punished by defined mandatory penalties because

[29] Peters, R. Supra p. 17.

the act violates a right protected by Allah."[30] Hudud are also defined as "crimes with fixed punishments in the *Qur'an* and *Sunnah*."[31]

The *Hudud* offences codified by this chapter include sexual offences covering unlawful sexual intercourse (*zina)*[32] sodomy (*liwat*)[33], lesbianism (*sihaq*)[34], bestiality (*wat'al-bahimah*)[35] and false accusation of unlawful sexual intercourse (*qazf*)[36]. Other Hudud offences codified in this chapter include theft (*sariqah*)[37], robbery (*Hirabah*)[38] and drinking of alcohol (*Shurbul-Khamri*)[39]. The chapter concluded by codifying some offences other than *Hudud* that were previously contained in the Penal Code of Northern Nigeria. This category covers rape, incest, defamation, criminal misappropriation and criminal breach of trust, receiving stolen property, cheating and criminal trespass.

Qisas offences form the second category of offences under the Islamic penal system. *Qisas* is employed to mean that "a person who has committed a given violation will be punished in the same way and by the same means that he has used in harming another person"[40].

Qisas therefore is a form of penal system whereby punishments are inflicted upon the offenders by way of retaliation for causing death of or injuries to a person[41].

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[30] Al Alfi A. A. (1982), Punishment in Islamic Criminal Law, in Bassioni, C.M. (ed), The Islamic Criminal Justice System, New York, Oceana Publications Inc. p. 227.
[31] Bambali, Y.Y (2003) *Crimes and Punishments Under Islamic Law*, Zaria – Nigeria, Malthouse, p. 26
[32] Zamfara State Shariah Penal Code Law,
[33] Ibid. section 130.
[34] Ibid. section 134.
[35] Ibid. section 136.
[36] Ibid. section 139.
[37] Ibid. section 144.
[38] Ibid. section 152.
[39] Ibid. section 149.
[40] Bassioni, M. C. (1982), Quesas Crimes, In Bassioni M. C. (ed) *The Islamic Criminal Justice System,* op. cit., P. 204
[41] See section 1 of the Zamfara State Shariah Criminal Procedure Code Law, 2000.

Chapter IX of the Shariah Penal Code devotes great deal of attention in codifying the Qisas offences. The codification, under this ninth chapter of the *Shari'ah* Penal Code, covers intentional homicide (*qatalal-amd*)[42], unintentional killing (*qatli bi shubh amd*)[43] and grievous hurt[44]. It should also be pointed out that some offences other than *Qisas* which were previously covered by the Penal Code of Northern Nigeria are retained in tact by the chapter. These include causing miscarriage, injuries to unborn children, concealment of birth, exposure of infants, kidnapping, abduction and forced labour.

Chapter X is the last but by no mean the least part of this Shariah Penal Code. Conversely, this is the bulkiest part of the *Shari'ah* Penal Code. It codified varieties of offences most of which are the vestiges of the Penal Code of Northern Nigeria even though some of their punishments have been modified and amended. Most of the modifications affect either the limitation or extension of the jail terms as well as the inclusion of corporal punishment in the forms of flogging or caning in the penalties segment of the Code for such offences[45]. Thus, criminal intimidation, forgery, wrongful restraints and confinements all fall under this chapter. In the same vein, offences against trademarks, breach of service, breach of official trust, offences against public peace, public servant and administration of justice are all codified under this chapter. The chapter concludes by incorporating

[42] Zamfara State Shariah Penal Code Law 2000, Section 199
[43] Ibid, Section 201.
[44] Ibid, Section 220.
[45] For instance the punishment of forgery which is imprisonment for a term which may extend to 14 years or with fine or with both under Section 364 of the Penal Code was reduced to 5 years imprisonment or with fine or with both under Section 253 of the Shariah Penal Code. In the same token vagabond is punishable with imprisonment for a term which may extend to one month imprisonment or with fine or with both under Section 406 of the Penal Code is punished with imprisonment which may extend to one year and with caning which may extend to 20 lashes under Section 376 of the Shariah Penal Code.

and codifying the offences of public nuisance, vagabond, mischief, gambling, cruelty to animal and offences relating to religions, ordeal, witchcraft and juju.

6.5.2 Islamic Law Punishments (Uqubaat) in the Shari'ah Penal Codes

Apart from retaining some punishments previously provided by the Penal Code, the *Shari'ah* Penal Code codifies and makes provisions for varieties of other punishments particularly those known to the Islamic penal system of Justice. In the next paragraphs attempt will be made at summarizing and covering all such codified punishments in the *Shari'ah* Penal Codes. This will allow the study to closely examine the contents of the *Shari'ah* Penal Codes and thereby authoritatively evaluate them on the basis of the classical *fiqh* paradigm with a view to drawing final conclusion on the codification of Islamic Criminal Law in the twelve Northern States of Nigeria.

a) Stoning to Death (Rajm)

The *Shari'ah* Penal Codes codified that where an offender is convicted for the offences of *zina* (unlawful sexual intercourse)[46], rape[47] *lewat* (sodamy)[48] and incest[49], the death sentence will be imposed with clear order that the convict be stoned to death[50] where the offender is either currently married or has ever undergone marital experience.

[46] Zamfara State Shariah Penal Code Law, 2000 section 127.
[47] Ibid. section 129 (b)
[48] Ibid. section 131 (b)
[49] Ibid. section 132 (b)
[50] Zamfara State Shariah Criminal Procedure Code Law 2000, Section 153.

b) Death by Crucifixion (*Salb*)

The *Shari'ah* Penal Codes further codifies that where a person has been convicted for the offence of *hirabah* (robbery) the mode and manner of executing the sentence of the death punishment is that the offender will be caused to die by crucifixion.[51] This, however, is only applicable in situations where the offender caused the death of the victim in addition to robbing and seizing their property as well.[52]

c) Retaliation (*Qisas*)

It is further codified in the *Shari'ah* Penal Code that where a person is found guilty for the offence of intentional homicide (*qatl amd*)[53] and causing miscarriage,[54] such offender will be caused to die in the like manner he caused the death of his victim except where such manner is contrary to Islamic law.[55]

Retaliation is also the codified punishment for causing grievous hurt[56] so that the convicted person is made to suffer injuries in the same manner the offender inflicted such injury to the victim[57]. However, retaliation in this case will not apply where the victim has waived the infliction of the Qisas punishment to the payment of *diyya*. Similarly, where the infliction of a similar wound will most likely lead to the death of the offender Qisas will not be applied.

[51] Ibid, section 240 (d)
[52] Section 153 (d) of the Zamfara State Shariah Penal Code.
[53] Ibid, section 199.
[54] Ibid. section 209 (b)
[55] Zamfara State Shariah Criminal Procedure Code Law 2000, section 240 (b)
[56] Ibid. section 220 (a)
[57] Section 241 of the Zamfara State Shariah Criminal Procedure Code

d) Amputation (*Qat'a*)

Amputation as a punishment, according to the codified provisions of the *Shari'ah* Penal Codes, applies in the case of a person convicted for the offence of *sariqa* (theft)[58] and *hirabah* (robbery)[59]. A convicted person for the offence of theft is liable to have his right hand from the wrist amputated when the offence has been committed for the first time. For committing such offence the second time, the offender will be punished with the amputation of his left foot. On the third conviction his left hand from the wrist will be amputated. The last right foot of the offender will be amputated if he committed such offence for the fourth time.[60]

Where a person is found guilty of *hirabah* (robbery), involving only seizure of property of the victims without causing the death of any one, his right hand from the wrist and his left foot from the ankle will be cross amputated.[61]

e) Caning (*Jald*)

Caning is the designated punishments for some *Hudud* offences. Canning, according to the codification in the *Shari'ah* Penal Codes, is the punishment for unmarried persons guilty of the offences of *zina* (unlawful sexual intercourse)[62], *lewat* (sodamy)[63] rape[64] and incest.[65] All these offences attract the punishments of hundred (100) strokes of cane. Similarly, the punishments for the offences of *shurbul khamr* (drinking of alcohol)[66] and *qazf* (false accusation of committing

[58] Zamfara State Shariah Criminal Procedure Code Law 2000, section 145
[59] Ibid. section 153
[60] Ibid. section 145
[61] Ibid. section 153 (b)
[62] Ibid. section 127 (a)
[63] Ibid. section 131 (a)
[64] Ibid. section 133 (a)
[65] Ibid. section 133 (a)
[66] Ibid. section 149.

zina)[67] is eighty (80) strokes of cane. However, *sihaq* (lesbianism)[68] and *watul bahimah* (bestiality)[69] are punishable with the penalty of fifty (50) strokes of cane on the convicted person for either of the above offences. It is also apposite to point out, here, that caning has been added to the penalties of so many offences codified by the *Shari'ah* Penal Codes.

f) Payment of Blood wit/compensation (*Diyya*)

The *Shari'ah* Penal Codes also provided that where a person is found guilty of intentional homicide, the designated retaliatory punishment may be compromised on the payment of compensation or *diyya*. But this is possible only where the relatives of the victim have agreed to the remittance of the punishment to the payment of diyya[70]. However, it should be noted that payment of *diyya* is the codified punishment in all other unintentional homicidal offences.[71]

g) Other forms of Punishments

Section 102 of the *Shari'ah* Penal Code provides that an offender may be punished with warning (*tahdid*) exhortation (*wa'az*) or by way of boycott (*haj*r) in lieu of or in addition to any other punishment to which he might have been sentenced to. However, these types of punishments will not apply in cases where the offender has already been sentenced to death, *Qisas* or *Hudud* punishments.

6.5.3 The Shari'ah Criminal Procedure Code

For the purposes of enforcement of the codified principles of Islamic Criminal Law as contained in the various *Shari'ah* Penal Codes most concerned states

[67] Ibid. section 140.
[68] Ibid. section 135.
[69] Ibid. section 137
[70] Ibid. section 200 (b)
[71] Ibid. section 202.

enacted the *Shari'ah* Criminal Procedure Code laws. In the case of Zamfara State which is our case study, *Shari'ah* Criminal Procedure Code was passed[72]. The Code specifically mandates the due observance of its provisions (by the *Shari'ah* courts) while enforcing the provisions of the *Shari'ah* Penal Code. Section 4 (1) and (3) of the above law provides that "all offences under the *Shari'ah* Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the *Shari'ah* criminal procedure Code". In any matter of a criminal nature, a *Shari'ah* court shall be bound by the provisions of this *Shari'ah* criminal Code.

It is also pertinent to point out, here, that the *Shari'ah* Criminal Procedure Code draws its inspiration from the Criminal Procedure Code applicable in most of the states of Northern Nigeria[73].

6.6 Limitations of the Codification of Islamic Criminal Law in Northern Nigeria

The codification of the principles of Islamic Criminal Law in Nigeria is necessitated by the constitutional requirement as already note above. The Constitution of the Federal Republic of Nigeria provides thus:

> *"Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined by and the penalty thereof is prescribed in a written law; and in this subsection, a written law refers to an Act of National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law"*[74]

[72] Law No. 8 of 2000.
[73] For example, Criminal Procedure Code Cap 37 Laws of the Kano State of Nigeria, 1991
[74] S. 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999 as amended in 2011, Cap C27, Laws of the Federation of Nigeria, 2010.

Since all the federating units in Nigeria have to operate under the law of the land, particularly the Constitution, it became necessary for any the state of Nigeria that wishes to introduce and apply the Islamic Law of Crimes in its domains to codify the rules, principles and doctrines of the Islamic Law of Crimes. This was, however, not without a price and some consequences. This Chapter, therefore, intends to explore and analyze the consequences of the codification of the *Corpus* of the principles of Islamic Criminal Law in Nigeria. The Chapter will, accordingly, highlight the limitations of such codifications, particularly within the constraints of the constitutional framework of Nigeria.

One of the forceful arguments against the codification of *Shari'ah* is that codification tends to make the Law static as it robs it of its fluid and flexible nature. Thus, some principles of Islamic Law which constitute its feature and characteristics may have to be sacrificed on the altar of the codification. Another area of serious limitation of the Nigerian efforts at the codification of Islamic Criminal Law is the omission, due to constitutional constraints, to codify *Riddah* and related offences. These specific issues that arose as challenges to the codification of the Islamic Criminal Law will be briefly outlined and discussed here with a view to laying solid foundation for analysis in the next chapter.

These challenges include, albeit not limited to, the followings:

1) Non inclusion of *Riddah* and related offences in all the *Shari'ah* Penal Codes of the twelve states of Northern Nigeria.

2) The position of the discretionary punishments (*Ta'azeerat*) after the codification of Islamic Criminal Law in the twelve states of Northern Nigeria.

3) Other Constitutional constraints, such as: Application of *Nolle Prosequi* and prerogative of mercy to cases before the *Shari'ah* Courts

6.6.1 Non Codification of *Riddah* & Related Offences in Northern Nigeria

The Arabic terminology for Apostasy *Riddah* or *Irtidad* derived from the etymological root of *Radd* which literally, among other connotations, means "to retreat, to retire, to withdraw or fall back from."[75] From technical perspective and jurisprudentially, *Riddah* is defined as renunciation or abandonment of Islam by a person who professes the Islamic faith. Apostasy could be committed by way of beliefs, words, actions or even willful omissions to perform certain obligatory acts on the part of an adult who is in full possession of his/her senses and acts voluntarily.[76] An apostate is technically referred to as *Murtadd* that is a person who changes his faith from Islamic religious belief to any other religion.

None of the *Shari'ah* penal codes codifies *Riddah* related offences mainly due to constitutional constraint. This is because the *Shari'ah* implementing states are part and parcel of the Nigerian project and, therefore, have to operates within the Nigerian Constitutional Framework that guarantees freedom of religion[77] of all citizens including the freedom to change ones' religious belief, it was not feasibly

[75] Rahman, S.A. (1996), *Punishment of Apostasy in Islam*, New Delhi – India, Kitabbhavan, p. 9
[76] Ibid
[77] S. 38 (1) of the 1999 Constitution provides thus: "Every person shall be entitled to freedom of thought, conscience and religion including freedom to change his religion or belief…."

possible for any of the *Shari'ah* implementing states of Nigeria, therefore, to include *Ridda* and related offences in their respective *Shari'ah* Penal Codes.

It is, however, argued that what could not be achieved in its entirety should be completely forsaken completely in line with popular Arabic adage *maa laa yudraku kulluhu laa yutraku julluh.* Meaning half cake is better than none. In line with the above argument it is better to apply what is implementable within the constitutional permissibility than to throw the baby with the bathing water by abandoning the whole *Shari'ah* implementation project just because an aspect of it is not implementable within the current constitutional framework.

There is also a second but a very weak argument to the effect that what *Shari'ah* actually criminalises in *riddah* is not the change of religion simpliciter rather it is the treasonable elements associated with such change of religion. This is because, it was argued, that Islam is not mere religion *per se* as understood in English language but it is rather a *deen* that blends religion with empire (i.e. state affairs) (*Al – Islam Deenun wad Daulatun).* Therefore any change of belief that takes a Muslim outside the folds of Islam and makes him to join forces with others poses serious threat to the Islamic belief system and may amount to treason which is punishable by death in the major state systems throughout the civilized world. It is, thus argued peaceful change of belief from Islam to any other faith without joining forces with enemies of Islam against its state system is not punishable with death. Herein lies the wisdom of the prophetic proviso to the death penlty on *riddah* in

the famous *hadeeth* narrated by Abdullahi Bn Mas'ud[78] that shedding the blood of a Muslim is not legally allowed except in three (3) cases one of which is the person who left his religion (of Islam) and diserted the *ummah* by joining forces with the enmies against the Islamic state, (*Attaariku li deenihi wal mufaariqu lil Jamaa'ah)*.[79] The proponent of this view assiduously argued that the Abdullahi Bn Abbas' *hadeeth* "whoever changes his religion" of Islam kill him, (*Man baddala deenahu faqtuluh)*[80] shall be interpreted in the light of the bove proviso in the more detailed *hadeeth, supra.*

6.6.2 Codification of discretionary (*Ta'azeerat*) Punishments

Another serious criticism leveled against the codidfication of Islamic Criminal Law borders on the area of the codification of *Ta'azeerat* that is discretionary punishments for non *hudud* or capital offences. The bulk of the codification of Islamic Criminal Law deals with this aspect of the Law. The critique is to the effect that once discretionary punishments are codified they lose their flexibility and fluidity. It will even amount to misnormer to refer to them as discretionary anymore. Once the codification of this aspect of the Law is made judges do not have discretion anymore but only to apply the codifed provisions of the Law technically known as *Al – Ahkaam al - Muqannanah*.

The response to the above criticisms is two ways: First, it was contended that codification does not necessarily strips judges of any element of discretion. This is because, often than not, the codified law (*al – ahkaamul muqannanah)* provides

[78] See Sabiq, As, (1980) *Fiqhus Sunnah,* Loc. Cit.,*infra*
[79] For detailed discussions on this strange but interesting argument see generally, Rahman, S.A., (1996), *Punishment of Apostasy in Islam*, New Delhi – India, Kitabbhavan Apostasy in Islam, pp. 78 - 102
[80] Transmitted by Bukhari and Muslim in their authentic books; See Sabiq, As, (1980) *Fiqhus Sunnah, Beirut* – Lebanon, *Dar El – Fikr Lit Taba' wan Nashr, 2nd Edition,* p. 386

range of punishments to be applied to any given discretionary offence thereby conferring discretion upon the judges of *Shari'ah* courts to select the most befitting punishments within the range and latitude provided as they deem fit having regard to the circumstances and the merits of each case.

Secondly, it was contended that, discretaionary punishments are within the prerogative powers of the *Imam* (the ruler, the political leader and the legislature) and not that of the Judge. Thus, codification is a veritable vehicle in the hand of the political and legislative leadership within the *Ummah* to exercise such discretion. Judges are only being employed to implement and apply the law as codified by the rulers and the legislature as the case may be.

It should be noted that *Ta'azeerat* (discretionary punishments) under Islamic Criminal Law are most amenable aspect of the law to the practice of codification. This is so because *ta'azeerat* or discretionary punishments are left to the discretion of the *Imam* to legislate upon unlike *hudud* (i.e. Islmic Capital Offences/Punishments)[81] that are restrictive ordinances of Allah (SWT) beyond which no one is allowed to go.

From the foregoing discourse, it is evidently clear that the codification of the principles of Islamic Criminal Law in the *Shari'ah* Implementing States of Northern Nigeria was mainly effected through the passage of Laws on *Shari'ah* Penal Codes. It was these laws that seek to incorporate and codify the *Corpus* of the Islamic Criminal Law for enforcement within the domains of the concerned states. This, as many critics argued, deprieved the *Shari'ah* Judges of any

[81] There are, all in all, seven (7) categories of *hudud* offences: *Zina* (Adultery or Fornication), Theft (*As – Sariqah)*, Highway or Armed Robbery (*Al – Hirabah),* Alcoholism (*Shurbul Khamr)*, Defamation of Character (*Qadhaf),* Apostasy (*Riddah)* and Wilfull Homicide (*Qatlun – Nafs).*

discretion as hitherto embodied in the discretionary penalties technically known as *Ta'azeerat.*

The contention, however, is that: Is it the *Imam* (i.e. the ruler) that was given the discretion and Judges exercise same in representative capacity by virtue delegation of such powers to them upon their appointment by the ruler? Or it is the judges that are clothed with the power to exercise their considered discretion?

Reading through Islamic sources revealed that the discretion is the ruler's exercisable by the judge in representative capacity. Thus, where the ruler through the legislative machinery codified the discretionary punishments (*Ta'azeerat),* the discretionary powers of the judge are thereby curtailed to the latitude provided within the codified laws (*Al – Ahkaamul Muqannanah).*

It is, also, pertinent to point out here that in the process of codifying the principles of Islamic Criminal Law, either by way of insertion of the relevant provisions of Islamic Law into the existing Penal Code or by way of promulgation and enactment into Law of a separate *Shari'ah* Penal Codes, other offences and their corresponding punishments are found and remained in tact in the *Shari'ah* Penal Codes. Resultantly, there is no single *Shari'ah* Penal Code that incorporates the pure and pristine principles of Islamic Criminal Law only. In fact, the non Islamic Offences are even more predominant in the Codes in both methods[82] of the codification of the principles of Islamic Criminal Law employed and adopted in the *Shari'ah* Implementing States of Northern Nigeria.

[82] These include the two methods of either inserting the principles of Islamic Criminal Law into existing Penal Code or enactment of new and separate Shari"ah Penal Code for the expanded application of *Shari'ah* in the concerned states.

6.6.3 Other Constitutional constraints

Other critical constraints imposed by constitutionality are the threats and the possibility of abusing the application of codified provisions of *Shari'ah* on crimes and punishments through the invocation of some constitutionally guaranteed powers. Such powers include the application of *Nolle Prosequi* to cases before the *Shari'ah* Courts and prerogative of mercy to the convicts of *Shari'ah* offences. It is true that the Constitution of the Federal Republic of Nigeria has conferred the power of entering *Nolle Prosequi* on the Attorney General of the Federation[83] and Attorneys General States respectively[84] "to discontinue at any stage before judgement is delivered" any criminal proceedings instituted or undertaken by him or any other authority or person in any court of law. After delivery of judgement, the Constitution invested the President of the Federal Republic of Nigeria[85] as well as Governors of the States[86] with powers to grant pardon through prerogative of mercy and amnesty to the convicts after due consultation with advisory council on the prerogative of mercy established by law.

The above fear albeit well founded, however, remains valid with or without codification of *Shari'ah* principles on crimes and punishments. It will remain applicable to *Shari'ah* cases so long as the Islamic Criminal Law continues to be implemented under the constitutional democracy which Nigeria as a country now practises. This is the position by virture of the supremacy clause of the

[83] S. 174 (1) (c)
[84] S. 211(1) (c) of the Constitution of the Constitution of the Federal Republic of Nigeria, 1999
[85] S.175 (1) (a – d) of the Constitution of the Constitution of the Federal Republic of Nigeria, 1999
[86] S.212 (1) (a – d) of the Constitution of the Constitution of the Federal Republic of Nigeria, 1999

constitution[87] which makes the provisions of the constitution supreme and renders any inconsistency with them null and void to the extent of such inconsistencies. This fear, thus, should not be a basis of rejecting codification if there are some benefits accruable to the *Ummah* through it. The only remedy to these constitutional constraints is constitutional amendment that will exempt *Shari'ah* cases from the application of these constitutionally guaranteed powers.

[87] S. 1(1) and (3) of the Constitution of the Constitution of the Federal Republic of Nigeria, 1999

CHAPTER SEVEN

FINDINGS, RECOMMENDATIONS & CONCLUSION

7.1 Introduction

This Chapter deals with the concluding issues of this study. The Chapter, therefore, summarises the whole work and highlights the findings on the salient points canvassed in the dissertation and makes recommendations thereon, thereafter a conclusion on the work was drawn with a view to analytically applying the opinions of the Muslim Jurists supporting and those opposing the practice of the codification of the principles of Islamic Criminal Law to our main research question, *to wit*: Whether the codification aids or retards the application of Islamic Criminal Law in Northern Nigeria? This enabled the chapter to draw conclusion and passed some remarks on the probable position of the codification of Islamic Criminal Law based on the analysis and the reasonings as well as the appraisal and evaluation of the argumentsand contending views of the Muslim Jurists and Modern Scholars on this issue.

7.2 Summary

Attempt has been made, at the beginning of this work, to paint the historical background of the total abrogation of implementation and the administration of Islamic Criminal Justice System in Northern Nigeria. The abrogation procedure was carried out gradually during the era of colonialism thereby spanning a considerable period of time. This dissertation traced, albeit briefly, how the administration and application of Islamic Criminal Justice System was subjected to the European notion of justice in the post colonial Nigeria; this engendered and

entailed a number of restrictions being imposed on the application of Islamic Criminal Law. These restrictions on the proper application and administration of Islamic Criminal Law, as found by this dissertation, was what led to the mass agitations for implementation of *Shari'ah* proper at the dawn of the fourth Republic. The general framework and research plan for the conduct of this study was drawn at this stage thereafter some conceptual clarifications to guard against any misgivings or misconceptions on the issues canvassed in the dissertation were adumbrated. This is also meant to further drive the point home accurately.

Attempts geared torwards discussing the Sources of Islamic Law with particular emphasis on Islamic Criminal Law (*Al – Jareemah*) was also made. This was with a view to laying down a solid theoretical frame of reference that will enable us to properly and adequately analyze and evaluate the overall theme of this dissertation, *to wit:* Critical Appraisal of the Practice of the Codification of the principles and doctrines of Islamic Criminal Law in the *Shari'ah* implementation of the *Shari'ah* Implementing States of Northern Nigeria.

The dissertation further dwelt, at some length, in examining the nature of Islamic Law generally and Islamic Law of Crimes in particular in order to drive the point home while unraveling the main research question of the dissertation as to whether the codification of Islamic Criminal Law (*Taqneen El – Ahkamis – Shar'iyya El – Iqaabiyyah/Janaa'iyyah*) under study in this dissertation aids or retards the implementation of *Shari'ah* in Nigeria.

Similarly, attempt to study the development of the *Corpus* of the principles of Islamic Law with particular emphasis on the principles of Islamic Criminal Law was made at this juncture. Resultantly, historical analyses was modestly attempted in which highlights on the challenges confronted by the early jurists in their efforts at developing the principles of Islamic Criminal Law, which the succeeding generations proudly inherited as part of collective heritage technically known as *Turath* was canvassed. The phenomenon of the closure of the gate of *Ijtihad* and its impact on the development of Islamic Law was yet another issue that engaged the focus of the study at this stage.

As a follow up to the issues raised and discussed in the preceding chapters, the dissertation also dwelt on the scholarly writings in respect of this phenomenon of the codification of the Principles of Islamic Law which formally and officially started with the *Mujallatul Ahkam El – Adliyyah* of Ottoman Empire in 1876. From this development, other Muslim Countries, old and new, followed suit. Contending perspectives on the practice of the codification were thereafter explored, analyzed and evaluated. Finally, the Codification of the Islamic Criminal Law in Northern Nigeria being the case study of this dissertation was studied and content analyses of the *Shari'ah* Penal Codes attempted.

The outcome of the above study as summarily captured in the preceding paragraphs led to some findings of this study upon which certain recommendations were made in this concluding chapter.

7.3 Findings

Based on the foregoing discussions and the critical appraisal of of the contending perspectives on the codification of the principles of Islamic Law of Crimes, this study arrived at the following major findings:

1) Most of the Muslim Countries, which were surveyed and reviewed in this dissertation, used the concept of the codification (*at - Taqneen)* as a vehicle for the codification of the civil aspects of Islamic Law for ease of consultation and facility of enforcement.

2) Interestingly, however, it is in Nigeria that the codification of Islamic Law centered only on the principles of Islamic Criminal Law. The Principles of Islamic Criminal Law were claimed to be codified twice in Nigeria. The first codification at the dawn of the country's attainment of self – rule after its colonial experience which led to production of Penal Code of Northern Nigeria and the second one during the fourh republic starting from Zamfara and spreading to other *Shari'ah* Implementing States of Northern Nigeria that brought into existence various states' *Shari'ah* Penal Codes.

3) Many factors led to the emergence of the codification of the principles of Islamic criminal Law as a phenomenon to be reckoned with. Prominent among them are the impact of colonialism on Muslim World, modernity and sophistication of the modern societies, intellectual efforts of Individual scholars, popular agitations and constitutionalism.

4) It is evidently clear that the codification of the principles of Islamic Criminal Law in the *Shari'ah* Implementation states of Northern Nigeria was mainly effected through either the passage of Laws on *Shari'ah* Penal Codes or amendment of the existing Penal Codes by inserting *Shari'ah* principles. It was these laws that seek to incorporate and codify the *Corpus* of the principles and doctrines of Islamic Criminal Law for enforcement within the domains of the concerned states.

5) It is, also, found out that in the process of codifying the principles of Islamic Criminal Law, either by way of insertion of the relevant provisions of Islamic Law into the existing Penal Code or by way of promulgation and enactment into Law of a separate *Shari'ah* Penal Codes, other offences and their corresponding punishments made inroad into the "*Shari'ah* Penal Codes". As they were either unaffected and/or left in tact in the '*Shari'ah* Penal Codes'. Resultantly, there is no single *Shari'ah* Penal Code that seeks to incorporate pure and pristine principles of Islamic Criminal Law only. In fact, the non Islamic Offences are even more predominant in the *Shari'ah* Penal Codes in both methods[1] of the codification of the principles of Islamic Criminal Law employed and adopted in Northern Nigeria, than the Islamic Law Offences.

6) The Codification of the Principles and doctrines of Islamic Law of Crimes in the *Shari'ah* Implementing States in Northern Nigeria was necessitated by constitutional imperatives. Analyses of the constitutional requirement which

[1] These include the two methods of either inserting the principles of Islamic Criminal Law into existing Penal Code or enactment of new and separate Shari"ah Penal Code for the expanded application of *Shari'ah* in the concerned states.

dictates that every offence and its designated punishment must to be prescribed in written law, meaning a Law passed by the National Assembly or a State House of Assembly reveals that without such codification *Shari'ah* in its jurists' based form could not be implementable. It is this constitutional requirement that led to the codification of the principles of Islamic Criminal Law into the various *Shari'ah* Penal Codes of the states of Northern Nigeria that are currently implementing *Shari'ah*.

7) Finally, evaluation and critical appraisal of the contending perspectives on the phenomenon of the Codification of the principles and doctrines of Islamic Criminal Law revealed that the views and arguments in support outweighed those in opposition to the practice of the codification of the Principles and doctrines of Islamic Law of Crimes and Punishments.

7.4 Recommendations

Having regards to the issues raised in this dissertation and various arguments canvassed therein, the following are the modest recommendations of the research work:

1. As the views of the proponents of the legality of the Codification of the principles and doctrines of Islamic Law are weightier and more in keeping with the spirit of Islamic Law in the modern time; Codification of the principles and doctrines of Islamic Law of Crimes and Punishments should be embraced by our *Ulama',* Jursists and Scholars

as a modern form of *Ijtihad*. This will promote intellectualism and legal development in this area of Islamic Law.

2. Since Codification of the rules and principles of Islamic Criminal Law known as *Taqneenu ahkamis Shar'iyya al –Jinaa'iyyah* is generally in keeping with the sprit of Islamic Law and is, therefore, legally appropriate; the qualified Individuals should as a matter of religious obligation undertake to codify various aspects of Islamic Legal Theory with a view to bringing same out to public domain who may not ordinarily have access to the rich *Shari'ah* intellectual heritage (*Turath al – Ilmy*). Furthermore, codification of the principles and doctrines of *Shari'ah* if carried out by the qualified Individual serves as a modern form of *Ijtihad* that upholds the dynamism of *Shari'ah* and its suitability to all places, time and epochs. The qualified scholars of our time shall brace up to this daunting challenge.
3. As Codification of the principles of Islamic Criminal Law in the contemporary modern world, particularly in Nigerian context, is a child of constitutional necessity which has to be embraced if *Shari'ah* is to be implementable; Even those who are opposed to the idea of the codification of the principles of Islamic Law of Crimes and Punishments should embrace it as a short term measure pending the alteration of the subsisting constitutional order in Nigeria and other Muslim Countries with the same problem. Rejection of this

recommendation will only amount to disservice to the *Shari'ah* as the entire *Corpus* of the law will remain unimplementable.

4. As the Codification generally aids, facilitates and promotes the smooth implementation of *Shari'ah* in this era; failure to codify the principles of Islamic Law of Crimes and Punishments in this modern time will not only retard the implementation of *Shari'ah* but will also breed serious confusion that will make mockery of the application of *Shari'ah* based on the quality of the personnel manning the administration of *Shari'ah* Law in Nigeria[2]. Even on this ground alone recommending the codification of Islamic Criminal Law becomes obviously imperative.
5. The contemporary Muslim Jurists and Scholars shall, as a matter of legal obligation and necessity, come together under the umbrella of either World Muslim League (*Rabidatul Alaamil Islamy)* or any other common platform with a view to developing comprehensive Model Islamic Legal Codes (MILCs)[3] covering all aspects of the Islamic Law generally and Islamic Law of Crimes and Punishments in particular, with a view to making them available to Muslim Countries throughout the globe for possible adoption and adaptation with necessary modifications to suit local peculiarities. This will, among other benefits, promote uniformity in the application of *Shari'ah* particularly Islamic Law of Crimes and Punishments in all Muslim States throughout the world.

[2] See the two cases of Amina Lawal & Safiyyatu Hussain Tungar Tudu.

[3] It is lamentable that while International Law Commission was busy developing the principles of International Law through development of model legislation and advocates for their adoption through the instrumentality of the United Nations Muslims are still in their deep slumber thinking that *Ijtihaad* still remain static and therefore starts and end with commentaries on the classical *fiqhu* manuals which can no longer respond to the demands of our time.

6. There shall be established by the *Shari'ah* Implementing States a body of experts consisting of learned people with thorough grounding in the sources of Islamic Law and those learned in the principles of modern legislation who will be drawn from the *Ulama',* Jurists and Scholars both within and outside the academia on representative capacities though based on their personal merits who will be saddled with the task of developing the Model Islamic Legal Codes (MILCs). Membership of this body of experts shall cut across various but recognized and acceptable divides of Muslim *Ummah* so as to carry all on board. This, it is believed, will facilitate adoption of the Model Codes by respective States as they are products of a participatory process each and every state will have a feeling that the work is theirs. This will also inject uniformity in the *Shari'ah* Legal Codes.
7. The works produced by the body of experts (as recommended above) shall be presented for delibration at validation workshop to be attended by all the relevant stakeholders for scrutiny and possible ratification. This is necessary in this modern era in which some people using treaties and international conventions as bases of analysis in trying to advance the argument that United Nation Conventions are consensus documents among the community of nations and should therefore be accepted by Muslim World as a kind of global consensus (*Ijma'*) upon which the world as a whole regarded as binding either by participation in

developing the instruments or by ratifications and accessions, as the case may be.

7.5 Conclusion

In conclusion and based on the critical appraisal of the contending views on codification of Islamic Criminal Law as well as the findings of this research work, it is the considered conclusion of this dissertation that the view of the proponents of the legality of the Codification of the principles and doctrines of Islamic Law is weightier and more in keeping with the spirit of Islamic Law in the modern time. This conclusion hinges on at least two reasons: First, the requirement of codification of Islamic Criminal Law in Nigeria is a constitutional imperative. This is because with the supremacy of the constitution brought about by our constitutional democracy, failure to codify will make the principles of Islamic Criminal Law unimplementable. Secondly, the application of the principles of Islamic Criminal Law as they are in their original sources requires mastery of various aspects of Islamic Juridical Sciences to the level of *Ijtihad* on the part of those administering the Islamic Criminal Law. As a fact, particularly within the context of our situation, this is difficult to attain. The two celebrated cases of *Amina Lawal and Safiyyatu Hussain Tungar Tudu* amply demonstrated the incapacities of the judges of the trial courts to access, assess, evaluate and interprete as well as to correctly apply the principles of Islamic Criminal Law. This is so, inspite of the codification, what more if there was nothing to guide them!

Based on the foregoing, it is a modest conclusion of this dissertation that the Codification of the principles and doctrines of Islamic Criminal Law aids, promotes and facilitates the application of *Shari'ah* in Nigeria. In fact without the codification of the principles of Islamic Criminal Law the application of *Shari'ah* will never be possible in Nigeria due to the constitutional constraints and incapacity of the majority of the personnel manning the *Shari'ah* Courts, as judges, to competently and skillfully administer the principles of Islamic Criminal Law in their original juristic form as contained in the classical sources.

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