

WESTERN SCHOLARS ON THE ROLE OF THE
'ULAMA' IN ADAPTING THE SHARI'A TO MODERNITY:
A CRITICAL REVIEW

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INTRODUCTION

Several Western scholars have in recent years written on the impact of modernization on transformations in the religio-legal, social and economic status of the 'ulama'. The main change from the perspective of the 'ulama' was the creation of centralized nation states that nationalized religious and legal spheres and deprived the 'ulama' of their exclusive authority as formulators and interpreters of the law. Another factor that has had a considerable impact on the status of the 'ulama' was the emergence of radical Islam, starting in the 1970s.¹ Scholars differ as to the extent to which the 'ulama' have been responsible for the erosion in their status, as well as with regard to the success of the strategies they have adopted for coping with the challenges of modernity.²

¹ While the position of the 'ulama' during the 1960s deteriorated (see Daniel Crecelius, "Nonideological Responses of the Egyptian Ulama to Modernization," in Nikki Keddie [ed.], *Scholars, Saints and Sufis*, Berkeley 1972, pp. 167–209), the emergence of radical political Islam in the 1970s has brought some states—Egypt, for example—to use the moderate version of Islam provided by orthodox 'ulama' as a strategic asset in combating radical Islam, thereby assisting the 'ulama' to move from their previously marginal position to the heart of the public discourse. See Malika Zeghal, "Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam and the State (1952–94)," *International Journal of Middle East Studies* 31 (1999), pp. 371–399; Tamir Moustafa, "Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt," *International Journal of Middle East Studies* 32 (2000), pp. 3–22.

² For example, Layish holds the 'ulama' responsible for the crisis of the *shari'a* in modern times for failing to articulate a novel but genuine legal theory. See Aharon Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44 (2004), pp. 100–101. Cf. a similar criticism by Crecelius ("Nonideological Responses of the Egyptian Ulama") who argued (before the strengthening of radical Islam in Egypt) that the response of the Egyptian 'ulama' to modernization concentrated on preserving their material political, social and economic position. Their defensive reaction (and even non-reaction) to the ideological challenge of secularism lost them the chance to shape modernization in an Islamic context. Vogel argues, to the contrary, that the 'ulama', by consistently forcing statutory legal reforms into the age-old *siyasa* channel, may prove to have benefited

In this paper, I focus on one aspect of the ‘ulama’s intellectual activity—namely, their attempts (as well as those of other intellectuals) to formulate an alternative Islamic legal theory that addresses, more adequately than did the old *usul al-fiqh*, the challenges of modernity in general and the most significant challenge to legal orthodoxy, statutory codification, in particular. The modernist Azhari scholar Muhammad ‘Abduh and his followers, already in the late nineteenth and early twentieth centuries, pointed to the need for such a theory and attempted to articulate one. Since that time additional attempts have been made both by ‘ulama’ and by other intellectuals. In the first part of what follows I discuss the opinions of Western scholars with respect to the intellectual merit of some of the new legal methodologies, demonstrating that those opinions are often negative. In the second part I discuss the expectations of those scholars regarding the formulation of such a theory in the future. This discussion includes two aspects: (1) What is the identity of the intellectuals who are expected to articulate the theory? (2) What should be the character of this theory and its content? This issue is studied against the background of the three legal models that exist in contemporary Islamic states: the civil-law model, the “Islamic” codification model and the Saudi Arabian model. I conclude (1) that the probability of the Islamic theory of law being updated by the ‘ulama’ is low, and (2) that any future theory of law will have to make provision for codification.

LEGAL MODELS IN THE CURRENT ISLAMIC MIDDLE EAST

Among the Middle Eastern nation-states (excluding Turkey, which is a secular state), one can discern three legal models. The first, a civil-law model, was adopted by most states, including Egypt, Syria, Lebanon, Jordan, Iraq, Iran, Tunisia and Morocco, which secularized all fields of law by importing Western-oriented codes (civil, criminal, commercial and international), to be applied by their national courts. The only fields left for the *shari‘a* courts have been family law, inheritance and *waqf*. Yet family law too has been codified in an effort to improve women’s rights within the family. To justify family law codification as

in the end, because state legislation today does not have a lot of public legitimacy. See Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, Leiden 2000, pp. 218–219.

emanating from the *shari'a*—a type of codification called *tashri'*—the legislators have used the theoretical devices supplied by the Modernist Muhammad 'Abduh and his followers.

Western scholars are divided over whether codification of the *shari'a* and the wide range of methods and mechanisms designed for applying the codified *shari'a* should be characterized as a development within the *shari'a* or outside of it.³ While some scholars, among them Coulson and Anderson, hold that these developments are an expression of the vitality of the *shari'a* and its ability to renovate itself and adapt itself to changing conditions,⁴ Schacht, Layish, Hallaq and others maintain that codification reflects a process of detachment from the *shari'a*, indeed its “secularization,”⁵ by the creation of an alternative statutory version of the *shari'a*.⁶ Put differently, codification of the *shari'a* by state legislators, since the middle of the nineteenth century, has brought about the transformation of the *shari'a* from a “jurists’ law,” i.e., a law created by independent legal experts (the ‘ulama’), to “statutory law,” i.e., a law promulgated by a national-territorial legislature. This transformation has had profound implications, the most important of which is to deprive

³ Ann Mayer notes that “non-Muslims cannot decide on the legitimacy of the conversion of the *shari'a* into statutes or whether the developments are inside or outside the *shari'a*.” And she holds that such determinations are exclusively for Muslims to make. See Ann E. Mayer, “Outlining Comments for Panel: The Transformation of Islamic Law from Jurists’ to Statute Law and Its Repercussions,” unpublished paper submitted to *The Joseph Schacht Conference on Theory and Practice in Islamic Law*, Leiden & Amsterdam 1994. Vogel holds the same view: “Saudi Arabia no doubt does not perfectly apply Islamic law, and indeed according to the views of some (and as a non-Muslim I make no judgment), does not apply true Islamic law at all” (emphasis added). See Vogel, *Islamic Law*, p. xv. Layish holds, to the contrary, that “outside observers may participate in this discourse provided no value judgment is involved.” See Layish, “Transformation,” p. 91, esp. n. 21. I think that it is proper to categorize a legal development as contrary to the *shari'a* as long as the scholar abstains from defining it as non-Islamic.

⁴ Noel J. Coulson, *A History of Islamic Law*, Edinburgh 1964, ch. 14; Norman Anderson, *Law Reform in the Muslim World*, London 1976, pp. 52, 64–65; Layish, “Transformation,” p. 94.

⁵ For Layish, the term “secularization” signifies the process of incorporating *shari'a* rules and principles into statutory legislation. The *shari'a* as a jurists’ law remains intact. Layish, “Transformation,” p. 92, n. 22.

⁶ Joseph Schacht argued that “...every codification must subtly distort it [the *shari'a*].” Schacht, “Problems of Modern Islamic Legislation,” *Studia Islamica* 12 (1960), p. 108; also Layish, “Transformation,” pp. 91–92. Hallaq too thinks that the establishment of the centralized nation-state and the use of codification altered the nature of the law and consequently brought about the demise of the *shari'a*. See Wael B. Hallaq, “Can the Shari’a Be Restored?” in Yvonne Y. Haddad and Barbara F. Stowasser (eds.), *Islamic Law and the Challenge of Modernity*, Walnut Creek, CA, 2004, pp. 22–26.

the 'ulama' of their "legislative" authority and invest that authority in a secular legislature.

The second model refers to such states as Libya, Iran, Sudan and Pakistan. These states, which applied the first model following their national independence, decided, starting in the 1970s, to "Islamize" their legal systems, especially penal law. It is important to note that these states do not intend to reinstate the *shari'a* by returning to a jurists' law system. On the contrary, since they have had a relatively long and apparently successful experience with codification, they seek to preserve codification as the main channel of "Islamic" legislation. Codification offers efficient state control of the legal system as well as greater uniformity, consistency and predictability within the judicial system.

As an example, the project of Islamic codification in Sudan took place under the rule of Numayri (ca. the mid-1980s) and was mainly motivated by political considerations. The professed three aims of the project however were: (1) to revise the existing legal system in an effort to make it compatible with basic *shari'i* norms; (2) to free the Sudanese legal system from the impact of English law; and (3) to mitigate various domains of the *shari'a* and adapt it to modern requirements. In the course of applying various domains of the *shari'a* through codification, entire statutes or parts thereof contravening the *shari'a* (for example those relating to income tax and other non-*shari'i* taxes) were abolished and replaced with the alms tax (*zakat*). An Islamic penal code, including the Qur'anic punishments (*hudud*), was introduced.

The third model is exemplified by the Saudi state, which has never reformed its legal system along Western lines. The Saudi legal model is based on close cooperation between the kings from the Sa'ud family, the *umara'* and the 'ulama' from the Ibn 'Abd al-Wahhab family, going back to the first Wahhabi state of the eighteenth century. Formally speaking, the current Saudi state has neither a constitution nor a sovereign legislative body equivalent to a Western parliament. The Qur'an is conceived of as the constitution. The Saudi 'ulama' still have the exclusive authority to interpret divine law by way of *ijtihad*, and the Saudi *shari'a* courts still have comprehensive jurisdiction in all areas of the law. According to the theory of *siyasa shar'iyya*, the ruler may issue legal orders on topics not covered by the *shari'a*, on condition that these orders do not contravene the *shari'a*.

During the twentieth century the Saudi state needed to adjust the normative and institutional system of a puritan regime to the conditions

of a state, society and economy that face the challenges of modernity. The Saudi regime truly expected that its 'ulama' would adapt the *shari'a* to state and social needs by resorting to *ijtihad*. But according to Vogel, author of the most extensive study of the current Saudi Arabian legal system, "when rapid change was needed, resort to the 'ulama', their *fiqh*, and their courts, was impractical and necessity required borrowings from modern, Western-based models." To address modern legal problems new to the kingdom, "the king [viz., 'Abd al-'Aziz] had no recourse other than to legislate on his own. He needed to create new legal institutions rapidly and could not wait for them, or alternatives to them, to be developed by the 'ulama' through meticulous *ijtihad*."⁷

As a result, the Saudi kings issued between 100 and 200 ordinances (*nizams*) and decrees (*marsums*) on a variety of topics not covered by the *shari'a*, such as laws on firearms, nationality, social insurance and motor vehicles. To justify this legal reform, the Saudi framers of statutory ordinances as well as the Saudi 'ulama' have invoked numerous legal devices, several of which were developed by the Modernist school of law—the expansion of *siyasa shar'iyya*, *maslaha*, *takhayyur* and *ijtihad* (see the discussion on the Modernist enterprise, below). The Saudi kings hoped that the *nizams* would be applied by the *shari'a* courts. Yet it is striking that the Saudi *shari'a* courts generally refuse to enforce the *nizams*. This refusal obliged the king to establish non-*shari'i* judicial bodies for applying his decrees. However, Saudi 'ulama' have opposed the creation of these tribunals and the attendant reduction of their own jurisdiction.⁸

Commenting on the attitude of Saudi 'ulama' towards the content of the *nizams* and the judicial bodies applying them, Vogel writes:

[W]hile the *shari'a* courts' refusal to enforce the *nizams* is very real, the rest of their position is somewhat unreal. It seems insincere for the 'ulama' to oppose most of the content of these laws and most of the adjudication enforcing them when they offer as yet nothing to put in their place... if they were serious about deciding *nizam* cases by *fiqh*, then they have to perform a major effort of *ijtihad* to draft *fiqh* rules to replace the *nizams*. This is not occurring [emphasis added].⁹

⁷ Vogel, *Islamic Law*, pp. 288 and 174–175, respectively.

⁸ *Ibid.*, pp. 175–176.

⁹ *Ibid.*, p. 177.

NEW THEORIES OF LAW

The Modernist Enterprise

In his important and frequently cited article “The Contribution of the Modernists to the Secularization of Islamic Law,” Aharon Layish, following Joseph Schacht,¹⁰ makes two highly critical claims: (1) The Modernist project of reformulating legal theory was an intellectual failure.¹¹ Muhammad ‘Abduh and his followers did not succeed in articulating a new and coherent theory of *usul al-fiqh* and they failed to define “public welfare” (*maslaha*) as a source of law and the exact ways *maslaha* should function within legal theory. (2) The Modernists, unintentionally, enabled the *shari‘a* secularization process by creating legal devices that made it possible for legislators to present statutory codified laws as emanating from the *shari‘a*, when in fact those laws are purely secular and have nothing to do with the *shari‘a*. Among these devices is the eclectic mechanism, *takhayyur*, i.e., combining legal elements from various law schools, and “patching,” *talfiq*, a more sophisticated form of *takhayyur*. The Modernists thereby completely destroyed classical *shari‘a* law without presenting an adequate substitute for it.

In the last chapter of his book on the history of Islamic legal theories, Wael Hallaq lends support to Layish’s thesis regarding the Modernists. Defining them as “Religious Utilitarianists,” Hallaq argues that they failed to construct a novel theory of law, for two main reasons: (1) they defined the principle of *maslaha* in a way that converts the *fiqh* into a utilitarian law; (2) their exaggerated use of the eclectic mechanism (*takhayyur*) created inconsistency in legal reasoning.¹²

The Egyptian Supreme Constitutional Court (SCC)

An innovative attempt to derive the general principles of the *shari‘a* from the classical sources has been conducted since the 1990s by the Egyptian Supreme Constitutional Court (SCC), the highest instance for deciding on the compatibility of Egyptian codes to the “general

¹⁰ Schacht, “Problems,” pp. 119–120.

¹¹ Aharon Layish, “The Contribution of the Modernists to the Secularization of Islamic Law,” *Middle Eastern Studies* 14 (1978), pp. 263–277. A quarter of a century later, Layish’s assessment of the Modernist project remains the same: failure. Layish, “Transformation,” p. 103.

¹² Wael B. Hallaq, *A History of Islamic Legal Theories*, Cambridge 1997. See also idem, “Can the Shari‘a Be Restored?” pp. 24–25, 46.

principles of the Islamic *shari'a*" (*al-mabadi' al-'amma li'l-shari'a al-Islamiyya*).¹³ This court distinguishes between "rules of law based on indisputable proofs and indicators" (*ahkam qat'iyya fi thubutiha wa-dalalatiha*) and "rules based on disputable proofs" (*ahkam zanniyya*). By "indisputable proofs" the court is referring to Qur'anic verses and sound Prophetic traditions. If a statute contradicts a rule of the first type, the statute must be abrogated. But if the statute contradicts a rule of the second type, there are no grounds to abrogate it, because the legislators are entitled to exercise *ijtihad* on the basis of both *usul al-fiqh* and other sources, such as *maslaha*.¹⁴ According to the criteria set by Layish (see below), the methodologies applied by the SCC judges cannot be regarded as a genuine *shari'a* reform project, because the judges of the SCC are not trained as 'ulama'. As such, they are neither authorized exponents of the *shari'a* nor are they bound by the *shari'i* legal methodology. As soon as they resort to statutory legislation and codification, they sidestep the framework of the *shari'i* legal system.¹⁵

*Al-Turabi's Methodologies and Islamic Legislation in Sudan*¹⁶

The application of the *shari'a* in its codified version in the Sudan is in striking conformity with the education and training of Hasan al-Turabi, the main creative legal mind behind the reforms. Al-Turabi, who is well versed in both Islamic and Western culture (he is a graduate of a Western law school and not of a *madrasa*), wished to shape flexible legal methodologies that would widen the political options of the Islamic regime. At the same time, he wished to adjust Islam to modern times on the basis of Western science and values. In his legal methodology, al-Turabi has created a synthesis of *usul al-fiqh* and Western legal principles, and he wishes to shape a new version of Islamic jurisprudence

¹³ Amendment to Article 2 of the Egyptian constitution from 1980 stipulates that "the general principles of the Islamic *shari'a* are the main source of legislation."

¹⁴ Cf. the Pakistani judges of the Supreme Court who allowed themselves to base their decision making on a judicial *khul'* divorce directly on the Qur'an and hadith. See Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change*, Princeton 2002, p. 230, n. 57.

¹⁵ Layish, "Transformation," pp. 105–106.

¹⁶ The analysis of the Sudanese case is based on Aharon Layish and Gabriel R. Warburg, *The Reinstatement of Islamic Law in Sudan under Numayri: An Evaluation of a Legal Experiment in the Light of Its Historical Context, Methodology, and Repercussions*, Leiden 2002, esp. pp. 275–285.

by means of statutory codification and legislation based on the eclectic expedient.

Al-Turabi authored the Judgments (Basic Rules) Act of 1983, which authorizes the judge—in the event of a gap in any statute and in the Qur'an and hadith—to exercise *ijtihad* on the basis of legal sources and principles in the following order: consensus of the jurists (*ijma'*), analogy (*qiyas*), public welfare (*maslaha*), legal precedents (of the Sudanese national courts) and custom. Yet the legal rules derived from the above-mentioned legal sources and principles should not contradict the principles of the *shari'a*, natural justice and the English-inspired principles of justice, equity and good conscience.

Layish holds that “this [al-Turabi’s] combination of sources of law is inconceivable from the viewpoint of the authorized exponents of the orthodox.”¹⁷ Layish and Warburg also hold that the selective incorporation of *shari'a* norms into statutory legislation has in many cases led to deviations from the *shari'a*, to the point of distorting it. For example, the Sudanese legislators imposed strict Qur'anic punishments, *hudud*, such as execution and amputation, for the offenses of murder, adultery and theft; at the same time, however, the same legislators deprived the offender of the *shari'i* “good defenses” of doubt or mistake (*shubha*) that avert corporal punishment,¹⁸ thereby distorting the traditional *shari'i* balance between the severity of the punishments and the mechanisms to avert them. Other commentators hold that English law was never replaced by the *shari'a* and that changes carried out in the name of Islamization have been only cosmetic or superficial.

Hallaq shares the latter opinion.¹⁹ He situates al-Turabi among the “religious utilitarianists” (such as 'Abduh and Rida) and finds his legal theory to be lacking. In a situation in which reasoning on the basis of the Qur'an and hadith leads to extreme social hardship, it seems that al-Turabi holds that *maslaha* takes precedence. However, he does not specify how the texts are explained away in situations of contradiction between them and the rule derived on the grounds of public interest. Hallaq writes: “Without articulating an elaborate and detailed theory

¹⁷ Layish, “Transformation,” pp. 104–105.

¹⁸ For example, a “good defense” in the case of adultery maybe that the offender mistakenly assumed that the woman he was sleeping with was his legal wife. Among the good defenses in the case of theft are that the stolen property was not kept in a properly secured place (*hirz*) and that the value of that property is below the minimum (*nisab*) prescribed by the *fiqh*.

¹⁹ Hallaq, *History*, pp. 226–230.

that addresses these concerns, al-Turabi cannot be said to have offered an adequate legal program to sustain what has been called 'al-Turabi's Revolution.'"²⁰

Ijtihad by Saudi 'Ulama'

That Saudi 'ulama' enjoy the freedom of *ijtihad* enables them, at least in theory, to freshen and update the traditional system of *usul al-fiqh*. We might refer to two levels of *ijtihad*: "high-level" *ijtihad*, performed by distinguished 'ulama', official or unofficial, and leading to the issuance of a *fatwa* that lends authorization to a decree issued by the king; and "low-level" *ijtihad*, i.e., judicial *ijtihad*, performed by a qadi in the process of adjudicating a lawsuit and leading to the handing down of an innovative precedent. With regard to the first level, only in a few isolated cases did the king insist on basing a reform on the *fiqh* rather than on Western-oriented law; the 'ulama' subsequently "delivered the goods."²¹ According to Layish: "... [T]here is no real trace of *ijtihad* in legislation... the boldest change appearing in legislation is a moving away from Hanbali positive law and an attempt to blur the distinction between the orthodox schools and to treat them all as a single large reservoir from which elements may be drawn [i.e., *takhayyur*] for predetermined reformist purposes."²² Layish and Vogel agree that the attitude of Saudi 'ulama' to the reforms is practical rather than theoretical. In other words, they use various legal devices to obtain the

²⁰ Ibid., p. 230.

²¹ The most notable example is as follows: In 1981 King Khalid requested the Senior Board of 'Ulama' to find a *shari'i* solution to two types of crimes: (1) various forms of violent assault, including rape, robbery and murder; (2) drug crimes. Four years [!] later, the Board issued *fatwa* No. 85, which classified these crimes as *hudud* by applying to them the text of Qur'an 5:33-34. In classical *shari'a*, this text, referring to "those who spread evil on the earth," serves as the justification for the *hadd* punishment for highway robbery (*qat' al-tariq*). This *fatwa* is innovative in that it adds to the orthodox interpretation of these Qur'anic verses violent offenses committed inside the town and not only on the roads, sex offenses as well as property ones. Also, the *fatwa* leaves determination of the punishment to the discretion of the qadi, whereas according to the *fiqh* there are fixed punishments commensurate with the components of the crime (for example, high robbery alone, or highway robbery accompanied by murder). In 1982, the king based his decree regarding violent assaults (excluding drugs) on this *fatwa*. See Vogel, *Islamic Law*, pp. 252-258.

²² Aharon Layish, "Saudi Arabian Legal Reform as a Mechanism to Moderate Wahhabi Doctrine," *Journal of the American Oriental Society* 107 (1987), p. 292. See also *ibid.*, p. 287.

result required by social and national needs, but these devices do not amount to a coherent theory of law.²³

As for judicial *ijtihad*, the expectation that it would bring about both just, divinely sanctioned outcomes in specific cases and, in time, any needed general *fiqh* rules²⁴ has not yet been satisfied. While the qadis insist on their formal right to exercise *ijtihad*, in practice they demonstrate conservative application of Hanbali doctrine. When the latter is not sufficient, the qadi relies on decisions of more senior qadis or on the opinions of senior 'ulama'.²⁵ Both Layish and Vogel found very few examples of judicial *ijtihad* that were an exception to this pattern.²⁶

The disappointing product of *ijtihad*, both quantitatively and qualitatively, may be explained by the fact that, since the first centuries of Islamic history, the 'ulama' have established a practical "division of legal labor" with the state (what Vogel calls a *fiqh-siyasa* division). From a psychological perspective, it is difficult for the 'ulama' to renounce that traditional division of authority and engage in *ijtihad* on legal topics that formerly belonged to the realm of the state.

To sum up, according to the Western scholars discussed here, the 'ulama' (and, for that matter, all modern Muslim legal theorists) have not yet come forward with a coherent proposal for legal reform that would redefine the relations between the *shari'a* and the national state.²⁷ This failure brings Hallaq to realize that there is no longer any point in reviving the *shari'a*: "...traditional *shari'a* can surely be said to have gone without return," he says.²⁸ He believes that the traditional theory of *usul al-fiqh* is no longer adequate to deal with the exigencies of modern life because it is literalist, paying too much attention to the lexical and technical meanings of the revealed texts.

Ann Mayer likewise holds that *usul al-fiqh* should be abandoned. She explains that the main problem in countries that have applied the *shari'a* through statutory codification is the unresolved conflict

²³ Layish, "Saudi," p. 292; Vogel, *Islamic Law*, p. 115.

²⁴ Vogel, *Islamic Law*, p. 177.

²⁵ Ibid., ch. 4, esp. pp. 115–117, 130, 136–137.

²⁶ Layish, "Saudi," pp. 287, 292; Vogel, *Islamic Law*, pp. 122–127.

²⁷ Layish, "Transformation," pp. 101–102. Layish refers also to the Egyptian jurist and qadi Ahmad Muhammad Shakir (d. 1958). Shakir's combination of orthodox *shari'a*, statutory legislation and justice (*adl*), as three sources informing a court of law in its adjudication of lawsuits, Layish argues, "deviates from the classical theory of the *shari'a*." Ibid., p. 104.

²⁸ Hallaq, "Can the Shari'a Be Restored?" p. 42.

between two competing sovereignties: the sovereignty of *ijtihad*, based on *usul al-fiqh*, which is divine, and that of statutory codification, which emanates from the common will of the people. The only solution that she sees is a total separation of the positive law of the *shari'a*, which might remain applicable, from the classical *usul al-fiqh*, which should be abandoned to permit the adoption of a new legal theory that will make room for codification. She expects this process to be delicate and painful, given the strong attachment of Muslims to the traditional theory of sources and its centrality to an understanding of the *shari'a* as it has been known for over a millennium.²⁹

Hallaq finds some intellectual merit in the work of those he calls "Religious Liberalists," i.e., secular autodidacts in the realm of law, such as the Egyptian judge Sa'id al-'Ashmawi, the Syrian engineer Mahmud Shahrur and the Pakistani scholar Fazlur Rahman. They have advanced methodologies that maintain a coherent hermeneutical link with the religious texts and at the same time manage to escape the traditional literalist approach. These proposals are however problematic: (1) they are only outlines and not comprehensive theories; (2) the intellectuals who proposed them are marginal public figures and, therefore, their sayings have little appeal to Muslims at large; (3) state officials and political rulers have turned a deaf ear to them.³⁰

According to Hallaq, "... it is only the state which can bring about a revival of Islamic law, but not without the full participation of Muslim intelligentsia and, more importantly, not while the present [autocratic and centralized] regimes remain in power." Hallaq recognizes however that the chances of his proposed solution materializing are low, mainly because modernity is too deeply rooted in the minds of Muslims.³¹

HOW SHOULD A FUTURE THEORY OF LAW LOOK?

Unlike Hallaq, Layish still sees a chance for a revival of the *shari'a* in the future, which depends on the following necessary conditions: (1) The only ones who may develop a genuine theory of law are independent 'ulama' who are not state officials. This is because the legitimacy

²⁹ Ann E. Mayer, "The Shari'a: A Methodology or a Body of Substantive Rules?" in Nicholas Heer (ed.), *Islamic Law and Jurisprudence*, Seattle 1990, pp. 197–198.

³⁰ Hallaq, *History*, ch. 6; idem, "Can the Shari'a Be Restored?" pp. 45–47.

³¹ Hallaq, "Can the Shari'a Be Restored?" pp. 47–48.

of any legal innovation is dependent upon the religio-legal authority of those who apply it. (2) The above-mentioned 'ulama' should "display intellectual vitality, creativity, integrity and courage necessary for articulating and redefining a legal methodology without deviating from the nature of the *shari'a* as a jurists' law." (3) The new theory has to be closely connected to the classical one.³²

By a legal theory that is "closely connected to the classical one," Layish probably means that statutory legislation or codification is not acceptable as a source of law. For Layish, the relevant criterion for testing the legitimacy of codification is not the legitimacy of the mechanisms used in the process of codification, but rather the religio-legal authority of the persons who apply it. A statute, even if based on mechanisms with traditional *shar'i* connotations, is first and foremost the legislative act of a sovereign parliament and hence cannot be assessed as a development within the *shari'a*. Although the modern legislators' direct approach to the textual sources of the *shari'a* bears a certain resemblance to classical *ijtihad*, this resemblance is purely technical: there are material differences with respect to the mode of resorting to the textual sources (replacement of deductive analogy, i.e., *qiyas*, by the *maslaha*) and with respect to the sources of inspiration and motivation for the reforms, i.e., Western ideas and pressures arising from a disturbance of balances in Muslim society as a result of modernization and Westernization. In conclusion, codification brings about the total disruption of *usul al-fiqh*, the body of law developed by each of the law schools, and of the status of the 'ulama' as the exclusive authorized exponents of the *shari'a*.³³

Let us now examine the probability that the conditions set by Layish will materialize.

Will Independent 'Ulama' Author a New Theory of Law?

By independent 'ulama' Layish probably has in mind *madrassa* teachers who do not occupy a position in the state bureaucracy and therefore are able to develop their legal ideas free of state pressures. Does this

³² Layish, "Transformation," p. 108. His position is informed by Schacht, who held that a new methodological synthesis should not "be a break with the past" but "true to the whole history of Islamic jurisprudence." Schacht, "Problems," p. 129.

³³ Layish, "Transformation," pp. 95–96. It was Schacht who referred to Modernist legislation in terms of a "complete break" with the basic assumptions of the *shari'a* state. See Joseph Schacht, "Islamic Law in Contemporary States," *The American Journal of Comparative Law* 8 (1959), p. 135.

type of scholar still exist? And if so, does such a scholar enjoy the same public prestige that he enjoyed in the past? To start with, the profile of current 'ulama' is different from that of the past. The current al-Azhar graduate of the Faculty of *Shari'a* has a much broader education than the classical Azhar graduate. On top of the *shari'a*, he is also trained in Western-imported law (*al-qanun*) in order to be prepared for working in the state's legal system.³⁴ State legislation and codification are therefore part of his education. The demand that the innovative 'ulama' be independent and not affiliated to the state is also unreasonable. Most Muslim regimes are highly centralized, meaning that the majority of high-quality 'ulama' are affiliated with the state in one way or another. Saudi Arabia is a case in point. Moreover, the modernization of the legal system along Western lines has changed the perception of the current 'ulama' regarding the *shari'a*—it is no longer a continuous discursive process but rather a body of positive law (on which more later).

The 'ulama' lost their monopoly over the legal discourse years ago, and that discourse is now much more open than it used to be.³⁵ Currently, the debate over a new theory of law involves, in addition to the 'ulama' (both state official and non-official), Muslim lawyers trained in the Western tradition who are autodidacts in *shari'a* law (such as the Egyptian judge Sa'id al-'Ashmawi) and Muslim intellectuals with no legal training at all (such as the Syrian engineer Mahmud Shahrur), among others.

A relevant example of this loss of monopoly is al-Azhar, the most important center of Islamic learning in the Muslim world, which became a state university in 1961. It seems that during the last decade or so the SCC has been gradually depriving al-Azhar of its status as the primary interpreter of divine texts. The main arena in which the status of the *shari'a* in Egypt is currently debated and fought over is the SCC, which adjudicates lawsuits that contest the compatibility of current Egyptian laws (including family law) with the "general principles of Islamic *shari'a*." The judges of the SCC are graduates of law faculties, and their training focuses on the civil-law tradition, although it may also include some basic training in the *shari'a*. The SCC judges

³⁴ Monique C. Cardinal, "Islamic Legal Theory Curriculum: Are the Classics Taught Today?" *Islamic Law and Society* 12 (2005), p. 225.

³⁵ Schacht held that even in the strongest field of the *shari'a*, i.e., family law, the 'ulama' "lost the battle" vis-à-vis the state already in the 1920s. Schacht, "Problems," p. 116.

do not hesitate to interpret Qur'anic and hadith texts according to considerations of public welfare. Asked about the relationship between the SCC and al-Azhar, Dr. Adel Omar Sherif, the deputy chief-justice of the SCC, responded: "The two institutions have always maintained a very good relationship. It is not a formal relationship, though the SCC does request the religious opinion from al-Azhar from time to time. However, the SCC is not obliged to adopt its suggestions, as they are merely advisory" (emphasis added). The subtext of this diplomatic answer speaks volumes about the major decline in the legal authority of al-Azhar and in its general prestige.³⁶

For all these reasons, I hold that the probability that independent 'ulama' will author a new theory of law is low.

*Will a New Theory of Law Exclude Statutory
Legislation and Codification?*

The probability that a new theory of law will exclude statutory legislation and codification is also low, for the following reasons: (1) The idea of statutory legislation is not foreign to the 'ulama'; it has some dimensions of continuity with the past. (2) Modern 'ulama', especially the Hanafis, have already incorporated statutory legislation into their discourse; moreover, even among the Hanbali 'ulama' of Saudi Arabia, who might be expected to be the most staunch opponents of codification, considerations of statutory legislation are no longer taboo.

Continuity with the Past

As early as the beginning of the 'Abbasid period (second half of the eighth century CE) the 'ulama', devoted to their moral principles and their developing legal methodology, gave up the ideal that the *fiqh* covers the full range of Islamic life. For reasons well explained in the literature, the regulation of the position of the individual vis-à-vis state authorities lay largely outside the scholar's self-imposed terms of reference.³⁷

Effective organization of the affairs of the 'Abbasid state thus necessitated the recognition of jurisdictions other than those of the qadi (*siyasa* jurisdictions), among them *sahib al-radd*, *wali al-jara'im* and, especially, the *mazalim*. *Mazalim* jurisdiction was much wider than

³⁶ The interview with the judge, conducted in November 2006, appears in the *Islamic Legal Studies Program Newsletter* 12.1 (December 2006), pp. 6, 10.

³⁷ Coulson, *A History of Islamic Law*, pp. 123–127; Vogel, *Islamic Law*, pp. 188–190.

an inquiry into complaints against officials of the state. Its jurisdiction was such as the sovereign cared to define and was often extended so as to constitute serious competition for the *shari'a* courts operated by qadis.³⁸ Islamic legal practice, therefore, was based on a dual system of courts; and although all functions in the Islamic state were theoretically religious in nature, "the distinction between the *mazalim* and *shari'a* jurisdictions came very close to the notion of division between secular and religious courts" (emphasis added).³⁹ The *shari'a* courts used to deal with personal status law, inheritance, pious endowment (*waqf*), civil contracts, bodily damages and criminal law only to the extent that procedural and evidentiary rules permitted the application of the *hudud*, which was exceptional; state courts dealt with criminal law by using more flexible procedures and rules of evidence and a gamut of non-*shari'a* punishments, which might have been considered discretionary (*ta'zir*) punishments.⁴⁰ In addition, state courts handled a range of other issues not addressed by the *shari'a* courts, such as administrative and fiscal laws.

The theory of *siyasa shar'iyya*, created by the Iraqi Shafi'i jurist al-Mawardi (d. 1058) in his treatise *al-Ahkam al-Sultaniyya*, legitimizes the legislative and judicial operations of the ruler and includes them in the framework of the *shari'a*.⁴¹ This theory sanctions the above-mentioned dual judicial system (similar to the dual system in modern Saudi Arabia). Moreover, in the judicial hierarchy of al-Mawardi, the *mazalim*, as state courts, stand above the *shari'a* courts. We have to remember, however, that this theory was not initiated by the 'ulama' as an ideal theory; rather, it was intended to provide a retroactive theoretical legitimacy for de facto legislative and judicial realities, some of which were created by the 'ulama' and some of which had been forced upon them. The Hanbali jurist Ibn Taymiyya (d. 1328) argued for strengthening the legal authority of the ruler. Calling for the annulment of the dual judicial system, he recommended that both *fiqh* law and ruler's ordinances be applied by one and the same judicial body. This recommendation was eventually adopted by the Ottoman state, at least from

³⁸ On the competence of these judicial bodies, see J. S. Nielsen, "Mazalim," *Encyclopaedia of Islam* 6 (1991), pp. 933–935.

³⁹ Coulson, *A History of Islamic Law*, pp. 127–129.

⁴⁰ Vogel, *Islamic Law*, pp. 228–229, 233–235, 298–300.

⁴¹ *Ibid.*, p. 231.

the seventeenth century onwards. The Ottoman qadis applied both the *fiqh* and the legal orders (*qanuns*) of the sultans.⁴²

Viewed from this perspective, statutory legislation has been a blow to the 'ulama' in legal terms, since it deprived them of their theoretical exclusiveness as creators and interpreters of the law and transferred entire fields of law, such as private contract law, from their jurisdiction to that of national courts, which apply Western-imported codes. It also prejudiced their social and economic status and that of their institutions. From the perspective of legal practice, however, modern legislation may have been less traumatic and surprising for the 'ulama' than some interpreters suggest, because for hundreds of years the 'ulama' have become accustomed to legislative acts of the ruler and to the operation of non-qadi courts of law. In other words, modern developments do not represent a total break with the past. They also contain dimensions of continuity.

Hanafi 'Ulama' and Codification

The attitudes towards codification of the *shari'a* found among the 'ulama' seem contradictory: on the one hand, many 'ulama' opposed the modernizing steps as innovations and strongly resisted codification; on the other hand, their opposition to these steps, as each was proposed, seemed strangely weak. Moreover, a few 'ulama' supported the techniques of codification with various degrees of enthusiasm and even provided specific proposals for legislation.⁴³

Western scholars have offered a few answers to this puzzle: (1) Western power was just overwhelming; (2) the ruling local elites were won over to Western secularism, so that the 'ulama's protests were pointless; (3) the 'ulama' were devoted to the *shari'a* as an ideal, to be realized only in the idealized past or mythical future; (4) the upper level of the 'ulama' hierarchy, who identified themselves with state interests,

⁴² Layish admits that the "Ottoman *qanun*, apparently intended to supplement the *shari'a*, actually amounted to superseding it, especially with regard to discretionary punishments (*ta'zir*). In many respects, the Ottoman *qanun* may be regarded as secular legislation" (emphasis added). Layish, "Transformation," p. 88.

⁴³ Layish, "Transformation," pp. 100–101. See also the opinion of the Egyptian qadi and famous hadith scholar Muhammad Ahmad Shakir, who accepted the legal validity of statutory legislation unless it contradicted a clear text of the Qur'an. He also came up with a proposal on how to make state legislation on divorce more effective. See Ron Shaham, "An Egyptian Judge in a Period of Change: Qadi Ahmad Muhammad Shakir (1892–1958)," *Journal of the American Oriental Society* 119 (1999), pp. 443–445.

became corrupt; and (5) the 'ulama' failed to grasp the ideological challenge posed by the reforms and therefore did not mount an ideological opposition, seeking only to keep their old privileges.⁴⁴

According to Vogel, although each of these explanations has some validity, none is sufficient. In his view, the 'ulama' tolerated a ruler's reform initiatives so long as they could be construed as *siyasa* but opposed such initiatives when they interfered in *fiqh* matters. Vogel suggests a spectrum, from clear *siyasa* matters (public law, such as international and constitutional law) to clear *fiqh* matters (private law, such as family law and ritual). Towards the *siyasa* end of the spectrum, the 'ulama' acknowledged that the state exercises the initiative and enjoys great freedom. Accordingly, Ottoman 'ulama' during the nineteenth century did not object when foreign-inspired codes were adopted for such *siyasa* matters as administration, land and penal law. But when the codification effort impacted on civil law, opposition naturally increased. Vogel concedes however that while the old *fiqh-siyasa* divide well explains the reactions of the 'ulama' during the first half of the twentieth century, it does not account for the phenomenon of Islamic fundamentalist movements, or countries, such as Iran, Sudan and Pakistan, which have reinstated the "*shari'a*" and yet kept using constitutions and statutes.⁴⁵

Muhammad Qasim Zaman, author of a comprehensive study on the 'ulama' in contemporary Islam, is among those who hold that

most 'ulama' [especially the Hanafis] do not...oppose the principle of codification, in Pakistan and in other contemporary Muslim societies. Indeed, it is safe to say that when they speak of an Islamic state in the context of the modern world, they typically mean a state based on a codified shari'a law. This is a point worth stressing because the concept of codification is relatively new in the history of the *shari'a* and thus its acknowledgment is, in some important ways, a considerable departure from the earlier practice of the 'ulama'.⁴⁶

Why do the Pakistani 'ulama' as well the 'ulama' in the majority of contemporary Islamic societies so easily accept the need for codification,

⁴⁴ Vogel, *Islamic Law*, p. 216.

⁴⁵ Ibid., pp. 216–220.

⁴⁶ Zaman, *The Ulama in Contemporary Islam*, pp. 96–97. See, for example, the Pakistani scholar Mawlana Taqi 'Uthmani, a judge in the Federal Shari'at Court (constituted as part of the Islamization process promoted by president Zia al-Haqq) and vice president of Madrasat Dar al-'Ulum in Karachi, who prefers to apply a codified form of the *shari'a* over instructing the qadis to apply Hanafi *fiqh*. Ibid., pp. 94–96.

although codification weakens them vis-à-vis the state? Zaman provides three possible explanations: (1) Unlike the Saudi Arabian 'ulama', who, as Hanbalis, have always insisted on their right to exercise *ijtihad*, the Pakistani and Indian 'ulama' are affiliated to the Hanafi school, which adopted *taqlid*, and it is therefore easier for them to accept the idea of codification. (2) In most of the Muslim states the majority of legal fields, including family law, were codified during the colonialist period. This fact permits the supporters of *shari'a* to demand the expansion of codification to other legal fields. Such demand becomes possible because the *shari'a* is currently perceived as a set of discrete laws, amenable to codification and application, rather than as a jurists' law that develops constantly through a discursive process. (3) Codification is a pragmatic way for applying the *shari'a*: on the one hand, it may be argued that a considerable part of current law, that which does not contradict the *shari'a*, may remain intact, thereby maintaining legal stability. On the other, presiding judges, trained in Western law, can rest assured about their ability to apply the codified *shari'a* after a relatively short training.

The 'ulama' however insist that only they, as experts in the *shari'a*, be entrusted with the task of codifying the *shari'a*. They hold that codification should not prevent the *shari'a* from continuing to develop. It is essential that *ijtihad* within the framework of a certain law school will continue, especially with regard to novel problems that do not find their solution in the existing texts.⁴⁷

Saudi 'Ulama' and Codification

Turning now to the Saudi 'ulama': The majority of them reject codification. For them, judging is nothing but *ijtihad*, i.e., striving to draw near to God's own judgment of the case. When a qadi's decision is motivated by something other than God's will or the facts of the case, such as by a ruler's command, this entirely defeats the divine intention. Several Saudi 'ulama' have opined that codification would reduce qadis to mere "machines" or "typewriters." In 1991 the Board of Senior 'Ulama' rejected the idea of codification.⁴⁸

This rejection of codification should come as no surprise. What is surprising is that some Saudi 'ulama' do justify codification on the

⁴⁷ Ibid., pp. 97–99.

⁴⁸ Vogel, *Islamic Law*, pp. 336–338.

grounds of *siyasa shar'iyya* and *maslaha*.⁴⁹ They assert that codification will redress many evils: differences and contradictions between the judgments of various qadis, the spread of *siyasa* tribunals in the kingdom, the obscurity of its laws, the avoidance by businessmen of Saudi courts and law in favor of adjudication abroad, and a failure to prove to the Muslim world that *fiqh* can be successfully codified.⁵⁰

Some Saudi proponents of codification indicate, at least in the rhetoric, that they have in mind models of codification other than the civil-law model. For example, Shaykh Muhammad b. Jubayr, once the president of the Board of Grievances and of the Consultative Council, advocated that a group of 'ulama' from the different Sunni law schools prepare such a compilation. The code would be binding on qadis (probably by a royal decree), though if a qadi were convinced that the code did not achieve justice in the case before him, he could rule otherwise. His judgment would then be reviewed by a higher legal authority. If the latter disagreed with the qadi, it would overrule him; if it agreed, it would adopt the qadi's decision as a precedent, and it would become part of the compilation.⁵¹

To sum up, opponents and supporters of codification among Saudi 'ulama' agree, in theory, that codification as a form of law making occupies a lower order of legitimacy than *ijtihad*. Practically, however, supporters of codification seem to believe that even if codification does mean sacrificing much of the legitimacy of law in *shari'a* courts and much of the piety of the qadi function, by ensuring that elite 'ulama' dominate the drafting of codes, the result will be a net long-term gain for the 'ulama' and *fiqh*. Opponents respond as follows: (1) The historical record does not support any optimism that codification will enhance, or even maintain, the legislative role of the 'ulama'. Codification has uniformly had the opposite result. (2) Giving in to *siyasa* to any degree poses a danger to the 'ulama' and *fiqh* in current times, when the 'ulama' have lost their professional and social advantage and the modern nation-state is omnipotent. (3) Codification threatens to further undermine the legal theory of the *fiqh* and with it the transcendence of the *shari'a* itself.⁵²

⁴⁹ Ibid., pp. 339–343.

⁵⁰ Ibid., p. 350. See also the sayings of 'Umar b. 'Abd al-'Aziz al-Mutrak, a member of the Presidency of the Judiciary, the Saudi supreme judicial authority, *ibid.*, p. 348.

⁵¹ Ibid., pp. 350–354.

⁵² Ibid., pp. 358–359.

In view of the opposition to codification on the part of most Saudi 'ulama', Vogel foresees one of the three following results: (1) Codification on the civil-law model, assigning only an advisory role to the 'ulama'. This is naturally the least desirable option for the 'ulama'. (2) A stagnating *status quo*: Due to external and internal political, social and economic pressures, the chances for such a *status quo* to continue for a long time are very low. (3) The creation of a new legal theory that will be acceptable even to opponents of codification. The creation of such a theory would demand from the 'ulama' a partial renunciation of the *fiqh-siyasa* dichotomy and the adoption of new legitimacies that have been sidelined by the *fiqh*—for example, the ideals of justice and equality, *nasiha* (good advice by the 'ulama' to the ruler), an oath of allegiance to the ruler (*bay'a*), consensus (*ijma'*) and consultation (*shura*). These elements can be combined to construct a more compelling, more legitimate theory of codification than one that relies only on *maslaha*.⁵³ Vogel forecasts that if reforms are delayed too long because of the religious and political sensitivities surrounding official *shari'a*, when change does come it may be very sudden. The fate of the *shari'a* in Saudi Arabia depends to a large extent on the initiative and creativity of the next generation of Saudi 'ulama'.⁵⁴

CONCLUSION

Most of the scholars whose studies are surveyed in this paper do not believe that the creation of a new theory of law by the 'ulama' is still a reasonable option. Hallaq holds that the *shari'a* has gone forever; Mayer forecasts the total abandonment of *usul al-fiqh* in favor of a legal theory that legitimizes codification; Vogel expects the Saudi 'ulama' to find *shari'a* legitimacies for codification before it is too late and the state imposes codification according to the civil-law model; and Zaman demonstrates how entrenched are the notions of codification in the discourse of Pakistani and Indian 'ulama'.

⁵³ Ibid., pp. 359–360. I am unclear on how Vogel sees this collection of principles being integrated into a coherent theory of codification. What should be the hierarchy of these elements? How would these elements interact with revealed texts? For example, how would one deal with the fact that the principle of equality contradicts the Qur'anic position of inequality according to gender?

⁵⁴ Ibid., pp. 360–361, 365.

The insights derived from the Saudi, Egyptian and Pakistani cases permit one to conclude that the three necessary conditions set by Layish for the renovation of Islamic legal theory by the 'ulama' are not likely to be met. The 'ulama' no longer dictate the agenda of the legal discourse but rather respond to the agenda set by state agencies. The case of Saudi Arabia, in which the 'ulama' still enjoy freedom to exercise *ijtihad*, proves that the creativity and courage that scholars expect from the 'ulama' are largely lacking. It seems that the will in the future have to legitimize codification if they wish to preserve the reduced public position they still occupy. In the absence of an initiative on the part of the 'ulama', Layish claims:

The forecast development in the foreseeable future in countries outside the control of radical Islam, is an increasing tendency towards nationalization of the *shari'a* by means of codification and statutory legislation and further detachment from the orthodox *shari'a*. In that case, the *shari'a* will survive solely as a domain for the intellectual activity of 'ulama' with no practical relevance within the curtailed boundaries allocated to it by the state. Which course—renovation of the *shari'a* by its authorized exponents or nationalization of the *shari'a* by the state—is the most appropriate to be adopted? The choice between these two alternatives entails a value judgment and hence should be left exclusively to the discretion of Muslims; the historian is spared this dilemma.⁵⁵

Leaving aside the question of appropriateness, it seems that the die is cast. Although it is highly uncertain which of the three contemporary legal models, or combination of elements from all of them, will prevail, one thing is clear—codification is not going to disappear and any future theory will have to incorporate it.⁵⁶

I end with a methodological comment. The critical discussion of Islamic legal methodologies by Western scholars lacks a comparative perspective, which makes it often difficult to understand what the criteria are by which they measure these methodologies and what they precisely mean when they speak about the need for a "positive," "constructive,"

⁵⁵ Layish, "Transformation," pp. 108–109.

⁵⁶ Schacht, it seems, reached the same conclusion already in the 1950s, since he discussed the use of what he saw as the basic terms of the *shari'a*—such as the protection of the individual from the arbitrariness of the state, the respect for private property and the sanctity of the contract—as principles on which legal reformers could base "their professed aim of pervading the secular laws of their respective countries with an Islamic spirit." Schacht, "Islamic Law," pp. 135–147.

“solid,” “consistent” and “straightforward” theory.⁵⁷ Such studies may benefit from comparison with Jewish law, which is also a jurists’ law. Indeed, there is one major difference between the two systems: Jewish law, unlike its Islamic counterpart, developed for centuries in non-Jewish states, which raises questions of religious law vs. state law different than the ones that have occupied Muslim societies. However, since the establishment of the state of Israel, Jewish religious scholars, like Muslim ‘ulama’, have struggled with the need to shape a legal theory that creates space for rabbinical law within the parliamentary legal system of a nation state. Additional comparative studies between current Islamic and Jewish laws might serve to improve our understanding of the issues at hand.

⁵⁷ See, for example, Schacht, “Problems,” pp. 120, 129.