

From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified

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Introduction

Since the middle of the nineteenth century, the position of the shari'a in most Middle Eastern legal systems has changed drastically. In this essay, I want to explore this change and examine how the relationship between the state and the shari'a developed, focusing on the Ottoman Empire (including Egypt) and its successor states. Central to my analysis will be the question of who controls the production of shari'a norms, or, in other words, who has the authority to formulate the rules of the shari'a.

In the first part, I will discuss the position of the shari'a in the pre-modern period focusing on its religious character and its relationship with the state. Then I will move to the second half of the nineteenth century and go into the notion of codification and the changing role of the state. In the third part, I will analyse the present-day role of the shari'a. I will argue that the subject matter of the shari'a, codified or uncoded, has been politicized and has become very much a prominent issue in the public debate.

The Nature of the Shari'a and *Fiqh* in the Pre-Modern Time

The Shari'a as Religious Law

Unlike modern Western law, the shari'a is not regarded as an expression of the will of the state, but of God's will. The classical texts define the shari'a as: 'The rules given by God to His servants as set forth by one of the prophets (may God bless them and grant them salvation).'¹ A swift glance at the table of contents of the average legal textbook shows that they begin with purely religious topics like ritual prayer and fasting, before embarking on the discussion of the issues that are legal in the Western sense of the word, such as the contract of sale, legal capacity, succession and criminal law. The shari'a is, therefore, religious law, but this does not tell us very much. There are many different types of religious law. We want to say something meaningful about the shari'a as religious law, and we must be

more specific and define its religious character. This, I would argue, consists in two features: the fact that the basis of its validity is God's will and the fact that the shari'a also contains rules of a purely religious character.

In order to inform Mankind of his commands, God, according to Muslim belief, has sent down revelations to successive prophets, the last of whom was Muhammad. To him the Qur'an was revealed. After his death, the contents of the Qur'an were supplemented by his exemplary behaviour, the Sunna, as transmitted by later generations of Muslims and compiled in the hadith collections. These are the divine sources of the shari'a and, therefore, the foundation of its validity. This divine basis of the law may be compared with Kelsen's *Grundnorm*, the extra-legal norm explaining why laws are binding.²

A large part of the shari'a is law as understood in the West. The rules of this domain of the shari'a deal with the legal effects of certain acts or events and discuss the creation and extinction of rights and obligations between individuals and between the individual and the community. Here we find, for instance, the law of sale, of marriage, of tort, of procedure, laws that can be enforced by the *qadi* if the relevant facts can be established in court. However, the shari'a is also envisioned as a set of norms constituting the code of behaviour of a good Muslim, a guide to attain eternal bliss in Paradise. This representation of the shari'a emphasizes its religious character and focuses on the Hereafter, that is, on whether, after one's death, one can expect to be rewarded or punished for certain acts. This is done by classifying them into five categories (obligatory, commendable, indifferent, reprehensible and forbidden) indicating their effects as far as reward and punishment are concerned. For instance, performing an obligatory act results in reward, whereas neglecting it will be punished. This applies not only to purely religious obligations, but also to legal ones, such as the obligation to pay one's debts. This part of the law falls outside the *qadi*'s competence. It is the exclusive domain of the *mufti*, the legal expert whose guidance is sought by individual Muslims in matters of the shari'a, but whose opinions are not binding, unlike the sentences pronounced by *qadis*.

The following passage, taken from a seventeenth-century legal handbook that was popular in the Ottoman Empire may help elucidate the double-sided character of the shari'a:

It is not reprehensible to lease out a house in the countryside (that is, in a village) if it will subsequently be used as a Zoroastrian temple, a church or a monk's cell, or if wine will be sold in it ... (at least according to the Imam [Abu Hanifa (d.767)], because the lease confers the right to use the house and there is no sin in that. The sin is related to acts committed by the lessee of his own accord. That means

that the relationship [between the landlord and the sin] is interrupted, just like in the case of the sale of a slave girl ... to a person who wants to have anal intercourse with her, or the sale of a young slave to a homosexual ... According to his companions [al-Shaybani (d.805) and Abu Yusuf (d.798)] *it is indeed reprehensible* (to lease a house for such a use, because it promotes sin. The other three imams are of the same opinion. ... *There is agreement [among the imams] that such a lease is reprehensible in a village or a region inhabited mainly by Muslims.*³

Here the authors discuss an aspect of the law of lease. However, their concern in this passage is not whether or not under the given conditions such a contract is valid and binding, but whether a Muslim who concludes such a contract will be punished in the Hereafter because it is religiously reprehensible.

The Shari'a as Jurists' Law

A second feature of the shari'a is that it is a jurists' law and that the jurists, and not the state, had the exclusive authority to formulate the rules of the shari'a. They did so in a scholarly, academic debate, in which conflicting and often contradictory views were opposed and discussed. Actually, we must use a more precise terminology and distinguish between the shari'a and the *fiqh*. If the shari'a is God's law, the *fiqh* is the scholarly discipline aimed at formulating the prescriptions of the shari'a on the basis of the revealed texts and using various hermeneutic devices. What we find in the *fiqh* texts is the jurists' approximation to the divine law. Because of differences in understanding the texts and in the use of the hermeneutical tools, the shari'a as laid down by the jurists is not uniform.

From the beginning, there were differences of opinion that resulted in the emergence of different schools of jurisprudence (*madhhab*, plur. *madhhahib*), that ascribed their doctrines to and derived their names from famous jurists from the eighth and ninth centuries. Controversies did not only exist between these schools, but also among the jurists of one single school, even on essential legal issues. The following passage, taken from the same Ottoman handbook, discusses the various opinions within the Hanafite school of jurisprudence on the question of whether a woman who is legally capable, may conclude her own marriage contract:

Marriage concluded by a free woman ... of full legal capacity (irrespective of whether or not she is a virgin) *is valid* (even if such a marriage is concluded without the consent and presence of a matrimonial guardian. This is the authoritative opinion of Abu Hanifa (d.767) and Abu Yusuf [d.798]. This is so because she disposes of something to which she is exclusively entitled by being sound of mind

and of age. For this reason she is entitled to dispose of her property and the principle here is that whoever may dispose of his property by his own right may conclude his own marriage and whoever may not [dispose of his property by his own right], may not [conclude his own marriage]. ... According to the other *madhhabs* marriage cannot be concluded by a woman *However, the marriage guardian* (that is anyone of them as long as no one has given his consent) *is entitled to object [to such a marriage]* (that is he has the power to submit it to the judge for annulment. ... The annulment is only effective by a judgement of the court since it is a matter of appreciation. Until such a judgement is pronounced the marriage is valid and the spouses inherit from one another if one of them should die before the judgement.) *If the husband is not her coequal (kuf')* (This is to avert damage and disgrace. If one of the matrimonial guardians has approved of the marriage, those who stand in the same or in a more distant degree [to her] cannot object anymore. This right [of objection] continues until she gives birth. ... This rule can be found in most authoritative works. However, according to a less authoritative opinion this right of objection continues even after she has given birth to several children. ...) *Hasan ibn Ziyad [d. 819] has reported from the Imam [Abu Hanifa] that it is not valid* (that is that such a marriage is not valid if she marries herself without a matrimonial guardian to a man who is not her coequal. Many of our scholars have adopted this rule since many cases are not submitted to judges.) *and Qadikhan [d. 1196] has issued fatwas according to this opinion.* (This opinion is more correct and cautious and therefore preferable for fatwas in our days because not every matrimonial guardian is proficient in litigation and not every judge is just) *According to Muhammad [al-Shaybani, d. 805] such a marriage is concluded conditionally* (that is, subject to approval by the matrimonial guardian) *even if the husband is her coequal.* (If a marriage is contracted conditionally this means that before approval sexual intercourse is not allowed, that a repudiation is void and that they do not inherit from one another)⁴

Here we see that within the Hanafite school of jurisprudence there are three conflicting rules with regard to the marriages of a legally capable woman concluded on her own accord. According to one opinion, she is fully entitled to do so, except that in case of a misalliance, her agnatic male relatives may petition the *qadi* for an annulment. A second opinion holds that such a mis-alliance is *per se* invalid, whereas according to the third view, all marriages concluded by legally capable women need the ratification of their marriage guardians.

This passage, which could be replaced by many other ones, is typical of the books on Islamic jurisprudence. They juxtapose different opinions on the same issue and it would appear that the legitimacy of dissent is one of the essential characteristics of the *fiqh*. There are several classical works of comparative *fiqh* in which the controversies are discussed and explained in terms of different interpretations of Qur'anic texts of Prophetic sayings, or the application of different hermeneutical tools.

As illustrated by this passage, *fiqh* texts do not resemble law codes. They contain scholarly discussions, and are, therefore, open, discursive, and contradictory. This discussion is the monopoly of the religious scholars, the ulema. Because of their religious training they have the prerogative of formulating the law on the basis of the revealed texts. Although in the early history of Islam, this prerogative was contested by the rulers and state officials, the ulema ultimately emerged victorious.

The most important ideological device that they used to keep the state authorities at bay, was the idea of the closing of the gates of *ijtihād*. With the institutionalization of the schools of jurisprudence, the freedom of the jurists adhering to them was restricted. They regarded themselves as being under the obligation of following the views of the founders of the schools. Gradually, over the centuries, this idea developed into the notion that jurists had to abide by the *madhhab* doctrine in all its details and were not allowed to formulate new opinions. This is called the obligation of *taqlīd*, the acceptance of a doctrine without questioning its bases. In the nineteenth century, both Muslim and Western scholars criticised this notion and blamed it for the stagnation and weakness of the Islamic world. However, recent research has shown that behind that façade of *taqlīd*, the law did change under the impact of social and political developments.⁵ Moreover, they failed to see its political and legal functionality. For one, the obligation of *taqlīd* could be used by the scholars to prevent state interference with the shari'a: if the jurists, who had been trained in jurisprudence and the related religious discipline were not allowed to interpret the sources of the law and formulate new views, this was *a fortiori* the case for state officials. Thus, the religious scholars could preserve their monopoly of formulating the shari'a. The obligation of *taqlīd* also had practical advantages: it provided a certain amount of legal certainty and predictability, which would not exist if all judges and practical lawyers were entitled to formulate and apply their own interpretations of the revealed texts.

Sharia and the State: Law Enforcement

The shari'a, like Western legal systems, leaves the enforcement of the law to the state. But how could the legal doctrine, or the normative repertoire of the *fiqh*, in which on one topic often contradictory opinions were

juxtaposed, function as positive law? This would require a transformation from legal doctrine to law of the land. In this transformation, both the head of the state and the judiciary played a role, but these roles could vary from time to time and place to place. On the one hand, the head of state may content himself with creating a judiciary and leave the details of the application to the *qadis*. This means that the *qadi*, in adjudicating cases, has a great deal of discretion in selecting rules and even can use *ijtihād*. On the other hand, the head of state may limit the *qadi*'s discretion by codification, thus instructing him to follow specific opinions from the doctrine. I will return to that later. For now, it suffices to say that the Ottoman Empire followed some sort of middle course: the Ottoman *qadis* were obliged to follow the most authoritative opinion of the Hanafite school.

In order to determine the most authoritative opinion, the founding fathers of the Hanafite school of jurisprudence were assigned a ranking: An opinion of Abu Hanifa would have the highest score and be more authoritative than the opinion of any other prominent Hanafi jurist. Next came Muhammad al-Shaybani, then Abu Yusuf, etc. With regard to certain topics, the sultan, for practical reasons, would reverse the order and impose another, not so authoritative Hanafi provision. The sultan was entitled to do so because he could give instructions to the *qadis* when appointing them and thus limit their jurisdiction. If a *qadi* would act against these instructions, the sentence pronounced by him would be null and void and not enforceable. All this is strictly in agreement with the classical doctrine regarding the position of the judiciary: judges are not independent from the executive, but subordinated in the sense that the sultan would determine the limits of the *qadi*'s jurisdiction. This he could do specifying the type of cases that the *qadi* could adjudicate, by imposing certain opinions within the doctrine that the *qadi* had to follow, or limiting the period during which claims could be brought to court. Through these instructions, a well-defined body of specifically Ottoman Hanafite law developed through which the sultan could control the *qadis*' adjudication.⁶

Codification of the Shari'a

The notion of the shari'a as religious, divine law, monopolized by the *'ulamā* would *prima facie* seem to be contradictory to and incompatible with the existence of state enacted law. However, this was not the case, at least not in the Ottoman Empire. As from the fifteenth century, the sultans began to enact regulations (*qanun*) dealing with land law, fiscal and criminal law. They supplemented the shari'a where the shari'a was silent or did not give precise rules. This legislation, however, was regarded as part of the Islamic legal order and not as being in conflict with the shari'a. The enactment of these

codes did not imply that the state had the monopoly of law-making, nor that state enacted law was of a higher order than other types of law.

Codification, however, is based on an altogether different concept, for codification presupposes that the state enacts legislation that completely regulates a certain domain of the law with the exclusion of other types of law (unless the codification itself confers force of law to such other types, like in the case of custom). Codification, therefore, implies that only the state determines what law is and that state law is the highest form of law. This notion of codification has its origins in the continental civil code tradition of the early nineteenth century.

In the Ottoman Empire, codification began in the second half of the nineteenth century. During the Tanzimat period (1839–76), the ideas on the relationship between the state and the law had begun to change. Tanzimat reform was very much administrative and legal reform and legislation became one of its most important instruments. The first reform decree, the *Gülhane Rescript* (1839), emphasizes the importance of legislation:

In order to better administer the Sublime Empire (*Devlet-i 'Aliyye*) and the Well-Protected Dominions (*Memalik-i Mahruse*), it is deemed necessary and important to enact some new laws. The most important provisions of these indispensable laws consist of more personal safety, of a better protection of honour, decency and property, of fixing the taxes and specifying the way of drafting the required soldiers and the period of their service.⁷

Legislation was not only an instrument of reform, but also of centralisation and legal unification. Under the influence of Western, continental, constitutional notions, the Ottoman ruling elite became convinced of the necessity of codification of all domains of the law, so as to emphasize that the state should determine what the law of the land is. As a consequence, codification was not only used to introduce Western law codes (for example, the Commercial Code of 1850, the Penal Code of 1858), but also to modernize existing law. Examples of the codification of traditional law are the Penal Codes of 1840 and 1851, the Land Law of 1858, the *Mecelle* which is the Ottoman Civil Code based on Hanafite *fiqh* enacted between 1868 and 1876, and, finally, the Code of Family Law (*Hukuk-i 'Aile Kararnamesi*) of 1917. Behind this movement was the Western notion that traditional law, as found in the various books of *fiqh*, in administrative practices and in custom was 'chaotic and inaccessible' and that 'codification is civilization'. The need for codification was especially felt when new courts were established in which not all judges had a training in Islamic jurisprudence:

Islamic jurisprudence, then, is an immense ocean and in order to find

solutions for problems by bringing to its surface the pearls of the topics required [for solving the problems] needs an enormous skill and mastery. And especially for the Hanafite *madhhab*, there were, in subsequent generations, very many independent interpreters (*mujtahid*) and there emerged many controversies so that Hanafite jurisprudence, like Shafi'ite jurisprudence, has branched out and become diverse to the extent that it cannot anymore be examined carefully. Therefore it is tremendously difficult to distinguish the correct opinion among the various views and to apply it to the cases. ... Therefore, if a book on legal transactions (*mu'amalat*) were to be composed that is easy to consult being free from controversies and containing only the preferred opinions, then everybody could read it easily and apply it to his transactions.⁸

During the same period, there emerged also semi-official codifications, that is, private compilations of the rules of the shari'a in a certain field, arranged in sections like law codes and presenting these rules in a conveniently arranged fashion so that they could be used as easy reference tools for legal practitioners. In Egypt, Muhammad Qadri Pasha, former minister of justice, published in the 1870s compilations on family law, law of property and contracts and waqf law.⁹ These compilations had a semi-official status in those fields of law that continued to be governed by the shari'a after the reforms of 1883, when French civil, commercial, criminal and procedural law was adopted. In the Ottoman Empire, Ömer Hilmi, a former president of the Court of Cassation composed an authoritative compilation of the law of homicide and personal injury, a part of criminal law that was still enforced by the shari'a courts.¹⁰

If one compares the *fiqh* texts on a certain legal issue with the codified provisions, the differences are striking. As I said before, the *fiqh* doctrine is jurists' law and the *fiqh* texts are discursive and include various, often conflicting opinions on the issue. They are open texts in the sense that they do not offer final solutions. Provisions of a law code, on the other hand, must be authoritative, clear and unequivocal. In a law code there is no room for contradictory opinions or argumentation and its provisions must be definitive and final. Therefore, choices have to be made when codifying the shari'a. This will become clear when we compare the codified provisions of the Hanafite doctrine regarding the marriage of a legally capable woman with the *fiqh* text on the same subject quoted above.

Muhammad Qadri's compilation (ca.1875):

... If [a free and legally capable woman] concludes a marriage with someone who is socially her inferior (*ghayr kuf'*) without her agnatic guardian's express consent before the marriage, then that marriage is

per se invalid and the guardian's consent given after the conclusion of the marriage is of no avail. If she has no agnatic guardian and marries herself to a person who is socially her inferior or if her guardian has consented to her marriage with a socially inferior man, then the marriage is valid.¹¹

The Ottoman Code of Family Law (1917):

If a woman of full age marries herself without informing her matrimonial guardian and without having obtained his consent, then the matter must be examined. If she has married herself to a person who is socially her equal, then the marriage is binding even if the bride price is less than her proper bride price. However, if she has married herself to someone who is socially her inferior, then the guardian can have recourse to the judge for rescission of the marriage.¹²

Both sections contain clear and unequivocal legal rules. The dissenting opinions that existed in the *fiqh* doctrine have been excised, in order to produce one authoritative, final statement of the law. But, if we read that sections carefully, it will be apparent that the authors of these texts have made different choices. Muhammad Qadri Pasha followed the more conservative view, attributed to Abu Hanifa by Hasan ibn Ziyad, which was the prevailing view in the Ottoman Empire. The Ottoman legislator of 1917 followed another authoritative Hanafite opinion, also ascribed to Abu Hanifa, that was more favourable to women. These two texts clearly illustrate the effects of codification: the transformation from a scholarly discourse in which different and opposing opinions are juxtaposed to an authoritative, definitive statement of the law, purged from all alternative views. But this is not the only effect. The adoption of the Western concept of law code also means the adoption of the Western concept of law. As a result, the religious norms are also eliminated from the shari'a codes. Codified shari'a, then, is no more than a thinned out version of the rich *fiqh* doctrine.

When states during the second half of the nineteenth century took the power to define the shari'a, the role of the *'ulamâ* did not end completely. Their co-operation was essential in order to legitimize the state-enacted shari'a codes. But more importantly, they were needed for their expertise. This explains the pivotal role of men like Ahmed Cevdet (1822-95) in legal reforms. Trained as religious scholars and having an open eye for reform, they staffed the committees that prepared the codification of the shari'a. The necessary participation of the *'ulamâ* limited in practice the freedom of the state in codifying the shari'a. They had the power to refuse to participate if the state would enact laws that they would regard as repugnant to the

shari'a. Such a step would greatly undermine the legitimacy of codifications of the shari'a.

Who Has the Authority to Define the Shari'a Today?

In the course of the twentieth century, most legal systems in the Middle East were westernized, by the adoption of Western substantive and adjective laws and Western notions of law. However, in most national legal systems, the shari'a still had a role to play. This role varies and we can classify these legal systems in four types according to the position of the shari'a in it:

- The completely secularised legal systems, from which the shari'a has been removed. The Turkish system is the prototype of such a legal system. One has to bear in mind, however, that the shari'a, especially in rural areas, for a long time and even still today, is important at the unofficial level, for example, in the infrajudicial settlement of all kinds of conflicts.
- The legal systems that are dominated by the shari'a, which means that the shari'a is the law of the land and that state legislation can only take place in areas where the shari'a is silent or not unequivocal. This is the case in Saudi Arabia¹³ and Yemen. In the latter country, however, most of the shari'a based laws have by now been codified.
- The most common type of legal system, the one in which western law prevails, except in the field of personal status (family law, law of succession) and the law of waqf. However, nearly everywhere, the law in these fields has been codified. In its uncoded form, shari'a rules are enforced only in Egypt, where only parts of the family law and the law of succession have been enacted as state laws and uncoded shari'a is applied on all personal status issues for which there is no enacted law.¹⁴ In some countries of this group, provisions have been introduced in the Constitution to the effect that the principles of the shari'a are the main source of legislation. This was done to take the wind out of the sails of the Islamist opposition. However, nowhere was the enforcement of this provisions more than cosmetic and did it result in noticeable changes in the law.
- Finally, there are those legal systems that have been re-Islamized. They developed out of the previous system, after Islamist regimes came to power. This re-Islamization was implemented by introducing Islamic law codes in many fields, noticeably in criminal law. This type exists in Iran,

Sudan, and, to some extent, in Libya. Outside the Middle East, we find it in Pakistan and many Northern, prevalingly Muslim, states of the Nigerian federation.¹⁵

It is striking that the shari'a, nowadays, is not applied by using the classical books of *fiqh*, but via legislation. The shari'a, interpreted in different ways, has become part of a great number of national legal systems. In the field of family law and the law of succession, codification was not only a means to ascertain state control over the law and to facilitate the finding of the law for judges, but also as an instrument of reform. In these fields, states have introduced changes in the law in order to eliminate some interpretations of the shari'a that were regarded as socially undesirable. The legislators, however, went to great lengths to show that their newly enacted rules were still within the scope of the shari'a. Even in a country like Tunisia, where far-reaching reforms were introduced, such as the ban on polygamy and on extrajudicial divorce, an effort was made to show that these changes were in agreement with the shari'a.

It is even more striking that those Islamist regimes that re-Islamized legal systems (with the Taliban regime in Afghanistan as the one ephemeral exception) did so by introducing Islamic norms using modern Western legal forms. The explanation is that these states did not want to give up their control over the law and abandon it to the *'ulamâ*. Only in Iran were attempts made at incorporating the notion of the authority of the Islamic jurists (*velayat-i faqih*) into the constitution. But even here, the power to legislate is essentially vested in the parliament and the government.

As a result of the process of codification that has continued for nearly a century and a half, there are hardly any countries left where the shari'a is applied without codification. The only exceptions are Saudi Arabia, and, for a few topics of personal status law, Egypt. This means that nearly everywhere the state has assumed the power to determine what the shari'a norms are, at least in those fields that are enforced as parts of the national legal systems. This power has been withdrawn from the ulema, although they still do play some role in preparing and legitimizing legislation. Defining the shari'a became a part of national politics, with the result that its codification varies from country to country. Of course, the doctrine of the *fiqh* regarding those topics that have been codified still exists. But only as an academic doctrine, a doctrine that by state legislation has been blocked from actual enforcement by the judiciary.

This led some, mainly Western, non-Muslim scholars to question whether this legislation can still be regarded as shari'a and as Islamic. Raising this question is, I believe, not very relevant and betrays a certain polemical point of view. By arguing that codified shari'a is not shari'a and

not Islamic anymore, they want to demonstrate that the re-Islamization of the law that was introduced in some countries, was not a real re-introduction of the shari'a. In my opinion, outsiders are not competent to determine for Muslims what Islam and the shari'a is. The only correct answer would be that if Muslims hold that it is Islamic and a legitimate (albeit perhaps not the only) interpretation of the shari'a, which most Muslims do, there are no good arguments to view it differently.

As a result of the nationalisation of the shari'a, the ulema lost their time-honoured position as the exclusive guardians of the law. This affected their status in society, which had already been impaired as their economic resources, especially employment opportunities, had declined. Traditionally, the ulema had the monopoly not only of religious functions connected with the mosques, but also of education and the administration of justice. Because of this monopoly, they enjoyed a high status in society.

However, all this began to change as from the end of the nineteenth century. Because of the creation of new types of schools for the training of military officers, civil servants, doctors and engineers, the '*ulamâ* lost the monopoly of education. At the same time, their intellectual authority was challenged by some of these new professionals and by those who had come into contact with the intellectual debates in the West. This decline of intellectual status went hand in hand with a gradual decline of the economic foundations of their livelihood. Whereas originally all judges and teachers were from the '*ulamâ* class, now, after the introduction of new types of schools and the Westernization of the legal system, they had to compete with graduates of other schools. The '*ulamâ*'s intellectual leadership was not anymore unconditionally accepted. They were fiercely attacked by Islamist intellectuals, who did not unquestioningly accept the traditional interpretations of the revealed texts, propagated by the '*ulamâ*. Although most Islamist intellectuals had not had a traditional religious education, they regarded themselves as competent in this field on the strength of their knowledge of the Qur'an and Hadith, which they often understood in new ways.

This has enormously affected the discourse on the shari'a, both the codified and the uncoded parts. For, as we have seen, codified shari'a is only a section of the entire body of shari'a doctrine. Not subject to codification are the purely ritual, religious and ethical provisions of the shari'a, dealing, for example, with ritual prayer (*salat*), pilgrimage (*hajj*) and dietary prescriptions, and those rules that have a legal character but are not implemented, such as, in most countries, shari'a private law (especially the provisions on interest), criminal and constitutional law. The rules of the shari'a that were not enforced by the judiciary, were traditionally the competence of the *muftis*, who belonged to the '*ulamâ* class and had a

traditional religious training. They were the religious authorities who would counsel the believers on a specific question of the shari'a. Although there were controversies and disagreements among them, their authority was not fundamentally challenged. This however, has changed now. Many of the issues that used to belong exclusively to the domain of the muftis have now become subject to public debates, in which intellectuals without a traditional religious training also participate. During the twentieth century, intellectuals without a religious training have increasingly put their imprint on the religious debates and started to question accepted religious truths. Initially, these were intellectuals who, under the influence of western ideas, became critical of what they saw as backward religious views and practices that would block 'progress'. However, during the last decades other types of believers became more prominent in these debates. There is an increasing group of pious Muslims who argue that the traditional doctrine of the shari'a, as expounded by the '*ulamâ*', has deviated from the pure teachings of Qur'an and Sunna and only want to take these pure teachings as guidelines for their daily lives.

These developments have resulted in a situation in which defining the shari'a is not anymore the exclusive competence of the '*ulamâ*', but has become a public concern. As to codified shari'a, the debate is directly connected with national politics. Dependent on the extent to which a state has adopted democratic procedures of legislation, the shari'a codes are discussed in parliament and the media. Although the traditional '*ulamâ*' still may play a role in the preparation and the 'marketing' of these codes, the ultimate decision is with the politicians. Codification of the shari'a, as well as the question of which parts of the national legal system must be immediately based on the shari'a, therefore, have become prominent and important political issues.

Since the '*ulamâ*' have lost their intellectual monopoly, the legally unenforced sections of the shari'a are also publicly debated. Although this debate is less political than the discussions on the codified shari'a, it certainly has political aspects. Islamic symbols and doctrines are connected with political positions and are used to legitimize political points of view. Whether or not all existing views can be fully expressed depends, naturally, on the extent to which the media are free from government interference and censorship. There are many instances where certain religious views are not permitted to be expressed, because of the political associations of these views.

What does all this mean for the shari'a in contemporary Muslim society? The most important development has been that the authority of the '*ulamâ*' has been challenged and has declined. There are now also Muslims without a religious training who can have their say about shari'a issues. Those parts

of the shari'a that have been codified and are part of the national legal systems are now brought under control of the state instead of being controlled by the '*ulamâ*'. This means that it has become political and, if the structures of the state permit it, even democratized. Concerning the other aspects of the shari'a, here, too, the '*ulamâ*' have lost control, although not as drastically as in the purely legal domain. The issues of the shari'a that fall outside the scope of codified law, are now debated by all kinds of Muslim intellectuals, with and without a formal religious training. These debates have not only been politicized, as I have shown before, but also, at least potentially, democratized. However, to what extent this may lead to a real democratisation depends on whether these debates are free from political constraints that block freedom of expression.

NOTES

1. See Tahanawi [1984: i, 759].
2. On Kelsen, see Kelly [1992: 384–8].
3. See Shaykhzade and Halabi [1884/1301H: ii, 417]. The passages in bold print are the translation of al-Halabi's elementary textbook; the remainder is Shaykhzade's commentary.
4. See Shaykhzade and Halabi [1884/1301H: i, 320–21].
5. See Johansen [1988].
6. See R. Peters, 'What does it mean to be an Official Madhhab?' in Bearman, Peters and Vogel [forthcoming].
7. Text in *Düstur* [1865–66: 2–3].
8. From the explanatory memorandum of the first book of the Mecelle (1868), Kaşıkçı [1997: 75–6].
9. See Qadri Pasha [1909a]; Qadri Pasha [1893]; Qadri Pasha [1909b].
10. See Hilmi [1881–82].
11. Qadri Pasha [1909a: Section 52].
12. *Huquq-i 'A'ile Qararnamesi* [1917: Section 47].
13. On Saudi Arabia, see Vogel [2000].
14. For the modernization of the law of personal status, see Ebert [1996]; Beck-Peccoz [1990].
15. For the Islamization of criminal law, see R. Peters, 'The Islamization of Criminal Law: A Comparative Analysis' [1994: 246–74]; and R. Peters, 'The Reintroduction of Islamic Criminal Law in Northern Nigeria: A Study conducted on behalf of the European Commission', Lagos, 2001.

