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SHARI^{C}A AND STATE IN THE MODERN MUSLIM MIDDLE EAST

The Islamic shari^{C}a is central to Islam in the minds of most Muslims and non-Muslim scholars. In many ways, the centrality of the Islamic shari^{C}a has increased in recent decades. Yet despite—or perhaps because of—this centrality, the precise, even the general, role of the shari^{C}a in Islamic societies is the subject of contentious debate among Muslims. Outside of and underlying such debates are more subtle and rarely articulated differences about the meaning of the Islamic shari^{C}a. In this essay, I will put forward a general intellectual map for those varying meanings. More critically, I will suggest that important shifts in the meaning of the Islamic shari^{C}a have taken place in the Muslim world, and that these shifts are closely connected to the nature and viability of legal and educational institutions associated with the Islamic shari^{C}a in the past. As the Islamic shari^{C}a has become disconnected from these institutions, its meaning has changed in some fundamental ways. Most important, the shari^{C}a is approached less for its process than for its content. And because the shift in institutions and understanding has received much less attention from Muslims, widespread attempts to re-create older relationships (particularly involving the relationship between the Islamic shari^{C}a and the state) in fact involve a deepening rather than a counteracting of the transformation in the Islamic shari^{C}a.

In this essay, I will first present the puzzle of the political silence that greeted the substitution of Western for shari^{C}a-based legal models in the 19th and 20th centuries. I will also show that one possible explanation for this silence—that the shari^{C}a had not actually been in force—is undermined by recent scholarship. My focus will then shift to an examination of how such recent scholarship has equated the shari^{C}a not simply with a system of law but with a set of institutions and practices. I will then show how these institutions and practices survived the adoption of European legal models intact and robust, only later to decay or be abandoned; their continued existence was hardly incompatible with legal reform. Finally, I will examine recent calls for the application of the shari^{C}a and show that current understanding of its role has largely been divorced from the institutions and practices that were once essential to the shari^{C}a's meaning and existence. The central focus in this essay will be on intellectual and institutional developments in Egypt over the past century, but examples will be drawn from other cases (especially the Arab states of the Gulf).

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THE PUZZLE OF THE ABANDONMENT OF THE ISLAMIC SHARIʿA

Since the 19th century, most states in the Muslim world have created centralized and secular legal systems, borrowing largely (occasionally even exclusively) from European sources. In doing so, they would appear to have either abandoned the Islamic shariʿa or rendered it irrelevant to all questions except those related to personal status. Throughout the Muslim world, there is now little dissent from the view that this shift involved abandoning the Islamic shariʿa for culturally and religiously inappropriate foreign law. Even most legal specialists do not contest that prior to the wave of legal and judicial reform, shariʿa courts possessed general jurisdiction.[1]

Yet if such a dramatic shift indeed took place, even more remarkable is the silence that greeted it. In a few cases, new and imported court structures and legal codes provoked active resistance. In Iran, the Constitutional Revolution—which resulted in a Parliament authorized to legislate positive laws—provoked vigorous opposition from some sections of the clergy.[2] Similarly, the introduction of the Ottoman *majalla*—based on shariʿa principles but taking the form of codified law—was adduced by Zaydi imams as a motivation for rebellion in Yemen in 1891 and 1904.[3] Yet in most cases, the introduction of European legal codes, along with a hierarchical and centralized court system, drew little or no opposition.

In Egypt, new courts and codes were introduced first by the Mixed Courts in 1876, which had jurisdiction in all civil cases in which a foreign interest was involved, and then by the National Courts in 1883, which had civil and criminal jurisdiction over cases involving Egyptians. Because the Mixed Courts were constructed after prolonged international negotiation aimed at prying away consuls' jurisdiction over their own citizens, Egypt had little choice but to accept European codes and judges. But the acceptance of a similar set of codes for the National Courts should have excited more domestic opposition. The code for the National Courts was the subject of domestic political discussion, and there were proponents of a greater use of the shariʿa in its content. What seems remarkable in retrospect, however, is how little acrimony characterized the debate. The authority of the National Courts to order an execution without the presence or approval of a shariʿa-trained judge did occasion debate (and it is still the case today in Egypt that executions must be approved by the mufti).[4] Yet even this controversy possessed far greater political than religious connotations—a claim by the Egyptian khedive (the hereditary governor of the country) to be able to order executions on his own authority amounted to a denial of Ottoman sovereignty. And this brief controversy aside, daily press accounts of the deliberations surrounding the construction of the system are remarkable for the absence of any complaint concerning the abandonment of the shariʿa.[5] Given the current strength of shariʿa-minded critics of the Egyptian legal system, the subdued tone of the debate in the 1880s is striking.

Those involved in designing the new system did make unsuccessful efforts to incorporate larger elements of Islamic law into the new codes. The primary objection to this step was practical: the codes of the Mixed Courts were available, and modifying them would only delay the operation of the new National Courts. Although the process of building the courts had begun before the British occupation, it came to fruition shortly afterward. Riyad, prime minister in 1882, persuaded his colleagues that any such delay would risk increasing foreign (presumably British) influence.[6]

The Egyptian experience was hardly unique. Indeed, Egyptian experts advised many other Arab governments on how to reconstruct their legal systems on Egyptian (and thus French) lines in the 20th century. In general, the Egyptian pattern was followed by most states in the region—matters of personal status were left to the shari^{c}a courts; most other civil and criminal matters were transferred to new civil courts. This pattern was followed even by those states that have rebuilt their court systems fairly recently (such as the Arab states of the Gulf, which relied on Egyptian advice between the 1950s and 1970s). Occasional complaints were heard (^{c}Abd Allah Al Mahmud, the shari^{c}a qadi in Qatar, referred to the new courts at their introduction as the "courts of Satan"[7]), but only rarely, and they did not give way to overt resistance. Even where resistance to European encroachment did occur (for instance, during the ^{c}Urabi revolt in Egypt), objections to the abandonment of the shari^{c}a were not salient.[8]

How is this quiescence to be explained? Why did the abrupt turning away from the Islamic shari^{c}a not cause greater debate, turmoil, and even political violence? One possible answer is that those who now agree that Islamic shari^{c}a generally prevailed as the law of Muslim lands have invented a historical golden age that never really existed. Indeed, most Western scholars (and some Muslims) have been highly skeptical that the shari^{c}a ever held sway. Thus, the turn to European legal models was not a repudiation of the Islamic shari^{c}a; pre-existing law was based not on Islam but on tribal law, custom, and the edicts (and even the whims) of rulers. For example, Hamid Enayat wrote, "the majority of Muslims, for the greater part of their history, lived under regimes which had only the most tenuous link with [religious] norms, and observed the *Sharī^{c}ah* only to the extent that it legitimised their power in the eyes of the faithful."[9] If the Islamic shari^{c}a was not in effect when the new codes and court were created, then no new affront to Islam was involved.

This explanation, while plausible, may rest on even shakier historical foundations than the myth of the golden age of the Islamic shari^{c}a. Because historical and documentary evidence on legal practice is so thin, generalizations on the topic are more tolerated and less noticed. Recently, however, some scholars have focused on the limited (and more recent) periods for which documentary evidence is available to claim that in specific cases the shari^{c}a constituted a vital and basic part of the legal system.

Two of the most extensive attempts to show how the Islamic shari^{c}a informed legal practice are based on the Ottoman period in Anatolia and Egypt. In his recent work on the Ottoman Empire, Haim Gerber asserts:

> The study casts serious doubt on several fundamental notions concerning the nature of premodern Islamic society—such as the supposed gap between theory and practice, one major expression of which was the province of law: the *sharī^{c}a* was sacred, yet in practice always of marginal importance—a gap that had supposedly disastrous consequences for the moral integrity of the Muslim community.
>
> In the case study presented here, this supposed gap hardly existed; and to the extent that it did exist, it was not perceived as morbid or disturbing.[10]

Galal El-Nahal makes very similar claims for shari^{c}a courts of 17th-century Egypt, showing them to constitute a viable, highly developed legal system characterized by judicial integrity.[11]

Given the scarcity of evidence scholars would wish to have in determining the extent to which the shari^{c}a informed legal practice (at least until the quite recent past), it is difficult to support any broad generalizations about Islamic societies. It is equally difficult to disprove such generalizations. Claims that the shari^{c}a normally prevailed in practice cannot be dismissed as inaccurate. If such generalizations miss any nuances in Islamic history, it must be noted that these are nuances that proponents of this view have displayed little interest in capturing. There is as much reason to accept as to reject the idea that the Islamic shari^{c}a generally prevailed.

Thus, the explanation for the muted reaction to the adoption of European codes and court systems must move from the realm of ahistorical generalizations to historically specific circumstances. Many Muslims feel that the Islamic shari^{c}a was suddenly abandoned as the primary law in Muslim societies in the late 19th and early 20th centuries. Whether or not the shari^{c}a held sway throughout most of Islamic history, what was the case at the time when the new codes and courts were introduced? Can the absence of resistance and the paucity of criticism be explained by the desuetude of the shari^{c}a and shari^{c}a-based institutions at the time of the reforms?

The best accounts seem to indicate otherwise. Indeed, for the Ottoman Empire, Gerber claims that the importance of the shari^{c}a and shari^{c}a courts was increasing.[12] In the Arab states of the Gulf, this was also probably the case as some areas came under the influence of the Wahhabi movement and as the size and political complexity of the societies increased (with the consequent demand for specialized courts as opposed to the informality of rulers' tribunals).[13]

In the case of Egypt, it would be difficult to claim that the Islamic shari^{c}a and shari^{c}a-based institutions increased in importance, but they certainly did not fade away during the 19th century. It is true that a series of court structures was established by the country's governors that were distinct from the shari^{c}a courts, but these new courts hardly replaced the older bodies. In fact, the newer bodies were initially integrated thoroughly with the shari^{c}a court structures in some ways that are retrospectively surprising. First, the law that the courts were to enforce generally did not depart from the shari^{c}a. In some areas, there was heavy borrowing from Ottoman *qānūn* law, which generally aimed at codifying shari^{c}a principles. As the 19th century progressed, there was a move away from enforcing *ḥudūd* penalties, but there was certainly no repudiation of Islamic bases for law.[14] Second, there is little evidence that the new courts came into conflict with the exclusively shari^{c}a-based courts. Not only did the shari^{c}a courts continue operating; they often retained jurisdiction over the same cases that were referred to the new courts. Particularly in the case of murder, both court systems generally had to be involved before an execution could be effected.[15] Finally, shari^{c}a-trained personnel were involved in the new court system, though they formed a minority. For instance, the *majlis jama^{c}iyyat al-ḥaqqāniyya*, the council designated by Muhammad ^{c}Ali to legislate and try cases, contained at least two leading members of the ulama.[16]

Yet this relationship between the shari^{c}a and state courts seems to have been abruptly terminated with the construction of Egypt's National Courts in 1883. After that date, the shari^{c}a courts were confined to matters of personal status and were eventually folded into the National Court system in 1956.

Thus, those who claim that the shari^{c}a was suddenly abandoned are perhaps more accurate than scholars who claim that the shari^{c}a was generally ignored. This is ironic, because the prevalence of the shari^{c}a is an invented tradition, advanced not on the basis of historical scholarship but instead on an attempt to understand (and sometimes change) the present situation. That the invented tradition contains a large degree of truth may be coincidental. But it makes the task for historical scholarship more difficult. Given the vitality of the shari^{c}a court system in the period before the adoption of European codes and court systems, the absence of resistance and paucity of criticism becomes even more striking. To understand this silence, we must look to a far more subtle matter. We must turn away from the issue of the enforcement of the shari^{c}a to its meaning. And here scholarship can be more helpful than invented tradition.

THE MEANING OF THE ISLAMIC SHARI^{c}A

Scholars and Muslims generally agree that "Islamic law" is at best only an approximate translation of the term "shari^{c}a." Nevertheless, the distinction between law and shari^{c}a is rarely explored and seems to be rapidly diminishing in current usage, at least by Muslims. Yet it is precisely this distinction that may lie at the heart of the silence that greeted the seeming abandonment of the shari^{c}a as law. Current scholarship emphasizes the shari^{c}a's nature not simply as law but also as a set of processes and practices married to specific institutions. After exploring what these processes, practices, and institutions are, we can understand why the adoption of European codes and court systems was less noxious to shari^{c}a-minded Muslims. Later, we will be able to understand some implicit shifts in the conception of the shari^{c}a in the current political debate among Muslims that has divorced it from these processes and practices (and even institutions), changing the meaning of the shari^{c}a in some fundamental ways.

Certainly the Islamic shari^{c}a encompassed a body of law that covered a wide variety of human affairs. The observation that this law covered not simply criminal and civil disputes but also religious matters and obligations need not be belabored; it is at the core of the common assertion that the shari^{c}a encompasses more than law in the current European and American sense. Yet more than its subject matter, the shari^{c}a is increasingly held by scholars to be distinctive because it was associated with a specific process for deriving law and another for adjudicating disputes. These processes in turn were associated with specific institutions and techniques of education and adjudication. According to the portrait emerging in current scholarship, long before the 19th century (when the turn to European codes and courts began) these processes and institutions had become integral and inseparable parts of the Islamic shari^{c}a. It is worth examining this recent scholarship in some detail.

Derivation of shari^{c}a law was not a matter of referring to unambiguous and codified texts, though standard manuals existed, but of participation in a broader discourse, as Brinkley Messick explains:

> [C]aution must be attached to the conventional gloss for the shari^{c}a as "Islamic law." The shari^{c}a is better characterized, to adapt a phrase from Marcel Mauss, as a type of "total" discourse, wherein "all kinds of institutions find simultaneous expression: religious, legal,

moral and economic." "Political" should be added to this list, for the shari^{c}a also provided the basic idiom of prenationalist political expression. For the social mainstream, the shari^{c}a represented the core of Islamic knowledge, while the basic shari^{c}a manuals were the standards of formal instruction. This total discourse was first modified and displaced, creating something approximating the form and separate status of Western law, as part of the larger process that brought about the rise of nation-states. Given its former discursive range, the codifications and other often radical changes worked upon the shari^{c}a were fundamental to the creation of these new states, in far more than the narrow legal sense.[17]

More directly, Timothy Mitchell claims that Islamic law "was never understood as an abstract code setting limits within which 'behaviour' was to be confined, but rather as a series of commentaries on particular practices, and of commentaries upon those commentaries."[18] Legal—and non-legal—education therefore involved specific media and techniques designed to elucidate the practices, commentaries on practices, and commentaries on commentaries central to Islamic knowledge:

> The great teaching mosques of Cairo and of other large towns in Egypt, like those elsewhere in the Islamic world, were centres not of education, or even learning *per se*, but of the art and authority of writing. They had been established in earlier centuries by those who held political power, as endeavors to secure and extend through those learned in law, language and philosophy the authoritative support of its word. The study and interpretation of this writing was a *ṣinā^{c}a*, a profession or craft. To stress the professional, political and economic aspects of this craft, I will refer to it as 'the law', though the word should be understood to include a large body of linguistic, philosophical and theological scholarship.[19]

Thus, learning and law did not inculcate a specific body of factual material but was designed to develop a mastery of a sequence of texts and commentaries. Mitchell insists that education and other aspects of the law were completely integrated and that instructional technique reflected this:

> The process of learning always began with the study of the Quran, the original text of the law (indeed the only original text, the only text which could not be read in some sense as the interpretation or modification of earlier writing). The student then moved on to the *ḥadīth*, the collections of sayings attributed to the Prophet Muhammad which interpret and extend Quranic doctrine, and then on again to the major commentaries upon the Quran and to the other subjects dealing with its interpretation, such as the art of its recitation and the study of variant readings. From there one moved on to the studies related to the reading of the *ḥadīth*, such as the biographies of the transmitters, then to the principles of theology (*uṣūl al-dīn*), then to the principles of legal interpretation (*uṣūl al-fiqh*), then to the divergent interpretations among the different schools of law, and so on according to a sequence given in the reading and interpretation of the law, which was the nature of the art being studied. Though the choice of secondary texts might vary, there was no need of a syllabus or curriculum. The order of learning disclosed itself, by the logic of interpretation in the order of the texts.
>
> In the same way there was no need for a daily timetable. The ordinary sequence of the day's lessons mirrored on a smaller scale the same textual order. The first lessons would be given immediately after dawn prayers, by those teaching the Quran. These were followed by lessons in *ḥadīth*, followed by Quranic interpretation, and so on, working outwards eventually to the study of mysticism, left to the period after evening prayer. The order of teaching, in other words, even the order of the day, was inseparable from the necessary relation between texts and commentaries that constituted legal practice.[20]

Mitchell, Messick, and other recent scholars are attempting to refine our understanding of the Islamic shari^{c}a not by revising the standard account of its sources and interpretive techniques, but by arguing that the form of derivation and instruction of the shari^{c}a cannot be divorced from its content.

The practice or craft of law was associated not only with institutions of learning, but also with courts. The understanding of the Islamic shari^{c}a developed in recent scholarship helps explain the practices and procedures characteristic of these courts. Despite the acceptance of standard texts and manuals, law in Islamic courts generally remained "jurists' law" in the sense that it was uncodified and derived from jurists rather than from state-legislated texts.[21] Courts operated without lawyers, and most violations of the law (even most murder cases) remained essentially private disputes between parties.[22] Courts and judges were dependent for their finances on the litigants themselves, even when sanctioned and appointed by the political authorities.

The autonomy of Islamic courts can easily be exaggerated. For instance, Ottoman qanun law may have diminished the distinction between the shari^{c}a-based and state-legislated law. Even if this is the case, however, it is not difficult to understand why such a legal framework would be regarded as unsatisfactory by ambitious, centralizing states. The institutions and practices associated with the Islamic shari^{c}a gave states little control over the content of law, the finances of courts, and even the cases brought to court. Although the courts and legal institutions that emerged in Islamic societies were never completely autonomous of the political authorities, the state-building projects of the 19th and 20th centuries required that the significant degrees of autonomy that existed be reduced and even eliminated.[23]

It might seem that if current scholarship has accurately captured the meaning of the shari^{c}a, the introduction of a new legal system should have been even more controversial. In fact, however, the emerging portrait of the meaning of the shari^{c}a helps us understand the political quiescence that greeted the new systems. Although the legal reforms that began in the 19th century did renegotiate the relationship between the shari^{c}a and the state, they generally did not endanger or undermine the institutions and practices associated with the shari^{c}a.

RENEGOTIATING THE RELATIONSHIP BETWEEN SHARI^{c}A AND STATE

The legal reforms undertaken in the 19th century in Egypt and the Ottoman Empire, and implemented throughout most of the Arab world in the 20th century, did fundamentally change the nature of law as practiced and understood. Yet the Islamic shari^{c}a, understood not simply as a legal system but more broadly as a set of institutions and practices, initially survived the legal transformation intact and even autonomous. Indeed, the course that legal reform took throughout the Islamic Middle East generally, and usually quite consciously, minimized the effect on the institutions and practices associated with the shari^{c}a. To be sure, the relationship between the shari^{c}a-based institutions and the state was steadily renegotiated, generally by a diminution in the legal jurisdiction of shari^{c}a courts. Yet the autonomy of the shari^{c}a-based institutions was maintained, and their nature remained fundamentally unaltered until later. With the shari^{c}a contained rather than endangered—at least in the short term—

by legal reform, the political quiescence that initially appears so puzzling is more easily understood.

First, educational institutions (or those institutions associated with the Islamic shari^{c}a "as a craft") were largely unaffected by the new legal systems. There was a wave of reformism in some institutions, most notably al-Azhar under the leadership of Muhammad ^{c}Abduh. Yet the intellectual ferment in al-Azhar actually began before the full brunt of the legal reforms was apparent. And the reformism that emerged aimed not at the new legal institutions but at the old ones; the project was to revitalize the Islamic shari^{c}a, not to eliminate the influence of the Code Napoléon. It must also be noted that most Islamic educational institutions—including al-Azhar—remained resistant to reform in both subject matter and method. The Islamic shari^{c}a was taught as it had been for a considerable period after the legal reforms that began in the 19th century. Rarely was there an attempt to combine instruction in positive and Islamic law; the new law schools lay outside of—and completely separate from—the older institutions. And when there was an attempt to include some study of Islamic law in the new law schools, it was treated as another academic subject and taught as a body of specific legal provisions rather than as a set of commentaries on practices and commentaries on those commentaries. For a considerable period, the methods of instruction in the two sorts of institutions remained distinct. One was a world of learned men teaching circles of students through textual exegesis; the other was a world of self-explanatory texts, structured curriculum, lecture halls, mass instruction, and examination. Neither educational system encroached upon the autonomy of the other in any significant way; the Islamic shari^{c}a as it had been historically understood remained unendangered and unaffected by the legal reforms. When reform in education did come, it provoked overt resistance and foot-dragging, as will be seen.

It was not simply the educational institutions that remained as they had been. Shari^{c}a-based courts were generally left untouched in their operation by the legal reforms. Only in very rare cases (such as Kuwait) was a serious effort made to maintain a unified legal system.[24] Throughout the Islamic Middle East, the decision was made to maintain two separate legal systems, one based on Islamic law and the other on the new codes and procedures. Seen this way, the legal reforms were much more evolutionary than revolutionary. They did not involve the creation of a new legal system, because states had generally already constructed their own courts with their own law. Nor did the reforms involve changing the shari^{c}a-based system. Instead, the effect of the reforms was to renegotiate the relationship between the two systems, generally by separating them to a greater extent and by enlarging the jurisdiction of the state courts.

Until the late 19th century, when the new legal models were adopted, governments had striven to harmonize the shari^{c}a-based and non-shari^{c}a-based court systems. They did so in ways that were discussed earlier—by consulting authorities on the Islamic shari^{c}a regarding legal questions, allowing trials of some cases to go to both sets of courts, consulting shari^{c}a judges before implementing criminal punishments, and including shari^{c}a judges in the non-shari^{c}a-based courts. The legal reforms that began in the late 19th century largely abandoned the attempt to make the two systems work together; they also abandoned dual jurisdiction (though often gradually).

They did so by specifying which cases would go to which sets of courts. State courts had handled a wide variety of cases in the past; the only area that had consistently been excluded from their jurisdiction were personal status cases.[25] Accordingly, the new legal arrangements assigned most civil and criminal cases to the European-style courts; personal status cases, and occasionally matters in a few other categories, were assigned to unreconstructed shari^{c}a-based courts. The new courts abandoned efforts to work within a shari^{c}a framework.[26]

This evolutionary view of the nature of legal reform forces us to recast our understanding of its political nature. It was not a death blow to the Islamic shari^{c}a but a significant though limited attenuation of the influence of shari^{c}a-based institutions that left their essence unaffected. Thus, the political quiescence that greeted the emergence of the new courts becomes much more comprehensible. Indeed, there is strong evidence that it was precisely the realization of the comparative inoffensiveness of such an attenuation that dictated the exact nature and extent of the reforms undertaken. In most locations, a series of measures maximized the seemingly innocuous nature of the reforms.

First, during the early stages of the reform, efforts were often made to allow potential litigants to use the shari^{c}a-based system. In Egypt in the 1880s and in Qatar in the 1970s, the shari^{c}a courts were allowed to hear any case brought to them, even those that the newly constructed civil courts were specifically charged with handling. In both cases, the officially decreed patterns of jurisdiction were only gradually enforced.[77] Further, gaps in the law often had to be filled by reference to pre-existing law, which was often shari^{c}a-based. In Egypt, this practice offended European observers who felt that it undermined the reforms.[28] In some cases, such as Kuwait and Egypt, the new courts were even staffed initially by those who had worked in the older state courts (which had cooperated with the shari^{c}a courts). Some of these judges even had a more extensive background in shari^{c}a than in civil law.[29]

This incremental approach to reform often came specifically in anticipation of protest if a more radical approach were adopted. Although the leadership of the reforming states varied in their regard for the shari^{c}a, there were certainly many who viewed the shari^{c}a-based courts as inappropriate structures for modern times. Indeed, foreign observers and civil lawyers and judges have generally viewed shari^{c}a-based courts as disorderly anachronisms. Such criticisms were heard in Egypt until the abolition of the courts in 1956; they are heard in Qatar today (where the shari^{c}a courts retain jurisdiction in murder as well as personal-status cases). Shari^{c}a-based courts are denounced as operating without fixed procedures and prone to arbitrary judgments at best, and corruption at worst. To many with civil-law training, shari^{c}a-based courts appear to be an affront to the dignity of justice, and the noisy cacophony found there is deemed more appropriate to the marketplace than to a court of law. In 1896, on the eve of a limited reform in the shari^{c}a court structure, Lord Cromer explained how the courts appeared to him and why he felt the question of reform, while important, must be approached gingerly:

> The difficulty of applying any effective remedy is great. The ordinary Civil and Criminal Courts of this country have during the last few years undergone a thorough process of reform. In these Courts, in spite of some defects, justice is well and honestly administered. But it is far otherwise with the Courts termed the Mehkeme Sheraieh, of which the Meglis-el-Hasby

is a branch. These Courts deal with all questions of marriage, guardianship, and testamentary succession—in fact, with everything which relates to personal status. Their decisions are governed by the Sheriat, the sacred law of Islam, which dates from the earliest days of Mahommedanism, and which every true Moslem considers it would be sacrilege in any degree to alter. The whole institution has become thoroughly rotten to the core. It is not merely that the Code is archaic, that the procedure is puerile, and that the general principles of law which are applied are wholly out of harmony with modern ideas. These difficulties, though great, might be minimized, if not altogether overcome, were the Code, such as it is, honestly administered. The main evil consists in this, that custom, which is almost as strong as law, obliges the Judges to be chosen not from amongst the educated Mahommedans who sit on the ordinary Civil and Criminal Courts, but from what are known in Egypt as the "turbanned classes," that is to say, the Ulema of the mosques, and others of a similar stamp. Whilst this custom prevails, it is hopeless to look for a pure or intelligent administration of justice.

There is only one effective remedy for this state of things. It is to abolish the Mehkeme Sheraieh as a separate institution altogether, and to transfer their jurisdiction to the ordinary Civil Courts. This is what was done many years ago in India, and I do not altogether despair of seeing a similar change eventually made in Egypt. The discontent on this subject is so great, that it is quite within the bounds of possibility that a demand for reform will at least emanate from native sources, and, moreover, that the demand will be sufficiently strong to overcome both the reluctance to change based on semi-religious grounds, and the opposition of those classes whose interests lie in the direction of maintaining the present system. But although, should a favourable occasion arise, English influence may very properly be used on the side of the reformers, it would, I venture to think, be very unwise to endeavor to force on the reform in the teeth of the very strong opposition which would certainly be evoked. In this case, we should to a great extent leave the initiative to Moslems.[30]

Cromer's attitude helps explain why the initial goal of most governments in the region—and not merely the governments under imperial sway—was to restrict the jurisdiction of the shari^{c}a-based courts rather than move directly against them.

To return to the reasons for the political quiescence that greeted the introduction of European models of courts and law, it should be clear that the abandonment of the shari^{c}a was more apparent than real. Those scholars who portray the shari^{c}a as a set of practices and institutions rather than merely a body of rules seem to be correct. What mattered to those engaged in the Islamic shari^{c}a was maintaining those institutions and practices. Enforcement of shari^{c}a rules was not a trivial matter, but renegotiation of the relationship between those rules and the law enforced by the state was not an affront to the essence of the Islamic shari^{c}a as it had come to be understood. The older understanding of the shari^{c}a made possible a tremendous legal revolution that did not have to be treated as an assault on the Islamic shari^{c}a.

If this account is accurate, why has the shari^{c}a re-emerged as such a vexatious matter in Middle Eastern politics? How can we account for the widespread calls for the application of the Islamic shari^{c}a today? A full answer to that question is beyond the bounds of this paper, but a partial answer indicates that the meaning of the shari^{c}a has been subtly but fundamentally transformed. The institutions and practices formerly central to the understanding of the Islamic shari^{c}a have decayed and sometimes been abandoned. The new meaning of the Islamic shari^{c}a is more restricted to law and thus cannot ignore the question of the place of positive law in an Islamic society.

RECOVERING AND REINVENTING THE ISLAMIC SHARI^{c}A: THE EMERGENCE OF AN ISLAMIC CONSTITUTIONALISM?

Although the institutions and practices associated with the Islamic shari^{c}a survived the introduction of European legal and judicial models, they subsequently declined in much of the Islamic Middle East. The reform of Islamic courts and institutions of learning was generally far slower and more contentious than the introduction of the civil codes and courts. As the institutions central to older conceptions of the shari^{c}a began to change, however slowly, the meaning of the shari^{c}a narrowed but grew in political potency.

Those institutions dedicated to Islamic knowledge have been transformed into universities with lectures, specified sequences of courses, and examinations. The educational techniques and practices earlier deemed to constitute an essential part of the shari^{c}a have largely been abandoned, even (perhaps especially) in Egypt's al-Azhar. The introduction of European law and courts drew few public complaints, but the battles over instruction, structure, and curriculum at al-Azhar were long and bitter, even on issues that seemed innocuous at first glance. The construction of the National Courts in 1883 drew no vocal opposition, yet the insistence of the government on making sanitation reforms in al-Azhar provoked controversy. (In 1896, a riot resulting in five deaths followed an attempt by the authorities to remove an ailing Syrian student to a hospital.[31]) Governments thus approached educational reform gingerly. In Morocco, the French did not tackle the issue until the 1930s.[32]

In Egypt's al-Azhar, change came particularly slowly.[33] During the 19th century, numerous European observers visiting al-Azhar commented on its disorderly appearance.[34] This impression was created by the educational system in place (devoid of rigidly defined curriculum, clear class lists or even classes, and regular examinations) combined with the apparent bedlam created by multiple groups of students studying, eating, and sleeping, interspersed with teachers bending over texts and vendors hawking their wares. By the late 19th century, some within the institution had begun to press for reform, occasioning bitter struggles over every conceivable issue. Only slowly did the advocates of university-type instruction force changes (sometimes with government support); lecture halls and classrooms did not replace the mosque courtyard as a locus of instruction until the middle of the 20th century.[35]

However tenacious the opposition to recasting shari^{c}a-based education, the transformation is now complete. In Qatar, where shari^{c}a-based courts are still strong, the *qāḍī* who presided over them for a half-century (and remains their nominal president) is generally described as "uneducated" even by his successors. The term is not meant to be disrespectful; it only indicates that he received no university education or degree and was educated according to the system now viewed as anachronistic even by the courts' supporters. New judges sport their university degrees with pride.

If shari^{c}a-based educational institutions have been transformed, so have shari^{c}a-based courts, where they continue to exist. Once again, the ambitious centralizing governments that have characterized the Middle East over the past century have been able to act on their frustration with shari^{c}a-based courts only gingerly and gradually. In general, three separate sorts of measures have been taken to exert greater control

over such courts: bureaucratization, codification, and amalgamation. The sequence and extent of reforms have varied, and amalgamation has remained the exception rather than the rule. Bureaucratization has involved the integration of the courts into the fiscal apparatus of the state (instead of reliance on court fees); the establishment of administrative offices; the construction of modern court buildings; and the establishment of clear appeals procedures and hierarchies of courts. Beginning in Egypt at the close of the 19th century, such bureaucratization has proceeded slowly and been greeted by more foot-dragging than overt opposition.[36] Codification has proceeded even more slowly. Personal-status codes have been introduced in most states of the Arab world, based fairly faithfully on prevailing shari^{c}a norms. In the Arab states of the Gulf, however, such codification has been the subject of many promises and little work.[37] Amalgamation of the shari^{c}a and civil courts has been rare; in Egypt, the step drew some opposition.[38] Thus, after more than a century of judicial reform, the matter remains one on which governments move with caution. Even the French colonial government of Algeria, hardly distinctive for unobtrusive behavior, bureaucratized rather than abolished the shari^{c}a-based courts.[39]

In some countries (Kuwait and Egypt), such efforts eventually led to amalgamation, in which civil courts, staffed by secularly trained judges, apply a shari^{c}a-based law that has totally divorced the derivation from the application of law. Even in countries in which shari^{c}a-based courts maintain an autonomous existence, ideological resistance to bureaucratization and codification has ceased. And even though foot-dragging on codification has continued, bureaucratization is accepted even in Iran, which has constructed a clearly hierarchical court structure. Works of Islamic jurisprudence are now accessible to all, and Islamic law itself can be studied as a discrete subject, like all others. No particular training beyond literacy and a degree of religious sophistication are necessary to understand—and sometimes even participate in—debates regarding the content and proper role of the shari^{c}a. The divorcing of the shari^{c}a and training in a specific school of law has also progressed, and objections to eclecticism in choosing among schools of law (*takhayyur*) have consequently declined.[40]

The result has been an increased understanding of shari^{c}a as meaning law in the narrow sense. (As such, however, it does remain an important symbol of legality and accountability.) The degree to which the shari^{c}a is seen as prevailing is connected less with the institutions and practices formerly associated with it than with the degree to which the law in force conforms to shari^{c}a norms. Indeed, the meaning of the shari^{c}a has been transformed to the extent that it is the self-proclaimed proponents of the shari^{c}a who insist on viewing it solely as law, whereas more secular writers argue for a broader conception, though it need not always inform actual legal practice.[41]

With the older institutions and practices surviving for a time, it should be no surprise that the first critics of the reliance on European legal and judicial models came from outside the institutions normally associated with the shari^{c}a. In the 1930s, Rashid Rida and ^{c}Abd al-Razzaq al-Sanhuri first argued that French law was at times culturally inappropriate for Egypt and that greater efforts had to be made to incorporate shari^{c}a-based law into the Egyptian codes.[42] This argument was initially made in a mildly reformist vein, but it was transformed in a radical direction by ^{c}Abd al-Qadir ^{c}Awda, an ideologist of the Muslim Brotherhood (and a civil-court judge) who was later executed as part of the suppression of the movement in 1954. ^{c}Awda unapolo-

getically claimed his first commitment as a Muslim had to be to the shari^{c}a and that Muslims were obligated not simply to ignore but to combat those laws that contradicted the shari^{c}a.[43] By the 1960s and 1970s, calls for application of the shari^{c}a had moved to the center for Islamist movements of all stripes. Several governments heightened their reliance on Islamic sources of legitimacy, generally by symbolic commitments to Islamicizing law. The Islamic shari^{c}a, understood no longer as connected to specific institutions and practices, but instead as a set of identifiable rules, has become the most widely accepted indicator of the degree to which a society and political system are Islamic. Departures from clear shari^{c}a-based law are often held to render a social or political system both illegitimate and immoral. The vestiges of the older institutions and practices are sometimes ignored or even distrusted by some (though certainly not all) advocates of application of the shari^{c}a.[44]

The debate about the shari^{c}a is often difficult for the historically minded to follow because the change in focus in the Islamic shari^{c}a from process to content has occurred without a change of vocabulary. Thus, moving the shari^{c}a to the center of the political stage has involved a little-noticed transformation in the understanding of the nature of the Islamic tradition and history. This has forced the question that was often avoided and almost always ignored a century ago: what is the proper relationship between state-legislated law and the Islamic shari^{c}a? While contentious debates rage about Islam and politics in general, there is a surprising degree of consensus about the answer to this question: there will always be a need for some positive legislation, but it must operate within the boundaries set by the shari^{c}a. The outlines of a quasi-constitutional doctrine may thus have emerged.[45]

Although this shari^{c}a-based constitutionalism remains so vaguely defined as to bar effective operation at present (with the possible exception of Iran[46]), the way in which jurists and legal figures on the one hand and Islamists on the other have been moving, from very different starting points, to such a position is striking. Arab jurists began to incline toward a more sympathetic view of the shari^{c}a beginning in the 1930s. ^{c}Abd al-Razzaq al-Sanhuri, an Egyptian legal scholar and judge who was directly involved in writing the codes of several Arab states, argued for a greater reliance on indigenous rather than European sources of law. This led to eclecticism in his own codification efforts, in which he borrowed from some of the corpus of Islamic law but largely maintained the form and structure of the Code Napoléon. While friendly to Islamic influence, al-Sanhuri was openly hostile to the practices and institutions that had become so closely associated with the shari^{c}a—he denounced imitation in Islamic jurisprudence and called for the abolition of the shari^{c}a courts.[47] With the newer, narrowly legal conception of the Islamic shari^{c}a, its applicability to codification and legislation is difficult to deny. Tawfiq al-Shawi, al-Sanhuri's son-in-law and a leading independent Islamist intellectual, has pushed this thinking a little further. He has explicitly endorsed attempts to render the Islamic shari^{c}a in codified form. At the same time, al-Shawi presents the shari^{c}a as more effective than written constitutions and judicial review at guaranteeing freedom and preventing dictatorship and tyranny. To make this argument, he posits the shari^{c}a as the highest law, with which all lower sources of law (constitutions, normal legislation, and administrative regulations) must conform.[48] Indeed, once the shari^{c}a has been recast as a set of identifiable rules, it becomes difficult to argue that those rules can be violated

without abandoning Islam. Thus, there is little direct challenge to the idea that positive legislation must be brought into accordance with shari^{c}a rules.

Attempts by less shari^{c}a-minded political forces to avoid the full implications of this approach have only confirmed the legitimacy of the idea. Governments have pledged to revise their legal codes in order to ensure that they are operating in accordance with the shari^{c}a. By doing so, they abandon any attempt to challenge overtly the emerging constitutionalism, resorting to foot-dragging and the appointment of numerous but torpid committees to slow the process.[49] The Egyptian Supreme Constitutional Court, charged with interpreting the second article of the country's constitution (designating "the principles of the Islamic shari^{c}a" as "the chief source of legislation") has interpreted this to mean that no legislative act may contradict the shari^{c}a principles. The court has avoided striking down large sections of the civil code and a large amount of legislation only by arguing that there is a distinction between the basic principles of shari^{c}a law and discretionary interpretations.[50] By advancing this argument, the court is essentially arrogating to the Parliament and the court itself the right to exercise *ijtihād* in developing new discretionary interpretations—effectively separating the process of deriving Islamic law from any training in Islamic jurisprudence.

The ideological (if not practical) triumph of the shari^{c}a as newly understood would seem to be nearly complete. But rendering the shari^{c}a primarily as a set of legal rules, though it has cowed secularly trained jurists, has also restricted the scope of affairs within its purview. Such a set of rules inevitably omits areas; this forces the question of how far political authorities may go in developing their own rules within the bounds established by the shari^{c}a. Some Islamist intellectuals seek to minimize the role for such rules (typically citing the example of traffic laws being beneath the dignity of the shari^{c}a), but it is difficult to escape the position that legislation not directly contradicting the shari^{c}a is legitimate. This position was advanced by the early leaders of the Muslim Brotherhood, including Hasan al-Banna$^{\supset}$, ^{c}Abd al-Qadir ^{c}Awda, and Hasan al-Hudaybi.[51] The frequently cited claim of Islamist groups—that their constitution is the Qur^{c}an—thus amounts to much more than sloganeering. It represents an attempt to articulate the proper relationship between positive legislation and the shari^{c}a. ^{c}Awda wrote in this vein: "The Islamic shari^{c}a is the basic constitution for Muslims, and all that agrees with this constitution is true and all that violates it is invalid, whatever the changes of time and the developments of opinion in legislation, because the shari^{c}a came from God by way of his prophet, peace be upon him, to work by it in each place and time."[52] According to Richard Mitchell, a committee of the Muslim Brotherhood even worked in this regard to develop an Islamic civil code.[53]

The new, narrowly legal view of the Islamic shari^{c}a is thus more difficult to ignore or keep contained in specific institutions. In that sense, it is more politically potent than the former, broader version that was circumvented in the process of legal reform. At the same time, however, it is more restricted to specific matters. Implementation of the shari^{c}a in many societies would seem to amount largely to revising commercial law and criminal penalties.

Present-day Islamist movements are often accused of imagining a false past—one in which the shari^{c}a prevailed, and Islamic norms governed social, political, and economic affairs. No blanket historical statement on the extent to which the shari^{c}a

played such a role is possible based on the current state of scholarship, nor will such a statement likely ever be made solely on scholarly grounds. Yet in the Islamic Middle East in the early modern period, the shari^{c}a was generally of real and increasing importance. The golden age imagined by Islamists may have existed, but in a different form than is often understood. What happened, especially over the past century, is not that the shari^{c}a was abandoned but that it was redefined. In its old form, as a set of practices and institutions, it was maintained but rendered progressively less relevant to social life. In its current form, as a set of rules, it is sometimes not implemented, but it forces itself onto the political agenda throughout the region.

NOTES

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[1]See, for example, Tariq al-Bishri, "Mi$^{\supset}$a ^{c}amman ^{c}alā al-qadā$^{\supset}$ al-Miṣrī" (One Hundred Years of the Egyptian Judiciary), *al-Quḍāh* 5/6 (May/June 1986): 28–31; and Jibra$^{\supset}$il Kahil Bey, "Al-Qadā$^{\supset}$ qadīman wa-ḥadīthan li-qāḍin ḥaḍar al-^{c}aḥadayn" (The Judiciary, New and Old, by a Judge Present During Both Eras), *al-Kitāb al-dhahabī li-l-maḥākim al-ahliyya* (Cairo: al-Maṭba^{c}a al-amīriyya bi-Būlāq, 1938), 1–4. For an example from the Gulf, see Yūsuf Muḥammad ^{c}Ubaydān, *Ma^{c}ālim al-niẓām al-siyāsī al-mu^{c}āṣir fī qaṭar* (The Features of the Contemporary Political System in Qatar) (n.p., 1984), 256. ^{c}Abd al-^{c}Aziz al-Khulayfi, the current vice-president of the shari^{c}a courts in Qatar (and a former judge on the civil courts), claims that the sharī^{c}a courts were the primary (if not the sole) courts in Qatar from the earliest days of Islam until 1971 (personal interview, Doha, December 1994; the claim was also made in a 1994 meeting with Qatari law students).

[2]Said Amir Arjomand, *The Turban for the Crown: The Islamic Revolution in Iran* (New York: Oxford University Press, 1988), 50–52. The relationship between constitutional and Islamic law has been a major and contentious topic in 20th-century Shi^{c}i political thought.

[3]Brinkley Messick, *The Calligraphic State: Textural Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993).

[4]See *al-Ahrām*, 5 March, 10 March, and 24 April 1883. Earlier, when ^{c}Abbas (r. 1849–54) claimed the right to order executions, the Ottoman authorities objected on the grounds that this was a violation of shari^{c}a-sanctioned procedures (reserving the authority for the sultan and the shari^{c}a judge). In essence, the sultan viewed the measure as a step toward Egyptian sovereignty. After a diplomatic crisis, a compromise was adopted under which ^{c}Abbas would refer execution orders to a committee that included the Ottoman-appointed qadi: ^{c}Azīz Khankī, "Al-Tashrī^{c} wa-l-qadā$^{\supset}$ qabla inshā$^{\supset}$ al-maḥākim al-ahliyya" (Legislation and the Judiciary Before the Construction of the National Courts), *al-Kitāb al-dhahabī*, 1:79. See also Laṭīf Muḥammad Salīm, *al-Niẓām al-qaḍā$^{\supset}$ī al-miṣrī al-ḥadīth 1875–1914*, 2 vols. (Cairo: Markaz al-dirāsat al-siyāsiyya wa-l-istrātijiyya bi-l-ahrām, 1984), 1:17–18.

[5]This is based on a reading of relevant press articles from 1881 to 1883 (chiefly from *al-Ahrām* but also from *al-Muqaṭṭam*).

[6]The minutes of the cabinet deliberations and other relevant documents are included in *al-Kitāb al-dhahabī*, 102–20.

[7]Interview with a legal official in Qatar, November 1994.

[8]In the specific case of the Egyptian nationalist movement of the early 1880s, the Mixed Courts were an issue, but not because they were based on a European model. The Mixed Courts represented European control to many Egyptians, but even political leaders associated with the nationalist movement were involved in the effort to build a European-style (though wholly Egyptian) system to replace them.

[9]Hamid Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982), 1.

[10]Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 1.

[11]Galal H. El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis: Bibliotheca Islamica, 1979). For Yemen, see Messick, *The Calligraphic State.*

[12]Gerber, *State, Society and Law in Islam*, 16–17.

[13]The investigation of pre-imperial law and courts is most developed for Kuwait. See ʿĀdil al-Ṭabāṭabāʾī, *Al-nizām al-dustūrī fī al-kuwayt* (The Constitutional System in Kuwait) (Kuwait: n.p., 1994), 243–62; ʿUthmān ʿAbd al-Malik al-Ṣāliḥ, *Al-nizām al-dustūrī wa-l-muʾassasāt al-siyāsiyya fī al-kuwayt* (The Constitutional System and Political Institutions in Kuwait) (Kuwait: Kuwait Times Press, 1989), 40–89; and "Lamḥa ḥawla taṭawwur al-qaḍāʾ fī al-kuwayt" (A Glimpse at the Development of the Judiciary in Kuwait), *al-Raʾy al-ʿāmm*, 7 February 1994. A. Nizar Hamzeh contends that in Qatar most disputes were settled according to tribal law until the Wahhabi movement made the sharīʿa supreme. While plausible, there is no documentation for the claim. See "Qatar: The Duality of the Legal System," *Middle Eastern Studies* 30, 1 (January 1994): 79.

[14]This emerges clearly in the work of Rudolph Peters. See especially "Murder on the Nile," *Die Welt des islam* 30 (1990): 98. Other accounts of the evolution of 19th-century law are included in Salīm, *al-Niẓām al-qaḍāʾī*; F. Robert Hunter, *Egypt under the Khedives 1805–1879* (Pittsburgh: University of Pittsburgh Press, 1984); and Donald M. Reid, *Lawyers and Politics in the Arab World, 1880–1960* (Minneapolis: Bibliotheca Islamica, 1981).

For the importance of the mufti's rulings over the courts, see Kenneth J. Cuno, *The Pasha's Peasants: Land, Society, and Economy in Lower Egypt, 1740–1858* (Cambridge: Cambridge University Press, 1992), esp. 8.

[15]Peters, "Murder." The dispute over the authority of the Egyptian governor to order executions has already been mentioned; that dispute was resolved by involving the Ottoman-appointed qadi in the process. The practice of trying murder in both sets of courts apparently continued until the construction of the National Courts in 1883. Husayn Fakhri, the minister of justice, called for an end to dual jurisdiction in a December 1882 report to the cabinet, reprinted in *al-Kitāb al-dhahabī*, 113–14.

It may be instructive that in his treatment of mid-19th-century Egypt, Ehud Toledano focuses not on any conflict between sharīʿa and state law but between formal legal practices and discretionary authority. Ehud R. Toledano, *State and Society in Mid-Nineteenth Century Egypt* (Cambridge: Cambridge University Press, 1990), 179 ff.

[16]ʿAziz Khankī, "Legislation," 65.

[17]Messick, *Calligraphic State*, 3.

[18]Timothy Mitchell, *Colonising Egypt* (Cambridge: Cambridge University Press, 1988), 101.

[19]Ibid., 82–83.

[20]Ibid., 83–84.

[21]For the tension between codified law and jurists' law in conceptions of the sharīʿa, see Ann Elizabeth Mayer, "The Sharīʿah: A Methodology or a Body of Substantive Rules," in *Islamic Law and Jurisprudence: Studies in Honor of Farhat J. Ziadeh*, ed. Nicholas Heer (Seattle: University of Washington Press, 1990).

[22]A portrait of the resulting informality of an Islamic court is given in Lawrence Rosen's *The Anthropology of Justice: Law as Culture in Islamic Society* (New York: Cambridge University Press, 1989). Rosen's portrait differs from many other recent works, which emphasize the high degree to which the dictates of the sharīʿa inform judicial decisions. This difference might be explained partly by the widely disparate cases that have engaged scholarly attention.

[23]I have dealt with this theme in more detail in a forthcoming book, *The Rule of Law in the Arab World: Courts, Politics, and Society in Egypt and the Arab States of the Gulf* (Cambridge: Cambridge University Press, 1997).

[24]The Kuwaiti exception is best explained by the historical weakness of the sharīʿa courts there. They had never established an existence independent of the rulers' courts.

[25]In general, the jurisdiction of the non-sharīʿa-based courts expanded over time. For instance, they were granted jurisdiction over land-tenure questions in Egypt in 1858 with the new land law. See Cuno, *Pasha's Peasants*, 194.

[26]It should be noted that a sharīʿa-trained shaykh was a member of the committee that helped develop the new court system in Egypt. See *al-Ahrām*, 29 January 1883.

[27]In Egypt, the matter is not completely clear, but the cabinet did decide in December 1882 to allow sharīʿa courts to continue to hear such suits. See *al-Kitāb al-dhahabī*, 1:116–18. Fourteen years later,

an Egyptian lawyer claimed that when the National Courts were established, Egyptians would still bring disputes to the shari^{c}a courts. See "The Progress of the National Courts," *al-Muqṭaṭaf* 20 (July 1896): 521–22.

In Qatar, a "gentlemen's agreement" existed between the civil and shari^{c}a court system to allow a case filed in one court system to continue there, regardless of which court had jurisdiction according to Qatari law (personal interviews with Qatari judges, November and December 1994).

[28]Sir Edward Malet to Lord Granville, 28 November 1881, FO 141/144, piece 348, Foreign Office Records, Public Record Office, Kew, England.

[29]On the staffing of the Egyptian courts, see the cabinet decision to create the National Courts issued in December 1882, reprinted in *al-kitāb al-dhahabī*, 119–20.

[30]Cromer to Salisbury, 8 November 1896, FO 371/14620, no. 30.

[31]Bayard Dodge, *Al-Azhar: A Millennium of Muslim Learning* (Washington, D.C.: Middle East Institute, 1974), 127.

[32]See Dale F. Eickelman, *Knowledge and Power in Morocco: The Education of a Twentieth-Century Notable* (Princeton, N.J.: Princeton University Press, 1985), chap. 7.

[33]Daniel Crecelius, "Nonideological Responses of the Egyptian Ulama to Modernization," in *Scholars, Saints, and Sufis: Muslim Religious Institutions since 1500*, ed. Nikkie R. Keddie (Berkeley: University of California Press, 1972).

[34]See Dodge, *Al-Azhar*, 147; and Mitchell, *Colonising Egypt*, 80–82.

[35]See Dodge, *Al-Azhar*, chaps. 6 and 7.

[36]On Egypt, the most comprehensive account is in Salīm, *al-Niẓām al-qaḍā$^{\supset}$ī*.

[37]In personal interviews in Qatar in November and December of 1994 with personnel of the shari^{c}a courts, I heard no opposition to the idea of codification in principle. Some even cited work done by a committee of Gulf Cooperation Council ministers of justice. Yet such work, if it is taking place, is progressing quite slowly.

[38]The Muslim Brotherhood and the personnel of the shari^{c}a courts opposed amalgamation, which involved folding the shari^{c}a courts into the civil-court system. Because the shari^{c}a judges were replaced on retirement by secularly trained judges, amalgamation actually amounted to gradual abolition. For an analysis of the steps taken to minimize protest, see *Rule of Law*, chap. 3.

[39]Allen Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton, N.J.: Princeton University Press, 1985).

[40]Even in the relatively conservative shari^{c}a-based courts of Qatar, such eclecticism is adopted without controversy. In a meeting with students from the Qatar University department of law in 1994, ^{c}Abd al-^{c}Aziz al-Khulayfi, the vice president and effective administrative head of the courts, drew freely from various schools in his presentation of the shari^{c}a. I am grateful to one of the students present for providing me with a tape recording of the session.

[41]See, for instance, Muhammad ^{c}Imara's criticisms of Muhammad Sa^{c}id al-^{c}Ashmawi, "What Is the Meaning of the Islamic Shari^{c}a," *al-Manhal*, October–November 1995, 10–17. For an exposition of al-^{c}Ashmawi's views, see William E. Shepard, "Muhammad Sa^{c}id al-^{c}Ashmawi and the Application of the Shari^{c}a in Egypt," *International Journal of Middle East Studies* 28 (February 1996): 39.

[42]See ^{c}Abd al-Razzaq al-Sanhuri, "^{c}Alā ayy asās yikun tanqīb al-qanūn al-madinī al-Miṣrī" (On What Basis Will the Egyptian Civil Code be Improved), *al-kitāb al-dhahabī*, vol. 2; and "Wājibunā al-qanūnī ba^{c}d al-mu^{c}āḥada" (Our Legal Duty after the Treaty), *al-Ahrām*, 1 January 1937. Also of interest is Enid Hill, "Al-Sanhuri and Islamic Law," *Cairo Papers in Social Science* 10 (1987). On Rashid Rida, see Hamid Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982), 77–78.

[43]^{c}Abd al-Qādir ^{c}Awda, *al-Islām wa-awdā^{c}nā al-qānūniyya* (Beirut: Mu$^{\supset}$assasat al-risāla, 1985).

[44]See Eickelman, *Knowledge and Power*, 167–68, 178.

[45]It may be doing violence to the idea of constitutionalism to consider this a constitutionalist answer. It rests on viewing religiously based law as the functional equivalent of a constitution, defining the nature and limits of government authority and of normal legislation. I am not the first person to use the analogy, but its appropriateness depends on whether one views constitutionalism as the epitome of natural law or a response to its demise.

[46]See Chibli Mallat, "Constitutional Law in the Middle East: The Emergence of Judicial Power" (SOAS Law Department, working paper no. 3, February 1993, SOAS, University of London).

[47]See "Our Legal Duty after the Treaty," *al-Ahrām*.

[48]Tawfīq al-Shāwī, *Fiqh al-shūrā wa-l-istishāra* (al-Manṣūra: Dār al-wafāʾ, 1992), esp. 168–76, 192–96.

[49]Such committees have been appointed in Egypt and Kuwait with little visible effect on legislation.

[50]See Hatem Aly Labib Gabr, "The Interpretation of Article Two of the Egyptian Constitution as Envisaged by the Supreme Constitutional Court" (unpublished paper, April 1994).

[51]For Hasan al-Bannaʾ, see *Majmūʿat rasāʾil al-imām al-shahīd Ḥasan al-Bannāʾ* (Dār al-shihāb, n.d.). Al-Bannaʾ accepted the Egyptian constitution as consistent with shariʿa but rejected certain laws. See pp. 170–74 and 215–18. On ʿAbd al-Qadir ʿAwda, see *al-Islām*. In an interview, Ḥasan al-Ḥuḍaybī articulated some principles (such as election of leaders and mandatory education) that should be included in the Egyptian constitution, thus implicitly endorsing the idea of a constitutional text even within an Islamic legal framework (*Rūz al-Yūsuf*, 27 December 1952, 7).

[52]ʿAwda, *al-Islām*, 62. ʿAwda is more restrictive than most Islamicist intellectuals, requiring not only that legislation be consistent, but that it aim at implementing the shariʿa.

[53]Richard Mitchell, *The Society of Muslim Brothers* (Oxford: Oxford University Press, 1993), 260.