Chapter 2

The Sharia as State Law

Contemporary Muslim majority states make a number of commitments to the sharia. Some states, including Egypt, Saudi Arabia, Syria, Yemen, and Sudan define the sharia as the—or a—source of legislation. Other states, such as Iraq and Afghanistan, maintain that any enacted law cannot be contrary to Islamic tenets. Still others, like Jordan, constitutionally acknowledge the partial impact of the sharia within the realm of personal status law. Any state that has the task of making state law compatible with the sharia or enforcing the sharia must confront challenges and grapple with conceptual differences between the sharia, rooted in the premodern discursive practices of the four schools of law, and modern state law. Wael B. Hallaq argues that the structures of the modern state have never been compatible with Islamic governance and that applying the sharia as state law is an impossibility since, "as a paradigm of governance, [the modern state] evolved in Europe . . . [and] is uncomfortably seated in many parts of the world."[1] Likewise, as Sherman Jackson argues, there is "a particular ideological difficulty that results from a fundamental conflict between the theory underlying the nation-state and that of the Islamic legal tradition."[2]

Jackson and Hallaq raise important questions about the relationship of modern state law to the sharia. However, the argument that this incommensurability is inherent emphasizes the normative expectations that were

made of the sharia at the expense of considering the historical and institutional contexts in which the sharia was elaborated. According to Mohammed Fadel, framing the "displacement of the traditional law-finding methods of the ulamā in favor of centralised legislation" as catastrophic effaces developments in governance and the role of the law in the Arab provinces of the Ottoman Empire.[3] In fact, in many cases, the sharia and state law existed alongside one another and were mutually supportive. At a number of points, particularly in the Ottoman Empire, there were moments when state law and the sharia were much closer.

This chapter charts some of the key features of premodern sharia and delineates the conceptual differences and similarities between the sharia and modern state law. It focuses on two main areas. First, it examines the ways in which the sharia was developed, interpreted, and applied by private scholars who often had a suspicious view of the Islamic polity and who endeavored to protect the sharia from too much intervention by the state. Thus, the sharia was developed by individuals and in institutions that were connected to—but still separate from—state institutions. Second, it considers the fact that Islamic jurists organized themselves into four schools of law. These four schools recognized the concept of mutual orthodoxy, the idea that there were multiple possible answers to a legal problem or issue. This meant that, in many respects, the sharia had an uneasy relationship with codified state law, which is based on the predictability and uniformity of state law.

However, while delineating the conceptual differences between the sharia and modern state law, the chapter also addresses the ways in which the premodern polity appropriated the right to make legislation and how the sharia itself established the possibility of state law existing alongside it. The concept of *siyasa shar'iyya* laid the groundwork for a closer relationship between the sharia and the law-making capacities of the ruling polity.

In nineteenth-century Egypt, the sharia was, to some extent, marginalized and underwent important transformations. The sharia was relegated to the sphere of family law while European law was introduced for civil and criminal codes. Even in the area of family law, the sharia was subject to codification which, in many respects, marked a shift away from premodern sharia. This marginalization of the sharia had three important consequences. First, in consigning the sharia to the sphere of the family, the family took on an increased role and became more representative of religion, tradition, and cultural authenticity. The second consequence was that the sharia came to play an increasingly important role in political discourse that opposed the postcolonial Egyptian state. The demand for Islam became, as

Iza R. Hussin shows, a demand for state intervention in the sharia. The state in turn was increasingly seen as the appropriate vehicle for the establishment of the sharia.

Drawing on the work of Armando Salvatore, I argue that the third consequence of the marginalization of the sharia was that it led to the emergence of the idea of the sharia as a concept, which meant that the sharia, for the most part, was not seen as a body of laws and texts rooted in particular institutional methodologies. Rather, it became a rallying cry and was presented as a solution to cultural and political problems. Islamist thinkers increasingly came to refer to the sharia not in connection with its particular complex laws and methodologies, or the multivalence that had existed in premodern contexts, but in terms of a concept, the application of which would lead to national regeneration. It is this idea of the sharia that enabled a commitment to it to be inserted in the Egyptian constitution in the 1970s.

The Ruling Polity and the Sharia

One of the features often mentioned in discussions about the incompatibility between the sharia and modern state law is the fact that premodern sharia was jurists' law. The sharia was formulated by scholars, who had expertise in the Qur'an, Hadith, and the sources of jurisprudence. These scholars were not affiliated with the ruling polity and believed that the polity should not interpret the sharia, but only provide the circumstances for its application. Often suspicious of the ruling polity's ability to be just, these scholars worked to insulate the sharia from manipulation by the ruling authority.

In the contemporary context, the appropriate venue for the making of laws is often considered to be the centralized sovereign state. Such a state issues decrees or legislation defining the law for a geopolitical entity that has a monopoly on the legitimate use of violence. On this basis, law derives from the state and serves state power. The state retains the exclusive authority to determine what is and what is not legally binding within its territorial boundaries. The ability to restrict legal authority is central to the sovereignty of the state. Thus, modern states have an interest in precluding the existence of other legal authorities to which citizens can turn. Such an assumption was voiced by Sir John Scott (1841–1904), the British judge for the new International Courts of Appeal in Egypt, who stated in 1899 that "there are, as everyone is aware, various systems of justice in Egypt. The ordinary right of a state to impose upon all those who dwell within its limits the authority of its own laws, administered by its own courts of justice, does not yet prevail."[4]

Sherman Jackson argues that the idea that state sovereignty alone has the right to decide what is and what is not law did not exist in classical Islam.[5] In premodern Islamic thinking, Hallaq contends, the state served the law and not the other way around. Political institutions, including the executive and the judiciary, were subordinate to the sharia. Hallaq argues that paradigmatic sharia was a moral system in which law was part of the moral structure and not the director of it. In contrast, the modern state regulates religious institutions, thus "rendering them subservient to its legal will."[6]

An important aspect of this conception of law in premodern sharia was what might be described as a form of pessimism about the state's ability to serve as a moral entity.[7] Lawrence Rosen contends that there was little expectation that justice would be an integral feature of the state. Rather, it was particular persons, including laymen or jurists, who were seen as embodying the features of the just. Many commentators of the classical and medieval periods had doubts that a ruler could be truly just. The ruling polity was seen as regulating reciprocity but was not seen as possessed of justice in itself.[8] This was why the ideal role of the religious scholars, it was maintained, was to keep at some considerable distance from the ruling polity. The historian ʿAbd al-Rahman al-Jabarti (1753–1825), for example, drew upon expectations inherited from the Islamic tradition and criticized the scholars of his time by describing the ideal scholar as someone who "refused to serve the rulers as judges and in other religious posts out of piety because authority leads to tyranny, oppression and corruption."[9]

Private scholars, who were drawn from the merchant and artisan classes, interpreted and devised the sharia, sometimes in opposition to the state. From the end of the eighth century, such scholars tried to develop jurisprudence that was consistent with their understanding of divine commands. The Abbasids (750–1258) were keen to show their piety and therefore supported these scholars, allowing them to develop the law outside the structure of the ruling polity. By the end of the eighth century, a body of positive legal rulings on a whole range of issues covered by the sharia, along with a number of judicial institutions, had developed.

There were early attempts to exert more control over the ulama and centralize legal authority in the caliphate. For example, Ibn al-Muqaffaʿ (d. 759) argued that it was the caliph's right to promulgate and enact the legal decisions of a uniform, binding code. Muhammad Qasim Zaman illustrates that al-Muqaffaʿ saw the ulama "essentially as functionaries of the caliph, coopted into the state apparatus."[10]

Yet, even though the caliph was required to be able to employ independent legal reasoning, or *ijtihad*, from the mid-ninth century on, it was the

jurists and not the caliphate who, for the most part, possessed the authority to interpret the law. The influential treatise of the Islamic jurist of the Shafi'i school of law, Abu Hasan al-Mawardi (d. 1058), provides us with an example. Al-Mawardi argued that the caliph was obliged to enforce—not promulgate—the law. It was his duty to provide the circumstances under which the sharia could be applied. Al-Mawardi wrote that the caliph "must guard the faith, upholding its established sources," and administer the legal penalties "so that the faith should remain pristine and the nation free from error."[11] The Shafi'i jurist Ahmad Ibn Naqib al-Misri (d. 1368) also emphasized that the caliph's role was to apply the law, protect it, and preserve it from alteration.[12]

Asifa Quraishi argues that this system formed a kind of balance of powers between the state and nonstate actors. This was not, she argues, the balance of power that we see in modern systems, between state institutions—that is, between the executive, judicial, and legislative branches of government. She characterizes the classical Islamic balance of power as one between the government as a whole and the Islamic scholars—between the state and nonstate powers. Neither had complete authority over the law. These state and nonstate actors recognized each other's role in the premodern Islamic system.[13]

Sami Zubaida argues that, for the most part, the institutions and practices of the sharia were dominated by the ulama, with the idea that the sharia had divine origins and could not be subject to the legislation of the state.[14] This enabled Islamic jurisprudence to develop in such a way as to have a legal scale of evaluation that included two categories, recommended and reprehensible, which were ethical evaluations that dealt with individual conscience and were not legally enforceable.[15] Thus, Islamic jurists made a distinction between the legal status of an act and its desirability from a religious perspective.[16]

The jurists sought to protect Islamic law from the state by limiting the area over which the state had jurisdiction. One of the ways they did this, Rosen shows, was by limiting the range of *hudud* punishments (punishments that are believed to have been fixed by God).[17] Baber Johansen points out that Hanafi jurists made a distinction between the "claims of God" and the "claims of men," narrowing the former and thus minimizing the area that was subject to state interference. Hanafi jurists thus tried "to protect the rights of the individual against all possible infringements by the authorities."[18]

Sherman Jackson shows how, in Mamluk Egypt, the Maliki jurist Shihab al-Din al-Qarafi (1228–85) tried to limit the government's authority. For al-Qarafi, the state enjoys only executive authority and needs to impose order

upon society. The state, he argued, does not have the right to organize and control the law. Al-Qarafi sought to restrict the government's authority over the content of the law by "limit[ing] the range of matters over which government could legally claim the authority to resolve disputes."[19]

Mohammed Fadel, however, has emphasized the ways in which the premodern polity appropriated the right to make legislation. Fadel argues that jurists in the later Mamluk and Ottoman eras contended that, while an administrative act could not order the commission of something that was forbidden in jurists' law, or order the omission of an act that was obligatory in jurists' law, administrative acts "could legitimately compel an individual to perform, or refrain from performing, an act that, from the perspective of the jurists' law, was either disfavoured, permitted or merely supererogatory."[20] Fadel thus shows the ways in which *fiqh* (Islamic jurisprudence) acted as a negative restriction or a limit on state law while also enabling the polity to move beyond that law and supplement it.

The premodern Islamic state therefore appropriated the right to make legislation and referred to—and used—the sharia. In addition, while the state and the sharia were theoretically separate, the sharia also coexisted with a wide variety of institutions and state-society relations. Sami Zubaida illustrates that many other legal rules, institutions, and practices interacted with the sharia and its institutions. The sharia courts were only one of a number of judicial tribunals, most of which, such as those for criminal prosecution and punishment, were directed by the rulers outside the framework of the sharia. The qadi's (judge of a sharia court) court illustrated the point at which state law and the sharia coexisted. While the qadi's authority was given to him by the ruler, he was obliged to rule according to the sharia. The qadi judged with reference to—and not in contradiction to—the sharia.[21]

The qadi's court reflected the requirements of an increasingly complex legal system. The Islamic ruling polity's production of its own law as a means by which to govern sometimes led to tension between state law and the law of the jurists. To resolve this tension, from the eleventh century, jurisprudence employed the concept of siyasa shar'iyya, or administration in accordance with the sharia, to adapt the sharia to the requirements of the Muslim community.[22] Ibn Taymiyya (1263–1328) and Ibn Qayyim al-Jawziyya (1292–1350) developed a theorization of siyasa shar'iyya. Ibn Taymiyya argued that a ruler's law was to be deemed legitimate if it was consistent with the sharia and if the ruler had cooperated with the jurists to ensure that the law did not command people to sin and advanced public welfare.[23] Ibn Taymiyya emphasized that the ruler should follow the Qur'an and the Sunna when counseled to do so. In the case of a dispute the opinion that is more

in conformity with the Qur'an and the Sunna should be followed.[24] He thus opened up a space for rule with reference to the sharia. Siyasa shar'iyya was implemented in what Clark B. Lombardi calls "qadi's fiqh" where a ruler could require the courts to "find their rules of decision in a body of *fiqh*."[25] Such a judgment would be legally binding, even if there were alternative interpretations within fiqh. Thus, Lombardi argues, while fiqh would "no longer be the sole source of positive legal norms in an Islamic state, it remained a crucial source of negative restrictions on the state's legislative power."[26]

The mutual relationship between fiqh and siyasa was important for Islamic governance. Siyasa and fiqh were different types of law and both of them made up the rule of law. Siyasa came from the ruler's assessment of public need and dealt with areas about which Islamic literature gave little direction. Quraishi points out that rulers were not able to form new fiqh or change the content of existing fiqh and that their power was limited to the realm of siyasa. However, the existence of siyasa enabled fiqh scholars to oppose forcing a particular fiqh doctrine upon the population. This enabled the multivalent nature of fiqh to be protected. Thus, Muslim rulers often applied siyasa rules to everyone, while appointing "a variety of *fiqh* scholars as judges so that laypeople seeking to resolve their *fiqh*-based legal conflicts could do so according to their chosen school of law."[27]

Quraishi argues that the possibility of creating siyasa law means that siyasa should not be seen as opposed to fiqh, but rather as part of it. Quraishi contends that "it could be said that when a state makes a *siyāsah* rule for the public good, then the state is acting consistently with its Islamic obligation to uphold the Sharī'ah."[28] In fact, classical fiqh scholars were deferential to rulers, and for the most part did not oppose siyasa power.[29]

Sherman Jackson shows that the sharia itself enabled law to go beyond the sharia. He contends that the sharia imposed limits on its own jurisdiction.[30] Fadel also argues that, rather than representing an immutable set of prepolitical rights and obligations, fiqh included the entitlement "to promulgate morally binding positive law which goes beyond the pre-political rights and duties of the jurists' law."[31] Fadel concludes, therefore, that rather than representing the failure of fiqh or a product of necessity and arbitrary power, siyasa actually represents a conception of public law that was the "result of the deliberations of an idealized agent acting to further the national good of his principal, the Muslim community."[32]

The doctrine of siyasa shar'iyya helped facilitate and legitimate governance in the Ottoman Empire.[33] Ottomans consistently maintained respect for the sharia even though the Sultan's *qanun*, or law, originated independently of it. Suleiman the Lawgiver (1494–1566) classified existing practice in sharia

terms. Ebussuud Efendi, who was the shaykh al-Islam—the highest religious office—under Suleiman, tried to bring the law of the empire, the qanun, and the sharia, much closer together. Qanun frequently referenced the sharia and qanun and fatwas often declared the qanun's compatibility with the sharia.[34] Yet the Ottomans also went further and brought religion and law into their own institutions, ultimately making both religion and law subject to imperial authority. The Ottomans integrated the ulama into the bureaucracy with religious offices existing in all levels of the government in what Ahmet Kuru has referred to as an "ulama-state alliance."[35] Jurists were appointed to serve as legislative advisers and judges. Qadis who based their decisions on the sharia, as well as qanun and customary law, were treated by the Ottoman Empire as state functionaries administering state law, and "not as purely religious judges following the books of *fiqh*."[36] Haim Gerber shows that the Ottomans attempted to include qanun legislation within the sharia, which was something that the Ottoman state had never done before. A collection of fatwas authored by Ebussuud Efendi (1490–1574) reveal that the Ottoman state aimed to innovate, possibly to legislate, within the sharia by using the authority of the sultanate.[37]

Premodern Islamic history was characterized by a relationship of some distance between the sharia and state law, but this distance was not complete or consistently maintained. The extent of the distance between the ruling polity and the sharia varied and was subject to negotiation. While the sharia and siyasa existed as separate realms of law, they also often mutually reinforced one another. State law enabled the sharia to maintain its status as jurists' law, and the sharia enabled state law to function if it ruled in conformity with the sharia. The Ottoman Empire made attempts to close this gap by using the sultan's authority to legislate within the sharia.[38]

The Schools of Law

One of the other central features of premodern sharia that is often mentioned in arguments about the incommensurability of the sharia and state law is that the sharia was formulated, interpreted, and often applied through a system of multiple schools of law. Contrary to common assumptions made by contemporary groups wishing to apply the sharia, the sharia is not a specific body of legal rules. Rather, it is a set of institutions and various interpretive methodologies, which flourished within the system of multiple schools of law.

While the sharia can be found in the extant texts of Islamic jurisprudence, premodern sharia was also rooted in certain premodern institutions.

These institutions had particular methods for assessing evidence and discovering facts that were reflective of different personal relationships. Lawrence Rosen emphasizes that justice in premodern Islam was not an abstract ideal. Justice, he argues, was not rooted in manuals and texts, but was personalized and contextualized. Rosen argues that the qadi did not aim to implement a consistent body of legal doctrine, but rather aimed to put "people back in the position of being able to negotiate their own permissible relationships."[39]

These judicial processes were rooted in the different methodologies of the schools of law. A school of law was similar to an independent association or guild of jurists, characterized by a particular interpretive methodology. Initially, there were numerous schools of law, all of which employed independent legal reasoning, or ijtihad, to determine questions of *fiqh* (Islamic jurisprudence) using the various sources. Up to about the ninth century, ijtihad referred to a freer type of direct scriptural interpretation whereas later forms of ijtihad more strictly adhered to laws relating to the different sources of Islamic jurisprudence, with each school emphasizing different sources.[40]

By the end of the eleventh century, the number of permanent Sunni schools was reduced to four, known as the schools of law. This coincided, Jackson argues, with increasing emphasis on *taqlid*, or following in the footsteps of previous legal reasoning, as opposed to ijtihad, using independent legal reasoning. Jackson refutes Hallaq's argument that the gate of ijtihad did not close, and contends that taqlid did indeed come to be dominant, and ijtihad increasingly restricted. The emphasis on taqlid increased the authority of the school of law thereby taking authority away from the individual jurist. The schools of law relied on taqlid to sustain and perpetuate their authority. The Maliki jurist Shihab al-Din al-Qarafi (1228–85) posited that a view acquired orthodox status not because it came from someone exercising ijtihad, "but because its advocate represented one of the orthodox" schools of law.[41]

All four schools were equally orthodox and mutually recognized. The system of schools of law inherently recognized a plurality of perspectives. The Shafi'i jurist Ahmad Ibn Naqib al-Misri (d. 1368) asserted that "scholarly differences are thus something natural, even logically necessary."[42] The doctrine of mutual orthodoxy stems from the fact that the process of legal interpretation was viewed as a fallible human activity, and thus legal decisions could only be accepted as probable interpretations of divine will, not certain ones. The standing of legal reasoning was based on the intention of the jurist undertaking the legal reasoning and not on the result of such reasoning.[43]

The doctrine of mutual orthodoxy meant that caliphs, sultans, and rulers would frequently appoint judges from multiple schools of law. The Mamluks (1250–1517), for example, appointed a separate judge for each of the schools of law.[44] Until the mid-nineteenth century, the sharia courts applied the doctrines of all four schools of law. While the Hanafi school of law was the official school of the Ottoman Empire, before the nineteenth century the sharia court system accepted the doctrines of the other three schools of law. The doctrine of mutual orthodoxy allowed individuals to apply to the school of law that best aligned with their interests.[45]

However, the doctrine of mutual orthodoxy was challenging for rulers who wanted to apply a single, predictable body of law. While in theory the authority of all four schools of law was equal, in practice some schools were closer to sources of power. This proximity conferred added legitimacy to the particular school of law, often at the cost of the other schools.[46] In thirteenth-century Mamluk Egypt, for example, the Shafi'i school emerged as dominant. The Mamluk chief justice refused to implement rulings handed down by judges from other schools when these contradicted the Shafi'i school. The jurist Shihab al-Din al-Qarafi (1228–85) was a member of the Maliki school, which was the second largest school in Cairo at the time. Jackson shows that al-Qarafi protested these exclusivist policies and developed "a theory designed to preserve the integrity of his and, by extension," all the schools of law.[47] Al-Qarafi attributed what Jackson refers to as "corporate status" to the schools of law "by virtue of which the views of all the schools are protected as constituents of the larger edifice of orthodox Sunni law."[48] The school of law emerged as the sole repository of legal authority. This allowed the members of a certain school of law to act according to its jurisprudence while also being exempt from the rules of another school of law.[49]

Jackson maintains that there was little concern with the problem of the relationship between schools of law and sources of power in the formative and medieval periods. However, this relationship became an important issue in the postclassical period.[50] This was particularly so in the Ottoman Empire, which supported the Hanafi school of law. All appointments made from Istanbul were of Hanafi qadis. The chief mufti was a Hanafi. Muftis and qadis of the other schools of law were appointed locally based on the needs of the population.[51] The Hanafization of law was pursued more rigorously in the nineteenth century when Sultan Mahmud II (r. 1808–39) enforced the Hanafi school of law in all the courts. The Hanafization of the sharia courts ended the flexibility that the subjects of the Ottoman Empire had enjoyed. In Egypt, which had been part of the Ottoman Empire from the early sixteenth century, the Hanafi school became the official school of law in 1856.

By this time, the grand mufti of Egypt—a position that had been created by Muhammad ʿAli (1769–1849) in 1835—was invalidating court decisions that were not based on Hanafi rules.[52] The head of al-Azhar had always been a Shafiʿi from 1725 to 1870, but from 1870 until 1969 more than half were Hanafis.[53] Kenneth Cuno argues that the process of Hanafization had such an impact in Egypt that, by 1897, the Hanafi school of law was known as the "established doctrine" when referenced in legal documents.[54]

Hanafization precipitated the decline of the schools of law and the authority of the ulama. Muhammad ʿAli sought advice on reforming Egypt not from the ulama of the schools of law but from "progressive Sunni jurists," such as the writer and intellectual Rifaʿa al-Tahtawi (1801–73). Muhammad ʿAli's government established national schools with a European-style curriculum unaffiliated with the schools of law. Nineteenth-century courts increasingly applied official law codes as opposed to qadi's jurisprudence. There was no requirement that judges be classically trained. By the twentieth century, the institutions of the schools of law had weakened and their domination of educational and judicial training institutions had ended. The schools of law no longer controlled law in Egypt.[55]

Modern Islamic reformist thought mirrored this movement away from the schools of law. The Islamic jurist and founder of Islamic modernism, Muhammad ʿAbduh (1849–1905), called for reviving Islam by breaking the power of taqlid over men's minds and eradicating its deep-seated influence.[56] Muslims, he argued, had distorted Islam's perfection by closing the door to ijtihad and blindly following taqlid. The Qur'an and Sunna were to be the true guides by which men possessing intellect could deduce legal stipulations. He called "the attitude that always wants to know what the precedents say" stupid and foolish and wrote that "mere priority in time, it [Islam] insisted, is not one of the signs of perceptive knowledge, nor yet of superior intelligence and capacity."[57] While there is clear antipathy in ʿAbduh's thought toward an overreliance on Islamic jurisprudence of the four schools of law, he did not call for bypassing the schools of law and the writings contained in Islamic jurisprudence entirely. At times, he praised certain jurists, particularly those of the early Islamic period.[58] Nevertheless, one of the implications of such an approach—and not necessarily one that was advocated by ʿAbduh—was a rejection of too much reliance on the schools of law and their various methodologies.

Later thinkers would take this antipathy toward Islamic jurisprudence of the four schools of law much further. For example, the Islamic reformer Rashid Rida (1865–1935) emphasized returning to the Qur'an and the Sunna, and rejected the authority of many rules of the classical tradition. For Rida, only those points of law on which the companions of the Prophet had

reached a consensus were binding. Rida wrote that a ruler's law did not need to conform to the ijtihad of the jurists. Ijtihad, he stated, is a matter of opinion and is not infallible. As long as laws did not contravene explicit texts, they should be followed.[59] Rida was critical of the factions that sided with a special imam and with particular ulama. He stated that "the multiplicity of schools in the religion contradicts the religion's purpose" and has contributed to divisions in Muslim society.[60] The decline in the authority of the schools of law contributed to a situation in which reformers would select from different doctrinal schools (a process known as *takhayyur* and *talfiq*, harmonization) to reach what they felt was the best outcome. This process of selection also enabled reformers to develop a version of the sharia that was closer in form to European law. Yet, in doing so, the sharia was transferred into a set of positive legal norms that had been separated from their institutional context. Such an institutional context, Anver M. Emon argues, had formed a vital component of the meaning and sense of the sharia.[61]

Such an approach to the schools of law can be seen in the thought of the contemporary judge and writer, Tariq al-Bishri (b. 1933), who served on the committee to review the Egyptian Constitution of 1971 that was set up by the Supreme Council of Armed Forces after the revolution. In calling for Egypt to establish its own judicial independence, al-Bishri advocates "taking from Islamic *fiqh* within the scope of a renewal (*nahda ʿilmiyya*) of this *fiqh*, without being tied to a particular school of law, while also respecting harmony with the general legal structure" of Egypt.[62] Law, he argues, should be made in the national interest, and broader principles, such as the idea that rights are not absolute but are restrained by the public interest, should be taken from fiqh. He calls for opening the gate of ijtihad in Islamic legislation and for this ijithad to take into account the reality of daily life in Egypt.[63]

The decline of the schools of law facilitated the move toward state centralization and the codification of the sharia. It also led to changing sensibilities about the nature of religious authority. This meant that more Egyptians without classical legal training began to serve as judges and began to conceive of ideas about a much closer relationship between the sharia and the state. Those, like Rashid Rida, who wanted greater proximity between the sharia and state law, found that their ideas and writings gained traction.

Codification

In the contemporary context, lawmaking is considered to be vested in the centralized sovereign government, which issues decrees and legislation that define the laws of the territory under its control. A single legal code assumes

a level of uniformity and predictability that is considered to be important for political control and stability.

Codification is a process of forming statutory law in which a broad range of interconnected subjects are treated systematically and simultaneously in one document, as opposed to the episodic treatment of isolated issues. Codification is designed to make law more transparent, consistent and accessible. Codified law is different from common law, which is derived from custom and judicial precedent. Codification refers to the laying down of laws from the beginning to be applied to a number different future situations rather than the giving of a verdict in the context of a specific case.[64] Modern law making often—at least in civil law systems and less so in common law systems—assumes codification and codification presupposes that only the state determines what law is. In turn, the codification of law facilitates the state's increasing involvement in everyday affairs.

In the nineteenth century, the Ottoman Empire, which laid many of the foundations of modern Egyptian law, pursued a policy of state centralization, legal consolidation, codification, and Islamization. This process was driven by the idea that legal authority resides in the impersonal institutions of the state and not in the sultan or in God. Such ideas began to take shape with the reforms of the Ottoman Sultan Mahmud II (r. 1808–39). Mahmud II established the Council for Juridical Enactments, thereby locating legislative authority in an institution that was distinct from the sharia and from the will of the sovereign.[65]

This project of centralization and increased state control continued under the government of Sultan ʿAbd al-Hamid II (r. 1876–1909). Ottoman officials wanted to centralize power over legal institutions and practices and centralize and consolidate state control. The codification of the sharia formed part of these reforms. The sharia was used in this project to enhance the empire's legitimacy.[66] Sultan ʿAbd al-Hamid II had an absolutist vision of state control that was Islamic and emphasized one united identity. Karen Barkey argues that it was a modernist plan intended to unify the Ottoman people under a common ideology.[67]

The first attempt in the Ottoman Empire to codify the sharia was known as the *majalla* which was published from 1870 to 1877. It was intended to be accessible and comprehensible to all.[68] The majalla was based on the opinions of the Hanafi school of law and dealt with a variety of subjects. However, the majalla resembled European codes much more than it did the sharia. While the majalla was based on the Hanafi school of law, it did not always incorporate the dominant opinions of the Hanafi school, and sometimes incorporated legal norms from other schools of law.[69] Samy Ayoub cautions against

seeing the majalla as representative of a fundamental break with premodern sharia and argues that the majalla both continued and changed the Hanafi legal tradition. The majalla, he argues, came out of Hanafi legal norms, was faithful to those norms and doctrines, and was justified by its drafters by reference to Hanafi norms.[70]

However, Ayoub also points out that the majalla fostered the role and authority of the Ottoman state. Ayoub emphasizes that the main function of the majalla was to cover the judicial aspect of fiqh. The codifiers of the majalla were much less concerned with the ethical dimensions of fiqh as shown by the fact that the categories that qualify human actions in Hanafi fiqh were not maintained in the majalla.[71] Messick argues that the majalla "for the first time brought closure to the 'open text' of shari'a jurisprudence."[72] The central feature of the sharia was that it did not give the ruler legislative authority. However, with the majalla, public officials and not the jurists, were given the authority to produce the sharia, which was then to be approved by the sultan.[73]

Officially, the majalla had jurisdiction throughout the empire, but it was not applied in Egypt. Initially, there were attempts to establish an independent Egyptian legal system with codified sharia. Muhammad 'Abduh (1849–1905) recommended codifying the sharia by compiling a compendium of the positions of all the schools of law from which qadis could choose, hoping that this would facilitate consistency in jurisprudence.[74] Muhammad Qadri Pasha (1821–88), a secular lawyer trained by Azharis in comparative law, wrote a codification of the sharia in the style of European legal codes, modeled on the Ottoman majalla.[75] Qadri Pasha also wrote a compilation of the Islamic rules on endowments and a book on Islamic personal status law. While both of Qadri Pasha's books were based on Hanafi law, they reconstructed Hanafi law in the form of positive law by selecting a single rule from among the multiple opinions within the Hanafi school of law.[76]

However, in 1883 the Egyptian government abandoned Qadri Pasha's draft Islamic code, deciding instead to adopt European secular codes of law based largely on French law. The Mixed Courts had been established based on French codes in 1875 to adjudicate cases between Egyptians and foreigners. This led to the adoption of French codes for civil law, civil procedure, criminal law, criminal procedure, commercial law, and maritime commercial law in the National Courts. This was not the first time European law had been introduced. Leonard Wood points out that, in the mid-nineteenth century, the Ottoman-Egyptian ruling elite applied criminal laws, constitutional laws, and land laws of mainly French and Swiss origin. The investigative procedures followed were also of European origin. The

Ottomans had established Nizamiyya courts, based on French law, as part of the Tanzimat reform process.[77]

The adoption of Western codified law is often framed as resulting from colonialism, in which Egyptians are accorded little agency. Rudolph Peters argues that, until 1883, the government was "keen on creating a legal system that would ensure the correct application of Ḥanafī law" and that the "wholesale reception of foreign law in Egypt beginning in 1883 must therefore be attributed to strong foreign pressure."[78] While codification predated the direct colonial encounter in Egypt, it was done, Hussin argues, "in the shadow of colonial power."[79] Kenneth Cuno contends that the Ottoman Empire—including Egypt—defensively adopted European-style and European-derived codes and courts hoping to bring an end to the unequal treaties that had been imposed on it by Western powers.[80]

Nathan J. Brown, however, asserts that legal reform should not be understood solely in terms of colonial pressure and cautions against removing "the initiative from the subject population."[81] He argues that the Egyptian elite consciously turned away from Islamic and Ottoman sources toward Europe to establish an independent judicial system that centralized state power. The Egyptian government, Brown argues, used the construction of the National Courts to keep the courts out of the control of the British. Legal reform, Brown argues, was initiated before the peak of European control and "what attracted such elites was not the Western nature of the legal systems they constructed but the increased control, centralization and penetration they offered."[82]

Leonard Wood concedes that many who worked in the Islamic courts and who were experts in Islamic law "interpreted Egypt's European law as an affront to Egypt's religious, cultural, national, and transnational Muslim identity."[83] However, he contends, the new Franco-Egyptian law was not stridently opposed. Most Egyptian law professionals, he writes, "believed that they were living in an age in which the old legal order no longer mattered—and they conducted their work accordingly."[84] Egyptian Muslims in the 1870s and 1880s revered the sharia, but it had been marginalized by the growth of secular courts since the middle of the century.[85]

In addition, the adoption of Western codified law was supported by some ulama who feared that the codification of the sharia would result in them losing their authority over the interpretation of the sharia.[86] Many ulama disapproved of the majalla project, seeing acts of codification as the state taking over the sharia.[87] When Khedive Ismail (1830–95) approached the scholars of al-Azhar with a request to write a compendium on sharia laws and penalties organized like European laws, he was refused. The Egyptian intellectual

Rifaʿa al-Tahtawi (1801–73) excused himself from this process "saying that he did not wish to be denounced as an infidel."[88] Rashid Rida criticized Islamic jurists who opposed the codification of the sharia on the grounds that it contradicted Hanafi doctrine. He advocated selecting from the sharia rulings that would accord with the sultan's needs as a defense against the introduction of foreign law.[89]

Islamic traditionalists thus aligned with many elite and secular Egyptians in their opposition to the codification of the sharia. Leading Egyptians, Brown writes, "shared a common belief with many colonial officials that the *shariʿa* in its present form was unsuitable for a modern state."[90] Husayn Fakhry Pasha (1843–1920), the new minister of justice, argued that a code based on the sharia "would not be consistent with the arrangements to which Egyptians were accustomed" and urged that the laws that were being applied in the Mixed Courts be adopted in the National Courts.[91] Brown shows that, while this did foment discussion in Egypt, and there were proponents of a greater use of the sharia in the National Court codes, such discussion was relatively limited.[92]

The legal scholar ʿAbd al-Razzaq al-Sanhuri (1895–1971) wrote the first version of the Egyptian Civil Code in 1949. Malcolm Kerr shows that, in drafting the civil code, al-Sanhuri relegated the sharia to a third and therefore minor place by selecting some concepts from the sharia on a piecemeal basis.[93] However, Mohammed Fadel argues that al-Sanhuri acknowledged a role for the premodern Islamic legal tradition within state law and thus "assured the continued relevance of that tradition precisely at a time when its continued legal relevance was increasingly in doubt."[94] In so doing, Fadel contends, al-Sanhuri reinforced "the notion that the law was an artifact of sovereign will rather than the product of the religious and discursive practices that constituted Pre-Modern Islamic Law."[95]

Personal Status Law

In modern Egypt, civil and criminal codes have been based for the most part on European law. In the nineteenth century, the sharia was marginalized and consigned to the sphere of the family. The codification of other areas of the sharia outside of the family occurred in other areas of the Ottoman Empire and did not take effect in Egypt. In relegating the sharia to the domain of the family, the family became increasingly associated with morality, and in turn with notions of cultural authenticity and tradition. The religious and the private realms were, Hussin argues, "co-constituted over the Muslim family."[96]

Yet, while the family gained a particular resonance for its association with the sharia in the colonial period, its role as an identifier is not solely the product of nineteenth-century colonial intervention. Lev E. Weitz shows how family law was central for medieval Middle Eastern Christians in their articulation of difference from their Muslim counterparts. Weitz argues that Christian bishops in early medieval Syria, Iraq, and Iran responded to the development of Islamic jurisprudence from the seventh to the ninth centuries by forming new traditions of communal law.[97] East Syrians, in particular, he argues, "developed the most extensive tradition of Christian law in the medieval caliphate."[98] The distance of Egypt's Coptic community from the center of Islamic legal thought—and its relatively large size—meant that it was not until the eleventh century that Coptic elites produced law that regulated Christian households.[99]

Weitz argues that marriage and the family became central to the creation of an area of communal law for Christians. In the seventh century, marriage was brought under the "purview of religious law" and became "constitutive of the religious community as a social body."[100] Weitz points out that "it would take several centuries for the Latin and Greek churches to develop a systematic theology of marriage as a sacrament."[101] Safi Ibn al-ʿAssal (c. 1205–65), whose compilation of church writings helped form the basis of Coptic ecclesiastical law, discusses family law—such as marriage, divorce, and inheritance—in considerable detail.[102] These areas were a source of competition between the jurisdiction of non-Muslim communal courts and the sharia courts, as will be seen in chapter 7.

The construction of family law or what came to be known in the late nineteenth century as personal status law is intertwined with the history of non-Muslims in premodern Islamic law. It also stems from the Ottoman Empire and what had emerged by the nineteenth century to be called the millet system. The millet system gave non-Muslims of the Ottoman Empire considerable judicial autonomy over what came to be described as "religious" laws, which were laws relating to the family and other civil issues such as education. Niyazi Berkes argues that, in the early nineteenth century, Sultan Mahmud II (1785–1839) wanted to abolish the millet divisions and establish equality for non-Muslims. However, he was prevented by the colonial powers which lobbied for the continuation of the privileges of the Empire's non-Muslim communities.[103] Colonial powers lobbied for such privileges based on existing areas of law over which non-Muslim communities had autonomy.

Niyazi Berkes argues that it is the failure to abolish the millet system that led Mahmud to make a distinction between worldly and religious affairs and

to exclude an area defined as religious from reform. Mahmud pushed the office of the shaykh al-Islam outside the area of the government that was to be reformed. He then equated the office of the shaykh al-Islam with the millet system. In so doing, Mahmud placed matters that were of concern to the millets in what was defined as the religious realm. While the office of the shaykh al-Islam had initially been intended for the interpretation of and consultation about religious-legal matters related to temporal affairs, after Mahmud's reforms, it became the highest office regarded as religious and was seen as having jurisdiction over Muslims only. It was also seen as remaining beyond the scope of reform. Thus, separate religious courts emerged that were not part of the reform process, thereby separating the sphere of government, legislation, and law from the domain of religion. From Mahmud's time, Berkes shows that the word "religious" acquired a new meaning and came to be identified with that which is unchanging. Reform was limited to the creation of a body of public law separate from the sharia. The Reform Charter of 1839 opened the "first formal breach between the 'temporal' and the 'religious.'"[104]

It is often assumed that personal status law or family law was simply left unchanged as a result of the British abstaining from interfering in religion.[105] Conversely, in pushing back against this argument, others have argued that in restricting the sharia to the area of personal status law, this category of law was effectively constructed or invented.[106] Yet it is also important to note the ways in which the construction of a new category of family law was based on existing areas over which non-Muslims had judicial autonomy. Thus, family law was not so much invented, but the boundaries between what it stood for and what it did not stand for became more heavily inscribed.

During the late Ottoman Empire, the codification of the sharia in the form of the majalla did not include family law. The commission drafting the majalla had intended to produce a body of laws to govern the family, but the shaykh al-Islam opposed continued codification and the committee dissolved without having codified marriage, family, and inheritance laws.[107] In 1886 a statement was issued by the Ministry of Justice that matters relating to marriage, divorce, alimony, retaliation, wills, and inheritance would come under the jurisdiction of the sharia courts. Berkes maintains that, by opposing further codification, the ulama made sure that the sharia would continue to operate within aspects of private religious law and that the sharia provisions with regard to constitutional, criminal, and commercial law would be removed.[108]

As a result, the sharia no longer had jurisdiction over commercial and criminal cases. The sharia courts were confined to what came to be known

as family law, which evolved to be limited to marriage, divorce, inheritance, and the custody of children and was eventually referred to as personal status law. The term personal status was first used in 1875 by Muhammad Qadri Pasha, who had written a codification of the sharia in the style of European legal codes. Even as late as 1880, the term "matters of the sharia" was often used to denote personal status. The first definition of personal status was given by the Egyptian Court of Cassation, Egypt's highest civil and criminal appellate court, in 1934.[109] The concept of personal status was derived from "statut personnel" in the French Napoleonic Code, which was a reference to laws related to one's person vis-à-vis the law.[110]

While the jurisdiction of the sharia courts narrowed, the courts were also changed. The sharia courts were bureaucratized: an appellate system was introduced, new emphasis was put on documentation in judicial procedure, and written codes were authorized.[111] A code for the sharia courts was promulgated in 1880 and amended in 1887; it restricted the jurisdiction of the sharia to the family. While the sharia was retained for family law, Cuno argues that it was changed through the process of codification and was influenced by the Napoleonic Code of 1804.[112]

Before 1920, the Egyptian courts applied Muslim family law. This law was uncodified, although it accorded official status to the Hanafi school. The codification of family law began in the 1920s and the very act of subjecting Hanafi law to statutory provisions represented "the subordination of the Sharīʿa to legislative power."[113] Tarek A. Elgawhary argues that the concept of codifying personal status law was theoretically and operationally problematic for some ulama who saw it as un-Islamic. However, he shows that for others it was a way to preserve the Islamic legal heritage. Muhammad ʿAbduh (1849–1905), for example, defended and advocated the codification of personal status law.[114] He called for the establishment of articles of law that would "indicate rulings in a straightforward manner, apply to all possible cases, be set forth in logical categories, and use simple linguistic constructions."[115] For ʿAbduh, the purpose of codifying the law was to ensure public welfare and the order and cohesion of society.[116] Elgawhary argues that the majority of the ulama accepted codification of the sharia in theory, "but often critiqued the result of the actual codification process."[117] In fact, he contends, the ulama were more concerned that they had not been included in the codification process than they were with the product of such codification.[118]

The codification of family law in Egypt occurred in 1920, 1923, 1929, and then in 1943 and 1946. Hanafi law formed the basis of family law, and the main opinion of the Hanafi school—while sometimes selecting from

other schools of law—was applied to any questions that had not been addressed directly in the codes.[119]

Nationalists were aware that the maintenance of different personal status courts for matters of family law for Muslims and non-Muslims could undermine the nationalist project. Criticisms of the existence of separate sharia and non-Muslim communal courts date to as early as the 1890s, but became more important from the 1930s on.[120] For this reason, during the 1930s and 1940s, the Egyptian government proposed to transfer the jurisdiction of the sharia and communal courts to a unified system. Other proposals aimed to further restrict the jurisdiction of the sharia and communal courts and reform their procedures. However, the leaders of the non-Muslim communities—supported by the British authorities—resisted these proposals, assuming that such reforms would end up imposing the sharia. As a result, all the proposals were dropped.[121]

However, in 1955 Nasser abolished the sharia and the communal courts. The law that abolished the courts aimed at consolidating the state's legal sovereignty. The memorandum that accompanied the law stated that "*the rules of public law require that the sovereignty of the state be complete and absolute in the interior, and that all those who live in it,* without distinction or nationality*, be submitted to the laws of the country, to its courts and to a single juridical jurisdiction*" (italics in the cited source).[122] The authors of the memorandum argued that Egyptian law, in which Egyptians submit themselves to numerous jurisdictions, undermined the sovereignty of the state. The law for the reorganization of the courts stated that judgments in matters of personal status would be issued "according to the most approved opinion of the school of Abū Ḥanīfa except where specific legislation has been issued."[123] For non-Muslim Egyptians who had organized communal jurisdiction at the time of the promulgation of the law, judgment was to be issued "according to their own legislation." However, notably it included a caveat: such legislation was to pay "due regard to public order."[124]

The Sharia as State Law and the Idea of the Sharia

Today, the great majority of countries of the Islamic world base their legal systems on the understanding that the state should monopolize legal authority. Yet, Hallaq shows, to assume that the state should exercise legal authority is "neither obvious nor normative" for the Islamic world.[125] But Islamic revivalists who call for the application of the sharia advocate that it is the role of the state to deliver the sharia. Wood argues that, for much of the nineteenth century, sharia was understood as a flexible source of law that

could exist alongside state law.[126] Khaled Fahmy shows that, in the 1840s and 1850s in criminal law, the Egyptian state utilized the sharia alongside the siyasa councils.[127]

Wood argues that in the nineteenth century, the political elite had mixed feelings about the marginalization of the sharia. The idea that the sharia should be revived to replace Franco-Egyptian law only became a fully developed theory in the twentieth century. It was from the 1920s on, in particular, that the sharia "was increasingly identified and advertised as a singularly complete and valid source for the development of a comprehensive system of positive laws that was created, managed, and enforced by the state."[128] Proponents of this view felt that the sharia should supersede all other law "and could not exist comfortably parallel, let alone in a state of subjugation, to 'man-made' laws that were considered morally inferior."[129]

Wood contends that, from the 1930s, there was a much more explicit opposition to European law.[130] Advocates of the revival of the sharia increasingly saw sharia in terms of positive law. Rashid Rida (1865–1935) called for the centralization of Islamic legal authority within the state. After the demise of the caliphate in 1924, Rida advocated the revival of the caliphate and emphasized the continued importance of its temporal and religious role. He also asserted that the ulama should make decisions of public law and policy acting in consultation with the caliph. Thus, "the 'ulamā' no longer need to consider themselves the sole guardians of the law against governmental corruptions."[131] Rather, political authority should lie in the hands of the ulama. Rida proposed one single body that would be legislative and judicial. The consensus (*ijma'*) of the jurists who are qualified had binding authority and was to become a kind of formal institution for the first time in Sunni Islam.[132]

Hussin illustrates that the marginalization of the sharia "was accompanied by its symbolic centralization."[133] The sharia provided a platform for challenging the authority of the colonial state. Thus, the delivery of the sharia—or lack thereof—became "central to the legitimacy of the state."[134] This shift tied "the individual Muslim to the state through the delivery of Islamic law."[135] The understanding that it is the role of the state to deliver the sharia has become ubiquitous in Islamist thought.

Islamic theorists no longer saw the state as something to be kept at arms' length, but as something to be captured and utilized in the Islamic renewal project. Islamic reformers wanted to revive Islamic traditions and the sharia, but they also emphasized the importance of modern courts and legal codes. Such an approach to the sharia as state law undermined the distinction between the sharia and siyasa. Yet those who called for a revival of the sharia advocated something akin to the removal of such a separation.

It was with the postcolonial state—from the 1970s on in particular—that the impetus to collapse the separation between the sharia and siyasa and locate Islamic legal authority in the state became a dominant demand. Hassan al-Banna (1906–49), the founder of the Muslim Brotherhood, emphasized the importance of establishing Islam from the grassroots up and his thought was therefore less developed with respect to the state. However, many later Islamists associated with the moderate branch of the Muslim Brotherhood sought to locate Islamic legal authority in the state. The Muslim Brotherhood has been committed to the concept of the Islamic state as central to the Islamist vision. Yusuf al-Qaradawi (b. 1926), an Egyptian Islamic scholar and chairman of the International Union of Islamic Scholars, contends that the idea that Islam is a religion and not a state is a malicious idea implanted by Western imperialism. The comprehensive nature of the sharia means that it "must become immersed in all aspects of life."[136] He writes that "the Islamic state is an ideological and an intellectual one. It is a state that is based on a doctrine (*ʿaqida*) and on a method (*manhaj*). It is not a mere 'security apparatus' that would preserve the *umma* from internal assault or from external invasion. Rather, its function is deeper and greater than that. Its function is to educate the *umma* and instruct it in the teachings and the principles of Islam and prepare a positive atmosphere and suitable climate for making Islam's doctrines, its ideas and teachings into a practical and palpable reality."[137] For al-Qaradawi, the notion in premodern writings that it was the state's role to provide the circumstances under which Muslims could live according to the sharia has given way to a much deeper conception of the state's role. It is the role of the state to help every Muslim perform his duty of commanding good and forbidding wrong.[138] The Islamic state, he asserts, believes "in a single morality, a morality for all people, a morality that cannot be divided up or be made variegated."[139]

The idea of the state as something to be captured and utilized in the Islamic renewal project has featured prominently in the way that the sharia is used in contemporary discourse on the relationship between Islam and the modern state. The sharia became a rallying cry for social justice. It became the focal point for the ideal of a utopian future. The sharia was a way that the ulama sought to establish their authority and a means by which Islamists sought to undermine the authority of the ulama. Perhaps more importantly, the sharia increasingly became an idea to challenge the postcolonial state. What various political and religious actors meant when they invoked the sharia varied. For its advocates, the sharia is seen as a repository of culture, tradition, and authenticity. Conversely, for its detractors, it is reactionary.

The concept of a transcendental unrooted sharia has figured prominently in contemporary discussions about the sharia and the modern state. In such discussions, the idea of the sharia as an entity that one either chooses to have or not to have, that one opts in or out of, has become normalized. Armando Salvatore argues that the idea of the sharia "laying a monopolistic claim to regulating public life and society" only emerged in the last quarter of the nineteenth century.[140] During this time, he writes, sharia was reformulated as a contribution to the normative structure of the public sphere and was seen as a "norm-ideal mediating between the project of reform of selves and society and the legitimacy of a reformed legal system."[141] While debates on the sharia were not highly visible, sharia "was an issue, and indeed a central and inescapable one for the reform project."[142] Sharia discourse portrayed the sharia as an idea that connected the project of reform for individual Muslims and society with the legitimacy of the legal system. This new conception of the sharia was presented as something that would order and civilize, an abstract entity disconnected from its multivalent history.[143]

The idea of the sharia as a civilizing concept also gained traction through the religious/secular binary. Salvatore maintains that, prior to the 1920s, it is anachronistic to refer to an opposition between secular and Islamic intellectuals. He argues that, before the turn of the century and even later, a clear awareness of the distinction between the secular and the Islamic did not yet exist. The need for the distinction between the Islamic and the non-Islamic in discourse in the Egyptian public sphere arose in the 1920s and 1930s.[144] By the 1930s, the idea of an Islamist opposition to the secularization of Egyptian law had developed. Such opposition tended to emphasize modern approaches and attitudes to Islamic law. Clark B. Lombardi shows that many of the Islamists of the time reimagined the classical doctrine of siyasa shar'iyya, "arguing that the state must apply a code of law that was drafted in accordance with some re-imagined modern vision of *siyāsa shar'iyya*."[145] Islamists emphasize interpreting the sharia and drafting Islamic legal codes with a view toward creating positive law. Salvatore argues that, from the 1960s to the 1980s, sharia became highly visible, "laying a monopolistic claim to regulating public life and society."[146]

Abullahi An-Na'im argues that the concept of an Islamic state is postcolonial and is "based on a European model of the state and a totalitarian view of law and public policy as instruments of social engineering by the ruling elites."[147] He maintains that those who advocate "a so-called Islamic state in the modern context seek to use the institutions and powers of the state,

as constituted by European colonialism and continued after independence, to regulate individual behavior and social relations."[148] But, An-Naʿim points out, sharia principles cannot be enacted and enforced by the state as public law since "if such enactment and enforcement is attempted, the outcome will necessarily be the political will of the state and not the religious law of Islam."[149] He argues that an Islamic state results in a narrow part of Islam being taken to represent Islam itself, since the process of codifying the sharia requires that state officials select from among differing legal interpretations rooted in the schools of law.[150]

The idea of the sharia—disconnected from the varied methods of the schools of law—has led, to use An-Naʿim's term, to a "narrowness" in the way that the sharia is referred to by Islamists. This narrowness has often been described as vagueness. The Muslim Brotherhood, for example, has been criticized for its political slogan "Islam is the solution" and for being vague on what aspects of the sharia they wish to be implemented. Bruce Rutherford argues that calls to implement the sharia are more about identity than they are about specific legal rulings. He argues that, in the works of contemporary Islamic thinkers, it is the moral and cultural importance of the sharia that is dominant. Thus, according to Rutherford, Islamic theorists do not aim to implement a particular legal code but rather to "re-ground Egyptian society in its Islamic history, culture, and tradition."[151]

We can see the idea of the sharia in the thought of the contemporary jurist Tariq al-Bishri (b. 1933). For al-Bishri, the sharia represents an ideological heritage "al-turath al-fikri." This heritage, he argues, is shared by all people including people from other religions and denominations.[152] Thus, al-Bishri contends, the sharia is a unifying force for all Arabs as well as for Muslim non-Arabs and "expresses an authentic sphere (*majal*) in which the religious and the nationalist trend can meet."[153] For al-Bishri, the sharia will help create an Egyptian national consciousness that emphasizes national unity between Muslims and Egypt's Coptic Christians but is also rooted in the Islamic tradition. Thus, through the sharia—subject to new interpretations and independent research—contemporary Muslims can reconcile the split that Egyptian society is afflicted by, the split between what is new and what has been inherited. Such reconciliation would, he argues, give greater weight to "the legal system that is more continuous with the environment, and more connected to the people and their heritage" than to a legal system that is foreign and newly arrived.[154] For al-Bishri, Islamic jurisprudence on the question of the state, law, and the constitutional system is relatively undeveloped.[155] Thus, he maintains, Islamic thinking needs to distance itself from

the approaches of Islamic jurists and come up with new ways of addressing Islamic sharia and the state. He himself does this in his thinking regarding the principle of equal citizenship for non-Muslims.[156] For al-Bishri, the sharia is less a body of law and more of what he refers to as "a referential authority" or a *marjiʿiyya*. Al-Bishri's concept of the frame of reference reflects an understanding of the sharia as an idea or a concept as opposed to a body of processes and rules. Secularism, he argues, is also a marjiʿiyya that produced socialism, Nazism, liberalism, and capitalism. Likewise, the Islamic frame of reference is capable of producing different approaches, ideas, and opinions.[157] It also allows for thinking in terms of the various possible norms that the sharia can yield through ongoing reinterpretation.

The idea that the sharia provides guidance or a number of possibilities within a frame rather than mandating specific instructions is reflected in the argument, frequently made by Islamist actors, that they do not want a religious state, but rather a civil state with an Islamic frame of reference. A November 2011 Muslim Brotherhood party platform declares that the state envisaged by the Freedom and Justice Party is "a modern Islamic, national, constitutional and modern state which has the Islamic sharia as a frame of reference."[158] The Muslim Brotherhood was emphasizing that, while on some issues the sharia is more definitive in its guidance, on most others it establishes general rules and principles "leaving the details to be worked out through interpretation and legislation according to what suits the period of time or environment."[159] The concept of the sharia as a frame of reference has emerged as the dominant way of thinking about the sharia. It has taken over conceptions of the sharia as a body of complex laws, treatises, and writings rooted in particular institutional methodologies.

In this chapter, I have undertaken a historical analysis of the sharia. I have shown that, contrary to the argument that the sharia is inherently incompatible with modern state law, premodern rulers gave themselves the right to legislate. The concept of siyasa sharʿiyya enabled the premodern Islamic polity to legislate without the need to positively enforce Islamic jurisprudence. However, this was based on the assumption that the sharia would provide a negative restriction on the polity's legislative capacity. Premodern Islamic systems remained obligated not to contravene the sharia. Thus, while premodern Islamic systems appropriated the right to make legislation, it was bounded by a higher law. It is for this reason that premodern sharia is somewhat conceptually different from modern state law. Premodern sharia was formulated as jurists' law by individuals with scholarly expertise in the Islamic texts. These individuals were private scholars who felt that it was

important for them to retain a level of distance from the ruling polity. Doubting that a ruler could be truly just, these scholars endeavored to protect the sharia from too much state intervention. While this distance from the ruling polity was in part compromised by what Ahmet Kuru refers to as the "ulama-state alliance" from the eleventh century on, such distance remained a powerful ideal.[160] Maintaining the distinction between the sharia and state law also enabled the schools of law to flourish and maintain the concept of mutual orthodoxy. This multivalence of the sharia was increasingly threatened by the state's legal capacities, particularly in the Ottoman period, when the sponsorship of one school of law became a means by which the empire sought to gain control over legislation.

In the nineteenth century, the sharia was marginalized and relegated to the sphere of family law while European codes were introduced for civil and criminal codes. Family law, which eluded the kind of reform that other areas of law were subject to, became tied to the idea of religious difference and to communal identity. While colonial powers lobbied for family law, family law is not just a product of colonial interventions but is, in some respects, also a continuation on from the history of non-Muslim communal law. However, as a result of those interventions, the family became more specifically demarcated and gained a new resonance. Family law remained the one area that was not fully subject to the state's efforts to consolidate legal control through the unification of law in Egypt.

The marginalization of the sharia had three important consequences. The first consequence was that, in consigning the sharia to the sphere of the family, the family became more associated with religion, tradition, and cultural authenticity. The second consequence was that the sharia became central in discourses that opposed colonial, and, more specifically, postcolonial rule. Thus, rule by the sharia became central to new Islamist discourses that called for a return to Egypt's culturally authentic past. It became vitally important for Islamist oppositional politics from the 1970s on. However, the sharia that became central was tied to the state and to state power. So calls for a return to the sharia were manifested in terms of the enforcement of the sharia as state law.

The third consequence of the marginalization of the sharia was that it led to the emergence of the sharia as a concept, an idea, or a frame of reference. This meant that the sharia, for the most part, was seen not in terms of a specific body of laws, but as an idea, divorced from its institutional methodologies. Islamist thinkers increasingly came to refer to the sharia not in terms of its particular complex laws or the multivalence that had existed in premodern contexts, but as an ahistorical concept, the application of which

would lead to national regeneration. Invocations of the Islamic frame of reference as opposed to a specific body of law reflects how Islamist thinking became attached to the sharia as an abstract concept, disconnected from pre-modern sharia. The emergence of the sharia as an idea then made it possible for commitments to the sharia to be inserted in the Egyptian constitution at a later date.