# Codification of Law

Codification of Islamic law is the process by which the various rulings of the *Sharah* (*al-akm al-Sharah*) of a particular subject matter (property, torts, family law, etc.) are collected and restated in a succinct manner to form a legal code that has full effect within a given political jurisdiction. In the modern context, the wording used in the restating of these laws and the outline of the code itself often overlaps with the language and outlines of Western European codes. The nature of the legal code is that it renders all other forms of law void and claims complete jurisdiction for itself.

This type of codification was not common in premodern Islamic law, which was largely scholastic and discursive. There were, however, early attempts at providing compendia of law that made popular and sound opinions of a given legal school (*madhhab*) more accessible, ranging from books of *ikhtilf al-fuqah*, like that of Ibn al-Mundhir (d. 931), to comparative compendia such as the *Bidyat al-mujtahid* of Ibn Rushd (d. 1198), to state-sponsored legal references like the seventeenth-century Moghul *Fatw lamgryah*. However, these efforts are more accurately called legal consolidation and not legal codification, the latter of which is largely an outgrowth of the colonial enterprise (India and

the Malay world) as well as the push for modernization and legal reform (the Ottoman Empire and North Africa). The process of codification of Islamic law began in the first of half of the nineteenth century and continued through the middle of the twentieth century, when many Muslim nation-states completed their process of legal codification and unified their judicial systems.

## *Early Efforts of Codification.*

The first recorded effort at legal codification of Islamic law was made by Ibn al-Muqaffa (d. 759), the Abbsid scholar and political advisor. Observing the great diversity of opinion on law and dogma among Muslims, which had already led to civil strife, Ibn al-Muqaffa wrote a letter to the Abbsid caliph al-Manr (r. 754775), suggesting that he select one sound position from the plurality of opinions on every issue, compiling a uniform vision of the *Sharah*. This story does not represent codification as defined above per se. Rather, it demonstrates the early need to make Islamic law more accessible for official state legislation. There is no evidence that the Abbsids or any subsequent dynasty adopted Ibn al-Muqaffas recommendation. There were other efforts to consolidate Islamic law, however, and provide works that contained the most sound or agreed-upon opinions of a given school on a given subject, such as the above-mentioned *Fatw lamgryah*. This digest of anaf positions, commissioned by the Mughal ruler Awrangzb (r. 16581707), was an unprecedented effort that brought together several hundred jurists and scholars to debate the various points of law in order to arrive at these positions.

The first experiment with formal codification of Islamic law took place under the British occupation of India. Rather than supplant local laws with British ones, the British colonial administration, under the leadership of Governor-General Warren Hastings (in office 17731785), slowly developed a hybrid legal system. British legal administrators oversaw British judges who themselves consulted with local Muslim jurists (both *q*s and muftis) with regard to the minutiae of Islamic law (a parallel process took place with what the British defined as Hindu law). As this system proved too complicated for British administrators over time, the famous Orientalist Sir William Jones (17461794) proposed that a code be drafted incorporating both Islamic and Hindu law. To make Islamic law more accessible, a series of English translations of key anaf texts was begun. Charles Hamilton translated al-Marghnns *Hidya* in 1791, and in 1792 Jones himself translated *al-Sirjiyya* in inheritance law. Neil Baille added to these translations in 1865 with his *A Digest of Moohummuddan Law* (sic), which was a selected translation of parts of the *Fatw lamgryah*. These translations provided the substrate for what was to become the Anglo-Muhammadan Law, a purely invented code of law that took positions found in the anaf School and merged them with British laws, the latter being more prominent than the former.

Another early experiment in the codification of *Sharah* took place under the Dutch in Java. Like India, Javanese society was syncretic. Local custom and tradition (*adat*) ran alongside Islamic law. The Dutch, unlike the British, were not interested in a hybrid system or a codification of local laws. Their approach was to create codes that governed Dutch settlers and that would eventually affect natives. So by 1848 the Dutch had issued codes related to civil procedures (*Burgelijk*) and criminal procedures (*Strafvorderong*). A penal code for natives came later, in 1873, and was nearly identical to the Dutch national penal code. As was the case in British India, Dutch colonial officials controlled local *Sharah* and *adat* courts, which gave final authority to Dutch judges and thus to Dutch law. Rather than provide translations of Islamic law to Dutch jurists (the notable exception is the 1882 French translation of al-Nawaws *Minhj al-libn* by L. W. C. van den Berg, translated into English by E. C. Howard in 1914), the Dutch preferred to promote *adat* law and courts over the *Sharah*. The Dutch study of *adat* law, termed *adatrecht*, was spearheaded by Dutch Orientalists like Christiaan Snouck Hurgronje (18571936). Research and writings on *adat* slowly morphed into codes that were used by both Dutch and Indonesian jurists. By 1927, the Dutch government had officially recognized *adat* as law, not the *Sharah*.

In the Ottoman Empire, legal reforms began in the early 1830s. By 1840, there was a codified penal code based primarily on anaf law. A code of commerce, taken from European codes, followed in 1850. The most famous, however, of all the Ottoman codifications was the *Mecelle-i Ahkm-i Adliye* (Ar: *Majallat al-Akm al-Adiliyyah*) issued between 1870 and 1877 and containing 1,851 articles pertaining to commercial transactions, oaths, and court procedures (but not family or criminal law) as found in the anaf school. The *Mecelle* was produced by a committee of jurists headed by Ahmet Cevdet Pasha (18221895) and was meant both to make the *Sharah* more accessible for courts and to ward off claims that the Ottomans were using European codes instead of Islamic ones. This was the first attempt within the Ottoman world to codify Islamic law proper. Its importance spread beyond the Ottoman heartland of the Balkans and Anatolia, however, and it was the subject of numerous commentaries in both Turkish and Arabic. These new codes were introduced into the *Nimiyye* (national courts) that were established as a result of the Tanzimat reforms after 1839.

Egypt was also a major center for legal reform throughout this period. Like many other areas under colonial rule and influence, Egypts legal system was plural and not unified, containing a mixed array of native and colonial legal jurisdictions. Accordingly, there were multiple efforts at codification occurring at the same time. There was an effort to create a national code to be administrated by a new national court system (*al-makim al-ahliyyah*), and there was the area of personal status law (*al-awl al-shakhiyyah*) that was administrated by the *Sharah* courts. In 1866, Rifah al-ahw (18011873), the polymath

Azhar scholar and reformer, translated and published the French Civil Code, and in 1868 he published a translation of the French Trade Law. By the 1870s Khedive Isml (r. 18631879) was asking various *ulam* for their thoughts and opinions on the viability of codifying Islamic law and adopting aspects of French law. ahws famous student and one-time minister of justice, Qadr Pasha (18211888), took an interest in codification and provided three works of codified Islamic laws: *al-Akm al-Shariyyah fil-awl al-shakhiyyah* (a collection of anaf rulings related to personal status laws), published in 1880; *Murshid al-ayrn il marifat awl al-insn* (a collection of anaf rulings pertaining to trade), published in 1890; and *Qnn al-adl wa al-inf lil-qa al mushkilt al-awqf* (a work seeking to codify rulings on religious endowments), published in 1894. In 1876 the Mixed Courts were established in Egypt, providing jurisdiction to non-natives and claiming to be an improvement on the egregious Ottoman capitulations that Egypt had inherited. An eclectic European code was drafted to govern these courts, mostly influenced by French codes. The significance of the Mixed Court Code is that it became the major influence on the drafting of Egypts civil code in 1881.

## *Codification of Personal Status Law.*

By the turn of the twentieth century, colonial powers had dominated areas of commercial and criminal law throughout large parts of the Muslim world. Although there were some elements of Islamic law that were retained, as many scholars have demonstrated, the major drive and model for these types of codification were European codes. As these areas of the law became settled, attention was given to a new area of law and one that had, up until the turn of the century, been the exclusive domain of the *ulam* and the *Sharah* courts they manned: personal status law (laws pertaining to marriage, divorce, child custody, inheritance, religious endowments, and gifts).

In the Ottoman Empire, personal status laws were codified in 1917 as the Ottoman Law of Family Rights. Although Turkey officially stopped implementing Islamic law in 1926, the 1917 code was adopted in the formerly Ottoman Levant. Unlike earlier Ottoman efforts at codification, with the exception of the *Mecelle*, the Law of Family Rights was purely based on the *Sharah* tradition.

Egypt followed suit with a reordering of the *Sharah* courts from a procedural point of view in 1857. By 1880, it was ordered that the *Sharah* courts would follow the most agreed-upon opinions of the anaf school (*arja aqwl al-anafiyyah*). This set in motion the formation of the Committee on Personal Status Law, which was to provide a codification of these opinions. The committee was mixed, containing both secular-trained lawyers, a profession that arose in the late nineteenth century, and *ulam*. The established code was modified with specific laws throughout the early decades of the 1900s. When the *Sharah*

courts were finally disbanded in 1955, the Code of Personal Status Law was subsumed into the national code, drafted by the secular-trained jurist Abd al-Razzq al-Sanhr in 1948 as an improvement on the 1881 code.

A similarly organized process took place in Morocco. Frustrated by the French-imposed *Dahir berbre* of 1930, which cast aside *Sharah* law for local custom, Moroccan reformers turned to legal codification after their independence from France in 1956. King Muammad V (r. 19271961) established a committee to produce a personal status code, headed by Alll al-Fs (19101974), the well-known resistance fighter and founder of the Istiqll party. The initial code was completed in 1957 and was titled *Mudawwanat al-awl al-shakhiyyah*. Although this code was to be based on the Mlik school, in similar fashion to the Egyptian code with respect to anaf positions, it also incorporated positions from other schools to satisfy modern concerns. For example, a anaf position was adopted to allow women to serve as their own legal guardians in marriage contracts, and a anbal position allowing women to stipulate in their marriage contracts that their husbands were not permitted to take a second wife was included. The code of 1957 has been revised and updated many times.

## *Ulam Reactions to Codification.*

Although the process of codification of law, both civil and personal status, is today a foregone conclusion throughout the Muslim world, such was not the case throughout the nineteenth and early part of the twentieth century. It would be correct to say that the process of codification was forced on Muslim countries as a result of colonization (both direct and indirect) as well as the push by Muslim political leaders for reform and modernization. Although the *ulam* were largely excluded from the various codification efforts of civil law (commercial codes, penal codes, etc.), they were heavily involved in the codification of personal status law, which became the last major area of law dominated exclusively by the *Sharah*.

Opinions of the *ulam* toward *Sharah* codification varied, often depending on whether or not the scholars in question had been selected to serve on the various committees of personal status. Although there were significant detractors of codification, it is fair to say that the majority of the *ulam* who commented on this topic through independent works and newspaper articles accepted the process of codification as a necessary step toward national unity and securing a role for the *Sharah* in modern society.

Essentially, the *ulam* fell into one of four categories in their opinions toward codification. There were the *ulam* who actually wrote (or participated in writing) the codes, those who supported the concept and process of codification but were not included in the formal

process, those who opposed codification altogether, and those who accepted the concept of codification in principle but had problems with the actual codes that were drafted.

Opposition to codification among the *ulam* came either from a belief that codifying the *Sharah* was not Islamically permitted or from the close association of codification with Western imperialism and colonial powers. Importantly, these two sources of opposition could blend into one another. Although civil codes were taken primarily from European codes, some Islamic considerations nonetheless obtained. There were efforts, for example, to make sure no civil code positions violated agreed-upon norms of the *Sharah*. The work of Abd al-Razzq al-Sanhr in Egypt and Iraq in this regard is well known. However, in the case of areas of personal status law, codification was solely based on *Sharah* sources.

## *Impact on Fiqh.*

The modern codification of Islamic law was unprecedented in Islamic history, and both as a theory and in practice it drew criticism from those conservative *ulam* who viewed it as completely incompatible with Islamic juristic norms. The major issues were not, however, related to simply taking rulings of the anaf, Mlik, or any school and stating them in a point-by-point code. In fact, works like the *Mecelle* and the writings of Qadr Pasha were welcomed and studied in *Sharah* schools throughout the Muslim world from the late 1800s onward. The controversy, rather, had to do with broader political issues and the manner in which the *Sharah* came to be defined.

The process of *Sharah* codification entailed three broad issues for the *ulam* who undertook the process. The first was their understanding of the authority of the state (specifically the ruler) to legislate. In general in Islamic history, the *ulam* had recognized the right of a ruler to rule and legislate (at least within a certain sphere), and the ruler in turn recognized the *ulam* as the defenders and interpreters of the *Sharah*. This religious-political relationship was carried over into the modern period by the *ulam* and applied to the permissibility of codifying personal status law. That is to say, the *ulam* involved in the codification process were of the opinion that it was within the rights of the ruler to ask for Islamic law to be compiled and codified as long as the *ulam* were retained to undertake this process and define the parameters of the law.

The second issue was a certain perspective toward independent legal reasoning (*ijtihd*). As opposed to the Islamic middle and early modern periods (roughly 12001700), which were dominated by a spirit of *taqld* (following a specific school of law to the exclusion of others), the eighteenth and nineteenth centuries witnessed a revival of the need to engage in independent legal reasoning to solve the many social issues that had emerged

and presented legal changes to the *Sharah* establishment. In the case of personal status law, issues surrounding womens rights quickly arose as key social issues that many of the *ulam* sought to address through independent legal reasoning. This often meant re-examining established rulings and in some cases deriving new rulings altogether.

The third issue was legal eclecticism (*talfq*). In the actual process of codification, the *ulam* came to the conclusion that it would be impractical to rely on one of the four Sunn schools of law to the exclusion of the others. Rather, an eclectic approach of choosing appropriate rulings as they were found in any of the schools was applied. *Talfq*, however, was problematic, often accepted in theory by Sunn jurists within certain limits, but carried out in practice to different degrees in various times and locales. *Talfq* did not go beyond the established *madhhab*s in a region, and never beyond the four Sunn schools. The *talfq* approach used in the codification process, however, took opinions from schools of law that were considered dead and extinct as well as from the four established schools. It even extended to adopting opinions found in Sh law (known as the Jafar school) when deemed appropriate. The best example of this is the Egyptian code adopting the Jafar position allowing bequests (*waiyyah*) to be made to inheritors (i.e., individuals already granted an inheritance share by Qurnic edict), a position rejected by all four Sunn schools.

## *Summary.*

Codification of Islamic law is a product of the modern world. It has been an unprecedented and controversial experiment that pushed the boundaries of legal authority. Although codification of law emerged largely from Western colonial influence, by the middle of the twentieth century it was something being called for by indigenous voices and by many *ulam* from within the Muslim world.

[*See also* ADAT; CAPITULATIONS; COURTS, *subentry on* MODERN SHARAH COURTS; ANAF SCHOOL OF LAW; IJTIHD; IKHTILF; JAFAR SCHOOL OF LAW; MADHHAB; MAJALLAH (MECELLE); MLIK SCHOOL OF LAW; MIDDLE EAST, *subentry on* EGYPT; MUGHAL EMPIRE AND LAW; NORTH AFRICA, *subentry on* MOROCCO; OTTOMAN EMPIRE, ISLAMIC LAW IN; SANHR, ABD AL-RAZZQ AL-; SHARAH; SOUTH ASIA, *subentry on* INDIA; SOUTHEAST ASIA, *subentry on* INDONESIA; TALFQ/TAKHAYYUR; TANZIMAT; TAQLD; *and* ULAM.]

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