Can the Shari'a be Restored?

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Courtesy: Yvonne Y. Haddad and Barbara F. Stowasser, eds., *Islamic Law and the Challenges of Modernity* (Walnut Creek: Altamira Press, 2004), 21-53.

During the past two decades, the forms of discourse demanding a return to Islamic values and practices have been many, including literature in print; radio and television programs; the propagandist activities of Islamic parties, associations, and clubs; and the literature of medical, financial, and other institutions. Permeating these forms is the distinct call to reapply or reinforce the shari'a. In the majority of cases, the shari'a is conceived as a well-defined, wholesome entity; the only problem is that it has been pushed aside to the backburner, so to speak. The Islamic book market affords the outside observer an abundance of materials embodying the deontic message as to how to apply the shari'a. A fairly representative example of such a beckoning call is a collection of articles by distinguished men of Islamic learning, tellingly titled *Wujub Tatbiq al-Shari'a al-Islamiyya* (The Necessity to Apply the Islamic Shari'a).[1] One author, for instance, suggests that a means to achieve this goal is for the political sovereign to spread the religious ethic and to "institute a code to be promulgated for the benefit of organizations and institutions, a code that is compiled by an assembly of learned and experienced specialists in law and Islam."[2] Another essay by a prominent author merely presents are introductory, even sketchy, discussion of the general principles *(qawa'id* of the Shari'a *for* the benefit of secular lawyers who are "entirely ignorant" of Islamic law and who have left behind the religious law in favor of the "importation of western legislation into the Arab countries. They are not the shari'a jurists but rather the 'other group' which needs to be addressed with such a simplified manner."[3] The underlying assumption here is the due admission that the hegemonic and professional legal power lies in the hands of this secular group whose knowledge-and, by implication, appreciation-of Islamic law is virtually nonexistent, a fact that justifies simplification of the shari'a subject matter *for* the purpose of persuading them to adopt it in legal application. In short, in this discourse the shari'a appears as an extramental object that can be applied or pushed aside, appreciated or marginalized, but it is qualitatively and most certainly a known entity the only predicament of which is that it is capable of being subject to these preferences.

It is my contention here that this pervasive and dominating discourse misses the crucial point that the shari'a is no longer a tenable reality, that it has met its demise nearly a century ago, and that this sort of discourse is lodging itself in an irredeemable state of denial. This chapter, therefore, is concerned with showing the features of this demise and of the crises that still persist in the pursuit of an Islamic legal identity.

The demise of the shari'a was ushered in by the material internalization of the concept of nationalism in Muslim countries, mainly by the creation of the nation-state. This transformation in the role of the state is perhaps the most crucial fact about the so-called legal reforms. Whereas the traditional ruler considered himself subject to the law and left the judicial and legislative functions and authority to the *'ulama,* the modern state reversed this principle, thereby assuming the authority that dictated what the law is or is not. The ruler's traditional role was generally limited to the appointment and dismissal of judges, coupled with the enforcement of the *qadi's* decisions. Interference in legislative processes, in the determination of legal doctrine, and in the overall internal dynamics of the law was nearly, if not totally, absent. The modern state, on the other hand, arrogated to itself the status of a legislator, an act that assigned it a place above the law. Legislative interference, often arbitrary, has become a central feature of modern reform and

in itself is evidence of the dramatic shift in the balance of legal power.

A direct effect of this shift was the adoption by the new nation-state of the model of codification that altered the nature of the law. Codification is not an inherently neutral form of law, nor is it an innocent tool of legal practice, devoid of political or other goals. It is a deliberate choice in the exercise of political and legal power, a means by which a conscious restriction is placed on the interpretive freedoms of jurists, judges, and lawyers.[4] In the Islamic context, the adoption of codification has an added significance since it represents potently efficacious modus operandi through which the law was refashioned in structured ways. Among other things, it precluded the traditional means of the law from ever coming into play. But to this significant transformation, which is primarily epistemic and hermeneutical, we will have to return later.

An essential tool--indeed, constitutive component-of the nation-state is centralization. In addition to codification, which could not have been achieved without this tool, centralizing mechanisms were carefully harnessed to confiscate the realm of law in favor of state control. As early as 1826, the Ottoman sultan Mahmud II and his men created the so- called Ministry of Imperial Pious Endowments, which brought the administration of the empire's major *waqfs* under central administration.[5] All rich endowments and their revenues and assets, supervised for centuries by the legal profession in the empire's various regions, came under Istanbul's direct supervision. This ushered a new era during which the jurists gradually lost control over their own source of power and became heavily dependent on state allocations that diminished in a steady and systematic manner.

But this was not all. The chipping away of the powers of the religious elite was bolstered by the creation of alternative elites that began to form during the first half of the nineteenth century. Under Mahmud II**,** there was already a proliferation of technical schools independent of the religious colleges, schools that eroded the monopoly the religious institutions had over the legal system. As if this is not enough, both the Ottoman sultans and the local Egyptian rulers created a new group *of* legal professionals, among others, who began to displace the traditional legal elite. With the adoption- indeed, coercive enforcement[6] of Western-style hierarchical courts - and law schools, these new elites were easily incorporated into the emerging legal structures while at the same time the religious lawyers found themselves unequipped to deal with this new reality. These courts operated on the basis of codes, and the lawyers who staffed them had little, if any, knowledge *of* the workings of religious law, be it doctrinally, judicially, or otherwise. On the other hand, while the foreign elements were incomprehensible to the traditional legal hierarchy, their *madrasas,* which depended almost exclusively on the dwindling *waqf* revenues, were systematically pushed aside and later totally displaced by the modern, university law faculties. The traditional legal specialists lost not only their judicial offices as judges, legal administrators, and court officials but also their teaching posts and educational institutions, the backbone of their very existence as a profession. This latter loss constituted the coup de grace, for it was depriving them not merely of their careers but mainly of their procreative faculties: they were no longer al- lowed to reproduce their pedigree. The ruin of the madrasa was the ruin of Islamic law, for its compass of activities epitomized all that made Islamic law what it is was.

Thus, the demise of the shari'a was ensured by the strategy of "demolish and replace": the weakening and final collapse of educational *waqfs*, the madras a, positive Islamic law, and the shari'a court was made collateral, diachronically correlational, and causally conjoined with the introduction of state finance (or, to put it more accurately, finance through the controlling agency of the state), Western-style law schools, European codes, and European court system. If law were to represent the entire spectrum of Islamic culture, it would not be an exaggeration to state that by the middle of the twentieth century, nothing in Islam was saved from a distinctly determined and omnipotent European hegemony.

What has remained of the traditional system in the modern codes is no more than a veneer. Penal law, land law, commercial law, torts, procedural law, bankruptcy, and much else has been totally replaced by their European counterparts and supplemented, in due course, by several other codes and regulations, such as the law of corporation, copyright law, patent law, and maritime law. Traditional rules are still to be found in the law of personal status, but these have been

uprooted from their indigenous context, a fact bearing, as we will see, much significance. As is well known, one of the favorite tools of modernists is the method of *takhayyur,* namely, picking and choosing legal rules from a variety of sources. Thus, the principles and rules of the marriage contract, for instance, may draw on more than one Sunni legal school, expediency being the rationale for an arbitrary amalgamation of doctrines. The modern legislators in Sunni countries furthermore resorted to Shi'i law in order to supplement their civil codes where Sunni law was deemed lacking in the fulfillment of their expedient methods. But they were extraordinarily daring not only insofar as the sources on which they drew were concerned but also in the manner in which they drew on traditional doctrine: they combined, in what is known as *talfiq,* several elements pertaining to a single issue from more than one source regardless of the positive legal principles, reasoning, and intellectual integrity that gave rise to the rulings in the first place. This approach is arbitrary in that it does not take into serious account--as should be the case--the subtle and intricate connection between the social fabric and the law as a system of conflict resolution and social control.

These considerations, on the other hand, were ever-present in the minds of the traditional jurists and the system they produced, a fact that explains the constancy and stability of classical Islamic law over the long course of twelve centuries. This lack of sensitivity to social reality among the modem legislators is manifest on a number of levels and in many areas of the law, but revealing examples of it may be found in the tinkering of the Indian and Jordanian legislators: in the Muslim Marriages Act of 1939, British India adopted numerous doctrines of the Maliki school when the country had had a long history of exclusive Hanafi jurisprudence. As Joseph Schacht aptly remarked in this regard, "The whole Act is typical of modernist legislation in the Near East, but it is hardly in keeping with the development of Anglo-Muhammadan law which has followed an independent course so far, nor even with the tendency underlying the Shariat Act of 1937."[7] Similarly, but even more flagrantly, in 1927 a Jordanian Law of Family Rights was enacted on the basis of the 1917 Ottoman Law of Family Rights, but in 1943, in less than a decade and a half, this law was replaced by the traditional shari'a law. Only eight years later, in 1951, the law was again repealed in favor of a codified law of family rights, inspired largely by the Egyptian and Syrian laws of personal status. Here it is difficult to draw any conclusion that Jordanian society had undergone, in the span of only two and a half decades, serious changes-and in different directions to boot. Insensitivity to social structures, arbitrariness, and inconsistency speak for themselves. The point to be made here is that what little that has been preserved of the shari'a in modern codes has been so flagrantly manipulated that lost its organic connection with both traditional law and society. This arbitrariness is simply a manifestation of the effects of infrastructural demolition of the traditional legal system.

As the opening paragraph of this chapter attests, the workings of the traditional system are little understood today, as has been the case since the end of the nineteenth century, if not even earlier. In the Ottoman *Majalla,* enacted in 1876, the Drafting Committee acknowledged the inability of the judges staffing the new courts to understand the shari'a law. "In fact," the committee argued,

> Islamic jurisprudence resembles an immense ocean on whose bottom one has to search, at the price of very great efforts, for the pearls which are hidden there. A person has to possess great experience as well as great learning in order to find in the sacred law the proper solutions for all the questions which present themselves. This is particularly true of the Hanafi School. In this school there are many commentators whose opinions differ markedly from one another. . . . One can thus understand how difficult it is to ascertain in all this diversity of opinions the best one and to apply it in a given case.[8]

With the increasing adoption of Western legal concepts and institutions, the difficulties mentioned by the Drafting Committee were also doubled and multiplied. The traditional system was steadily rendered irrelevant, useless, and a thing of the exotic past. It is on this account that the implications and consequences of the methods of *takhayyur* and *talfiq* were and still are little understood and appreciated by the modem legislators. It is perhaps telling that a Chief Justice of the High Constitutional Court of Egypt, when queried about his professional interest in the positive legal works of the traditional schools, told this writer that they are archaic arid incomprehensible.

II

The rupture, therefore, is certainly one of epistemology and goes deep into the inner structure of legal thinking. The modern Muslim lawyer and judge, by the very fact of their training-which is wholly alien to its traditional counterpart-have lost the epistemological and hermeneutical framework within which their *faqih* predecessor operated. To begin with, the modern lawyer has no understanding whatsoever of what *taqlid,* as an authorizing tool, is all about. One of the functions of *taqlid* was the defense of the school as a methodological and interpretive entity, an entity that was constituted of identifiable theoretical and substantive principles.[9] The school was defined by its substantive boundaries, namely, by a certain body of positive doctrine that clearly identified the outer limits of the school, limits beyond which the jurist ventured only at the risk of being considered to have abandoned his *madhhab* (legal school). An essential part of the school's authority, therefore, was its consistency in identifying such a body of doctrine that was formed of the totality of the founder's opinions, substantive principles, and legal methodology, be they genuinely his or merely attributed to him.[10] Added to this were the doctrines of later jurists deemed to have formulated legal norms in accordance with the founder's substantive and theoretical principles. In other words, Islamic law represented the total sum of doctrinal accretions beginning with the founder down to any point of time in the history of the school.

The multiplicity of doctrinal narrative resulted in the development of a technical terminology whose purpose was to distinguish between types of legal opinion. The evolution of this terminology was symptomatic of the staggering variety of opinion that resulted from a fundamental structural and epistemological feature in Islamic law, a feature that emerged early on and was to determine the later course of legal development. Its root cause was perhaps the absence of a central legislative agency-a role that could have been served by the state or the office of the caliphate but was not. The power to determine what the law was had lain instead, from the very beginning, in the hands of the legal specialists, the *proto-fuqaha',* and later the fuqaha' themselves. It was these men who undertook the task of elaborating on the legal significance of the revealed texts, and it was they who finally established a legal epistemology that depended in its entirety on the premise of an individualistic interpretation of the law. This feature was to win for Islamic law, in modern scholarship, the epithet "jurist's law." The ultimate manifestation of this individual hermeneutical activity was the doctrine of *kull mujtahid musib,* that is, that each and every *mujtahid* is correct.[11] The legitimation of this activity and the plurality that it produced had already been articulated as a matter of theory by as early as Shafl'i.[12] It was also as a result of this salient feature that juristic disagreement, properly known as *khilaf* or *ikhtilaf*, came to be regarded as one of the most important fields of learning and enquiry, a field in which the opinions of a veritable who's who of jurists were studied and discussed.[13]

This feature of what we might term *ijtihadic* pluralism had already become part of the epistemology that was integral to the overall structure and operation of the law. Its permanency is evidenced by the fact that, even after the final evolution of the madhhab, plurality could not be curbed: the old multiplicity of opinion that had emerged before the rise of the madhhabs conflated with the plurality that surfaced later at every juncture of Islamic history.

If legal pluralism was there to stay-a fact that the jurists never questioned-then it had to be somehow controlled in the interest of consistency and judicial process, for doctrinal uncertainty was detrimental. Which of the two, three, or four opinions available should the judge adopt in deciding cases or the jurisconsult opt for in issuing fatwas? The discourse of the jurists, in the hundreds of major works that we have at our disposal, is overwhelmingly preoccupied by this problem: which is the most authoritative opinion? No reader, even a casual one, can miss either the direct or oblique references to this difficult question. Of course, the problem was not couched in terms of plurality and pluralism, for that would have amounted to stating the obvious. Rather, the problem was expressed as one of trying to determine the most sound or most authoritative opinion, although without entirely excluding the possibility that subjectivity--as is admitted in all legal systems--might influence the decision. It is no exaggeration to maintain therefore that one of the central aims of most legal works was precisely to determine which opinion was sound and which less so, if at all. As in all legal systems, consistency and certainty are not only a desideratum but also indispensable. In short, it cannot be overstated that reducing the multiplicity to a single authoritative opinion was seen as absolutely essential for achieving the

highest possible degree of both consistency and predictability. However, it must be emphasized here that plurality was not seen as a problem. To the contrary, and as has been concluded elsewhere,[14] it was viewed as conducive to both legal flexibility and legal change.

The same system that produced and maintained legal pluralism also produced the means to deal with the difficulties that this pluralism presented. Legal theory was based on the premise that the activity of discovering the law was both purely hermeneutical and totally individualistic. The allowances that were given to personal ijtihad created, within the theory itself, the realization that, epistemologically and judicially, pluralism had to be subjected to a further hermeneutical process by which plurality was reduced to a minimum. Different opinions on a single matter had to be pitted against each other in a bid to find out which *of* them was epistemologically the soundest or the weightiest. This elimination by comparison was in theoretical discourse termed *tarjih,* or preponderance, namely weighing conflicting or incongruent evidence. Here evidence should be understood as the totality of the components making up the opinion itself: the revealed text from which the legal norm was derived) its modes of transmission) the qualifications and integrity of the transmitters) and the quality *of* linguistic and inferential reasoning employed in formulating the opinion.

The theoretical account of *tarjih* represents, in general terms, the methodological terrain in which the jurists were trained to deal with all conceivable possibilities *of* conflict in textual evidence and in the methods of legal reasoning. Their knowledge *of* all the issues involved in preponderance equipped them for the world of positive law where theory met with legal practice. It is with this arsenal of legal knowledge *of* the theoretical principles of preponderance that the jurists tackled the problem of legal pluralism and plurality of opinion. These principles provided the epistemic and methodological starting point for the operative terminology used in the determination of substantive law.

Law treatises are replete with statements declaring certain opinions to be correct *(sahih))* more correct *(asahh))* widespread *(mashhur))* and so on.[15]

These terms are emblematic *of* a complex juristic activity that involves a proficient handling *of* the fundamentals *of* preponderance as expounded in works *of* legal theory. But as an organic part *of* the environment of substantive law that includes as one of its essential components the school'! authoritative and long-established positive doctrine) the authorization of opinion was bound to take into account both the methodological and the substantive principles *of* the school. Thus, in realistic terms it acquired, complexity that exceeded that observed in the discourse of legal theory.

Despite (or perhaps because of) the fact that a staggering number of opinions are determined in terms of sahih or mashhur) the authors *of* lay books seldom bother to demonstrate for the reader the process by which an opinion was subjected to these processes *of* authorization. This phenomenon, I think, is not difficult to explain. Authorization usually involved a protracted discussion *of* textual evidence and lines of legal reasoning whose aim was often not only the justification of rules as such but also the defense of the madhhab. Most works, or at least those avail- able to us, do shy away from providing such self-indulgent detail. The Hanafi Ibn Ghanim al-Baghdadi, for instance, explains the problem in his introduction to *Majma' al-Damanat,* where he states, "Except for a few cases, I have not included the lines of reasoning employed in the justification of the rules, because this book is not concerned with verification *(tahqiq).*[16] Our duty is rather limited to showing which [opinion] is sahih and which is asahh."[17] The task of "verifying" the opinions was not only too protracted but also intellectually demanding. It is precisely this achievement of "verifying" all available opinions pertaining to one case and declaring one of them to be the strongest that gave Nawawi and Rafi'i such a glorious reputation in the Shafi'i school and Ibn Qudama the same reputation in the Hanbali school.[18] This was an achievement of few during the entire history of the four schools.

In his magisterial *Majmu',* Nawawi sometimes, but by no means frequently, explains the reasoning involved in *tashih.* Consider the following examples, the first of which pertains to the types of otherwise impermissible food that a Muslim can eat should he find himself, say, in a

desert where lawful food is not to be had:

> Our associates held that the impermissible foods which a person finds himself compelled to eat are of two types: intoxicating and non-intoxicating. . . . As for the non-intoxicant type, all foods are permitted for consumption as long as these do not involve the destruction of things protected under the law *(itlaj ma'sum).* He who finds himself compelled to eat is permitted to consume carrion, blood, swine meat, urine, and other impure substances. There is no juristic disagreement (khilaf) as to whether he is permitted to kill fighters against Islam and apostates and to eat them. There are two waj'h-opinions[19] [though] concerning the married fornicator *(zani muhsan),*[20] rebels and those who refuse to pray *(tarik al-salat).* The more correct of the two opinions (asahh) is that he is permitted [to kill and eat them]. Imam al-Haramayn, the-author [Shirazi],[21] and the majority of jurists *(jumhur)* conclusively affirm the rule of permissibility. [In justification of permissibility] Imam al-Haramayn maintained that this is because the prohibition [imposed on individual Muslims] to kill these is due to the power delegated to governing authority *(tafwidan ila ai-sultan),* so that the exercise of this power is not preempted. When a dire need to eat arises, then this prohibition ceases to hold.[22]

Juwayni's reasoning here was used by Nawawi to achieve two purposes: the first to present Juwayni's own reason for adopting this wajh-opinion and the second to use the same reasoning to show why Nawawi himself thought this opinion to be the more correct of the two. Thus, the absolute legal power of the sultan to execute married fornicators, rebels, and prayer deserters is preempted by the private individual's need to eat, should he or she face starvation.

Note here that Nawawi gives only the line of reasoning underlying the opinion that he considers to be more correct of the two despite the fact that the other wajh-opinion is admitted as sahih. This was the genera practice of authors, a practice that has an important implication: if another jurist thought the second, sahih opinion to be in effect superior to the on identified by Nawawi as the asahh, then it was the responsibility of the jurist to retrieve from the authoritative sources the line of reasoning sustaining that opinion and to show how it outweighed the arguments of Juwayni and of others. In fact, this was the invariable practice since nowhere does one encounter a reprimand or a complaint that the author failed to present the lines of reasoning in justification of what he thought to be the less authoritative or correct opinion(s).

There was no need to present the evidence of non-sahih opinions because they were by definition negligible--not worth, as it were, the effort.[23] These opinions became known as *fasid* (void), *da'if* (weak*), shadha* (irregular), or *gharib* (unknown), terms that never acquired any fixed meaning and remained largely interchangeable.[24] No particular value was attached to any of them, for just as in the study of hadith, a da'if report was dismissed out of hand. A premium, on the other hand, was placed on the category of the sahih and its cognate, the asahh. At first, it might seem self-evident that the asahh is by definition superior to the sahih. But that is not the case. Claiming sahih status for an opinion necessarily implies that the competing opinion or opinions are not sahih but rather da'if, fasid, shadhdh, or gharib.[25] But declaring an opinion asahh means that the competing opinions are sahih, no less. Thus, in two cases, one having sahih opinion and the other an asahh opinion, the former would be considered, in terms of authoritative status, superior to the latter since the sahih had been taken a step further in declaring the competing opinion(s) weak or irregular, whereas the asahh had not been. In other words, the sahih ipso facto marginalizes the competing opinions, whereas the asahh does not, this having the effect that the competing opinion(s) in the case of the asahh continue(s) to retain the status of sahih. The practical implication of this epistemic gradation is that it was possible for the opinions that had competed with the asahh to be used as a basis for *ifta',* or court decisions, whereas those opinions which had competed with the sahih could fio longer serve any purpose once the sahih had been identified (that is, unless a *mujtahid* or a capable jurist were to reassess one of these weak opinions and vindicate it as being more sound than that which had been declared earlier as sahih; this, in fact, was one means by which legal change took place).[26]

This epistemic evaluation of tashih was usually helpful in assessing opinions between and among a number of jurists belonging to one school. At times, however, it was necessary to evaluate

opinions within the doctrinal corpus of a single jurist, in which case the sahih and the asahh would acquire different values. If a case has only two opinions and the jurist declares one to be sahih and the other asahh, then the latter is obviously the more preponderant one. But if the case has three or more opinions, then the principles of evaluation as applied to the larger school doctrine would apply here too. It is to be noted, however, that these principles of evaluation were generally, but by no means universally, accepted. Disagreements about the comparative epistemic value of tashih or *tashhir* (the rendering of an opinion as mashhur) persisted and were never resolved, a fact abundantly attested to by the informative account penned by the last great Hanafi jurist Ibn Abidin (d. 1252/1836).[27]

The more important point to be made here is the basis of which opinions were authorized. In some cases, the basis was purely hermeneutical in the sense that doctrinal considerations of established principles dictated a certain extension of these principles. In other cases, it was based on considerations of customary practices *(ada)* and of social need and necessity. In fact, the latter consideration is cited as grounds (or abandoning an otherwise sahih opinion in favor of another that would become on these very grounds the sahih. The Hanafi jurist Ibn Abidin argues this much: "Not every sahih [opinion] may be used as a basis for issuing fatwas because another opinion may be adopted out of necessity *(darura)* or due to its being more agreeable to changing times and similar considerations. This latter opinion, which is designated as fit for ifta' *(fi-hi laf al-fatwa),* includes two things, one of which is its suitability for issuing fatwas, the other is its correctness *(sihhatihi),* because using it as the basis of ifta' is in itself [an act] by which it is corrected *(tashih la-hu)."*[28] Thesl notions of tashih did not remain a matter of theory or an unaccomplished ideal. In his *al-Fatawa al-Khayriyya,* Khayr al-Din al-Ramli offers a substantial collection of questions which were addressed to him and which he answered with opinions that had been corrected *(sahhahahu)* by the leading Hanafi scholars on the basis of considerations having to do with changing requirements of the age and of society.[29]

Needless to say, the basis of tashih may also be any of the considerations articulated in the theory of preponderance. Illustrations of such considerations, especially those related to Sunnaic textual evidence, abound.[30] Obviously, the purposes of authorization through tashih, tashhir, and other concepts fundamentally differ from those of defending the madhhab, but the processes involved in both activities are very much the same they are offshoots of *tarjih* or adaptations thereof.

Preponderance, as we have seen, depends in part on corroboration by other members of a class, which is to say that it is subject to inductive corroboration by an aggregate body of the same type of evidence. Thus, a tradition transmitted by a certain number of channels and transmitters was considered superior to another transmitted by fewer channels and transmitters. Similarly, a *ratio legis* attested by more than one text was deemed to outweigh another supported by a single text. Consensus itself: epistemologically the most powerful sanctioning authority, depended on universal corroboration. Thus, what we have called inductive corroboration no doubt constituted a fundamental feature of legal thinking, both in the theory of preponderance and elsewhere in the law.[31]

It is perhaps with this all-important notion in mind that we might appreciate the controversy that found its way into the discourse on the sahih Taj al-Din al-Subki reports that in his magisterial work *al-Muharrar* Rafi'i was rumoured to have determined opinions to be sahih on the basis of what the majority of leading Shafi'i considered to fall into this category,[32] this majority being determined by an inductive survey of the opinions of individual jurists. Ramli reiterated this perception of Rafi'i' endeavor and added that he did so because maintaining the authority of school doctrine is tantamount to transmitting it, which is to say that authority is a devolving tradition that is continually generated by a collectivity of individual transmissions. He immediately adds, however, that preponderance by number is particularly useful when two (or more) opinions are of the same weight.[33]

Be that as it may, tashih on the basis of number or majority appears to have become a standard, especially, if not exclusively, when all other considerations seemed equal. Ibn al-Salah maintained that if the jurist cannot determine which opinion is the sahih because the evidence and reasoning in all competing opinions under investigation appear to him to be of equal

strength, he must nonetheless decide which is the sahih and preponderant opinion according to three considerations in descending order of importance: superior number or majority, knowledge, and piety.[34] Thus, an opinion would be considered sahih if more jurists considered it to be such than they did another. The tashih of a highly learned jurist outweighs that of a less knowledgeable one and that of a pious jurist superior to another of a less pious one. In the same vein, an opinion held to be sahih by a number of jurists would be considered superior to another held as such by a single jurist, however learned he may be. The same preference is given to a learned jurist over a pious one. Thus, tashih operates both within and between these categories.

That number is important should no way be surprising. The entire enterprise and concept of the madhhab is based on group affiliation to a set of doctrines, considered to have an authoritative core. Reducing plurality through number or any other means was certainly a desideratum. It is therefore perfectly reasonable to find the Maliki Hattab declaring, like many others, that the descending order of number, knowledge, and piety is a denominator common to all four schools.[35]

Tashih and tashhir (the latter having particular importance in the Maliki school) did not alone bear the burden of authorization. The four schools resorted to other means, each of which was labeled with what we have called an operative term. Leaving aside any consideration of their order of importance, these terms were as follows: *rajih, zahir, awjah, ashbah, sawab, madhhab, mafti bi-hi, ma'mul bi-hi,* and *mukhtar*. Together with the sahih, the mashhur, and their derivatives, these constituted the backbone of the operative discourse of substantive law. Of these, two are most relevant to my argument here, namely, the madhhab and mafti bi-hi.

The term "madhhab" acquired different meanings throughout Islamic history. Its earliest use was merely to signify the opinion or opinions of a jurist, such as in the pronouncement that the madhhab of so and so in a particular case is such and such.[36] Later the term acquired a more technical sense. During and after the formation of the schools, it was used to refer to the totality *of* the *corpus juris* belonging to a leading mujtahid, be he a founder *of* a school or not. In this formative period, the term also meant the doctrine adopted by a founder and by those *of* his followers, this doctrine being considered cumulative and accretive. Concomitant with this, if not somewhat earlier, appeared the notion *of* madhhab as a corporate entity in the sense of an integral school to which individual jurists considered themselves to belong. This was the personal meaning *of* the madhhab, in contrast to its purely doctrinal meaning, which was expressed as loyalty to a general body *of* doctrine.

There was at least one other important sense of the term that deserves our attention here, namely, the individual opinion, accepted as the most authoritative in the collective doctrinal corpus *of* the school. In order to distinguish it from the other meanings *of* the word "madhhab," we will assign to it the compound expression "madhhab-opinion."

In this doctrinal sense, the term "madhhab" meant the opinion adopted as the most authoritative in the school.. Unlike the sahih and the mashhur, there were no particular or fixed criteria for determining what the madhhab-opinion was since it might be based on general acceptance on the grounds *of* tashih, tashhir, or some other basis. Yet it was possible that the madhhab-opinion could be different, say, from a sahih-opinion.[37] However, the most fundamental feature *of* the madhhab-opinion remained its general acceptance as the most authoritative in the school, including its widespread practice and application in courts and fatwas. This type of opinion is to be distinguished from the mashhur, in that the latter is deemed widespread among a majority, but not the totality, *of* jurists belonging to a school. This explains why the madhhab-opinion could not be as a rule, outweighed *by* another, competing opinion. A distinctive feature of the madhhab-opinion was its status as the normative opinion in legal application and practice. It is precisely here that an organic connection between fatwa and madhhab-opinion was forged-the fatwa being a reflection of litigation and the legal concerns of mundane social life.[38] Hattab's commentary on the matter eloquently speaks of this connection: the term *"al-madhhab,"* he remarked, was used by the more recent jurists *(muta'akhkhirun)* of all the schools to refer to the opinion issued in fatwas. He also remarked, conversely, that any fatwa issued on the basis of something other than the madhhab-opinion ought not to be taken into account *(la yakun la-*

ha'i'tibar).[39] In these pronouncements of Hattab, two important matters must be noted: first, that the connection between fatwa practice and the term "madhhab (-opinion)" is one that appeared among the muta'akhkhirun, not among the *mutaqaddimun,* that is, the early jurists who flourished between the second/eighth and fourth/tenth centuries, a period in which the schools were formed,[40] and second, that the fatwa practice defines the general body of madhhab-opinion in any given school.

But how did the jurist know which opinion constituted the standard basis of fatwas or the madhhab-opinion? This became one of the most urgent questions, constituting a serious challenge to later jurists for whom the determination of the most authoritative school doctrine was essential. Nawawi provides an answer:

> You ought to know that law books of the school contain significant disagreements among the associates, so much so that the reader cannot be confident that a certain author's opinion expresses the madhhab-opinion until he, the reader, deciphers the majority of the school's well-known law books. . . . This is why (in my book) I do not exclude the mention of any of Shafi'i's opinions, of the wajh-opinions,[41] or other opinions even if they happen to be weak or insignificant. . . . In addition, I also mention that which is preponderant, and show the weakness of that which is weak. . . and stress the error of him who held it, even though he may have been a distinguished jurist *(min al-akabir).* . . . I also take special care in perusing the law books of the early and more recent associates down to my own time, including the comprehensive works *(mabsutat),* the abridgements *(mukhtasarat),* and the recensions of the school founder's doctrine, Shafi'i. . . . I have also read the fatwas of the associates and their various writings on legal theory, biographies, hadith-annotation, as well as other works. . . . You should not be alarmed when at times I mention many jurists who held an opinion different from that of the majority or from the mashhur, etc., for if I omit the names of those constituting the majority it is because I do not wish to prolong my discussion since they are too many to enumerate.[42]

Nawawi did not live long enough to conclude his ambitious project, having completed only about a third of it by the time of his death. Yet for him to know what was the madhhab-opinion was in each case, he felt compelled to investigate the great majority of what he, saw as the most important early and later works. Hidden between the lines of this passage is the fundamental assumption that in order to identify the basis of fatwa practice, one must know what the generally accepted doctrine was. Only an intimate knowledge of the contents of the legal works written throughout the centuries could have revealed which opinions remained in circulation---that is, in practice-and which had become obsolete. It is precisely this knowledge that became a desideratum, and this is why the subject of *khilaf* was so important. The study of khilaf was the means by which the jurist came to know what the madhhab-opinions were. Law students, for instance, are often reported to have studied law, *madhhaban wa-khilafan* under a particular teacher. The Maliki Ibn abdal-Barr emphatically states that for one to be called a jurist (faqih), he must be adept at the science of khilaf, for this was par excellence the means by which the jurist could determine which opinions represented the authoritative doctrines of the madhhab.[43]

Although the determination of the madhhab-opinion was more at inductive survey than a hermeneutical-epistemological engagement, it nonetheless entailed some difficulties, not unlike those the jurists faced iT deciding what the sahih and the mashhur opinions were. In his notable effort, Nawawi himself did rather well on this score, which explains his prestige and authority in the Shafi'i school. Nonetheless, he and Rafi'i are sail to have erred in about fifty cases, claiming them to be madhhab-opinion when they were thought by many not to be so.[44] The following case from the *Fatawa* ofTaqi al-Din al-Subki further illustrates the uncertainty involved:

> Two men die, one owing a debt to the other. Each leaves minor children behind. The guardian *of* the minors, whose father was the lender, establishes against the debtor's children the outstanding debt in a court *of* law. Should the execution *of* the judgement (in favour *of* the first party) be suspended until the defendants (viz., the debtor's children) reach majority, or should the guardian take the oath (and have the debt be paid back. . .. The madhhab-opinion is the latter. However, he who investigates the matter might think that the madhhab-opinion is that the judgment should await implementation (till the children reach majority), but this may lead to the loss of their rights. By the time the debtors children attain majority, the money may well have vanished at the hands of the debtor's heirs.[45]

Note here the ambiguity as to which of the two is the madhhab-opinion. Subki identifies immediate execution of the judgment as the madhhab-opinion, while at the same time he also admits that anyone who investigates the matter will find that the opposing opinion has the same status. Subki does not even go so far as to claim that the one who espouses the latter is mistaken.

Be that as it may, the term "madhhab," when referring to an individual opinion, was used to determine what the law on a particular case was. And the criterion for acquiring this status was general acceptance and the fact of its being standard practice in the school. The madhhab-opinions therefore gained authoritative status because they were used predominantly as the basis of issuing fatwas. The Shafi'i Ramli declares that the jurist's most important task is to determine which opinions in his school are regularly applied *(mutadawala)* in the practice of ifta' since this will determine the authoritative madhhab-opinions.[46] In his widely known work *Multaqa al-Abhur,* the Hanafi Halabi also considered his chief task to be the determination of which opinions were the most authoritative. It turns out that next to the sahih and the asahh, the most weighty opinions were those "chosen for fatwas" *(al-mukhtar lil-Jatwa).*[47] In the Maliki school, the authoritative category of the mashhur was in part determined by the common practice of ifta'. Hattab maintains that tashhir is determined, among other things, by the mafti bi-hi, the opinions predominantly adopted by the jurisconsults.[48] At the risk of repetition, it is important at this point to recall Ibn 'Abidin's statement that reflected the centuries-old practice of his school: "Not every sahih [opinion] may be used as a basis for issuing fatwas because another opinion may be adopted out of necessity *(darura)* or due to its being more agreeable to changing times and the likes of such considerations. This latter opinion, which is designated as fit for ifta' *(It-hi laft al-Jatwa),* includes two things, one of which is its suitability for issuing fatwas, the other its correctness (sihhatihi), because using it as the basis of ifta' is in itself [an act] by which it is corrected *(tashih la-hu)."*[49]

Similarly, the rules that were commonly applied, that is, the ma'mul bi-hi, acquired paramount importance as the authoritative doctrine of the school. Like the mafti bi-hi, the ma'mul bi-hi formed the basis of tashhir in the Maliki school,[50] the assumption being that the authoritative opinions of Malik, Ibn al-Qasim, and those of the later mujtahids make up the foundations of dominant judicial practice. In his commentary on Nawawi's *Minhaj,* the Shafi'i Ramli purportedly included in his work only those opinions that were in predominant use, and whenever citing weaker opinions, he alerted the reader to this fact by distinguishing between the two types.[51] In the Hanafi school, the madhhab-opinion was organically linked both to fatwa and to *'amal* (practice). No fatwa was to be considered valid or at least authoritative unless it was backed by the judicial practice of the community *('alayhi 'amal al-umma).*[52] Ibn Hajar al-Haytami summed up the entire issue when he said that " 'alayhi al-'amaln was a tarjih formula used to determine which opinions are correct and authoritative.[53] Conversely, an opinion that is not resorted to in judicial practice will become obsolete, and therefore negligible, if not altogether needless. Speaking of authorial practices, Tufi argues that the author-jurist must not, as a rule, record those opinions that are not relevant to practice, for "they are needless."[54]

Since practice varied from one region to another, an opinion thought to have gained wide circulation in one region might not have been regarded as such in another, an added factor in the disagreement over which opinion was deemed authoritative in the school and which not. The Maliki discourse on this matter perhaps best illustrates the difficulties involved. Ibn Farhun states that the commonly used formula "This is the prevailing practice in this matter" *(al-ladhi lara al- 'amal hi-hi fi hadhihi al-mas'ala)* cannot be generalized to include all domains in which a particular school prevailed. Rather, such a formula would have been applicable only to that region or locale in which the practice had prevailed. This explains, he maintains, why the jurists attempted to restrict the applicability of the formula by adding to it expressions like "in such and such region" *(fi balad kadha).* Otherwise, if they did not qualify the formula, then the opinion would be said to be universally applicable. The opinion's purported universality was in itself an argument in favor of its preponderance as the authoritative opinion of the school no matter

where the opinion might be appealed to. Ibn Farhun also asserts that the principle of authorization by dominant practice is accepted by the Shafi'i as well.[55] To the Shafi'i, he might as well have added the Hanafi, who, as we have seen and as we will further see in the next chapter, placed great stress on dominant practice as a legitimizing factor. The Hanbali, on the other hand, appear to have laid slightly less stress on it than any of the other schools, if we are to judge by what seems to have been a lower statistical frequency of explicit reference to practice in their works. But this is by no means correct in all cases. In his *Muntaha al-Iradat,* for instance, Ibn al-Najjar considers practice *(alayhi al-amal)* to be a preponderating I factor, standing on a par with tashih and tashhir.[56]

The foregoing discussion has shown that operative terminology evolved as a response to the plurality and thus indeterminacy of legal rules. All operative terms had in common a single purpose, namely, the determination of the authoritative opinion on any given case, a determination that amounted in effect to reducing plurality to a single opinion. Epistemologically, this determination and the varied vocabulary that expressed it stood as the binary opposite of ijtihad. The latter created multiplicity, while the former attempted to suppress or at least minimize it. Ijtihad, then, was causally connected with operative terminology, for it stood as its progenitor, historically, hermeneutically, and epistemologically.

A salient feature of operative terminology that evolved as a response to the indeterminacy of legal rules is its own indeterminacy. Yet juristic disagreement was indeed a blessing, a *rahma,* as the jurists might have said. The very diversity of opinion that resulted from this failure allowed Islamic law to keep up with change, a theme that I have discussed in de- tail elsewhere.[57] (It is worth noting in passing that recent findings[58] to the effect that the mechanisms of change were integral to the very structure of Islamic law raise the question of why the so-called legal reforms were so massive, drastic, and destructive of the established legal structures.)

III

Thus, the traditional jurists operated within a self-sufficient system in which practice, hermeneutics, and positive legal doctrine were conjoined to produce the legal culture, which largely defined their world. Practice stood in a dialectical relationship with doctrine, informing it and by which it was informed. Practice also formed an integral part of interpretation and was by no means a mere tail-end of a process, a funnel through which justice was disposed. The legal practitioners and jurists constituted likewise an *epistemic* community, which was systematically engaged on a hermeneutical level. Their practice was both pragmatic and discursive and was the direct result of a legal tradition that bound them with the authoritative demands of doctrine and continuity. Their present was primarily the last moment pf a historical tradition, integral to and inseparable from it. When a qadi or a mufti adjudicated a case or a question, his engagement epitomized at once horizontal and vertical fields of synchronic and historic legal activity: it brought into play 1) the hermeneutical presuppositions of legal theory and methodology and the exegetical arsenal associated with it throughout centuries of refinement and evolution; 2) the principles of positive law,[59] which had been constructed as part of the founders' authority, which in turn was seen as the founding principle of the school as a doctrinal entity;[60] 3) the aggregate but diverse body of knowledge generated by the authoritative figures of the school in the interpretation of these principles; and 4) the reception of these interpretations by the community of jurists within the school, a reception determined by the extent of the interpretive applications in the social, mundane order.

The coming into play of these diachronic and synchronic elements was integrated into other parts of juristic and pedagogical experiences: The qadi or the mufti (or any legal professional for that matter) engaged himself, at one and the same time, in a tradition in which 1) he acquired legal education through the method of "closed texts," which, together with the *ijaza* (license) system, constituted a fundamentally different sort of training from that which the modern law school offered; 2) he was apprenticed, during and after his graduate study, in shari'a courts where doc- trine met practice and where the imposing intellectualism of the law collided, but was always synthesized, with the reality of society and judicial practice; 3) the religious ethic was the sole dominating force and the final arbiter of legal legitimacy; 4) the entire juristic (doctrinal)

and judicial enterprise was thoroughly supported by financially and administratively self-sufficient and independent institutions; and 5) the authority of the jurist was individualistic and exclusively personal (ijtihadic).

None of these elements continues to exist in the modern legal systems of Muslim countries, and what remains of the traditional system, as we have already said, are remnants of mutilated doctrine patched up in a disparate and methodologically deficient manner. Even if we submit that these remnants are faithful to the Islamic ethos as it stands nowadays- which we do not-they are, by virtue of their displacement and organic disconnection from the erstwhile dynamic and vibrant school tradition, incapable of further development and change, at least not so in a systematic and coherent manner; on the one hand, they have lost their methodological, hermeneutical, practice-based, and institutional connection with the Islamic legal tradition. If the name *furu'* (branches) is to be taken in any real sense, as it well may be, then their stem, through which they are literally nourished, no longer survives. On the other hand, they have been systematically alienated from the modernist legal system, and their disconnection from it is equally obvious.

To put our argument more plainly, in order to rejuvenate the entire traditional system-in its founding principles, axioms, hermeneutics, and financial, educational, and madhhab institutions-it would be required that Islamic law be more than a dead "branch." And this, in light of the intractable and well-nigh irreversible modernity and its imperatives, is a manifest impossibility.[61] Since traditional shari'a can surely be said to have gone without return, the question that poses itself therefore is, Can a form of Islamic law be created from within or without the ruins of the old system?

Before attempting an answer to this intricate question, an explanation must be provided as to the assumption underlying this question, namely, the posited necessity for today's Muslims to live by a religious law. Since the middle of the nineteenth century, Muslim societies have embarked on a course of identity crisis caused, among other things, by the disappearance from their daily lives of the religious structures that sustained them for over a millennium. One of these structures, and a central one at that, was Islamic law as a religious and pragmatic system. To say that this law was "the core and kernel" of Islamic life is indeed to state the obvious. Thus, for these societies to regain their cultural and religious identities, a form of Islamic law must obtain-and this for two good reasons. First, historically, Islamic societies have lived by a religious law for over twelve centuries, and what made their identities what they have always been was their possession of a particular legal phenomenon. Islam has always been a nomocracy. Indeed, Islamic societies and polities have throughout these centuries exemplified the highest form of what a nomocracy can be. Second, it is at present inconceivable that Muslims can or will want to transform their Weltanschauung into a Western model of rationality and secularism. They view the modernity of the West as incompatible with their vision of morality and ethics, as having miserably failed in: maintaining the social fabric and in creating a coherent worldview or a meaningful cosmology. The truth claims of Western reason and modernity seem diametrically oppositional and extremely antithetical to the Islamic ethos. The "return to Islam" that we have been witnessing since the Iranian Revolution is partly caused by this disenchantment with Western culture and its products. The solution for Muslims seems to lie in an institutional and normative revival of Islam. It would appear that the legality and legal-mindedness that governed Muslim life for so many centuries is again required to surface in order to redress the havoc that the problems of cultural and religious crises have wreaked.

Joseph Schacht once argued that the problems that modern Muslim: face are parallel to those that prevailed during the early formation of Islamic law, namely, the first two Islamic centuries:

> [T]he subject matter of Islamic law is to a great extent not originally Islamic, let alone Koranic; it became Islamic law only through having the categories of Islamic jurisprudence imposed on it. Islamic jurisprudence derived its fundamental attitude from the Koran, elaborated and developed it, and thereby created an integrating principle which made of an agglomerate of various elements a unique phenomenon *sui generis.* During the first two centuries of Islam, Islamic jurisprudence created a central

> core of ideas and institutions which went far beyond the mere contents and even the implications of the Koran, but which the Muslims considered and have continued to consider specifically Islamic. . . . This assimilating power of the Islamic core over foreign elements anticipated the assimilating power and spiritual ascendancy of Islamic law, as a religious ideal, over the practice, after the two had irremediably separated.[62]

Schacht's views represent a major voice in the discourse that was generated-and is still being generated-by the colonizing cultures. In the spirit of this discourse, he persistently upheld the idea that a fundament: gap had always existed between doctrine and practice in Islam[63] and that if Muslims could live with this gap for so many centuries, then why should they not be able to do so now. In other words, Schacht believes that modern Muslims can construct a new jurisprudence and law, but they must continue to live with the fact that much of what they "assimilate" will always ways go beyond the dictates of the Qur'an. Just as they initially assimilated Jewish, Roman, and other legal institutions and concepts that had dominated the ancient Near East, they can now do the same with Western norms and institutions.

Be that as it may, Schacht's position fails to appreciate the detail of the two historical situations that he sees as parallel. First, when the totally Muslims embarked on constructing a legal system and jurisprudence. they-of course unknowingly-were unencumbered by, and in part largely free from, restrictive and constricting historical precedents or a binding tradition. This is not the case at present. Their movement therefore is detained, if not also limited, by the fact that departures from traditional, *religious* doctrine must be constantly justified (justification here is taken to be no less than the art of persuasion on which hinges the success or failure of a proposed enterprise). The doctrines of Usul al-fiqh constitute a powerful grip over the minds of Muslims today, for they are intimately connected with the holy texts. No refashioning of doctrine or jurisprudence can even take off without due considerations of the imperatives that the usul theory dictates. Second, when the early Muslims embarked on constructing a law and a legal system, they did so from a position of international hegemonic power, a fact that allowed them to speak and act with confidence. Whatever they appropriated from other cultures became theirs, especially in light of the fundamental transformations to which they subjected borrowed concepts and institutions. The present situation is significantly different: modernity is a Western product, a fact poignantly obvious to everyone. On both popular and state levels, today's Muslims perceive themselves, and rightly so, as colonized and dominated subjects, and whatever they adopt of Western ideas and institutions is not, and will never be, theirs. The balance of power, which determines the legitimacy of cultural and other appropriations, is simply not in their favor. Third, and issuing from our foregoing consideration, the balance of legal power does not lie in the hands of the religious-legal specialists who were exclusively, individually and and collectively, responsible for constructing early Islamic jurisprudence and law. The modern state's appropriation of legal powers changes the old equation and, as we have seen, totally marginalizes even the potential contributions of the individual shari'a-minded jurists (assuming that these now exist). And as long as the modern Muslim states remain vassal-like entities in relation to the Western hegemonic powers, their dedication to the Islamic imperatives will always remain vacuous, especially in light of the close control that the West, especially the United States, has been exercising over politics and the religious movements in the Muslim world.

IV

If the modern reality of Muslims is unprecedented, then what is the solution? First of all, the traditional theory of *usul al-fiqh* is no longer sufficient to deal with the exigencies of modern life, even if we assume-against at odds-that a professional legal class, qualified to harness it, can be resurrected. This theory is essentially literalist, paying heed to the lexical and technical meanings of the revealed texts. In some cases, central to society and economy, no amount of interpretation can change the dictates of certain revealed texts. This theory therefore has no chance of any revival (much less success) unless a necessary and sufficient condition is met, : condition some recent Muslim intellectuals are arguing for, namely, that abandonment of all things, material and otherwise, that conflict or contradict with the dictates of this theory. In other words, on their view, much of modernity must be thrown to the wastebasket, for it is not only incongruent with Islam but also harmful in the first place. This writer, however, beg to differ with this assessment. Modernity, as intrinsically reprehensible as it may be, is a reality that cannot be pushed aside or

in any manner neutralized from the midst of Muslim life. Modernity is not only technology and science, Hollywood, McDonald's, and Calvin Klein jeans but also: psychology, an ethic, a set of values, an epistemology, and, in short, a state of mind and a way of life. Modernity is here to stay, at least for a long time to come. The realistic solution, therefore, is to alter what can be altered legal theory has in any case been on the back shelf for a century and a half and it is far more realistic and practical to remold it than to sweep modernity-with all its powerful values, institutions, and epistemologies- aside.

If traditional legal theory cannot provide a solution, then what can? Elsewhere, I have discussed in some detail the reformists' proposals toward fashioning a new theory of law and have concluded that no alternative thus far seems to meet the requirements of the time.[64] What I have labeled the "Religious Utilitarianists" fail to produce a cogent legal theory or methodology and thus offer nothing more than shallow juristic devices that at best attempt to justify the existing arbitrariness of state legislation. Their refashioned concepts of necessity (darura) and public interest *(maslaha, istislah)*, which are inspired by traditional methodology are taken so far as to obliterate the very system from which they themselves derive. In addition to the incurable subjectivity into which these proposals fall, they fail to provide any tools that permit a coherent, logical, or consistent development of the law. Their utilitarianist positions are barely appropriate solutions for the present, and the proposals they otter can by no means function as dynamic methodologies, organically tied to the demands of an evolving legal sociology.

The other group of reformers we have identified are the "Religious Liberalists" who offer a diversity of theories that have at their core promising nonliteralist methodologies.[65] The proposals of Fazlur Rahman and Muhammad Shahrur represent two major examples of this group. Their merit lies in the fact that they provide methodologies that maintain a coherent hermeneutical link with the religious texts but, at the same time, manage to escape the traditional literalist approach, which, in light of the drastic changes brought to the fore by modernity, is highly restrictive and leads to tortuous lines of legal reasoning. However, associated with these proposals there remain three main problems. First, none of them has been sufficiently elaborated as to create a comprehensive and structured theory, matching in caliber its traditional usul counterpart. What has been offered thus far is no more than an outline, so to speak. Second, these proposals remain circumscribed, having little appeal to Muslims at large. Rahman's ideas, for instance, were and remain a marginal voice, and Shahrur has been the subject of much negative controversy. Personally, I have yet to meet one Muslim intellectual who has adopted a favorable attitude toward him. In fact, the book market is now replete with works and pamphlets refuting or criticizing his intelligent contributions. Third, even if these proposals were received with great favor by the general Muslim public, which is clearly not the case, they have so far had no effect whatsoever on the centers of power-the state officials and political rulers who have turned a deaf ear to them as they did Virtually to all others. And it is unlikely that this situation will soon change.

What we are witnessing therefore is no less than a formidable impasse. The cries of Muslim intellectuals, however promising their ideas mayor may not be, are still and will remain marginalized. At the same time, the interest of the Muslim states, with their authoritarian and autocratic regimes, is little served by the adoption of a full-scale program of Islamization. The relatively very few regimes that claim themselves to be Islamic (with the exception of Saudi Arabia and Iran) take this stance as a political device and strategy. The promulgation of the *hudud* penal law hardly constitutes a genuine restoration of the shari'a and fails to mask the political expediency underlying the seemingly legal initiative. As long as the Muslim intellectuals are estranged from state apparatus and as long as the present regimes continue to hold a firm grip over power, there can be no hope for a true Islamic revival.

Yet it is only the state that can bring about a revival of Islamic law, but not without the full participation of Muslim intelligentsia and, more important, not while the present regimes remain in power. The Iranian experience affords an eloquent example of the combination of political and legal governing, but then the Shi'ite religious elite differs from its Sunnite counterpart in fundamentally structural ways. The solution for the Sunnite countries, therefore, is for the *new* Muslim state to incorporate the religious intelligentsia into its ranks. The custody of Islamic law, history has shown, must re- side with a learned hierarchy largely dissociated from political

power: the independence of law from the concerns of politics is as much an Islamic phenomenon as it is American or European. In fact, this independence has a much longer history in Islam. The state must re-create the necessary conditions for a modern version of Islamic law to be constructed and to evolve largely on its own. It must financially sustain religious institutions, especially shari'a colleges; it must install the religious hierarchy in the respective social and political hierarchy so as to enable the legal profession to sense and reflect societal concerns on all levels; it must be able to give this legal profession a free range in determining what the law is; and finally it must respect its verdict. But none of this can be attained without a genuinely Islamic polity.

Theory, however, is one thing, reality another. A most central and vexing problem remains, and the solution to it seems thus far untenable. The question that today's Muslims must answer is to what extent they are willing to subscribe to modernity and to adopt its products. To reject it completely is obviously out of the question: modernity, we have said, is not merely a material phenomenon but primarily one that effected a systematic restructuring of psychology and epistemology, among many other things. Accordingly, if they were to adopt of it what suits them, what is to be adopted? If commercial, corporate, and other business laws are to be adopted, as they have and as they must, can Muslims do so while escaping the snares of usurious interest? If they are to join the other nations in signing human rights charters and conventions, as they have, can they, or are they willing to, enact religious laws that grant their religious minorities an equal status? If the education of women has become an essential feature of their society, can the religious law forge for the Muslim woman a commensurate status compatible with her new role in society? If this status were to be accorded, can this law, while maintaining its intellectual and religious integrity, deal with the implications and consequences of this new role? And if all this were to take place, how are the revealed texts to be interpreted?

Notes

1. Salih Ganim Sadlan, *Wujub Tatbiq al-Shari'a al-Islamiyya* (1404; reprint, Riyadh: Idarat al-Thaqafa wal-Nashr bi-Jami'at Muhammad b. Sa'ud, 1984).
2. See especially the essay by Muhammad Salih 'Uthman, *Wujub Tatbiq ai-Shari 'a al-Islamiyya,* 143-82, especially 176.
3. See Mustafa al-Zarqa, *Wujub Tatbiq al-Shari'a al-Islamiyya,* 227.
4. Paul Koschaker, *Europa und das romische Recht* (Munich: C. H. Becksche Verlagsbuchhandlung, 1966), 183.
5. Madeline C. Zilfi, "The *Ilmiye* Registers and the Ottoman *Medrese* System Prior to the Tanzimat," in *Contribution a l'histoire economique et sociale de l'Empire ottoman* (Leuvin: Editions Peeters, 1993), 309-27.
6. See, for example, NathanJ. Brown, *The Rule of Law in the Arab World* (Cambridge: Cambridge University Press, 1997),26-29, 33-40. However, the author's view that "the legal reforms of the late nineteenth and early twentieth centuries can- not be seen as an external imposition" (49) is entirely unwarranted. It is based on fragmented evidence and is inconsistent with the indisputable facts of history; including those rehearsed by the author himself (see, for example, 33-40). It also grossly ignores central facts about Islamic legal history, the nature of colonialist ventures, and the pervasive effects of modernity. Furthermore, even if we go by Brown's partial and superficial explanation that the adoption of European law was the Arab nationalists' choice and means of "resisting direct European penetration," it still is the colonialist enterprise that imposed this option on the nationalists and that, wit- tingly or not, created severe legal ruptures in the Muslim world. The crux of Brown's explanation is the underlying assumption, adopted by a large number of Western scholars, that modernity and modernization are universal phenomena and that it is natural and expected that everyone in the world should want to adopt them. This eccentric assumption has been seriously challenged by Western social anthropologists, critical theorists, as well as others, but our field, instead of pioneering these re- assessments, still labors with an archaic nineteenth-century mentality.
7. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 104.
8. Cited in H. Liebesny, *The Law of the Near and Middle East: Readings, Cases and Materials* (Albany: State University of New York Press, 1975), 67-68.
9. Namely, those principles that were elaborated in legal theory *(usul al-fiqh)* and those that governed the hermeneutical activity of taqlid in substantive law (also known as *usul).* Being fundamentally different from each other, these two types of principles must not be confused with each other. On the function of *taqlid,* see W. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), chap. 4.
10. On the construction of the Imam's authority, see Hallaq, *Authority,* 24 ff.
11. Abu Ishaq Ibrahim aI-Shirazi, *Sharh al-Luma',* ed. Abd aI-Majid Turki, 2 vols. (Beirut: Dar al-Gharb al-Islami, 1988), 2:1043-45; Ahmad b. Ali Ibn Barhan, *al-Wusul ila al-Usul,* ed. Abd al-Hamid Abu Zunayd, 2 vols. (Riyad: Maktabat al-Ma'ari 1404/1984), 2:341-51.
12. Muhammad b. Idris al-Shafi'i, *al-Risala,* ed. Ahmad Muhammad Shakir (Cairo: Mustafa Baba al-Halabi, 1969),560-600; Norman Calder, "Ikhtilaf and .ljma in Shafi'i's Risala," *Studia Islamica* 58 (1984): 55-81.
13. Abu 'Umar Yusuf Ibn Abd aI-Barr, *Jami' Bayan al-'IIm wa-Fadlihi,* 2 vols. (Cairo: Idarat al-Tiba'a al-Muniriyya, n.d.), 2:45 ff.; G. Makdisi, *The Rise of Colleges* (Edinburgh: Edinburgh University Press, 1981), 107-11.
14. Hallaq, *Authority,* 166 ff., 236 ff.
15. On the non-sahih-opinions, see note 24.
16. Verification is the activity of the "verifiers" *(muhaqqiqun),* scholars who establish the solution to problems by means of original proof and reasoning. See Muhammad b. Ali al-Tahanawi, *Kashshaflstilahat al-Funun,* 2 vols. (Calcutta: W. N. Leeds' Press, 1862),2:336 (s.v. *tahqiq);* W. B. Hallaq, *Ibn Taymiyya against the Greek Logicians* (Oxford: Clarendon Press, 1993), 12 n. 2.
17. Ibn Ghanim Muhammad al-Baghdadi, *Majma' al-Damanat* (Cairo: al-Matba'a al-Khayriyya, 1308/1890), 3.
18. In the Hanafi school, Marghinani, among others, acquired a similar status. In Malikism, it was Ibn Rushd, Mazari, and Ibn Buzayza, although in his *Mukhtasar,* Khalil was to bring together the fruits of these and other jurists' efforts.
19. Opinions formulated by *ashab al-wujuh* or *ashab al-takhrij.* See; Hallaq, *Authority,* 43 ff.
20. Since, unlike the unmarried fornicator whose punishment falls short of the death penalty, the married fornicator receives the full extent of this punishment. See Sharaf al-Din Muhyi al-Din al-Nawawi, *Rawdat al-Talibin,* ed. 'Adil 'Abd al-Mawjud and 'Ali Mu'awwad, 8 vols. (Beirut: Dar al-Kutub al-'Ilmiyya, n.d.), 7:305-6.
21. Since Nawawi's work is a commentary on Shirazi's *Muhadhdhab,* he refers to him as "The Author" *(al-musannifi,* a common practice among commentators.
22. Sharaf ai-Din al-Nawawi, *al-Majmu: Sharh al-Muhadhdhab,* 12 vols. (Cairo: Matba'at al-Tadamun, 1344/1925), 9:43-44.
23. For example, in his *al-kJajmui* 1:5, Nawawi states that he will overlook the lines of reasoning in justincation of ,veak opinions even when these opinions are of the widespread *(mashhur)* category.
24. Taqi ai-Din al-Subki, *Fatawa,* 2 vols. (Cairo: Maktabat al-Qudsi, 1937), 2:10 ff.; Jalal al-Din al-Suyuti, *al-Ashbah wal-Naza'ir* (Beirut: Dar al-Kutub al-'Ilmiyya, 1979), 104; Sharaf al-Din al-Nawawi, *Tahdhib al-Asma' wal-Lughat,* 3 vols. (Cairo: Idarat al-Tiba'a al-Muniriyya, 1927), 1:94, 113, 164; 'Ala' al-Din al-Ba'li, *al-Ikhtiyarat al-Fiqhiyya* (Beirut: Dar al-Fikr, 1369/1949), 24; 'Ali b. Sulayman al-Mirdawi, *Tashih al-Furu',* ed. 'Abd al-Sattar Farraj, 6 vols. (Beirut: 'Alam al-Kutub, 1985), 1:25,31,32; 'Isa b. 'Ali al-'Alami, *Kitab al-Nawazil,* 3 vols. (Rabat: Wizarat al-Awqaf wal-Shu'un al-Islamiyya, 1983), 3:6. Abu al-Khattab al-Kilwadhani (d. 510/1116) was said to have held a number of opinions not shared by the members of his school, opinions described as *tafarrudat.* These opinions, also characterized as *ghara'ib* (pl.

of *gharib,* lit. unfamiliar, thus irregular), were corrected *(sahhaha)* later by Hanbali. See 'Abd al-Rahman Ibn Rajab, *al-Dhayl ala Tabaqat al-Hanabila,* 2 vols. (Cairo: Matba'at al-Sunna al-Muhammadiyya, 1952-1953), 1:116, 120, 126-27. It is to be noted that in some cases the opposite of the *da'if was* the *qawi* (lit. strong) or the *aqwa* (stronger), terms that were rarely used and whose technical meaning remained unfixed. See, for instance, the Hanbali 'Ala' al-Din al-Ba'li, *al-Ikhtiyarat al-Fiqhiyya* (Beirut: Dar al-Fikr, 1949), 11. The same may be said of the term *sawab* or its fuller expression *wa-hadha aqrab ila al-sawab* (this is more likely to be true or correct), which was used infrequently to designate the status of an opinion. See, for example, 'Ala al-Din al-Kasana, *Bada'i' al-Sana'i'* 7 vols. (Beirut: Dar al-Kitab al-Arabi, 1982), 1:31. A very rare labeling of weak opinions is the term *quwayl,* which is the diminutive of *qawl* (opinion). See the Hanbali Shams al-Din al-Zarkashi, *Sharh al-Zarkashi 'ala Mukhtasar al-Khiraqi,* ed. Abd Allah al-Jabrin, 7 vols. (Riyadh: Maktabat al-'Ubaykan, 1413/1993), 1:63,290.

25. It is quite possible that the last two, and particularly the fourth, of this quartet may have referred to opinions lacking in terms of sufficient circulation, without any consideration of correctness or soundness. However, the connection that was made between authoritative status and level of acceptance meant that widely circulated opinions were correct, whereas those that failed to gain wide acceptance were problematic. See further discussion on this issue later in this chapter.
26. See Hallaq, *Authority,* 166 ff.
27. See his splendid discussion in *Sharh al-Manzuma,* printed in his *Majmu'ar Rasa'il,* 2 vols. (n.p., 1970), 1:10-52, at 38 ff., which marshals a myriad of opinions from the early and late periods.
28. Ibn 'Abidin, *Sharh al-Manzuma,* 1:38-39.
29. Khayr ai-Din al-Ramli, *al-Fatawa al-Khayriyya,* printed on the margins of Ibn 'Abidin's *al-'Uqud al-Durriyya fi Tanqih al-Fatawa al-Hamidiyya* (Cairo: al-Matba'a al-Maymuna, 1893), 3.
30. See Hallaq, *Authority,* chap. 4.
31. On this theme, see Wael B. Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunni Legal Thought," in *Islamic Law and Jurisprudence: Studies in Honor of Farhat J. Ziadeh,* ed. N. Heer (Seattle: University of Washington Press, 1990), 3-31.
32. Taj al-Din al-Subki, *Tabaqat al-Shafi'iyya al-Kubra,* 6 vols. (Cairo: al-Maktaba al-Husayniyya, 1906), 5:124.
33. Shams ai-Din al-Ramli, *Nihayat al-Muhtaj ila Sharh al-Minhaj,* 8 vols. (Cairo: Mustafa Babi al-Halabi, 1357/1938), 1:37.
34. Taqi ai-Din Ibn *al-Salah,Adab ai-Mufti wal-Mustafti,* ed. Muwaffaq b. Abd al-Qadir (Beirut: 'Alam al-Kutub, 1407/1986), 126.
35. Muhammad al-Hattab, *Mawahib al-Jalilli-Sharh Mukhtasar Khalil,* 6 vols. (Tarablus, Libya: Maktabat al-Najah, 1969), 6:91. See also Mirdawi, *Tashih al-furu',* 1:51; Nawawi, *Majmu,* 1:68.
36. For example, see Muhammad b. Idris al-Shafi'i, *al-Umm,* ed. Mahmud Matarji, 9 vols. (Beirut: Dar al-Kutub al-'llmiyya, 1413/1993),2:102,113,136, 163, and passim.
37. Mirdawi, *Tashih al-Furu',* 1:50-51.
38. This has been demonstrated in W. Hallaq, "From *Fatwas* to *Furu':* Growth and Change in Islamic Substantive Law," *Islamic Law and Society* (1994),17-56, at 31-38.
39. Hattab, *Mawahib al-Jalil,* 1:24; 6:91. 40. This periodization, which is determined by our independent investigation of the madhhab evolution and the construction of authority, agrees with the traditional distinction between the "early" and "later" jurists.
40. Wajh-opinions are those formulated by *ashab al-wujuh* or *ashab al-takhrij,* jurists who flourished mainly during the third/ninth-fourth/tenth centuries. The activity of the *ashab,* however, continued on a smaller scale throughout the next three or four centuries. On these, see Hallaq, *Authority,* 43 ff.
41. Nawawi, *Majmu',* 1:4-5.

42. Ibn 'Abd *al-Barr, Jami' Bayan al-Ilm,* 2:43 ff
43. Ramli, *Nihayat al-Muhtaj',* 1:38.
44. Subki, *Fatawa,* 1:324.
45. Ramli, *Nihayat al-Muhtaj,* 1:36-37.
46. Ibrahim al-Halabi, *Mulatqa al-Abhur,* ed. Wahbi al-Albani, 2 *vols.* (Beirut: Mu'assasat al-Risala, 1409/1989), 1:10; 2:194, 202, 207, 210, 211, and passim,
47. Hattab, *Mawahib at-Jalil,* 1:36.
48. Ibn 'Abidin, *Sharh al-Manzuma,* 1:38-39.
49. Hattab, *Mawahib at-lalit,* 1:36.
50. Ramli, *Nihayat al-Muhtaj,* 1:9.
51. Ala' aI-Din al-Haskafi, *al-Durr al-Mukhtar,* 8 vols. (Beirut: Dar al-Fikr, 1979),1:72-73. See also Ibn 'Abidin, *Sharh al-Manzuma,* 38.
52. Ibn Hajar al-Haytami, *al-Fatawa al-Kubra al-Fiqhiyya,* 4 *vols.* (Cairo: 'Abd ai-Hamid Ahmad al-Hanafi, 1938), 4:293.
53. Najm al-Din al-Tufi, *Sharh Mukhtasar al-Rawda,* ed. 'Abd Allah al-Turki. 3 vols. (Beirut: Mu'assasat al-Risala, 1407/1987), 3:626; *"idh ma la amala alayh la hajata ilayh."*
54. Shams al-Din Ibn Farhun, *Tabsiratal-Hukkam,* 2 vols. (Cairo: al-Matba'a al-'Amira al-Sharafiyya, 1883), 1:49.
55. Taqi al-Din Ibn aI-Najjar, *Muntaha al-Iradat,* 2 vols. (Cairo: Maktabat Dar al-'Uruba, 1961-1962), 1:6.
56. See Hallaq, *Authority,* chap. 6.
57. See Hallaq, *Authority,* chap. 6.
58. See note 7.
59. On the later construction of the founders' authority, see Hallaq, *Authority,* chap. 2.
60. Today, some Muslim intellectuals argue that the loss of the religious ethic is the cause of failure to apply the shari'a. They maintain that the restoration of this ethic and the regaining of the religious *Geist* will guarantee the creation of a reality in which Muslims will abandon all that is contrary to the legal ethic, thereby abandoning in the process all the evils of modernity. In other words, their argument amounts to the claim that popular conviction can change the facts on the ground, facts here meaning all that is associated with the nation-state, technology; economic modes of production, finance, consumerism, and much else. This writer, however, begs to differ. Even if this popular conviction were to obtain, there remains the problem of how to accommodate the modernist material reality within the parameters of Islamic values.
61. Joseph Schacht, "Problems of Modern Islamic Legislation," *Studia Islamica* 12 (1960), 100-101.
62. A major doctrine of Orientalist legal scholarship that was required to vindicate the colonialist enterprise generally and, more specifically, the massive legal restructuring to which the Muslim institutions and concepts were subjected.
63. Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), chap. 6.
64. Hallaq, *A History of Islamic Legal Theories,* 231 ff.
65. In other words, can modern Islamic banking and finance still operate, as it does, in a global market and still avoid, in a true and genuine manner, engagement in usurious transactions? The experience on the ground thus far has shown this to be untenable.