CHAPTER SEVEN

WESTERN SCHOLARS ON THE ROLE OF THE 'ULAMA' IN ADAPTING THE SHARI'A TO MODERNITY: A CRITICAL REVIEW

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INTRODUCTION

Several Western scholars have in recent years written on the impact of modernization on transformations in the religio-legal, social and economic status of the 'ulama'. The main change from the perspective of the 'ulama' was the creation of centralized nation states that nationalized religious and legal spheres and deprived the 'ulama' of their exclusive authority as formulators and interpreters of the law. Another factor that has had a considerable impact on the status of the 'ulama' was the emergence of radical Islam, starting in the 1970s. Scholars differ as to the extent to which the 'ulama' have been responsible for the erosion in their status, as well as with regard to the success of the strategies they have adopted for coping with the challenges of modernity.


For example, Layish holds the 'ulama' responsible for the crisis of the shari'a in modern times for failing to articulate a novel but genuine legal theory. See Aharon Layish, “The Transformation of the Shari’a from Jurists’ Law to Statutory Law in the Contemporary Muslim World,” Die Welt des Islams 44 (2004), pp. 100–101. Cf. a similar criticism by Crece-lius (“Nonideological Responses of the Egyptian Ulama”) who argued (before the strengthening of radical Islam in Egypt) that the response of the Egyptian 'ulama' to modernization concentrated on preserving their material political, social and economic position. Their defensive reaction (and even non-reaction) to the ideological challenge of secularism lost them the chance to shape modernization in an
In this paper, I focus on one aspect of the ‘ulama’s intellectual activity—namely, their attempts (as well as those of other intellectuals) to formulate an alternative Islamic legal theory that addresses, more adequately than did the old *usul al-fiqh*, the challenges of modernity in general and the most significant challenge to legal orthodoxy, statutory codification, in particular. The modernist Azhari scholar Muhammad ‘Abduh and his followers, already in the late nineteenth and early twentieth centuries, pointed to the need for such a theory and attempted to articulate one. Since that time additional attempts have been made both by ‘ulama’ and by other intellectuals. In the first part of what follows I discuss the opinions of Western scholars with respect to the intellectual merit of some of the new legal methodologies, demonstrating that those opinions are often negative. In the second part I discuss the expectations of those scholars regarding the formulation of such a theory in the future. This discussion includes two aspects: (1) What is the identity of the intellectuals who are expected to articulate the theory? (2) What should be the character of this theory and its content? This issue is studied against the background of the three legal models that exist in contemporary Islamic states: the civil-law model, the “Islamic” codification model and the Saudi Arabian model. I conclude (1) that the probability of the Islamic theory of law being updated by the ‘ulama’ is low, and (2) that any future theory of law will have to make provision for codification.

**LEGAL MODELS IN THE CURRENT ISLAMIC MIDDLE EAST**

Among the Middle Eastern nation-states (excluding Turkey, which is a secular state), one can discern three legal models. The first, a civil-law model, was adopted by most states, including Egypt, Syria, Lebanon, Jordan, Iraq, Iran, Tunisia and Morocco, which secularized all fields of law by importing Western-oriented codes (civil, criminal, commercial and international), to be applied by their national courts. The only fields left for the *shari’a* courts have been family law, inheritance

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Islamic context. Vogel argues, to the contrary, that the ‘ulama’, by consistently forcing statutory legal reforms into the age-old *siyasa* channel, may prove to have benefited in the end, because state legislation today does not have a lot of public legitimacy. See Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, Leiden 2000, pp. 218–219.