THE TRANSFORMATION OF THE SHARI‘A FROM JURISTS’ LAW TO STATUTORY LAW IN THE CONTEMPORARY MUSLIM WORLD*

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In memoriam Hava Lazarus-Yafeh

1. Introduction

In this short essay I want to present the thesis that the codification of the shari‘a by Muslim legislatures, since the middle of the

* This essay concentrates on the Middle East (including Egypt and the Sudan) and North Africa. I here attempt to draw an outline and some tentative conclusions with a view to promoting public discussion on what seems to be one of the most controversial issues among contemporary scholars. My approach to the subject matter is from the viewpoint of a socio-legal historian.

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I owe my colleague, the late Professor Hava Lazarus-Yafeh from the Hebrew University, much encouragement in embarking on this issue. She quite often expressed the idea that comparative research on Islamic law and Jewish law in modern times is extremely important. Hava’s curiosity extended beyond the academic aspect. In both cases the question as to whether a theoretically immutable eternal law can adapt itself to changing conditions is of utmost practical importance. She strongly believed that contemporary exponents of Jewish law may greatly benefit from the experience gained by the codification of Islamic law since mid-nineteenth century. This essay is dedicated to her memory.
nineteenth century, brought about the transformation of the shari‘a from “jurists’ law,” that is, a law created by independent legal experts, to “statutory law,” in other words, a law promulgated by a national-territorial legislature. This transformation entails profound implications the most important of which is the deprivation of the fuqahā’ of their “legislative” authority and its investment in secular legislature.

The shari‘a is, broadly speaking, a product neither of legislative authority nor a case law; there is no binding precedent in the Western connotation of the term.¹ The shari‘a is a jurists’ law in the sense that it was created and developed by fuqahā’ (jurists) and muftīs who in the formative period were not integrated as a professional class in the establishment.²

The characteristics of the shari‘a are manifested in the textual sources, legal methodology, and the authority for sanctioning legal rules. The legal methodology (usūl al-fiqh) of the shari‘a consists of four sources of law: the Qur‘ān and the Prophetic ḥadīth or sunna (custom, normative way of life) that make up the material sources; the analogical deduction (qiyyās) which is the method of deriving legal rulings from the above mentioned sources; and the consensus (ijmā‘) of the fuqahā’ of each of the schools of law (madhāhib) which substantiates the new rulings.³ This legal methodology did not leave the political ruler any leeway, except by means of administrative decrees (see below), to control the formulation of the legal norm inspite of all his efforts to the contrary.

It is interesting to note in this connection that Ibn al-Muqaffa‘ (d. 140/757), Secretary of State, suggested to the Caliph al-Manṣūr, while the shari‘a was still in its formative period, that the latter enact,

¹ That is, formation of positive law by means of cases handed down by the highest judicial court authorized to interpret statutes, regulations, and constitutional provisions. See Black, Law Dictionary, s.v. “Case Law.” Cf. Johansen, Truth and Validity of the Qādi’s Judgment.

² For a detailed discussion of fiqh as a sacred law, see Johansen, Contingency, Introduction. On the role of muftīs in the development of Islamic law, see Hallaq, Iftā’ and Ijtihād.

³ On the legal methodology, see Schacht, Introduction, 58ff.; Coulson, History, 55ff. For a detailed discussion of Islamic legal theory, see Zysow, The Economy of Certainty; Hallaq, Legal Theories.