

THINKING ABOUT  
SECULARISM AND LAW  
IN EGYPT

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**THINKING ABOUT  
SECULARISM AND LAW  
IN EGYPT**

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## I

I want to talk about secularism and law reform in Egypt, a subject about which I have recently begun to think in a systematic way. I shall stay clear of contemporary political debates about instituting the *shari'a* as the law of the nation-state—although I shall say something on that matter briefly towards the end. Instead, I shall take up some theoretical questions relating to changes in the nineteenth century and the first few decades of the twentieth. In my view, an anthropological approach to such a theme requires one to pay attention to social concepts and institutional arrangements that derive from Western history. This is not because they are standards for measuring the progress of Egypt, nor because they have polluted the purity of Egyptian culture, but because they were inserted into Egypt's modernity in singular ways. I want to see the reform of that law neither as a story of progressive liberalization, nor as a reflection of continuing failure to modernize properly. I want to see it as a dimension of secularization—in particular, of how “secularization” reflects changing connections between state power, legal institutions, moral norms and religious authority.

In a polemical vein, several contemporary writers have claimed that in the past religion and religious law (the *shari'a*) always occupied a restricted social space and that this fact proves the continuous presence of secular society in Islamic history.<sup>1</sup> However, I think that in speaking of secularism (and also of religion) in this way, one obscures important historical re-configurations. A secular society, I would argue, is a modern construct based on the legal distinction between public and private, on a political arrangement requiring “religion” to be subjected by law to the private domain, on an ideology of moral individualism and a downgrading of the knowing subject, on a celebration of the physical body as well as on a range of personal sensibilities, that all emerged in Western Europe together with the formation of the modern state. I do not mean by this that sec-

1. See, for example, Muhammad Nur Farhat, *Al-Mujtama' wa al-shari'a wa al-qānūn* (Cairo: Al-Hilal, 1986), p. 39.

ularism is not relevant to conditions in contemporary Egypt. On the contrary, it is very relevant. But that is because of the involvement of its history with that of the West.

I shall start by recounting the story of the gradual narrowing of *shari'a* jurisdiction (i.e. the restriction of the scope of "religious law") and the simultaneous importation of European legal codes. This process has been represented by historians as the acquisition of civilized culture, or as the facilitation of capitalist exploitation, or as a complex struggle for power between imperial and nationalist agents. Each of these perspectives has something to be said for it, but my concern is with something else: with exploring more precisely the changes involved when we talk about the reforms as secularization. So I go on to look briefly at the wider context of cultural change and Islamic reform, and I point to the importance of the modern state. This leads me to do a reading of a report on the reform of the *shari'a* court system written by the highly influential Islamic reformer Muhammad Abduh in 1899, in which I look for the ways it adapts itself to the new spaces of the modernizing state; I then do the same for the writings of the lawyer Ahmad Safwat who, in 1917, proposed principles for the reform of the *shari'a* that are crucial for the constitution of a secular state. Finally, I discuss a point arising from a recent article by the anthropologist Brinkley Messick dealing with law, state, and subject formation.

I should emphasize that what I have to say is very much in the nature of work in progress—and that it is therefore both incomplete and provisional.

## II

Let me begin straightaway with my schematic account. Egypt in the nineteenth century was formally part of the Ottoman Empire but it possessed a large measure of political autonomy. *Shari'a* courts had primary jurisdiction over urban Muslims, rural tribes followed customary rules and procedures (*urf*) and *milliyya* courts presided over various sects of Christians and Jews. Hence *shari'a* courts were by no means the only form of governmental regulation. Indeed, strictly speaking *shari'a* courts were at first not part of the state, although in theory the *shari'a* was upheld by the prince. A civil code was introduced in 1876 for the Mixed Courts (an autonomous institution administered by European judges, dealing with Europeans resident in Egypt and their transactions with Egyptians).

In 1883, a modified version of the code used in the Mixed Courts was compiled for the National (*ahliyya*) Courts, both codes being based mainly on the Napoleonic

Code. Courts administering *shari'a* law, often described by European historians as “religious courts”, were gradually deprived of jurisdiction over criminal and commercial cases, and confined to administering family law and religious endowments (*awqāf*). The so-called “secular courts” (both Mixed and National) had jurisdiction over the rest. The bureaucratization of the *shari'a* courts (i.e. the introduction of an appellate system, a new emphasis on documentation in judicial procedure as well as the authorization of written codes) drew on European principles and incorporated the *shari'a* into the modernizing state. In 1955, under Jamal Abdul Nasir, the dual structure of the courts was finally abolished. This unification and extension of state power, and the accompanying triumph of European-derived codification, have together been seen as essential to Egypt’s secularization.

### III

The story historians tell is of course more complex and differentiated, paying attention to particular times, places, and people. But what interests me as an anthropologist are the cultural categories used in the story, and how it attempts to explain cultural phenomena. Thus the massive process of westernization is not in dispute among historians of modern Egypt. A question that is in some dispute, however, is why the reformers looked to Europe rather than build on pre-existing *shari'a* traditions.

Nathan Brown, the author of a recent history of law in the modern Arab world, has complained that “much recent scholarship continues to assert that the basic contours of legal systems were laid by the metropole, local imperial officials, and expatriate populations....This view, centered as it is on the motives and actions of the imperial power, should cause some discomfort because it risks writing the population of much of the world out of its own history.”<sup>2</sup> Thus, contrary to the repeated claim that the Mixed Courts were imposed because of the capitulations, argues Brown, the Mixed Courts were a means by which the Egyptian government sought to limit the capitulations. This motivation, he says, should be attributed to the entire movement of legal reform along European lines because the latter can be seen as a tool for resisting direct European penetration.<sup>3</sup>

2. Nathan Brown, “Law and Imperialism: Egypt in Comparative Perspective”, *Law and Society Review*, vol. 29, no. 1 (1995), pp. 104–5.

3. *Ibid.*, p.115.

The notion of resistance is attractive to historians and anthropologists who wish to give subordinated peoples what they think of as “their own agency”. It allows them to argue that European reforms were not imposed upon but used by subordinated agents, although what purpose they were used for is not always made clear. In fact, the very notion of resistance is obscure, as when resistance to the reforms is explained as “rigidity and reaction”, or attributed to the fear that material interests are being threatened. How good are such explanations? Talk of “reaction” merely invokes a metaphysic of linear progress and, as such, is no explanation at all. Reference to the resisters’ material motives is admittedly an explanation, in spite of its reductive character. What is frequently missed in such attempted explanations, however, is that since the idea of “resistance” implies the presence of intrusive power, we need to attend properly to what that power consists in, what intrusive power seeks—in short, to what acts we are confronted with. If “imperialism” is thought of as an agent contingently connected to its acts, a player calculating what his next move should be in a game whose stakes are familiar to all participants, then we may talk of agents seeking to strategize and of others resisting that strategy. If, on the other hand, imperialism is regarded not as an already-constituted agent that acts in a determinate way, but as the diverse powers that converge to create a new political, legal, and moral landscape, then we should certainly not say that “imperialism was a far weaker force for legal reform than has generally been assumed to be the case.”<sup>4</sup>

Arguments about the defensive character of legal reforms are not new. The numerous reforms initiated by the Ottomans since the eighteenth century have been described in precisely that way. The point, however, is not to speculate about an old motive (resistance) but about new spaces (institutional and discursive models) that make different kinds of knowledge, action and desire possible. That the results were not exactly European has also long been recognized, but there are two ways of looking at this outcome: either (as the majority of historians have said) as evidence of “a failure to modernize properly”, or (and this is just beginning to be proposed) as different experiences rooted in part in traditions other than those to which the European-inspired reforms belonged, and that therefore have their own potentialities for thought and action. At any rate, the most important feature of the new spaces is the Egyptian version of the modern and modernizing state in which law had to acquire new substance and new functions—a process often called “secularization” by historians of Egypt, although not analysed as fully as it might be.

4. Nathan Brown, *The Rule of Law in the Arab World* (Cambridge, 1997), p. 18.



## IV

Reform of the law in Egypt has been deeply entangled with the circumscription and reform of the *shari'a*, and thus with the reform of Islamic tradition in general.

Reinhard Schulze once asked a question most historians have taken for granted: Why did nineteenth-century Islamic reformers take so eagerly to the European interpretation of Islamic history as one of civilizational decadence?<sup>5</sup> The interesting answer he gave refers to political economic changes as well as to the cultural consequences of print. European capitalism, he pointed out, transformed the eighteenth-century mode of surplus extraction through rent into a system of unequal exchange between metropole and colony. Because the traditional forms of political legitimation were now no longer appropriate to the colonial situation, he argued, a new ideological need was created—and eventually met by the indigenous elite that emerged out of social-economic disintegration and the effects of print culture. European historical reason (including the notion of an Islamic Golden Age followed by a secular decline under the Ottomans) was adopted by the new elites, he suggested, via the books from and about Europe, as well as the Islamic “classics” selected for printing by Europeans in Europe and by westernized Egyptians in Egypt. That historical discourse could now be used, concluded Schulze, to legitimize the claim to equality and independence.

The sense of *ijtihād* was extended to mean the general exercise of free reason and thus was directed against *taqlīd* (here meaning the unquestioned authority of tradition). This has been commented on critically by generations of orientalist who have pronounced the Reform movement a failure. But Schulze himself appears to be interested less in whether or not the movement was intellectually successful. He tells us instead that advocating *ijtihād* in the new sense provoked the fear among more conventional *ulama* that they would lose their position of power as the new Islamic intelligentsia emerged, so they too began to take their distance from “tradition”. Nevertheless, “traditional Islamic culture” did not disappear, says Schulze. The bastion of that tradition remained mysticism. The movements of rebellion against colonialism were based on this traditional culture, and the hostility between it and colonialism was extended to relations with the official Islam that colonialism had created. Thus Schulze employs a notion of

5. Reinhard Schulze, “Mass Culture and Islamic Cultural Production in 19<sup>th</sup>-Century Middle East”, in G. Stauth and S. Zubaida (eds.), *Mass Culture, Popular Culture, and Social Life in the Middle East* (Westview Press, 1987).

“traditional Islam” which he identifies with Sufism and considers more authentic than the *salafiyya* attempts at reform.

Schulze writes that the *islāh* movement openly turned against every manifestation of mysticism because mysticism represented what the European bourgeoisie disliked most about Islam—irrationalism, superstition, and fanaticism. By taking their distance from it, the new Islamic elites signalled their abandonment of their own tradition and asserted their claim to independence on the basis of civilized status. This is a sophisticated account, but I am not persuaded by it. To begin with, the concept of “tradition” requires more careful theoretical attention, something I am not able to give here. Furthermore, Muhammad Abduh’s relation to Sufism was more complicated than Schulze suggests. For although Abduh was critical of Sufis who propounded doctrines he considered contrary to the *shari’a* (*ghulāt al-sūfiyya*), and who served the political purposes of rulers by providing them with “corrupt *fatwas*”, he strongly endorsed the Sufi understanding of ethics and spiritual education (*‘ilm al-akhlāq wa tarbiyyat al-nufūs*).<sup>6</sup> I will return to this point later.

Jakob Skovgaard-Petersen has taken the argument about the ideological role of the new Islamic elites further, with specific reference to a sociology of secularization within Egypt.<sup>7</sup> He underlines the well-known social developments from the late nineteenth-century on—the centralization of state authority, the creation of new state institutions, the standardization of administrative rules—and he too points to the spread of printing and the emergence of a reading public as critical developments. These new developments, he tells us, enabled Islamic reformers to advocate a more rational and ethical Islam, especially through the institution of the *fatwa*, in which the idea of self-regulation is crucial. Skovgaard-Petersen here borrows Peter Berger’s ideas on secularization to propose that the freeing of the individual from religious authority has a double consequence: on the one hand, it greatly expands the choices available to him, and on the other hand, religious commitments come to depend on subjective judgment—and because the choices are now situated in a disenchanted world, the judgment tends to employ secular reason. We can draw out a conclusion here which Skovgaard-Petersen leaves implicit. The individual is now

6. See, for example, the summary of a conversation in 1898 between Abduh and Rida (published under the heading *al-tasawwuf wa al-sūfiyya*, in Muhammad Imara (ed.), *Al-A’māl al kāmila*, vol. 3) in which he also declares to the latter that “All the blessings of my religion that I have received—for which I thank God Almighty—are due to sufism”, p. 552.

7. Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dar al-Ifta* (Brill, 1997).

encouraged—in morality as well as in law—to govern herself, as befits the citizen of a liberal secular society. Such, at least, is the ideal. But we must not forget that this autonomy depends on conditions that are themselves subject to political regulation and control.

This conclusion seems to me to have particular implications for an analysis of the modernist movement in Islam. It enables one to ask of the *salafiyya* reformers not why they failed to produce a sufficiently impressive Islamic theology or legal theory, nor why they became willing ideologists for the modern state, but primarily how the re-ordering of modern social life imposed certain demands on Islamic tradition. I shall illustrate this point first with reference to a plan for rationalizing the *shari'a* courts, and then with reference to an early argument for reforming the law of personal status.

## V

When the *shari'a* is structured essentially as defining personal status in the law, it is radically transformed. This is not because the *shari'a*, by being confined to the private domain, is thereby deprived of political authority, the authority that the advocates of an Islamic state argue should be restored. On the contrary, what happens to the *shari'a* is not curtailment but transmutation. It is rendered into a subdivision of law that is authorized by the centralizing state. What interests me is that it is secularized in distinctive ways.

In the perspective on law reform in Egypt that I adopt, a citizen's rights are neither an ideological legitimation of class rule (as in Marxism) nor a means for limiting arbitrary government (as in liberalism). I see them as integral to the process of government itself, to the normalization of social conduct in a secular, modern state—a state whose interventions in the private and public life of individuals are to be kept to a minimum, but only in clearly-defined circumstances, for liberalism recognizes the right to self-government only in persons who are considered to be capable of exercising it. That is why in even the most liberal of democracies enforcement by administrative authority rather than self-enforcement is the rule for categories of the population that are deemed to be incapable, whether temporarily or permanently, whether due to their own fault or through no fault of their own: young children, soldiers, recipients of welfare, and inmates of hospitals, hospices, shelters and prisons. And, of course, colonial populations. Liberal theory always assumed that it was necessary for the colonial state to forcibly educate its subject populations until they had truly devel-

oped that capacity and could exercise the right to self-government in a responsible manner.<sup>8</sup>

The attempt at the forcible education of subjects is a major part of the story of nineteenth-century reform in Egypt, as it is of progressive reform in other parts of the non-European world. Forcible government in that sense has continued in post-colonial times, most notably under the Nasir regime. In these conditions (as well as others in which the safety or prosperity of the national population is at stake) liberalism requires the state to intervene directly in the lives of its subjects. Agents who have learned how to obey their own conscience must be allowed to govern themselves simply because that is the most efficient way of securing overall social order. But the conscience has to be of a particular kind.

In the liberal scheme of things, the law separates and secures public and private domains of life, and the state embodies and administers law in the interests of its self-governing citizens. The state's concern for the harms and benefits accruing to its subjects is not in itself new. But—as Foucault rightly argued—the modern state expresses this concern typically in the form of a new knowledge (political economy) and directs it at a new object (population). It is in this context that “the family” emerges as a category in law, in welfare administration, and in public moralizing discourse. The family is the unit of “society” in which the individual is physically and morally reproduced, and has his or her primary experience as a “private” being. The secular formula of privatizing “religion” is adhered to by confining the *shari‘a* to the family.

This brings me to Muhammad Abduh’s report on the *shari‘a* courts written in 1899.<sup>9</sup> Abduh’s recommendations cover a range of technical topics—improving court buildings, increasing the salaries of judges and clerks and raising their standard of education, expediting the hearing of cases and the execution of judgments, instituting regular inspections and a better system of record-keeping, simplifying interaction with litigants and clarifying the official language used, etc. The reforms Abduh proposes here have therefore largely to do with procedure and setting. The *shari‘a*, he insists, is not itself in need of improvement but the books in which it is written are unnecessarily difficult for litigants to understand, and it could therefore do with the kind of rationalizing work that

8. I discuss the liberal qualification for self-government in my “Conscripts of Western Civilization”, in C. Gailey (ed.), *Civilization in Crisis*, vol. 1 (1992).

9. Muhammad Abduh, “Taqrir islāh al-mahākīm al-shar‘iyya”, in Muhammad Imara (ed.), *Al-‘Amāl al-kāmila lil-imām Muhammad ‘Abduh*, vol. 2 (Beirut, 1980), pp. 217–97. Surprisingly, it is not mentioned in the standard histories of modern Egyptian law.

the Ottoman state undertook in the *Majalla*.<sup>10</sup> But what is striking is the way Abduh approaches the fundamental social function of the *shari'a* courts through something that has come to be called “the family”.

These courts, he writes, intervene between husband and wife, father and son, between brothers, and between a guardian and his ward. There is no right relating to near or distant kin over which these courts do not have jurisdiction. This means, says Abduh, that *shari'a* judges look into matters that are very private and listen to what others are not allowed to hear. For even as they provide the framework of justice, they are also a depository for every kind of family secret. In other words, the courts are expected both to guard the privacy and to work through the sentiments on which “society” ultimately depends.

Among the many recommendations in his report, Abduh stresses the need for a more careful separation of functions between administration and jurisprudence (*al-idāra wa al-fiqh*), and he urges greater independence of the *shari'a* courts from state control. Nevertheless, he clearly considers the *shari'a* system to be integral to government. Thus the *shari'a*, which had previously not been bound by the limits of the state, is now virtually an arm of the modern state. Abduh regards it as essential to the restoration of “the family”. Without the work of the *shari'a* courts—which are in effect “family courts”—he sees society itself in danger of moral collapse. By being identified with the family, the *shari'a* becomes at once functionally central to political order and theoretically the guarantor of individual privacy and of individual self-government in what is increasingly becoming a secular society.

It is in this context that I think one may place the reform that eventually translates the *shari'a* as “family law”, for the family is not merely a conservative political symbol or a site of gender control. By virtue of being a legal category, it is an object of administrative intervention—not least in the twentieth-century projects of birth control—that is part of the re-arrangement of the modern nation-state. Ironically, the “family” becomes salient precisely when modern political economy, the principal source of government knowledge and the principal object of its management, begins to represent and manipulate the national population in terms of statistical abstractions—economic sectors, consumers, active labour force, property owners, recipients of state benefits, demographic trends, etc. At this level of “public” knowledge and activity the individual, as a knowing and acting subject, has ironically been erased. But the legal formation

10. Ibid., p. 295.

of the family gives the concept of individual morality its own “private” locus,<sup>11</sup> and the *shari’a* can now be spoken of as the law of personal status—*qānūn al-ahwāl al-shakhsiyya*—the product of a secular formula, a defined place in which “religion” makes its public appearance through state law.

## VI

Whatever the function of the family—and of family courts—in modern law, colonial Egypt was obviously not ruled by a liberal democratic regime. Nevertheless, the social and cultural changes that took place in the late nineteenth and early twentieth centuries created some of the basic pre-conditions for modern secular society. This involved the legal constitution of fundamental political spaces in which social order was to be maintained respectively through (a) the legal authority of the nation-state, (b) the freedom of market exchange, and (c) the moral authority of the family. Central to this liberal ordering is thus the distinction between law (which the state embodies, produces, and administers) and morality (which is the concern only of the responsible person generated and sustained by the family), the two being mediated by the freedom of public exchange, the space that was created by the penetration of European capital into Egypt. The reform of the *shari’a* in Egypt may be seen as an adjustment to this secular re-ordering.

Ahmad Safwat’s attempt at the beginning of the twentieth century to formulate for Egypt a secular distinction between law and morality claims our detailed attention.<sup>12</sup> Safwat was a British-trained lawyer and advocate of *shari’a* reform, who, like other evolutionary Victorian thinkers, saw the Qur’an as an archaic religious text that mixed together moral and legal rules, rules whose real significance must be identified by a historical teleology. Where the disregard or breaking of a rule leads to a penalty imposed by the state, says Safwat, we have (secular) law; where transgression is sanctioned only by punishment in the next world, we have (religious) morality.

11. In the same year that Muhammad Abduh wrote his report, his friend Qasim Amin published *Tahrir al-mar’a*, in which he argued passionately for making the husband-wife bond (on which the modern nuclear family is based) central to civilized life.

12. These views were first published in his book, *Baḥṭh fī qā’idat islāh qanūn al-ahwāl al-shakhsiyya* (Alexandria, 1917). A shorter, more systematic statement of that position appeared later as “The Theory of Mohammedan Law”, *The Journal of Comparative Legislation and International Law*, vol. 2 (1920).

The opposition of “law” to “morality” in terms of sanctions allows Safwat to make a further distinction between positive and negative rules derived from the Qur’an: rules that prohibit certain acts, e.g. marrying more than four wives at a time; and rules that require certain actions, e.g. distributing inheritance in accordance with fixed principles. Everything else, Safwat proposes, can be identified as optional rights that allow the individual to do as he pleases, such as marrying up to as many as four wives. Thus, only the first two kinds of rule are obligatory. Optional rights are strictly speaking not rules at all, and if they are mentioned in the Qur’an it is only in the context of a positive or negative obligation. Optional rights refer to acts that may or may not be taken up; they do not refer to acts that are mandatory. But because the area of freedom is logically infinite, permitted acts cannot be exhaustively enumerated—they are simply all acts present and future that are not constrained by a specific rule.

The dual classification between sanctioned obligations and optative rights allows Safwat to argue for a liberal reform of the *shari’a* by the state—I think one of the earliest and certainly one of the most rigorous arguments of its kind in modern times. He thus points out that permitted rights must not be confused logically with mandatory rules. The category of what is permitted (i.e. everything that is not required or forbidden) is a residual one, and as such it is much more extensive than the rights that happen to be mentioned in the Qur’an. It is incorrect, says Safwat, to maintain that just as what is forbidden cannot be permitted, what is permitted cannot be prohibited. Permitted rights can indeed be curtailed or rescinded by a state, and if it were not so, a Muslim state—or any other state—could not legislate at all. In fact, every state does restrict optional rights—as in the case of the right to exercise a particular trade without a license, or (this is Safwat’s example) to marry a second wife without license from the Court. The priority of state-derived authority is clear in this argument.

Safwat’s secular separation of “law” from “ethics” differs from the older, *shari’a* conception. For in the latter, the concept of morality is not defined simply in terms of the type of sanction (secular versus religious) or of the type of governance (subjective freedom versus obedience to authority). Morality is a dimension of all accountable behaviour (including justiciable acts) in the sense that while every such act is the responsibility of a free agent, it is also subject to assessments that have practical consequences for the way one lives in this world *and* the next. And all programmes for the cultivation of moral virtues presuppose authoritative models. The older *shari’a* tradition does, of course, distinguish between disputes and transgressions that are subject to judgment by law courts, and also matters that are not. My point here is that Safwat’s modern conception of ethics as a “private” rule (a matter of moral or religious conscience) enables him to separate it from legal discourse in distinctive ways.

## VII

So far I have been mainly concerned with some conceptual shifts in the legal discourse of liberal reformers of the *shari'a*. I will now turn to the question of how legal discourse disciplines subjects of the state. For this I take up Brinkley Messick's excellent article which attempts to think through some conceptual problems about the constitution of *shari'a* subjects in Yemen.

Legal instruments and records, Messick observes, are important "for the imaginative construction of a specific subjectivity."<sup>13</sup> In old Yemen, he tells us, only the *shari'a* had jurisdiction. Furthermore, there were no identity papers, driver's licenses, or bank cards, and no personal naming conventions such as we find today in Yemen, of the sort with which we are familiar in the West. Unlike contemporary Yemen, state records in the pre-modern period were few and far between, and to the extent that identities were documented, they were attached to property (land and buildings). Witnessing in a court of law (like teaching) required a human presence and living speech, not written statements. This meant, observes Messick, that a crucial problem for the constitution of the *shari'a* subject was how intention (*niyya*) is to be established, "how overt acts and social identities are understood by judges and others as indices of the inner intentional state."<sup>14</sup>

There are two qualifications one might make with respect to this interesting account of subject formation in *shari'a* discourse. The first is that the intention to be determined by the *qadi* when confronted with an accuser, a defendant, or a witness, should not ipso facto be identified with constituting a quotidian intentionality, because it is primarily an attribution for legal purposes.<sup>15</sup> There is a difference between intention being constituted in the legal sense and in the everyday psychological sense, although the two are of course related. And this brings

13. Brinkley Messick, "Written Identities: Legal Subjects in an Islamic State", *History of Religions*, vol. 38, no. 1 (1998), p. 29. I need hardly stress that my interest here is only in some aspects of this article. This is not the place for discussing it as a whole, still less for commenting on his splendid contribution to the anthropology of law, *The Caligraphic State* (California University Press, 1993).

14. *Ibid.*, p. 44.

15. In his fascinating article on the connection between spousal apostasy and divorce among Muslims in British India, Khalid Masud gives an example of intention becoming *legally* critical where earlier it had not been. This is precisely a case where psychological intention was relevant to a legal argument but not constituted by it. (M. K. Masud, "Apostasy and Judicial Separation in British India", in M. K. Masud, B. Messick, and D. Powers (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Harvard, 1996).



me to my second qualification: Even if it were the case that intention in both senses is entirely the product of a certain kind of inscription, the judicial process is not the only site where signification operates. In other words, there are other sites within the *shari'a* than simply *mu'āmalāt* (transactions). The entire range of *'ibādāt* (devotional acts) carried on beyond the space of the court's judicial intervention is also an important place (of course not the only place) for the "construction of *shari'a* subjects". When the *shari'a* comes to be equated with justifiable rules, the consequence is not simply abridgement but a re-articulation of the concepts of law and morality.

This is precisely what we find in the liberal reform lawyers, who refer to the *shari'a* as *qānūn al-ahwāl al-shakhsiyya* (the law of personal status). And we find it also—sometimes—in reformers like Muhammad Abduh.

But in Abduh, the modernizing Azharite steeped in *tasawwuf*, there is a tension that is absent in the proposed reforms of the European-trained lawyers. For on the one hand, Abduh complains that teaching and examining the *shari'a* at al-Azhar pays far too much attention to *'ibādāt* and far too little to *mu'āmalāt*.<sup>16</sup> But he also recognizes that the *qadi's* authority depends on his developing certain moral aptitudes and predispositions.<sup>17</sup>

What is interesting about this, I suggest, is not merely the claim that *'ibādāt* are a vital part of every Muslim's upbringing, nor that they are an integral part of the *shari'a* considered as a total normative structure. It is that they take ritual cultivation to be a moral pre-requisite for the acquisition of certain intellectual virtues by the *qadi*. A simple knowledge of legal theories (*usūl al-fiqh*) will not suffice, Abduh points out. The authoritative character of the laws itself can be recognized and properly applied only after a lengthy process of personal cultivation that depends on what he calls *al-sunna al-dīniyya al-saḥiḥa*—"the true religious tradition". According to this conception, techniques of the body (kinaesthetic as well as sensory) employed in *'ibādāt* help create the sensibilities that are not only a precondition of Islamic ethics but also of the law's moral authority. Whether, and if so, how and to what extent such cultivation actually works is of course another question—one for historical and ethnographical research.

What Abduh is saying here is in a sense the reverse of what political Islamists assert when they call for personal conduct to be governed by the authority of the state. It also leads to a view of subject formation that is less directly dependent on state law, in which subject formation is simply the way individuals learn to

16. Muhammad Abduh, *Taqrīr*, p. 295.

17. *Ibid.*, p. 219.

live through tradition-guided practices—or fail to do so in uncontrollable circumstances—and the sensibilities they acquire in that process. I repeat: These practices do not have to be derived from the *shari'a*, but when they are so derived they relate to the authority of the *shari'a* as law in a particular way.

If we consider the matter carefully, I think we shall find that in the pre-modern Muslim state (whether Yemeni or Egyptian) moral subjectivity was never constructed simply through legal instruments and texts. It was cultivated by a range of traditional disciplines, many of which had nothing to do with the *shari'a*. Legal texts were of course part of that process, but their thrust as part of the tradition of the *shari'a* had to be different from their role as mere instruments of state law. The difference I allude to is not a matter of size (a wider or a narrower normative structure), nor is it a matter of grounding anthropological accounts (abstract generalizations versus concrete behaviour). It is a matter of the way traditional practices that are relevant to the law become authoritative *in* the law, and conversely, of how normative discourses (justiciable as well as non-justiciable) form part of the moral disciplines of subject-formation in daily life. In short, the history of the *shari'a* is not coterminous with the history of the pre-modern state (by which I do not mean that the social life of Muslim societies has always been largely secular). I do not think the instruments of *shari'a* courts constructed the subject—either in the sense of the embodied human being who is subject to the *shari'a*, or in the sense of a discursive legal construct (because that discourse cannot alone constitute the authoritativeness of that category). For the point of view that Abduh represents, the authority attached to the concept of *shari'a* subjectivity presupposes an entire range of moral and spiritual disciplines.

## VIII

Let me conclude. The importation of European legal procedures and codes in nineteenth-century Egypt were seen at the time as westernization or civilization. Today most people prefer to speak of that process as secularization and modernization, as though these terms were self-evident and neutral. And it has become more fashionable to look for Egyptian agency in place of imperialist imposition. Implicit in this emphasis seems to be the feeling that people are—and should be—essentially free. The increasing restriction of the *shari'a*'s jurisdiction has been seen as a welcome measure of progress by nationalists, and by Islamists as a sign of temporary defeat. But both have taken a strongly statist perspective in that both see the *shari'a* as circumscribed religious law.

This is not surprising since the unprecedented powers and ambitions of the modern state have been central to the great transformation of our time. By trying to work out some of the implications of this transformation for the modern story of the *shari'a*—including the reconstruction of law's relation to morality—we may hope to understand better what secular disciplines entail in different times and places.









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