Codification and Islamic Law: The Ideology Behind a Tragic Narrative

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Field Notes

Editors’ Note to the Field Notes

“Field Notes” is a new section of MELG that features reflective essays on the state of the art in academic fields that contribute to the study of the Middle East, law and governance. Inspired by the name of the famous notebook and the accounting for positionality implicit in ethnographic practice, this new section of MELG features self-reflective pieces on the phenomenon of scholarly production. A new initiative led and overseen by the editorial board, each piece is vetted for the purpose of furthering conversation, dialogue, and new research directions that interrogate what counts as standard narratives, canonical sources, and orthodoxies in a field of research — all of which invariably inform (and sometimes limit) the work that takes place within and across academic disciplines.

Codification and Islamic Law: The Ideology Behind a Tragic Narrative

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* The seeds for this article were planted in the idyllic atmosphere of the Institute for Advanced Study, in Princeton, New Jersey, where I was privileged to be a member of the School of Social Sciences for the 2014–2015 academic year. I am particularly indebted to Joan W. Scott for creating a collegial and intellectually challenging environment in which to test new ideas and broach new streams of research. In that wonderful space, I was privileged to learn from a wide range of scholars, who have since become friends, as I wove my way to the argument of
Abstract

This article repositions historiographically a particular thesis in Islamic legal studies that characterizes Islamic law as utterly incompatible with codification, and by implication the modern administrative state. This article departs from that argument by situating codification efforts in Muslim majority polities alongside other efforts at codification, specifically 19th century Germany and the United States. The article shows that the thesis of incompatibility relies on a constricted reading of the “Islamic”, an overdetermined conception of the state, and an under-appreciation of the populist-cum-democratic ideology that animates the thesis in the first place. A more fruitful way forward is to reify the “state” rather than rarefy it as a theophanic specter. To better appreciate the relationship between Islamic law and codification, the argument suggests, requires that scholars attend to the “state” while resituating the history of the “Islamic” in terms of a history of the “legal”.

Keywords


Introduction

This essay examines a specific argument within Islamic legal studies about the incompatibility of Islamic law with modern codification. It situates that argument within a larger historical analysis about codification, which has stretched from early 19th century Germany to late 19th and early 20th century US legal
history and that continues to inform ongoing debates about the administrative state in the US, UK and especially in Europe, with increasing focus on legal harmonization within the European Union.

The scholarly concern about codification and Islamic law is a modern one that tracks the rise and prominence of the state, particularly since the 19th century, alongside the proclaimed demise of Islamic law, with its presumed vision of a decentralized legal pluralism. Indeed, Wael Hallaq wrote that although the state and Islamic law are “machines of governance” and “legally productive mechanisms,” one key difference is that Islamic law “could and did accommodate a measure of legal intervention by the political sovereign, but to an extent that did not exceed the peripheral or the marginal, especially in terms of determining the substance of the law.” The state, on the other hand, has even “less tolerance to legislative, administrative, and bureaucratic competition. Its staunchly centralized nature largely precluded any palpable tolerance of other systems.” The animating condition of the state, for Hallaq, was its tendency to centripetal force, “compelling and pushing toward an exclusive and ultimate center”; in contrast, Islamic law was “demonstrably centrifugal.”

Generally, codification is distinguished from “classical” Islamic law in three ways: (1) unification of the law in formal, codified format; (2) centralization of law-making in the state; and (3) narrowing of the scope of Islamic legal content in contemporary codified systems. These three features of contemporary law making in the modern state have led some scholars to criticize modern state efforts at Islamization as being fundamentally contrary to the nature and spirit of Islamic law. To sustain this claim, their argument proceeds in near syllogistic fashion. Premise 1: Islamic law is distinct from codification. Premise 2: codification is a foreign, colonial legal technology that is inherent to the modern state. From these two premises, the conclusion follows that Islamic law is incompatible with the modern state form. But what does it mean to suggest that Islamic law is distinct from codification? Embedded in this premise are certain claims about both that, while focusing on legal technique, implicitly rely on an ideology of law and the state to perform the analytic heavy lifting. The most well-known advocate of this position is Wael Hallaq, although he is not alone in his concerns. I will review his and other scholars’ arguments about codification to suggest that their critique of the state through codification mistakes ideology

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3 Hallaq, *Sharia*, 362.
for law.\textsuperscript{5} I am not arguing for a disjunction between law and the state; rather I am arguing that ideology serves as a middle term that construes the relationship of the disciplinary and material institutions and practices of law to the state.\textsuperscript{6} I argue below that what makes Hallaq’s and other scholars’ argument about codification work is an ideology about legal form and the state that is not fully articulated. My goal is to interrogate arguments that conceptually link assumptions about codification (item 1 above) to the centralizing state (item 2 above). In particular, I will suggest that an ideological reading of the techniques of codification serves as a proxy for an aggregated, monolithic image of “the state,” despite the fact that codes and legislation, in addition to being technically distinct, do not do what many in the field of Islamic legal studies think they do.

The implicit ideology in this debate is hardly surprising given the historiography of both the Civil Law and the Common Law. As John Henry Merryman and Rogelio Pérez-Perdomo noted, people who should know better often remark that “civil law systems are codified statutory systems, whereas the common law is uncodified and is based in large part on judicial decisions.”\textsuperscript{7} This is an over-simplification given that civil law systems have no shortage of judicial decisions, and common law systems are increasingly governed by legislation. In fact, as Merryman and Pérez-Perdomo note, California, a common law state in the US, has “more codes than many civil law nations, but California is not a civil law jurisdiction.”\textsuperscript{8} Though even in stating this truism, one should be careful not to treat as synonyms technical terms such as code, codification, and legislation, as some scholars of Islamic law have done.\textsuperscript{9} Whereas “code” and “codification” generally aim at a systemic endeavor, “legislation” reflects a

\textsuperscript{5} Codification is a complex term that can denote an entire legal system—as in the civilian legal tradition—or a technique of developing law (i.e. codes of law). It is related to, but distinct, from statutes and legislation, as the latter are often piece-meal and not meant to enact a systematic legal enterprise. There is often slippage in how these terms are used in the literature reviewed below—a slippage that is reflected and addressed in the analysis below.


\textsuperscript{8} Merryman and Pérez-Perdomo, The Civil Law Tradition, 27.

piecemeal legislative agenda characteristic of historically Common Law systems, though not exclusively so. Nevertheless, Merryman and Pérez-Perdomo remind us that the all-too-facile distinction between civil law and the common law only makes sense when understood in ideological terms. As Kunal Parker has shown, in the 19th century, the common law served distinct ideological ends in the formative period of the United States. Moreover, such ideological content is not limited to the Civilian or Common law traditions. In her masterly study on periodization in European history, Kathleen Davis illustrated how the land-tenure concept of “feudalism” informed historical periodization by demarcating the “Middle Ages” as the very tradition against which the “Modern” was cast. In this vein, “feudalism” (and its underlying legal content on property) served as a conceptual midwife for secularism, sovereignty, and the state. “Secularization appeared in relation to feudalism through sovereignty, and it quickly became evident that the relation of secularization and sovereignty is also key to historical debates about periodization – particularly with respect to the idea of ‘modernity’ as an independent, self-constituting period.”

If ideology is present in claims of distinction between legal systems generally, it stands to reason that competing assumptions are at play in the distinction between codification and Islamic law. To make these assumptions plain, I juxtapose the Islamic law debates on codification with debates in early 19th century Germany and late 19th and early 20th century US legal history. Examining these earlier debates reveals that whether one valued a common law or codified approach to law depended on certain ideological assumptions about history, popular consent and obligation, and the authority and scope of the state. For example, in the late 19th and early 20th century United States, a period which witnessed extensive industrial development, the debates about codification were politically coded as either progressive or conservative, depending on one’s view about market regulations and economic laissez faire. As William Novak has brilliantly shown, that era represented the rise of the state (particularly the federal state) as a major feature of people’s lives, because the state was the principle institution in this period capable of checking the excesses of private capital in the interests and welfare of the people (salus populi). After the Great Depression, WWII, and the rise of the New Deal administrative state (and by implication, the legislation that made that administrative state

possible), the ideological rancor about codification (which also collapsed codification and legislation) tended to wane as legislation became a more normalized technique of US federal and state practice – a technique that could be utilized to either enhance market efficiency or to redistribute resources.

By the mid-20th century, codes and statutes were such a reality of statecraft that the state, whether identified as a civil law or common law system, was ultimately revealed as the principal point of concern throughout these debates on codification. This broader historiography of codification should give pause to scholars of Islamic law who embrace a narrative of Islamic law that sees modern codification, and the specific legislation of Islamic doctrinal law, as the demise of Islamic law. As this article suggests, this expanded historical account ought to raise important questions about the underlying assumptions of law as formal and/or informal; the relationship between legal form and popular consent to obligation; and, fundamentally, the relationship between legal system and governance. Ultimately, the current dominant narrative in Islamic legal studies – in a sense, a tragic narrative – adopts an ideology of codification that collapses codification as technique with the state as form. More pointedly, this essay shows that the dominant historiographic view of codification and Islamic law is less about Islamic law or even the legislative process, and more about a critique of the state or, more precisely, the authoritarian state. Just as F.A. Hayek was concerned about the totalitarianism that might arise from a social welfare state, contemporary scholars of Islamic law are (ironically) also worried about the totalitarianism of the state, where Islamic law is deemed to have paid the ultimate price for an authoritarian political culture that has a genealogy tracing back to colonialism and anti-colonial movements. In the post-colonial inspired narrative of Islamic law, Islamic law is made to represent the people, their welfare, and/or their well-being, on the assumption that the state (or its colonial ancestor) is incapable or unwilling to serve them effectively. This historiographic trend in Islamic legal studies today so collapses codification and the state as to posit both as Islamic law’s “Other.” But to do so is to stake out an ideological position that also, ironically enough, instrumentalizes the memory of an Islamic legal order to critique the authoritarian one that dominates the Arab-Muslim landscape. If that is the case, then the advent of the state calls for closer attention to how we understand the state (as opposed to codification and legislative processes, or even Islamic law) as a disaggregated institutional actor, as well as how law and legal systems

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(whether of the formal or informal variety, Islamic or otherwise) are practiced and experienced.

**The Ideology of Technique: Codification as Cover for a Politics of the State**

When Islamic legal scholars take aim at codification as a technique of statecraft, they implicitly (if not explicitly) target the modern state and the ideologies deployed either to uphold or subvert it.\(^{14}\) For instance, J.N.D. Anderson noted in a 1971 article on law reform and “modernisation” that 19\(^{th}\) century Ottoman codification reforms were designed to ensure “administrative efficiency” of the state, in part by bypassing substantive Islamic legal doctrines.\(^{15}\) According to this reading, Sharīʿa is inefficient, and thereby sits in contrast to the state, whose efficiency is built upon its monopoly of the legislating function: “the national State today has become the unique source of all legislation.”\(^{16}\) But the state’s legislative monopoly can be cast in different ideological terms: on the one hand, the state form provides rational efficiency, and on the other hand, may be no less than a totalitarian dispensation that downgrades the pluralism of Islamic law to monist legal dictate.\(^{17}\)

Wael Hallaq has a sustained description of codification that is instructive for purposes of this analysis. In his impressive and extensive study, *Sharīʿa: Theory, Practice, Transformations*, Hallaq relied on two articles written in the mid-20\(^{th}\) century to reflect on the dynamics of codification. The first one, “A Primer on Codification”\(^{18}\) by Ferdinand Fairfax Stone, was published in the *Tulane Law Review*. A Rhodes scholar, Stone attended Oxford in 1931 and thereafter received his JSD from Yale University. A highly respected scholar of torts\(^{19}\)

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14 For a scholar that makes these broader concerns explicit, see Aharon Layish, "The Transformation of the *Sharīʿa* from Jurists’ Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44 no 1 (2004): 85–113.


and comparative law, Stone’s scholarship engaged both domestic American and European audiences; in fact, one of his books on American law was in French and published in Paris. Charles De Gaulle issued him an honorary degree from the University of Grenoble, and Queen Elizabeth II named him an honorary officer in the Most Excellent Order of the British Empire. Given his intellectual interests in European law, his teaching career in Louisiana, and his founding and directing of Tulane University’s Institute for Comparative Law, it is hardly surprising that Stone would write about codification. Louisiana is the only US state whose legal system was drawn from the Civil Code tradition of continental Europe. Indeed, Louisiana’s unique legal history informs the nature and scope of the comparative law curriculum at Tulane Law School and its two-track training in both the Common Law and the Civil Law.

An outlier in the US context, Louisiana represents a mixed legal system that draws upon both the Common Law and Civil Law in varying ways. In the early 18th century, the area around New Orleans was a French Settlement. In 1769, it was held by the Spanish, who transferred it back to France in 1803, who quickly sold it to the United States on December 20, 1803 as part of the Louisiana Purchase. The French and Spanish influence on what is now known as the state of Louisiana was not easily forgotten, and in fact informed the development of the only formal codification process in any of the then-existing and subsequent states of the United States of America. By 1808, the region had its Civil Code, drawing upon French, Spanish, Roman and English sources. In 1822, the Louisiana legislature tasked a committee of drafters to revise the Civil Code, which took effect in 1825. Despite presumptions of the United States as a Common Law country, Louisiana presents an exceptional case of a “mixed legal system up to the present day.”

22 For this biographical outline, see http://registrar.osu.edu/staff/commence_bulletins/wi82_commence.pdf (accessed October 13, 2014).
27 Weiss, “Enchantment of Codification,” 501. For an extended historical analysis of the Louisiana Civil Code, see Richard Holcombe Kilbourne, A History of the Louisiana Civil Code,
As much as historians of Louisiana’s legal system note its distinctive features, it is perhaps not surprising that law professors and comparative law specialists like Stone, writing in the mid-20th century, would represent codification as mere technique, indeed without ideological content, in the post-New Deal administrative environment of the historically Common Law oriented United States. Stone’s “Primer” reads in almost apolitical terms about codification as mere technique – indeed, Stone characterized codification as “simply a method.” But to characterize codification in this fashion obscures the immediate political context in which Stone wrote. Arguably, one cannot read his article without also appreciating how it normalizes Louisiana’s unique civil law contribution to US legal culture.

Nor can one read the second article Hallaq cited as if it were an ideologically detached assessment of codification. Published in 1965, “Codification in Modern Times” was written by S.A. Bayitch, a professor of law at Miami University. Bayitch was a scholar of comparative and international law. His publications reveal a keen interest in Inter-American legal affairs, in particular codification and aviation law. Bayitch’s article on codification, like the one by Stone, reflected broadly on the theme of codification. At the onset, he referred to codification as “a method of lawmaking” and drew upon both Common Law and Civil Law definitions to determine its core features:

First it signifies enacted law, i.e., legal rules consciously formulated and reduced to writing to be adopted as well as promulgated in this form; this is a vital distinction from customary law. Second, these rules emanate from the legislative branch, sometimes from the executive, but

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Stone, “A Primer on Codification,” 303.


See for instance, S.A. Bayitch and José Luis Siqueiros, Conflict of laws: Mexico and the United States; a bilateral study (Coral Gables, FL: University of Miami Press, 1968); S.A. Bayitch, Guide to interamerican legal studies; a selective bibliography of works in English (Coral Gables, FL: University of Miami Library, 1957).

never from the judicial branch; as a consequence, the notion of codified law excludes not only regulations, though they are comprehensive and general in nature and enacted under the authority of the judicial rule-making power (e.g., rules of procedure), but also case law in whatever form. Third, a codification contains abstract, general rules; this excludes enactments dealing with individual situations...Finally, a codification is concerned with large areas of life in society, for example, private, commercial, criminal and aviation law; it is therefore comprehensive in scope and systematically arranged.33

Of particular interest is how Bayitch drew upon both Common Law and Civil Law-inspired approaches to codification and legislation, as if trying to limit the extent of the differences between the two, thereby undercutting any possible contest about the relative merits of the two artifacts of distinct legal systems. This should not be particularly surprising once we appreciate the fact that Bayitch’s article appeared in a volume on civil law published in Louisiana. Moreover, the editor of the volume, Athanassios N. Yiannopoulos (now emeritus), was a law professor at Tulane University School of Law, where he specialized in civil law, comparative law and maritime law.34 Moreover, he was the director of the Eason Weinmann Center for International and Comparative Law, the institutional descendant of Stone’s Institute at Tulane.

As much as these two articles described codification as if it were a mere technique or tool, it would be a mistake to assume that codification as legal technique is not also embedded within a larger politics about the Common Law origins of United States law and legal culture. Stone’s “primer” intervened in what he acknowledged were highly politicized debates about codification. He wrote: “The debate between those who espouse the cause of codification and those who do not is frequently long, labored, confusing, and in its later hours, inclined to be pedantic and precious. Like many similar arguments it serves merely to convince the debaters of the rightness of their own views and the complete folly of the opposition.”35 This seemingly casual comment ought to raise questions about the ways in which “codification” is represented, and the analytic work such representation does as we consider its implications in the study of Islamic law.

33 Bayitch, “Codification in Modern Times,” 165.
For instance, writing in 1932, Ernst Freund characterized his analysis of legislation as apolitically focused on the “function and tasks of legislation.” But he noted that his contribution came at a time when legislation was the subject of highly fraught political debates. Importantly, Freund wrote at a time when the New Deal’s social welfare state was itself a subject of considerable dispute. In the same year Freund published his book on legislation, former US Solicitor General James M. Beck bemoaned in no uncertain terms the expansion of the federal government’s administrative agencies and bureaucracies, considering them a fundamental threat to the Constitution itself. “The Constitution was the noblest expression of the spirit of individualism in the annals of the world. Its fundamental philosophy was that the interference by the government in the life of the individual should be reduced to a minimum.” Writing in the 1950s, Roscoe Pound could not ignore how the judicial-centric image (perhaps even fantasy) of the Common Law was under attack in the United States. Pound bemoaned the looming threat of the expansive, legislatively-driven administrative state in the United States, and its implications for the Common Law:

If not actually upon trial in the United States, the common law is certainly under indictment...[I]ts doctrine of supremacy of the law and consequent judicial power over unconstitutional legislation is bitterly attacked in the land of its origin and is endangering the independence and authority of the court which is the central point of the Anglo-American system; its commercial law is codifying in England and in America...In the United States...the rise of executive justice, the tendency to commit everything to boards and commissions which proceed extrajudicially and are expected to be law unto themselves, the breakdown of our policy of individual initiative in the enforcement of law and substitution of administrative inspection and supervision, and the failure of the popular feeling for justice at all events which the common law postulates appear to threaten a complete change in our attitude toward legal problems.

36 Ernst Freund, Legislative Regulations (New York: The Commonwealth Fund, 1932), viii.
The rise of the administrative state in this period reflected an ideological conflict between those who espoused the laissez faire ideology of a minimal state, and those who saw in the state a bulwark against the negative side effects of the industrial revolution, fluctuating currency exchange, and increasing global financial interconnectedness.\textsuperscript{40} For Beck and Pound, the increased resort to legislation to create new regulatory agencies, which further issue their own set of regulations and regulatory review boards, challenged the primacy of the Common Law judiciary and, ultimately, their non-positivist, judicially-centered, individualistic notion of the law. For them, these new legislatively designed institutional developments brought a calcification of the law contrary to the historical spirit of the everyday workings of the people, whose liberty, freedom, and personal autonomy gave content to the spirit of the Common Law.

Although Hallaq invoked both Stone and Bayitch in his analysis of codification, he took their apolitical description of codification as technique on face value. And why not? Codification, when viewed as a technique of the legislative function, is certainly shared across the Common Law and Civil Law world. The problem, though, is that he relied on the technical representation of codification to make an ideological claim about codification and Islamic law without also appreciating the ideology implicit in accounts of codification. For instance, when Hallaq characterized codification in the Islamic legal environment, he wrote that codification is “totalistic, since codes must also fulfill the requirement of completeness and exclusivity. They must comprehensively cover the area they claim to regulate...Were an exception to be made permitting the coexistence of other forms of (preexisting) law, this too would only be allowed by virtue of the code’s permission.”\textsuperscript{41} In a footnote, however, Hallaq quickly exempted the Common Law from his characterization of codification: “Obviously, the common law is an exception, but then the vast majority of Islamic states did not adopt this system, Egypt being a prime example


\textsuperscript{41} Hallaq, \textit{Sharia}, 367.
of a British protectorate opting for the French-inspired law.”42 One can infer that the Common Law is not totalistic, but rather piecemeal by virtue of its casuistry. But it is not clear why this exception is “obvious,” and Hallaq did not expand upon or explain his conclusory description.43 For instance, *stare decisis* has a preclusive effect on future judges from adjudicating legal issues anew. The structure of appellate review precludes lower courts from parting judicial ways. In other words, the “obviousness” of this distinction is not clear, and recalls the words of Merryman and Pérez-Perdomo that such a bald assertion of the obvious difference between the Common Law and Civil Law “oversimplifies and misrepresents” the technicalities of the two traditions in the service of the ideological ends such claims serve.44 Indeed, when reading Hallaq’s footnote in light of the history of codification, it becomes clear that this facile distinction between the Civil Law and Common Law says less than he might have thought about how either legal system operates. Rather, his footnote offered a hint of his own ideology with a history of its own: an ideology of codification as a proxy for the state.45

Certainly, there is no shortage of critical analyses of the state.46 But as will be shown below, to critique the state by critiquing codification so reduces

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43 Dworkin’s account of the Common Law may provide insight. His noble judge, named Hercules, adjudicates a dispute with utmost integrity. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 105–6. Dworkin recognizes that no judge will approximate the competence and capacity of his Hercules, but that does not preclude him from building his theory of legal interpretation around such a fantastical judicial image.


45 For his critique of the state, see Hallaq, *The Impossible State*.

codification as a technique in the service of ideology that it ultimately misdirects our analysis. Certainly, the story of codification in Islamic legal studies often tracks state or state-like behavior: Ottoman reforms of the 19th century, European colonialism, and ultimately the rise of the modern state. But codification has a longer, contentious history in 19th century Europe and the US. To understand the political salience of codification in Islamic legal scholarship requires examining a different history—a history of codification debates that in turn will reveal the underlying assumptions of law that animate varying approaches to defining what Islamic law is, who announces its content, whether it exists, and if so, where.

**The Ideology of Codification**

Legal historians and comparative law scholars have variously defined codification, while admitting that any definition necessarily comes up short. After examining different definitions across jurisdictions, Gunther Weiss remarked “it is impossible to find a single uniform notion of codification. Of the many definitions and explanations, no two are exactly alike. The concept of codification is both unclear and polysemous.” This ambiguity calls for caution when offering any definitive distinction between the Common Law and Civil Law, let alone Islamic law and codified law, if only to avoid the possibility of being overdeterminative, and allowing that over-determination of distinction to inform further analyses.

In his comparison of the European Civil Law context, Weiss provided an illuminating taxonomy of codification’s characteristics. The taxonomy does not necessarily imply that these are necessary characteristics of codification per se. Indeed, actual codifications rarely accomplish all of the features listed below. This taxonomy, though, reveals what Merryman and Pérez-Perdomo considered the “ideology” that informs codification in the Civil Law context. Moreover, the taxonomy provides a heuristic by which to tease out the implicit ideological work performed by the distinction between codification and Islamic law. For that reason, Weiss’ description of each element in the taxonomy is accompanied by references to Islamic legal scholars who draw upon the same elements to distinguish codification from Islamic law. How these scholars understand and express these features reveal their assumptions about

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Codification and how it works in the modern state. While they will be included within Weiss’ typology, I will add one notable exception (*) that is present in Islamic legal scholarship but not in Weiss’ account.

Codification regimes generally have six characteristics (and sub-characteristics):

**Authority**: Codification provides a formal account of the law and is enacted by a duly authorized governing body, such as a legislature. Codification implies that “law is not only found but also made – that law is positive law.”

Islamic legal scholars also invoke the idea of authority to describe codification, but in doing so reveal their concern with the executive authority of the state. Some describe codes as “declaratory and enunciative of their own authority.”

“The basis for all these [codified] reforms can be found in the broad principle that the Ruler has the right to confine and define the jurisdiction of his courts.”

“[T]he national State has today become the unique source of all legislation.” “It is the national state that appoints commissions to formulate the code, they base their work on whatever madhhab they wish, or draw on several if they so decide, and the code is only valid within the borders of that state.”

Codification of Islamic law (tashrīʿ) “is first and foremost a legislative act of a sovereign parliament or ruler that decides which of the sharʿī principles are worthy of being adopted within the framework of statutes.”

**Completeness**: Codes are meant to be “complete and coherent”; they preempt any other normative source and cover the full range of issues that require legal regulation. Weiss subdivided this ideal as follows:

**Exclusiveness**: Codification is designed to “exclude other sources of law.” Where a plurality of legal sources can create confusion, codification in monist fashion coopts the entire field of law. “The ideal was that

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51 Hallaq, *Sharia*, 368.
54 Vikør, *Between God and the Sultan*, 226.
57 Merryman and Pérez-Perdomo, *The Civil Law Tradition*, 43, who identify this dogma while gesturing at is illusoriness.
the code could answer all legal questions and that it would not be necessary to fall back on judges’ opinions, customs, or scholarly wisdom.”59 According to Islamic legal scholars codes are represented as “a single book of law.”60 They “have come to replace ‘all previous inconsistent customs, mores and law.’”61 Indeed, “codification results in a complete departure from the religious-legal literature.”62 “[C]odification brings about total disruption of the sharīʿa legal methodology (uṣūl al-fiqh), of the body of the sharīʿa law as consolidated in each of the schools....”63

The Absence of Gaps: Codification limits the judge’s discretion, and thus renders the codified law the only source of law.64 The “judge’s role is limited to mechanical application of the code.”65 According to Islamic legal scholars, “the primary attribute of the code is its capacity to create uniformity...not only within themselves but also in their application.”66 Only in the case of lacuna is the judge “instructed by the legislature to resort to the uncodified sharīʿa” thereby restricting his scope of judicial discretion.67 The judge “is not debarred from consulting religious-legal literature (or any other source) provided he does not contradict statutory provisions.”68

Comprehensiveness: Codification is not meant to cover specific topics of law, but rather entire fields. It is not that a single code can or does cover all the relevant legal field, hence the pentalogy of Civil Code, Penal Code, Commercial Code, Civil Procedure, and Criminal Procedure. But the idea of comprehensiveness (along with the absence of gaps) is that codifications “generally cover a broad field of the law,” although the degree of particularity and coverage within the field might vary between codes.69

For Hallaq, codes were “not only, but also universal in the statement of

60 Vikør, Between God and the Sultan, 227.
64 Merryman and Pérez-Perdomo, The Civil Law Tradition, 48, who describe this characteristic of codification as a proxy for distrust of the judiciary.
66 Hallaq, Sharia, 368.
rules...they are always abstract, ‘to the point,’ and deliberately preclusive of the concrete.”

**Systemic:** Codification is meant to express the internal logic and systemic design of a legal system. “It aims, at least, to present a clearly structured and consistent whole of legal rules and principles...promoting the internal coherence of the law...and providing a conceptual framework for further doctrinal, judicial, or legislative development.”

For Islamic legal scholars, “Codes must be systematic and clear, arranged rationally and logically...” The “most essential feature of the code is the production of order, clarity, concision, and authority.”

**Simplicity:** If the idea of an absence of gaps was directed toward the judiciary, and systematization was directed toward legal scholars, simplicity concerns the readers of codification, namely those subjected to the law. But as Weiss, noted, “simplicity in the sense of a simple law that can be understood by everybody might be a desirable feature, but the historical record shows that it is not necessarily a defining element of codification.” For Hallaq, simplicity goes along with the systematic nature of codification. Codes must be “rendered easily accessible to lawyers and judges.” Again, the “most essential feature of the code is the production of order, clarity, concision, and authority.”

**Reform:** This feature of codification can apply either to form or substance or both. As a reform of form, it unifies the law and, at least ideally, precludes other sources of law. As a reform of substance, it presents an opportunity for legislators and drafters to reform legal doctrines going forward. As Weiss cogently remarked, “codification is always both innovation in form and innovation in substance.” But beyond that, there is no hard and fast rule to suggest that the reform is of a deep or superficial degree. In Islamic legal studies, codification is often framed in terms of reform and modernization. The impetus for legal reform “was

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70 Hallaq, *Sharīʿa*, 368.
72 Hallaq, *Sharīʿa*, 368, citing Stone’s “Primer on Codification”.
75 Weiss, “Enchantment of Codification,” 469.
76 Hallaq, *Sharīʿa*, 368, citing Stone, “Primer on Codification”.
77 Hallaq, *Sharīʿa*, 367, citing Stone, “Primer on Codification.”
the desire to adapt the legal norm which until then was shaped by the shari'aa, to changing social requirements and to bring about modernization under European influence. The reforms were, in some measure, meant to enhance “administrative efficiency.” They were justified by references to economic or political arguments about freeing capital from stringent legal mechanisms, following “in the steps of Western progress”, or even simply seeing “emancipation from a law” that seemed archaic, “a straitjacket which must necessarily inhibit...[society’s] progress and development.”

National Legal Unification: Historically, there is little doubt that arguments for codification were not merely about creating legal unity, but also national unity in a context of a politically fractured territory. This characteristic is not inherent to codification as a legal technique, but has historically accompanied many codification efforts. For Weiss, it was important that codification be disentangled from the project of the nation-state as his particular research concerned codification and harmonization in the European Union. As he specifically stated, “codification is not necessarily supportive of only one political idea, nor is it exclusively devoted to the idea of a nation state.” But for Islamic law scholars working within the framework of post-colonial analysis, codification is directly linked to the project of nation-state making. “The mere codification brings about the nationalization of the shari‘aa...The shari‘variants incorporated in the statutes are to be interpreted strictly within the framework of the national-territorial statutes.”

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81 Layish, “The Transformation of the Shari‘a,” 89.
84 Weiss, “Enchantment of Codification” 467.
85 Codification in Europe has lead to a narrative of tragedy too; the civilian tradition is rendered an antiquarian subject of history. See generally, Reinhard Zimmermann, Roman Law, Contemporary Law, European Law: The Civilian Tradition Today, Clarendon Law Series (Oxford: Oxford University Press, 2001).
One last characteristic of codification that appears in Islamic legal scholarship but not in Weiss’ typology is the following:

**Colonial Imposition**: “[T]hese reforms did not stem initially from any popular demand, but were imposed on the people from above...in deference to foreign opinion.”88 Indeed, “far-reaching changes have been introduced, under the impact of the West, in the process of developing of the legal norm.”89

Of particular interest for this analysis is where scholars of Islamic law get their understanding of codification in the first place. Some may be reading the codes. Indeed, Layish’s remarks reflected provisions in codes and legislation that anticipate judicial interpretation of Islamic law in areas where the code is silent. But as evident from the above, even such forms of discretion are viewed as legislatively defined and delimited, and thereby are implicit expressions of the sovereign’s authority. Moreover, reading Weiss’ typology with quotes from the field of Islamic legal studies reveals how those writing about Islamic law so associate codification with the state, the sovereign, and the coercive force of an executive, that codification is ultimately cast as a fundamental disruption of the Islamic legal order. At the heart of the tragic narrative of Islamic legal studies, therefore, is a fundamental commitment to an epistemology and ontology of the law, which will have important implications for the relationship between law, the state, and the legal subject.

**Codification Debates in 19th and 20th Century Europe, US & Middle East**

In the study of Islamic law, modern codification is often presumed to be an uncontested European technology of law and governance imposed upon a subordinated people in an act of bureaucratic violence at the cost of an Islamic tradition that was presumably organically ingrained in and culturally representative of the now-colonial subjects. However, codification in Europe, as well as the United States, has its own conflicted history that is, ironically, echoed in debates in and on the Muslim majority world. From Savigny in Germany, Bentham in England, and Field and Cook in the United States – the debates about codification and Islamic law are part of a larger contest about the relationship

89 Layish, “The Transformation of the Sharīʿa,” 89.
between law, history, and the values of a people. More than about mere legal form, the debates in 19th century Europe and the US relied on a fundamental assumption that the suitability of a particular legal technique (or technology) of governance depended on how to maximally correlate the culture and values of a people with the law, on the grounds that the greater the correlation, the more likely legal subjects will consent to the law’s application on them and be law-abiding.

Thibaut, Savigny, and the “Consent of the Governed”
The first wave of European codification took the forms of the Prussian Code (1794), the French Civil Code (1804), and the Austrian Code (1811).90 The second wave came shortly on the heels of a pointed debate over German codification in 1814, which will serve as a starting point for our inquiry herein. By the end of the 18th century, Germany was hardly a formalized nation-state. An “amorphous country” under French suzerainty, it had “many little centres of culture but no single capital.”91 German military forces participated in the Sixth Coalition that defeated Napoleon at Leipzig in October 1813, which ended French control over Germany.92 This moment of German freedom was the backdrop for the “famous codification controversy of 1814”93 between Anton Friedrich Justus Thibaut (1772–1840) and Friedrich Carl von Savigny (1779–1861). Savigny, who opposed German codification, emerged the victor, at least for a few decades, until the promulgation of the German Civil Code (Bürgerliche Gesetzbuch, or BGB) in 1900.

The arguments for and against codification in the Thibaut-Savigny debates revealed two competing assumptions about law, value, and consent to legal obligation. For Thibaut, the defeat of Napoleon inspired the need for a German code that would serve as a symbol of German unity across otherwise fragmented German lands that had until recently been under French rule. According to European legal historian Franz Wieacker, Thibaut “hoped that such a code might unify a nation divided by its dynasties...and above all rescue law from moribund scholarship and transform it into a vital and political national

93 Weiss, “Enchantment of Codification,” 453. See also, Beiser, German Historicist Tradition, 233–234
possession.”94 Thibaut’s hope for a unified Germany had to wait for some decades. But his legal prescription was premised upon a belief that “a single civil code for all the German states would help to create and sustain the sense of a common German identity, which was a virtual necessity given the new national self-awareness inspired by the recent wars against Napoleon.”95

However, Thibaut’s proposal met with stern opposition from Savigny. It is not that Savigny necessarily believed a code was impossible for the German people. Rather, he believed that his generation did not have the requisite skills and capacities to develop the kind of code necessary for governance. For Savigny, “a proper code had to be an organic system based on the true fundamental principles of the law as they had developed over time.”96 Whereas Thibaut was critical of the inherited Roman law tradition, Savigny was deeply troubled by the idea of codifying over and against it: “It was the product of more than a thousand years of German history, and it was at the very heart of the culture of the Holy Roman Empire. To abolish it would be to deracinate Germany, to cut it loose from its historical moorings.”97 For Savigny, the law must reflect a common, shared consciousness of a people – and such a consciousness could not be arbitrarily imposed from above. It must be allowed to develop in relation to the history of the people subjected to it. Savigny stated:

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.98

For Savigny, the historical sensibility of law was fundamental and a core principle of the German Historical School of Law with which he was affiliated. A key principle of the Historical School was that “it was the spirit of the

95 Beiser, German Historicist Tradition, 235.
96 Reimann, “Historical School Against Codification,” 98.
97 Beiser, German Historicist Tradition, 237.
people (Volksgeist) which produced the law."\textsuperscript{99} Savigny did not mean by this any particular grouping of a people or a nation of citizens; to do so would have required him to admit that such a collection of people could decide to codify their law. Rather, Savigny was referring less to a specific people and more to a cultural tradition of a people: ‘People’ for Savigny is not any actual nation or society, but an ideal cultural concept, the intellectual and cultural community bound together by a common education...where the history of a people is simply a form through which humanity is educated into self-realization.\textsuperscript{100} For Savigny, codification was the antithesis of Volksgeist: it was an arbitrary act outside of history that imposed a law on a people who were very much in history.

For law to enjoy the consent of the governed, Savigny believed it had to reflect the organic development of a people:

\begin{quote}
[T]his organic connection of law with the being and character of the people, is also manifested in the progress of the times...For law...there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.\textsuperscript{101}
\end{quote}

According to Reimann, Savigny considered law to be an “evolutionary phenomenon, subject to constant change, and can be properly understood only in its historical dimension.”\textsuperscript{102} Law, for Savigny, contains a people’s culture, and as such any reform to the law must be gradual, performed by those who specialize

\begin{itemize}
\item \textsuperscript{99} Wieacker, \textit{A History of Private Law in Europe}, 285.
\item \textsuperscript{100} Wieacker, \textit{A History of Private Law in Europe}, 31. Wieacker remarks that this approach to the "people" also reflects Savigny’s particular hostility to the "claim of the modern state to change its social structure by political means." Wieacker, \textit{A History of Private Law in Europe}, 312. Savigny was deeply committed to preserving the status and role of the jurist as the “exclusive representative of law in the people.” Wieacker, \textit{A History of Private Law in Europe}, 31. As he remarked, law may start out as based on “custom and popular faith”, but ultimately it is developed by jurisprudence. Savigny, \textit{Of the Vocation}, 30. The reference to jurisprudence implies the primacy of jurists (and not the broader populace) in articulating and representing the law. Savigny’s elistism puts his dispute with Thibaut into stark relief.
\item \textsuperscript{101} Savigny, \textit{Of the Vocation}, 27.
\end{itemize}
in the technical sciences of the law, but who at all times respect the relationship between the law and the consciousness of a people.\textsuperscript{103} 

The contrast to Thibaut could not be starker. Thibaut viewed codification effectively as an act of popular will. However much codification might unite a nation, it would also enact in a moment in time the values of a people. In other words, one can view Thibaut’s advocacy of codification as aspiring to enhanced democratic representativeness in the construction of a German nation-state identity.\textsuperscript{104} From Savigny’s perspective, though, if the law reflects the culture of a people, which shifts and develops slowly and gradually over time, then a historical approach to the law will ensure that whatever the law is in a given moment already benefits from the people’s implicit consent to its claims upon them and their liberty. In Savigny’s view of law and history, codification represents an artificial, arbitrary imposition of a particular legal regime that will undoubtedly suffer democratic deficits going forward.

\textit{Codification, the Common Law, and Legal Reform}

In roughly the same period of the Thibaut-Savigny debates, but across the English Channel, Jeremy Bentham was one of the most significant voices advocating codification in the late 18\textsuperscript{th} and early 19\textsuperscript{th} centuries. Critical of English Common Law, he considered it “unclear uncertain and full of fictions and tautologies”; further, he believed “the judiciary was slow and unjust.”\textsuperscript{105} Moreover, and in contrast to the historical sensibility of Savigny, Bentham did not consider the Common Law to be “the expression of the immemorial custom and practice of the people” which by implication benefited from the people’s consent in its application upon them.\textsuperscript{106} According to Postema, Bentham saw the custom of the Common Law to be little more than “the artificial custom of the professional élite, the legal partnership, Judge & Co....What degree of pretense could possibly sustain the belief that the enormously complicated, technical, and artificial concepts, rules, and forms of Common Law reflect the traditions, customs, and practices of the people?”\textsuperscript{107}

\begin{thebibliography}{999}
\bibitem{103} Savigny, \textit{Of the Vocation}, 28–29; Beiser, \textit{German Historicist Tradition}, 237, who also notes that the Thibaut-Savigny dispute was less a conflict between a revolutionary and a conservative, but rather a dispute about the appropriate mode of legal reform, whether wholesale from above or gradually by jurists from below.
\bibitem{104} Wieacker, \textit{A History of Private Law in Europe}, 314.
\bibitem{105} Weiss, “Enchantment of Codification,” 475.
\bibitem{107} Postema, \textit{Bentham and the Common Law Tradition}, 274–5.
\end{thebibliography}
Bentham’s adoption of codification was connected to his utilitarian philosophy of maximizing the good for the greatest number of people. Such a philosophy might find codification attractive as an efficient mechanism to establish a social welfare state, as will be addressed below. If the Common Law model is judge-centered and redresses wrongs that have already occurred, codification is future-oriented in its attempt to order, organize, and anticipate conflicts in advance. Whatever the merit of Bentham’s project, he stood in stark contrast to Savigny. If the law should reflect the values of a people so as to maximize their consent to it and their law abidingness, which form accomplishes this task most effectively? In both cases, we have authorities (i.e., judges and legislatures) using distinct legal techniques to characterize, locate, and vindicate the needs, interests, and values of a people. This difference took on a particular poignancy in the late 19th century debates in the US between John Coolidge Carter and David Dudley Field over the New York Civil Code.

The competing legacies of Savigny and Bentham were implicitly (and, in some cases, explicitly) at play in the debates between Carter and Field. The late 19th century debates on codification in the US should not be read as if the country was in theory and application a Common Law country. Rather, historical studies have shown that there were codes in place even before the Revolutionary War. Massachusetts’ Book of the General Laws and Libertyes (1648) was the first code and an inspiration for those that followed. By the early 18th century, all thirteen colonies had codes of their own. Even as the ink on the Declaration of Independence was drying, the law in the colonies was a confusing juridical maze. “[T]he law included colonial legislation, English law, and the legislation of the new states. By the end of the eighteenth century, the legal system had become a complicated morass of sources.”

By the late 19th century, however, debates on codification in the US centered on the efforts of David Dudley Field to revise New York’s legal system. A legal practitioner, Field was concerned about the detrimental effect of New York’s complex and confusing legal system on access to justice, as well as on the general public’s respect for the law. In a rebuke to his detractors, Field remarked on the utter chaos of the New York legal system:

We have in this State seven judges of the Court of Appeals, forty-six of the Supreme Court, counting twelve who begin in June, and eighteen of the higher city courts—all making case law, judge-made law,
or common law, whichever you may choose to call it. In this endeavor, they have the assistance of 11,000 lawyers, paired regularly one against another, at every trial, this side insisting that the law is, or should be, this way, and that side that way, and the sides changing perhaps at the next trial. If here be not confusion worse confounded, or chaos...then I know not what may answer that description.112

According to Field, codification of the Common Law would limit the scope of that chaos while preserving some of the open-endedness of the Common Law tradition. Field argued that lawyers and those committed to the Common Law created a phantom idea of codification, a straw man for espousing their own commitment to the Common Law. “Their imaginations portray it as a body of enactments governing and intended to govern every transaction in human affairs, present and future, seen and unforeseen, universal, unchangeable, and exclusive.”113 If Field is fairly representing his detractors, their characterization of codification nicely maps onto Islamic legal scholars’ characterization of codification in contrast to Islamic law. For Field, this characterization was caricature and far from what he had in mind, namely “the reduction into a positive code of those general principles of the common law, and of the expansions, exceptions, qualifications, and minor deductions, which have already, by judicial decisions or otherwise, been infringed on them and are now capable of a distinct enumeration.”114

Field’s ultimate success in codifying New York’s laws was limited. According to the 1846 Constitution of New York, the New York legislature was required to “appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and


113 David Dudley Field, Speeches, arguments and miscellaneous papers of David Dudley Field, ed. Titus Munson Coan (New York, 1890), 238 (accessed online: The Making of Modern Law. Gale. 2014. Gale, Cengage Learning. 27 October 2014. http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F370653394&srchtp=a&ste=14). Later in the same essay, he humorously related one of the arguments against codification: “[A] code is a cast-iron frame unfitted for a growing body. The same might be said of the dictionary. Language is one of the most flexible instruments; it grows with the growth of a people; new words, bearing their thoughts.” Field, Speeches, arguments, and miscellaneous papers, 241.

114 Field, Speeches, arguments, and miscellaneous papers, 239.
 This provision created the constitutional window through which Field introduced his codification agenda. His one success: a code on civil procedure, enacted in 1848, with a revised version, enacted in 1851, and which became a model other states later followed.

Field later led efforts to draft codes in more substantive legal areas. All of his draft codes came up for legislative discussion, and the Penal Code was eventually enacted in 1881. But his other draft codes met with failure. For instance, the Civil Code, which was passed by both houses of the New York legislature, met with resistance from successive governors who refused to sign the codes into legislation. In all cases, New York’s Bar Association was a key opponent, and ultimately succeeded in derailing Field’s codification efforts.

The Bar Association’s opposition was personified by corporate lawyer James Coolidge Carter. Channeling ideas similar to those of Savigny, Carter viewed codification as an artificial imposition that forestalled the natural development of law in accordance with the historical development of a people and its values. He went so far as to identify codification with authoritarian regimes, in contrast to his own American republic. He wrote:

> Whoever glances over the varying systems of law exhibited by civilized States, will perceive that in some, as in England and with us, the great body of the rules which determine the rights of men in respect to their persons and property, have never been directly enacted in statutory form. They have their origin in the popular standard, or ideal, or justice as applied to human action, and the usages and practices sanctioned by it. The system, therefore, rests upon an original, but ever growing, body of custom, and the rules thus established have been, through a long succession of centuries, expounded, applied, enlarged, modified and administered by a class of experts – lawyers and judges – who are supposed to devote their

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117 Weiss, “Enchantment of Codification,” 505, noting that the Field Code was especially utilized in the West to bolster the younger legal systems of more recently incorporated states.


119 Carter studied the ideas of Savigny when at Harvard Law School, and so may have been predisposed to understand the law through Savigny’s historical approach. See, Reimann, “Historical School Against Codification,”
lives to the study of the system and to the work of adapting it to the ever shifting phases which human affairs assume...In other States, however, such as most of those on the Continent of Europe, the system of law is found to be different. There, the rules which perform the same functions in society, or Codes, enacted by the arbitrary power of the sovereign, or by the authority of a legislative assembly, where such a body exists.

It will also be observed that the system first above described is a characteristic of States of popular origin, or in which the popular element is predominant, while the latter system is a characteristic feature in those which have a despotic origin, or in which despotic power, absolute or qualified, is, or has been, predominant...In free, popular States, the law springs from and is made by the people...In despotic countries, however, even in those where a legislative body exists, the interest of the reigning dynasty are supreme...The sovereign must be permitted at every step to say what shall be the law.\textsuperscript{120}

Carter’s analysis resonates with both Savigny’s \textit{Volksgeist}, and Islamic legal scholars’ characterization of codification, including its use as a proxy for state authoritarianism. For Carter, codification reflected the will and interests of the ruling regime. The sovereign ruler decides the law and directly benefits from its fulfillment. Based on this reading, codification undercuts the popular will, which develops slowly and steadily. Whether it is the product of a legislature or dictator, codification is a technique of the state that ultimately subverts the values of a people.

The political implications of Carter’s opposition to codification, though, are made evident by his delineation of certain legal topics appropriate for codification, and others that are best kept to the Common Law. He supported legislative efforts in public law fields such as judicial procedure, taxation, and the “special regulations designed to secure the health and good order of society.”\textsuperscript{121} He agreed that some legislative activity must exist if the state is to exercise its “police power” to ensure effective “public administration” or uphold “public interests.”\textsuperscript{122} But the fields of private law (e.g., contract, property) should remain subject to the Common Law:

\begin{enumerate}
\item \textsuperscript{121} Carter, \textit{Proposed Codification}, 17–20.
\item \textsuperscript{122} Carter, \textit{Proposed Codification}, 21. On police power, see Ernst Freund, \textit{The Police Power: Public Policy and Constitutional Rights} (Chicago: University of Chicago Press, 1904). On the 19\textsuperscript{th} century regulatory state in the US, see, the exceptional study by Novak, \textit{The People's Welfare}.\end{enumerate}
The appropriate province of *unwritten law* [i.e. Common Law] may be described, sufficiently for the present purpose, as embracing the rights, obligations and duties in respect both of person and property which arise from the ordinary dealings and relations of men with each other...This immense field covers the general law both of contracts and torts, the law of sales, or partnership, of agencies, of corporations, of bills and notes, of shipping, insurance, and admiralty; the law governing the rights and duties spring out of particular employments, occupations, relations and engagements, as the law of carriers, of bailees, of master and servant, of husband and wife, of telegraphs, and the principle body of the law affecting the ownership and transfer of property, real or personal.123

Importantly, the areas of private law that Carter preserved for the Common Law were those that business interests preferred to self-regulate through contract. Carter was a lawyer whose interests in the Common Law’s dominance over private law coincided with the interests of his business clients, who took advantage of an unfettered freedom of contract without onerous state regulations.124 Indeed, writing in 1950, Henry Steele Commager indicted the pro-capitalist bias of Carter’s lawyerly concern about preserving private law for the Common Law: “The invention by the legal fraternity of the fiction of liberty of contract – a fiction designed to safeguard the right of working men and women to contract for any hours, wages, and conditions that they saw fit to accept.”125 Safeguarding that right, in this context, was an indictment of how freedom of contract worked to the disadvantage of the labor class, who were in a weaker bargaining position to negotiate the terms of employment. This disadvantage only increased as the Industrial Revolution widened the gap between industrialists and America’s labor force. Andrew J. Waskey noted that “[i]ndustrial processes became more centrally located within fast-growing cities and people were displaced from rural areas and took low-paying jobs in the new factories. Once in the cities, workers and their families lived under crowded conditions in less than adequate housing. Sanitary conditions were extremely bad and

124 On the role of state legislatures in upholding the interest of the people through legislation and regulation of business, see Novak, *The People’s Welfare*.
disease was rampant.”126 To this widening gap, the Common Law had no answer. Frank Johnson Goodnow, in his 1911 Kennedy Lectures, remarked that the “tremendous changes in political and social conditions due to the adoption of improved means of transportation and to the establishment of the factory system have brought with them problems whose solution seems to be impossible under the principles of law which were regarded as both axiomatic and permanently enduring at the end of the eighteenth century.”127

The principle institution that could check the excesses of industrial capital was the state. In this context, the state stepped in with specific, narrowly tailored statutes and regulations when the Common Law seemed incapable of protecting laborers who were otherwise vulnerable because of their limited bargaining position.128 Legislation in late 19th century US should be understood for its democratically representative, redistributive potential in a climate of dynamic change, industrial development, and increasing levels of urban poverty. Indeed, this is the register that Field used to counter Carter’s characterization of codification. Field reversed the political association Carter made between codification and authoritarianism by emphasizing codification as a vehicle for enhanced democratic accountability and accessibility to the law. Implicitly suggesting that Carter’s opposition to codification was in the service of the elite,129 Field complained about the lawyer’s prejudice against codification and legal reform in general.130 Field remarked: “If they would bring themselves to consider the subject with the care with which they construct their briefs, they would,
I cannot doubt, come to think it part of their duty to help make the laws of the land more accessible to the people, to the judges, and to themselves; and more easily understood when found.”\textsuperscript{131} In other words, far from being an act of despotism, codification makes the law plain, clear, and democratically accessible.

\textit{Egypt, al-Sanhūrī, and the Codification Project}

In the Thibaut-Savigny and Carter-Field debates, the ideological content of “codification” concerned how best to reflect the values of a people, and garner their consent and law-abidingness toward the state. A similar ideological challenge faced ʿAbd al-Razzāq al-Sanhūrī when he contended with the relation between Islamic law and codification in 20th century Egypt. The principal drafter of Egypt’s 1949 Civil Code, al-Sanhūrī was “Egypt’s most distinguished scholar of modern jurisprudence,” whose Civil Code remains a key feature of Egypt’s legal system today.\textsuperscript{132} Al-Sanhūrī’s fundamental hope for his codification project was to introduce a “new dimension of value-based morality,” supporting both the “weak and the strong” in Egyptian society.\textsuperscript{133} Al-Sanhūrī’s code, in other words, sought to enhance the welfare of the people and to envision “a new and better Egyptian society.”\textsuperscript{134}

Al-Sanhūrī’s life was marked by a series of transitions, such as Egypt’s formal independence in 1922 as well as the demise of the caliphate in 1924. This transitional moment, according to Guy Bechor, situated al-Sanhūrī in a position similar to that of Thibaut and Savigny: the defeat of France created a new opportunity for German reunification, just as the independence of Egypt required new symbols of nationalism. Familiar with Savigny, al-Sanhūrī drew upon the former’s historical approach, but without acceding to Savigny’s critique of codification. As al-Sanhūrī remarked, “If Savigny was attacking the very notion of codification, time has proven him incorrect, and one cannot ignore the practical benefit of codification, as proved by the experience of many nations. A legal collection assists greatly in drawing the general public nearer to an acquaintance with law.”\textsuperscript{135} Al-Sanhūrī envisioned the code as both a


\textsuperscript{134} Bechor, \textit{The Sanhuri Code}, 3.

\textsuperscript{135} Bechor, \textit{The Sanhuri Code}, 55 (quoting al-Sanhūrī).
reflection of the transitional era in which it was developed, and a prospective-
ly-oriented mechanism to balance the interests of individuals with those of an
evolving society. As he wrote:

The new legislation occupies a fair and equitable stance concerning the
individual (al-fard) and society (al-jamā’a). The individual is not instru-
mentalized for society’s benefit, and society is not subordinated in the
service of the individual (lam yāḍiḥ al-fard li maṣlaḥat al-jamā’a wa lam
yusakhkhar al-jamā’a li khidmat al-fard)...The new legislation does not
curtail the protection of individuals and does not neglect to make rea-
sonable space (majāl maʿqūl) for individual freedom (li al-hurriyya al-
fardīyya)...However, the new legislation is consistent with the spirit of its
age (riḥ ‘āṣrīḥi). It adapts to the significant changes that affect the ideology of individualism (madhhab al-fardīyya)...This legislation makes ex-
traordinary progress on the path of realizing social justice (fī sabīl taḥqīq
al-ʿadāla al-ijtimāʿīyya). In this [legislation] is nothing other than a reflect-
tion of its era.136

In this short passage, al-Sanhūrī revealed his own ideological commitment to
codification as enhancing the welfare of people, as both individuals and as
part of a community. Given that this ideology pertains to a transitional mo-
ment in Egypt, his argument aligned nicely with the visions of both Thibault
and Field, who saw in codification a certain emancipatory potential in a period
of an expanding state. This emancipatory potential stood in stark contrast to
the kind of laissez faire status quo endorsed, at least implicitly, by Savigny and
Carter. Carter and Savigny “shared a laissez faire philosophy in the sense that
they cherished clear separation of the state’s public affairs and society’s private
business...As they saw it, the common law, of Roman or English origin, had for
centuries left private transactions to legal science and self-regulation, but now
legislation, epitomized by codification, threatened to destroy the paradise.”137
But theirs was the paradise of a business and landed elite. Carter was a law-
ner who represented business interests, and “Savigny was a political conserva-
tive, a landed nobleman with an interest in maintaining the status quo, and
with decidedly elitist views in his contempt of the masses.”138 Indeed, it would

136 ʿAbd al-Razzāq Aḥmad al-Sanhūrī, al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī, 2nd ed. (Cairo:
not be surprising if emancipation from such an elitist status quo animated al-Sanhūrī’s thinking about codification. As Shalakany reminded us, al-Sanhūrī wrote one of his dissertations on the English law of freedom to contract and labor. Shalakany further noted that al-Sanhūrī made therein “a clear ideological argument for the redistributive role of law in bringing about social justice.”

If ideology informed Savigny and Carter on the one hand, and Thibaut, Field and al-Sanhūrī on the other, it is hardly farfetched to suggest that a certain ideology about the state informs those in Islamic legal studies who posit a conflict, if not incommensurability, between Islamic law and codification. For example, Khaled Abou El Fadl valorized the historical forms of Islamic legal authority, and in doing so revealed his own assumptions about the authority of Islamic law as against the rise of the modern state and its technologies of legal ordering. He wrote:

Islamic law has staunchly resisted codification or uniformity, at least until the contemporary age. The earmark of traditional Islamic methodology has been its open-ended and anti-authoritarian character. Fundamental to this character was an evolutionary process of exploration, investigation, and adjudication that, according to its own inner logic, resisted settlement or inertia.

But it must be noted that his is an inner logic that asserted patriarchy, slavery, and discrimination on account of race and faith as part of the status quo. In other words, the spirit of emancipation inherent in the laudatory characterization of Islamic law as open-ended and anti-authoritarian hides an oppressive status quo of a different sort.

Likewise, when Hallaq described Islamic law from the perspective of codification, he exposed a dichotomy between the two that tracks similar descriptions at play in earlier debates about codification in Germany and the US:

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139 Shalakany, “Between Identity and Redistribution,” 207.
140 Later in life, al-Sanhūrī refuted the Civil Code’s debt to Islamic law, which is perhaps not at all surprising if we recognize the ideological aim of codification as having less to do with the content of Islamic law and more to do with (per)forming the state. Shalakany, “Between Identity and Redistribution,” 204.
141 Abou El Fadl, Speaking in God’s Name, 170.
Islamic law depended in both theory and practice, on the cooperation of customary (ʿāda, ‘urf) and royal law (siyāsa sharʿiyya)...Nor, in this connection, was Islamic law self-declaratory, in that it did not pronounce itself...as the bearer of exclusive authority that had come to replace others in the field...Islamic law was not systematic according to the European perception of the world, although an expert in it may view the matter entirely otherwise. Similarly, from a modern perspective, Islamic law may be described as obscure and complex, unlike the “clear and accessible” code...[T]he argument of clarity is no more than a relative one. An adept expert in fiqh may find it as clear as the modern lawyer finds the code... Admittedly, however, Islamic law cannot be said to have internal uniformity, since plurality of opinion...is its defining feature par excellence... Most importantly, however, it was the declaratory nature of the code as well as its uniformity of substance and legal effect that betrayed a will-to-power which emanated from the higher offices of the nation-state; by contrast, in Islamic law such a will-to-power could not exist except at the level of the abstract and theoretical, that is, the metaphysical and the theological.143

If al-Sanhūrī sits alongside Thibaut and Field in his ideology of codification and its relation to the values of a people and polity, scholars of Islamic law such as Hallaq, Anderson, and Abou El Fadl echo Savigny and Carter in their approach to Islamic law. However, while these figures seem to be arguing about what the law is or should be, the ideology undergirding their characterizations of law’s various forms is ultimately directed at the state. Of course, the law is constitutive of the state, but saying so does not mean the law can or should be elided with the state either. Put another way, the ideology of codification so collapses codification as technique onto the state-as-form that it runs the risk of over-determining both. To identify the state as the ideological target or telos in their critique of codification is to question whether the emphasis in Islamic legal studies on defining what is or is not Islamic law (in contrast to codification) over-determines the law (and its forms) while failing to make the state analytically concrete.

Conclusion

Why should this ideologically driven collapsing of law as technique and the state as form matter for the Islamic legal studies academy? In short, it invests

143 Hallaq, Sharīʿa, 368–9.
(Islamic) law with a constitutive power that is far too deterministic of both the state and the people who are presumably its subjects. As critiques of Savigny’s historical method suggest, the elision emphasizes what are often rarified notions of popular values at the expense of interrogating competing political claims (e.g., laissez faire and social welfarist policies) about the responsibility of the state and to whom. In other words, by focusing attention on the techniques of Islamic law and codification, the elision blinds us to the politics of which law is made an instrument. Indeed, these politics remain hidden behind the screen of competing legal epistemologies.

To reflect on this elision in Islamic legal studies alongside German and US legal histories allows a robust appreciation of how the contrast between Islamic law and codification often plays on ideology rather than technique. In the cases drawn from the 19th and early 20th century, the contest over codification provided legal cover for a broader political debate about the aim, responsibility, and claim of the state in relation to its citizen-subjects. Likewise, in the field of Islamic law, it would seem that the more one emphasizes the distinction between Islamic law and codification, the more one is likely decrying the coercive power and violence of the modern state. European colonial violence upon Islamic legal forms becomes violence against the thought world of a people made subservient by an artificial colonial enterprise, and later by an artificial political entity, namely the modern state. But if we can criticize Savigny and Carter for indulging in romantic ideals of law, then we are left wondering whether those in the field of Islamic law are also overstating their case about Islamic law, its representativeness of a people’s values and, most notably, its demise.

This essay suggests, in contrast, that if the critique of codification is a proxy for a critique of the state, what requires greater attention is how we understand and critique the state. Perhaps Islamic legal scholars must draw upon additional disciplines that have not altogether found their way into the study of Islamic law, given its formative history in philology. It might require first asking, for instance, whether one can talk about “the state” at all or whether it must be viewed as a disaggregated entity, or if one can talk about the textual sources of the law without also appreciating how it is experienced from below.

See, James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (New Haven: Yale University Press, 1999); idem., The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia (New Haven: Yale University Press, 2010). The institutional/organizational turn in legal theory, calls attention to the state as comprised of a range of institutional actors, not all of which act in concert with one another. See, Scott Shapiro, Legality (Cambridge: Belknap Press, 2013); Cass R. Sunstein and
Turning to other social science disciplines such as anthropology might cause the more philologically-oriented scholars of Islamic law to blanche, especially as some anthropologists have gone so far as to ask whether we can even speak of a state, or whether the state is mere phantasm. But the anthropological turn, for example, puts in stark relief how the more text-centered or case-study approach to law reflects a formal and elitist view of law. This is hardly unique to Islamic law; it is a feature of legal study generally. For instance, one cannot fully appreciate the elitist implications of Savigny’s historical approach to law without also recognizing that for him, the arbiters of the law were jurists. Likewise, even advocates of codification such as Field, who argued about the accessibility codification would provide, knew that the law would still be the province of lawyers and judges. Consequently, the narrative that codification runs contrary to the Islamic legal tradition is an argument that implicitly gives primacy to a particular, formal, and indeed elitist approach to Islamic law at the expense of a different venture, namely of the state, albeit without effectively identifying the state, demarcating its boundaries, or addressing how it performs its authority on the bodies of those who are its subjects.

Various institutions of a state are engaged in law-making functions. In the Muslim majority world, these institutions grapple with a Sharīʿa tradition that finds expression in a highly disaggregated bureaucratic enterprise. Hallaq and others are certainly correct that this new reality of Sharīʿa differs from its sociological condition in the pre-modern period. Moreover, they are right to identify the colonial process as contributing to this shift. But to emphasize codification as being contrary to the Islamic legal tradition and elide it with a monolithic image of the state fails to account for the disaggregated nature of the state, the indeterminacy of codified law, and the various sites (state-based and otherwise) in which people experience the law. To elide codification with the state as if the state were uniform and unitary does not sufficiently problematize the state or the experience of the law, Islamic or otherwise.

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