

The Dilemma of Codified Law

1 Introduction

In Saudi Arabia, the codification of Islamic law is commonly understood as a power struggle between traditionalists, who want to preserve the “original” *sharī‘a*, and progressives, who aim to implement a European-style legal system. However, as Guido Steinberg rightly pointed out, scholarship on Saudi ‘*ulamā*’ tends to neglect religious and legal understandings that drive the Saudi scholarly discourse and to explain the scholars’ actions with their economic interests.¹

This chapter explores the debate on codification from the perspective of the Saudi jurists’ own understanding of the Islamic legal tradition. Looking at the debate from the perspective of the ‘*ulamā*’ will allow us to see beyond the power struggle between the king and the jurists.

In the last thirty years, the discourse of the ‘*ulamā*’, and in particular of those that work in the Saudi legal system, largely focused on theoretical problems.² It will be those detailed and complex arguments forwarded by ‘*ulamā*’ who specialized in Islamic legal theory to which we will pay special attention. In order to illustrate how the Saudi jurists’ scepticism is often driven by general

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- 1 Steinberg emphasized that it is equally problematic to only focus on the scholars’ discourse without considering the social and political context. Steinberg, *Religion und Staat*, 17. Frank Vogel’s analysis of the debate on codification is a notable exception. While he also focuses on the relationship between the king and the ‘*ulamā*’, he also looks very closely at the jurists’ arguments. Vogel found that the arguments on codification at the time of his research were sterile, since they were stuck in the old rhetoric between opponents and supporters of codification. The debate, he wrote, was dominated by quotations of premodern scholars, especially of Ibn Taymiyya. Today, as we will see, Saudi jurists present original arguments related to codification. Moreover, as we have already seen in our discussion of Ibn ‘Abd al-Wahhāb’s thought, a new way of using premodern legal writings can also constitute an original legal argument. See Vogel, *Islamic Law and Legal System*, 309–62.
 - 2 Vogel stated that very few extensive public statements by Saudi ‘*ulamā*’ opposing codification could be found at the time of his research in the 1980s and ‘90s. As we will see in this chapter, the situation has changed. Today, Saudi ‘*ulamā*’ do not hesitate to speak or write about codification. I will mainly draw on these newer, much more differentiated views. See *ibid.*, 337.

considerations of the nature of law, parallels will be drawn between Islamic and European notions of codification.³

2 The Codification of Islamic Law

2.1 *The Different Forms of Codification*

Codification describes two different concepts: firstly, it can be understood more broadly as any form of written law. Such codes are not bound to a specific epistemology but simply record rulings on certain legal questions. Thereby, they do not aim to form a comprehensive system of rules. Such forms of codification have been known since the Bronze Age, when several codes, most famously the Code of Hammurabi, laid down the Babylonian king's law.

Secondly, codification can be understood as a systematized comprehensive system of rules. This understanding originates in enlightenment rationalism, which called for a comprehensive restructuring of the law.⁴ The first code that tried to systematize the law in a comprehensive way was the Bavarian Civil Code from 1756.⁵ New codifications soon spread all over Europe, most notably the Allgemeine Preußische Landrecht from 1794 and the French Code Civil from 1804.

If we understand codification simply as any form of written law, we can see that Islamic jurists discussed the issue since early Islam. The most famous attempt to introduce a written code was in 757, when Ibn Muqaffa', a Persian bureaucrat who had converted to Islam, wrote a letter to the Abbasid caliph al-Manṣūr. In the letter, he criticized that court judgements differed between the cities of the caliphate and sometimes even between courts in the same city. Ibn Muqaffa' suggested reviewing the different opinions in the schools

3 Although the epistemological foundations of European legal theory fundamentally differ from those of the Islamic tradition, the jurists' arguments for and against codification are surprisingly similar. I am fully aware that such an approach is a risky endeavour and largely ignores the social and historical context in which these European debates took place. However, the goal is not to give a full portrait of European legal thought but to understand that ideas presented in the Saudi legal discourse are not unique to Saudi Arabia or Islamic law.

4 Pio Caroni, *Gesetz und Gesetzbuch: Beiträge zu einer Kodifikationsgeschichte* (Basel: Helbing & Lichtenhahn, 2003), 126.

5 Reinhard Zimmermann, "Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law," *European Review of Contract Law* 8, no. 4 (2012): 372.

and compiling them in a single book. The caliph, however, did not follow Ibn Muqaffa's proposition.⁶

Later, one of the Abbasid caliphs⁷ told Mālik, the founder of the eponymous legal school, that he intended to send a copy of Mālik's most famous legal treatise, the *Muwatṭa'*, to all judges in the caliphate and planned to force the judges to apply it. Mālik is said to have refused the caliph's plan because he held that every town and every people have their own view of the law and therefore should apply the laws that they choose and believe in.⁸ Mālik's famous refusal of codification was one of the main reasons why codified law only played a minor role in subsequent fiqh debates.

Codifications that systematized the law were introduced to the Arab world in the nineteenth century. From the 1840s onward, codification became an essential element of legal reform in the Ottoman Empire. As Avi Rubin pointed out, the Ottoman Empire thereby followed a global trend towards systematic and comprehensive law codes.⁹ Over the subsequent decades, codification in most parts of the Arab world went hand in hand with a loss of influence of Islamic law. French law became more and more of a role model for new legislation, especially in commercial and criminal law. Eventually, only the area of "personal status" (*al-aḥwāl al-shakhṣiyya*), a newly formed category that included family law, inheritance law, and the law of Islamic endowments (*awqāf*), remained under the realm of the sharī'a.¹⁰ As Talal Asad argued, the restriction of Islamic law to matters of personal status was fundamental for the process of secularization in the Middle East. By limiting religious law to the private sphere, a space for the modern secular nation-state was created.¹¹

In the course of the twentieth century, and especially after the Second World War, the vast majority of the newly founded Arab nation-states also codified this last remaining area. However, this did not wipe away traditional Islamic jurisprudence. Egypt, for example, still has no single family code, and in most

6 Muḥammad Kurd 'Alī, *Rasā'il al-bulaghā'* (Cairo: Dār al-Kutub al-'Arabiyya al-Kubrā, 1331/1913), 125.

7 There is some dispute over the Abbasid caliph's name, because several versions of the story exist. See Muḥammad bin 'Abd al-'Azīz al-Fāyiz, *Taqnīn al-aḥkām al-qaḍā'iyya* (n.p., 1431/2010), 25–26.

8 Ibn 'Abd al-Barr, *Al-Intiqā' fī faḍā'il al-thalātha al-a'imma al-fuqahā'* (Cairo: Maktabat al-Quds, 1350/1931), 41.

9 Avi Rubin, "Modernity as a Code: The Ottoman Empire and the Global Movement of Codification," *Journal of the Economic and Social History of the Orient* 59 (2016): 828–56.

10 J.N.D. Anderson, "Codification in the Muslim World: Some Reflections," *RabelsZ* 30, no. 2 (1966): 245.

11 Asad, *Formations of the Secular*, 255.

Arab countries, judges turn to Islamic jurisprudence whenever the code is silent on a legal matter. In such cases, courts in Iraq, for instance, have to follow the opinion in Islamic jurisprudence that they consider most in line with the intention of the codified law.¹² Until 2022, Saudi Arabia remained the only country in the Arab world without a comprehensive codification of Islamic law.

2.2 *The Implications of Codification for Islamic Law*

If and in what ways codification changed Islamic law has been subject to intensive debate in Western scholarship on Islamic law. Wael Hallaq famously argued that the codification of Islamic law irrevocably altered the nature of the shari'a. "Traditional" Islamic law, as he called it, was thereby transformed into state law.¹³ Hallaq wrote that "[i]n the Islamic context, the adoption of codification has an added significance since it represents potently efficacious modus operandi through which the law was refashioned in structured ways."¹⁴ The traditional means of Islamic jurisprudence, he claimed, and most importantly, the epistemology of premodern law, were no longer used. For Hallaq, codification is not merely a pragmatic decision but a conscious choice to limit the powers of judges. Normative pluralism, a fundamental principle of premodern Islamic law, Hallaq held, was abolished by codes that aimed to create uniformity.¹⁵

Furthermore, many observers argue that codification most significantly changed the position of the 'ulamā', the architects of the "traditional" law. Western literature commonly understands Islamic law as jurists' law.¹⁶ By codifying the law, stateless Islamic law was transformed into statutory law and thus came under the control of the state. Rudolph Peters argued that this transformation of Islamic law could explain the religious scholars' loss of influence in the legal realm in most Muslim countries. The traditional jurists lost, as Peters put it, their position as "exclusive guardians of the law."¹⁷

12 Lauan al-Khazail and Dominik Krell, "Die Wirksamkeit von Minderjährigen- und Zwangsehen nach syrischem und irakischem Familienrecht," *Das Ständesamt* 73 (2020), 12.

13 Wael Hallaq, "Can the Shari'a Be Restored?" in *Islamic Law and the Challenges of Modernity*, ed. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (New York: AltaMira, 2004), 22–23.

14 *Ibid.*, 23.

15 Hallaq, *Shari'a: Theory, Practice, Transformations*, 368–69.

16 This understanding of Islamic law was most importantly shaped by Joseph Schacht, see Schacht, *Introduction to Islamic Law*, 5.

17 Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified," *Mediterranean Politics* 7, no. 3 (2007): 93.

Similarly, Aharon Layish contended that codified Islamic law was detached from orthodox *sharī'a*. Codification could even be seen as a form of secularization of the law. Like Peters, Layish held that codification put Islamic law under the legislative authority of the state and transformed it into statutory law, and that, as a result, the 'ulamā' lost control over the application of Islamic law.¹⁸

Much of the literature on codification focuses on the state's role and therefore rarely considers internal developments in Islamic jurisprudence. Anver Emon pointed out that Western scholarship on Islamic law understands codification mostly as an ideology of statecraft and associates it with the coercive force of an executive.¹⁹ Undoubtedly, the role of the 'ulamā' changed over the course of the nineteenth and twentieth centuries in many countries. Emon argued that the focus on the scholars' power led to the common understanding in Western literature that codification constituted a rupture in Islamic legal history.²⁰ Furthermore, he criticized that the different forms of codification and their epistemological foundations are often not distinguished. Yet, the effects a codification has on jurisprudence largely depend on the code's structure.

Most Western scholars focus on the developments in the Ottoman Empire during the nineteenth century. However, it is questionable whether and to what extent conclusions that are drawn from those historical discourses can be generalized. Earlier codifications took place in the context of the colonial project, whereas the legal discourse today is influenced by globalization and modern capitalism. Nevertheless, the literature on codification in the nineteenth century still frames our understanding of the codification of Islamic law today.

2.3 *Contemporary Muslim Perspectives on Codification*

Today, most Islamic jurists outside of Saudi Arabia do not see a tension between "traditional" and codified Islamic law, and most of them support at least some form of codification.²¹ This includes not only modernist reformers but also more traditional 'ulamā'. For example, the Syrian jurist Wahba al-Zuhayli (d. 2015), a moderate but conservative thinker, criticized the opposition of Saudi 'ulamā' to codification in his widely read book "The Efforts to Codify Islamic Jurisprudence" (*Juhūd taqnīn al-fiqh al-islāmī*):

18 Aharon Layish, "The Transformation of the *Sharī'a* from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44, no. 1 (2004): 91–92.

19 Anver Emon, "Codification and Islamic Law: The Ideology Behind a Tragic Narrative," *Middle East Law and Governance* 8 (2016): 275–309.

20 *Ibid.*, 293.

21 See Nāṣir bin 'Abd Allāh al-Maymān, *Al-Nawāzil al-shar'īyya* (Dammam: Dār Ibn Jawzī, 1430/2009), 90; and 'Abd al-Barr Zakī, *Taqnīn al-fiqh al-islāmī: Al-Mabda' wa-l-manhaj wa-al-taṭbīq* (Qatar: Idārat Ihyā' al-Turāth al-Islāmī, 1407/1986), 56.

Some ‘ulamā’ hold that there is no need for the codification of Islamic jurisprudence because the rulings [*aḥkām*] can be found in the books and these are Arabic books in Arabic script. However, this view cannot be accepted because the fiqh in the old books is known [only] to a small group, and these are specialists. Yet, [even] for most university professors, judges, and others like them, it is difficult to go back to these books since their structure is different from contemporary publications. And there are a lot of legal opinions in them. The researcher needs to read a lot in order to know the preponderant [*rājiḥ*] view. Perhaps a view is preferable according to one book, but [this] varies from another [view] in a different book. The understanding can vary, and it happens in some countries²² that the judges’ decisions differ in one question according to each judge’s interpretation [*ijtihād*], knowledge and expertise.²³

Al-Zuḥaylī regarded codification as a way to make Islamic law more understandable and approachable. For him, codification is not the demise of Islamic law but a way to uphold its authority and a requisite for legal security, which he considers mandatory in the context of today’s life.²⁴ His brother, Muḥammad al-Zuḥaylī, a respected scholar in his own right, even called the codification of Islamic law the newest development in Islamic jurisprudence (*aḥdath taṭawwur li-l-fiqh al-islāmī*).²⁵

Similarly, the famous Egyptian jurist Muḥammad Abū Zaḥra (d. 1974) considered codification the only way to defend the application of Islamic law today.²⁶ For Yūsuf al-Qaraḍāwī (d. 2022), one of the most influential contemporary Islamic intellectuals, codification was a means to renew Islamic law. According to al-Qaraḍāwī, codification should not be limited to one school of Islamic jurisprudence but should be based on comparative studies of different schools to find the opinions that best suit the needs of our times. In order to do this, al-Qaraḍāwī argued, a new generation of ‘ulamā’ were needed who could connect the Islamic legal tradition to modern jurisprudence.²⁷

22 The context leaves no doubt that he is referring to Saudi Arabia.

23 Wahba al-Zuḥaylī, *Juḥūd taqnīn al-fiqh al-islāmī* (Beirut: Mu’assasat al-Risāla, 1408/1987), 50.

24 Ibid., 29.

25 Lecture by Muḥammad al-Zuḥaylī on the schools of Islamic jurisprudence and their influence on the flexibility of codified law. Available on YouTube: www.youtube.com/watch?v=aW_FWsdFOsA, min 5 [last access: 21 August 2022].

26 See Abū Zaḥra’s introduction to ‘Abd al-Raḥmān bin ‘Abd al-‘Azīz al-Qāsim, *Al-Islām wa-taqnīn al-aḥkām* (Riyadh: Dār al-Ma’ārifa al-Sa‘ūdiyya, 1977), Nūn.

27 Yūsuf al-Qaraḍāwī, *Madkhal li-dirāsāt al-sharī‘a al-islāmīyya* (Beirut: Mu’assasat al-Risāla, 1414/1993), 263.

These contemporary ‘ulamā’, of course, operate in the context of legal systems that have largely abandoned Islamic law. Many of their arguments are directed at the general public to defend Islamic law from further loss of influence. However, what becomes clear is that contemporary Islamic scholars outside Saudi Arabia generally do not consider codification a separation of “traditional shari‘a” and modern law.

3 The Problem of Binding Rules

3.1 *Islamic Law as State Law?*

We have seen that Western literature on Islamic law usually associates codification with the relationship between the state and the law. By codifying the law, Hallaq and others argued, uncoded Islamic law would be transformed into a new category, namely state law.

Saudi ‘ulamā’ generally follow a different understanding of codification: even if the state codifies the law, this does not change the law’s nature. A codification of Islamic law would become, as former appeal court judge Muḥammad al-Fāyiz framed it, a “new text of fiqh” (*naṣṣ fiqhī jadīd*).²⁸ Hence, it would not introduce something new but merely rephrase the law.²⁹ For al-Fāyiz, who is a supporter of codification, it is, most importantly, a tool to present Islamic law to a wider public. In an interview, he stated,

What is shari‘a? Is there a single book? When it is said, the Quran and the Sunna, there are many schools and views. What is shari‘a? When we have a code of the school of sunna and jamā‘a, which stems from a meeting of some ‘ulamā’ and is based [on Islamic jurisprudence], we can tell the rest of the world and the Muslims: this is the shari‘a.³⁰

28 Interview with Muḥammad bin ‘Abd al-‘Azīz al-Fāyiz in an episode of the TV program al-Barnāmij Midād titled “Taqnīn al-fiqh,” available on YouTube: www.youtube.com/watch?v=fjfluDAhxMk, min 43 [last access: 12 March 2023].

29 This view is by no means unique to Saudi scholars. The influential nineteenth-century German scholar Friedrich Carl von Savigny, whose ideas we will discuss later in this chapter, wrote in 1831 that he considered “the code as the exposition of the aggregate existing law, with exclusive validity conferred by the state itself.” Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (London: Littlewood, 1831), 27.

30 Interview with Muḥammad bin ‘Abd al-‘Azīz al-Fāyiz in an episode of the TV programme al-Barnāmij Midād titled “Taqnīn al-fiqh,” available on YouTube: www.youtube.com/watch?v=fjfluDAhxMk, min 44 [last access: 12 March 2023].

Similarly, Nāṣir al-Maymān, a trained jurist and member of the Shūrā Council (Majlis al-Shūrā),³¹ complained that jurists from other countries always requested to see the Saudi laws, which left him in an uncomfortable position.³² The lack of codification, he maintained, hindered the inclusion of the sharī'a into international law. Moreover, it was difficult for comparative legal studies at foreign universities to include Saudi law.³³ Ḥamd al-Khuḍayrī, a judge at the Riyadh Court of Appeal, held that the codification of Islamic law would open a way for foreign NGOs to understand the judiciary and help to correct wrong ideas about the Saudi legal system.³⁴

Interestingly, the same argument is made the other way around. 'Abd Allāh al-'Asaylān, a judge at the General Court in Riyadh, argued that, because of the judges' similar education, there was a broad consensus among them on what the law is. He pointed to the fact that all Saudi universities, and especially the Higher Judicial Institute, share a curriculum. A codification of Islamic law, he asserted, would thus only express what is already practiced, and is therefore unnecessary.³⁵

References to the role of the state are hard to find in the jurists' discourse. The state is not seen as the lawgiver but, following the doctrine of *siyāsa shar'iyya*, as the enforcer of the law as determined by the 'ulamā'.³⁶ At least in theory, the king and the scholars are imagined to be working hand in hand. For instance, the decision of the Council of Senior Scholars on codification emphasized the king's good intentions when he planned to codify Islamic law.³⁷

31 *Shūrā* (consultation) has its roots in early Islam. The Prophet encouraged leaders to consult with those affected by their decisions, and subsequent Islamic leaders often followed his example. In addition to consulting the king, the Saudi Shūrā Council also has limited powers to enact some laws. In the context of the legal system, however, the Shūrā Council is of little importance. See Joseph Kéchichian, *Legal and Political Reforms in Sa'udi Arabia* (London: Routledge, 2013), 114.

32 Undated lecture by Nāṣir bin 'Abd Allāh al-Maymān on the codification of Islamic law, available on YouTube: www.youtube.com/watch?v=LR6-EaA3OYI&t=942s, min 15 [last access: 24 April 2023].

33 *Ibid.*, min. 18.

34 Interview with Ḥamd al-Khuḍayrī in his office at the Appeal Court in Riyadh, 25 July 2018.

35 Interview with 'Abd Allāh al-'Asaylān in a hotel in Riyadh, 23 July 2018.

36 However, this does not mean that the state is not seen as a lawgiver in other areas of the law. As we have discussed in Chapter 2, the Saudi Basic Law generally acknowledges the separation of state power into a legislative, an executive, and a judicial branch.

37 Al-Amāna al-'Āmma li-Hay'at Kibār al-'Ulamā' (ed.), *Abḥāth Hay'at Kibār al-'Ulamā'*, 3:232.

3.2 *Codification as a Matter of School Coherency*

Since Saudi jurists consider codification a mere reformulation of the law, they discuss the issue in the context of the much older problem of whether a judge could be forced to follow a specific opinion. Bakr Abū Zayd (d. 2008), a former member of the Council of Senior Scholars, summed up the debate as follows:

Codification is actually a literary work [*taʿlīf*]. The mistake is to give up the terminology of the sharīʿa. If this language is taken away, among the bad consequences is the separation of the views [on this matter] from the established truths and meanings in sharīʿa jurisprudence and its rulings.

No matter if it is called codification [*taqnīn*], compilation [*tadwīn*], or books [*taʿlīf*], this is a wrong description. The field of the dispute is limited to the question of whether the restriction [*ilzām*] [to a specific opinion] is allowed or forbidden.³⁸

Saʿd al-ʿUtaybī, a well-known professor of *siyāsa sharʿiyya*, held that the discourse on codification was about the theological and legal roots (*judhūr ʿaqadiyya wa-fiqhiyya*) of Islam.³⁹ Since Islamic creed demands that humans judge according to Islamic law, every Islamic codification has to be based on the primary sources of Islamic law. The legal aspects of the debate, on the other hand, are about an “area of controversy in Islamic jurisprudence, namely the ruling on the restriction of the judge – who is responsible for dispensing justice – in matters of *ijtihād*”.⁴⁰

The reference to the question of madhhab restriction enables the jurists to connect their discourse to the older debate on school coherency. Many Saudi scholars discuss Ibn Taymiyya’s legal reasoning, who, as we have seen in the last chapter, generally opposed the strict following of a single school of jurisprudence. Consequentially, Ibn Taymiyya was also against forcing the judge to adjudicate according to one single madhhab.⁴¹

In this regard, Ibn Taymiyya’s opinion is very much in line with mainstream Islamic jurisprudence. All schools, except the Ḥanafīs and some Mālikīs, oppose any restriction of the judge to one particular madhhab.⁴² For the majority, as we have seen in the last chapter, the judge should be a mujtahid. Ibn Qudāma,

38 Bakr bin ʿAbd Allāh Abū Zayd, *Fiqh al-nawāzil* (Riyadh: Muʿassasat al-Risāla, 1416/1996), 111.

39 Al-ʿUtaybī, *Maqālāt fī al-siyāsa al-sharʿiyya*, 15.

40 Ibid., 16.

41 Ibn Taymiyya, *Majmūʿat al-fatāwā*, 31:73.

42 Muḥammad Ḥamdī, *Al-Mutūn al-fiqhiyya wa-ṣīlatuha bi-taqnīn al-fiqh* (Jeddah: Dār al-Bilād li-l-Ṭabāʿa wa-l-Nashr, 1421/2000), 411–16.

for instance, wrote that a judge is obliged to dispense justice, and since “justice cannot be found in one school,”⁴³ any restriction to only one school or a particular opinion in the school would be void. The situation changes slightly when the judge is a muqallid. In this case, Ḥanafī scholars allowed the ruler to restrict the adjudication of the judge to a single school and sometimes even to a particular opinion in the school.⁴⁴

3.3 *Individual Justice and Codified Law*

However, Saudi jurists do not only rephrase the opinions of older generations of scholars. Some, mostly specialists in the judiciary, discuss the problem of madhhab restriction and its relationship to different forms of codified law in greater detail.

Saudi jurists generally distinguish between the codification (*taqnīn*) and the compilation (*tadwīn*) of Islamic law. For Saudi scholars, compilation describes the arrangement of legal information in the form of numbered articles and paragraphs. The main difference between codification and compilation is the binding effect. Whereas a compilation is never binding, a codification must always be coercive. This distinction is by no means unique to Islamic law or to Saudi scholars but is also common among European jurists.⁴⁵

Ibn Khunayn demands that the two different levels should be kept in mind while discussing the codification of Islamic law. For Ibn Khunayn, codification itself does not contradict the nature of Islamic law, but only some aspects of a binding law code are problematic. Most importantly, he is concerned with the interpretative flexibility in disputed questions in Islamic jurisprudence. He explained the problem of codification as follows:

Codification [*taqnīn*] has two meanings:

The first [is]: the arrangement of the material in the form of numbered paragraphs that are divided into chapters. This is a form of text that is not concerning. However, the writer has to state the textual evidence [*dalīl*] and the underlying cause [*taʿlīl*] [of a ruling].

The second [is]: the enforcement of this codified material. There are [several] forms:

43 Ibn Qudāma, *Al-Mughnī* (Beirut: Dār ʿĀlam al-Kutub, 1417/1997), 14:91.

44 Ibn ʿĀbidīn, *Radd al-muḥtār ʿalā al-darr al-mukhtār* (Beirut: Dār ʿĀlam al-Kutub, 1423/2003), 8:98.

45 Damiano Canale, “The Many Faces of the Codification of Law in Modern Continental Europe,” in *A History of the Philosophy of Law in the Civil Law World, 1600–1900*, ed. Damiano Canale, Paolo Grossi, and Hasso Hofmann (New York: Springer, 2009), 136.

The first form: What the Quran and the Sunna state, and when there is a consensus [*ijmā'*] on a ruling, like: the ḥadd [punishment] for a married or a virgin [person], the ḥadd [punishment] for false accusation, and other questions of human interaction, marriage, inheritance, and the like. This is binding, and it is not possible to deviate from that.

The second form: the general principles of Islamic jurisprudence [*qawā'id al-fiqhiyya*], like “no harm should be inflicted or reciprocated” [*lā ḍarar wa-lā ḍirār*] ... and many other legal principles. These are binding ... and if there is uncertainty, this belongs to the fourth form.

The third form: procedural rulings, like the Code of Procedure, [the rules on] founding companies, the ways to prove a crime, and other forms of procedural statutes [*anzīma*]. As long as it is derived from the foundations [*uṣūl*] of the law, it is binding.

The fourth form: rulings on specific issues, like rulings on sales, rents, marriage, and other areas of *ijtihād*, [in which] the jurists interact with the revelation. This is the area where the question of being bound [to a rule] has to be seen.⁴⁶

The opponents of codification argue that a codified law would bind the judge to rigid rules, which would hinder them in their primary aim: the achievement of justice. To bridge the gap between individual justice and binding law, some Saudi jurists propose different forms of codification that, if introduced, could provide for the necessary flexibility.

Al-Fāyiz, for example, argued that the ideal law code should include the option for the judge to depart from the codified law or, under certain circumstances, even allows the judge to establish a new ruling. However, al-Fāyiz only granted the judge this right if three requirements are met: Firstly, the judge's legal reasoning has to follow the general principles (*qawā'id*) laid down in the written law. Secondly, the judge must base his verdict on the sources of Islamic law. And thirdly, the decision has to be reviewed by the High Court. A legal code that under these conditions allows for exceptions from the binding law would benefit from all the advantages of a codification while avoiding its negative consequences.⁴⁷

The idea that the judge can depart from established legal norms in exceptional cases originates in Islamic law's acknowledgement of normative pluralism and is commonly invoked by Saudi jurists. It is referred to in the 1928

46 'Abd Allāh bin Muḥammad Āl Khunayn, “Muqābila ma' ṣāhib al-faḍīla al-shaykh 'Abd Allāh bin Muḥammad bin Sa'd Āl Khunayn,” *Al-Majalla* 1086 (6–12.9.1421/3–9.12.2000).

47 Al-Fāyiz, *Taqnīn al-aḥkām al-qadā'iyya*, 140.

decision by the Higher Judicial Authority that we discussed in the last chapter and, as will be shown in the next chapter, the same idea is brought up in the context of the concept of the prevailing practice at court. Thus, the discourse on codification revolves mainly around the concept of normative pluralism, which is considered the pivotal element of Islamic law. Therefore, diverging court judgements in similar cases are considered a natural part of the Islamic legal tradition. For example, al-Fāyiz argued,

There are many who demand a binding codification and call it necessary to end the differences between judicial decisions in similar or perhaps identical cases. It is said that this divergence is a form of injustice [*ẓulm*] and points to the lack of continuity and the loss of rights since the basis of human rights is that a person knows his rights. When a person does not know his rights, then how can he demand his rights and how can he organize his legal actions, how can it be accepted today that there are two conflicting rulings [*ḥukmān*] on a contract, a divorce, or a crime etc.

The correct answer to this question is that pluralism [*ikhṭilāf*] was present at the time of the pious forebears [*salaf*]. This is proven, for example, by the stories of Fārūq [the epithet of ‘Umar bin al-Khaṭṭāb] about the [case of the] distribution of the estate. He deprived the brothers of their inheritance,⁴⁸ and when they came to him after he had judged differently in a second case, he told them, “This is what I judge, and that is what I judged.”⁴⁹

The normative pluralism inherent in the Islamic legal tradition, al-Fāyiz explained, allows for the consideration of the peculiarities of the case, especially in family law:

A binding codification clashes with the benefits it brings because it restricts the judge in his discretionary power to consider the best interests in family law. Like, to declare that a woman has violated her marital duties [*tanshīz*], contrary to the Ḥanbalī School, or to accept the utterance [*lafẓ*] in the dissolution [*firqa*] of the marriage, contrary to the Shāfi‘ī

48 According to Ibn al-Qayyim, ‘Umar bin al-Khaṭṭāb was confronted with a dispute regarding the inheritance of a deceased woman, who had full brothers and half-brothers from her mother’s side. He divided the estate equally between the half-brothers and full brothers. In an earlier judgement, however, he had given the inheritance only to the half-brothers from her mother’s side. Ibn al-Qayyim, *I‘lām al-muwaqqi‘īn ‘an rabb al-‘ālamīn* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1425/2004), 83–84.

49 Al-Fāyiz, *Taqnīn al-aḥkām al-qadā’iyya*, 121.

School, or to accept the triple major irrevocable divorce [*ṭalāq*] according to the four schools,⁵⁰ or [to determine] the age of the child [*maḥḍūn*] [in custody cases] and the role of the remarriage of the mother, opposing all four schools in this question.⁵¹ It is not in the interests of the parents or the child that the judge is bound to one single view in these questions.⁵²

Like other Saudi jurists, al-Fāyiz hoped to thereby establish justice on a case-to-case basis and considered legal reasoning beyond school boundaries necessary for a just solution of the case. In other words, he followed an interest-based approach, whereby the law itself is not just or unjust. Instead, justice largely depends on the interests of the parties, at least in family law. Similarly, ‘Aṭiya bin Muḥammad Sālim (d. 1999), a former appeal court judge as well, argued for an individual interpretation of justice:

From the perspective of judicial methodology, everyone who practices [as a judge] knows that every case has its special circumstances. He knows what is appropriate for this case and not for the other case. There begins the alleviation or aggravation according to the case ... So, if we introduce, for example, a criminal code and force the judge to apply it to every criminal case that looks similar, but differs in the circumstances and motives, this does not establish justice.⁵³

This tension between abstract rules and individual justice is not unique to Islamic law or to Saudi ‘ulamā’.⁵⁴ European legal scholars have extensively debated this issue since the nineteenth century. Although the social, political, and epistemological context in Europe is, of course, very different, the underlying dilemma remains the same. For example, the French philosopher Jacques

50 See Chapter 7 for a detailed discussion of the debate on triple ṭalāq.

51 See Chapter 6 for a detailed discussion of Saudi court practice in custody cases.

52 Al-Fāyiz, *Taqnīn al-aḥkām al-qaḍā’iyya*, 135.

53 Interview with ‘Aṭiya bin Muḥammad Sālim, printed in Muḥammad al-Majdhūn, *‘Ulamā’ wa mufakkirūn ‘arraftuhum* (Riyadh: Dār al-Shawāf, 1992), 2:213.

54 It is important to note that there has been no substantial influence of European legal theory on Saudi Islamic scholars. This is in contrast to many other Arab countries, where Islamic scholars were directly reacting to developments in European jurisprudence. As Leonard Wood showed, Egyptian legal discourse in the nineteenth and early twentieth centuries was deeply influenced by earlier European debates on codification. See Wood, *Islamic Legal Revival*, esp. Section 11.

Derrida (d. 2004) claimed that justice “exceed[ed] law and calculation.”⁵⁵ Justice, contrary to the calculation of written law, was incalculable and indeterminable in an abstract rule. Derrida wrote,

To be just, the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case. No exercise of justice as law can be just unless there is a “fresh judgement”.... Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.⁵⁶

For Derrida, a law code can even contradict justice since the calculation that lies at its heart might hinder the judge’s “fresh judgement.” A similar view was forwarded in early twentieth-century Germany, when legal scholars became increasingly critical of the formalistic legal reasoning of nineteenth-century pandectism. The German *Freirechtsschule*, one of the most important legal movements in twentieth-century Europe, argued that judges should not only look at the law but consider the social context of the case and search for individual justice. Ernst Fuchs (d. 1929), one of the most prominent advocates of the *Freirechtsschule*, described the movement as follows:

The *Freirechtsschule* shifts the emphasis of jurisprudence away from mere bookishness to an observation of the needs and to experience. Hence, its focus is on the in-depth exploration of the legal facts and the peculiarities of the case, as well as on weighing up the opposing interests.⁵⁷

Although the jurists of the *Freirechtsschule* were not against written laws per se, they criticized how mainstream legal reasoning at their time was bound to abstract legal rules that were derived from Roman law. In a similar fashion,

55 Jacques Derrida, The “Mystical Foundation of Authority,” in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson (New York: Routledge, 1992), 28.

56 *Ibid.*, 23.

57 Ernst Fuchs, *Was will die Freirechtsschule* (Rudolstadt: Greifenverlag, 1929), 12–13.

Ibn Khunayn criticized that law should be more than mere calculation and instead explore the peculiarities of the case:

[Codification] kills the spirit [*rūḥ*] of the judge's *ijtihād*. He cannot consider the specifics [*khusūṣiyya*] of the case. Instead, this forces him to handle it like mathematics [*riyādiyya*] without consideration of the specifics of the case. This is wrong because it restricts the view [*naẓr*] of the judge to the codified articles and does not open his view to other things that are not in the codification, [but it] would perhaps be better and more reasonable to solve the specifics of the case. The mistake gets worse when the judge applies the codified law. From the point of view of Islamic law [*naẓr al-sharʿ*], this is far away from what is desired.⁵⁸

In addition to the inflexibility of the law when it comes to individual cases, Saudi 'ulamā' argue that a written law would not be flexible enough to react to social changes. To make their case, Ibn Khunayn and others referred to the German scholar Carl Friedrich von Savigny (d. 1861), one of the most important opponents of codification in Europe.

3.4 *Carl Friedrich von Savigny and Saudi 'Ulamā'*

Saudi judges generally see Islamic law as a living tradition that must serve the needs of the Islamic community today. Legal change is considered necessary to adapt Islamic law to the questions of our times. Codification, on the other hand, is equated with inflexibility and standstill. When I asked Ibn Khunayn about his view on codification, he immediately referred to von Savigny.⁵⁹ This was undoubtedly inspired by the fact that I was a German lawyer; however, in an interview published in 2000, he had already mentioned von Savigny and his opposition to codification.⁶⁰

Von Savigny was one of the most influential European jurists of the nineteenth century. His works profoundly influenced jurisprudence in all of Europe, South America, and even parts of Asia.⁶¹ His main criticism was that codified law was not flexible enough to adapt to the ever-changing circumstances of human life.⁶² He held that there was an "organic connection of law with the

58 Āl Khunayn, "Muqābila ma' ṣāḥib al-faḍīla".

59 Interview with Ibn Khunayn in his home in Riyadh, 24 April 2018.

60 Āl Khunayn, "Muqābila ma' ṣāḥib al-faḍīla".

61 See Joachim Rückert and Thomas Duve, *Savigny international* (Frankfurt am Main: Klostermann, 2015).

62 Von Savigny, *Vocation of Our Age*. Von Savigny argued against his contemporary Friedrich Justus Thibaut (d. 1840), who advocated for a unified German law code. The discussion

being and character of the people,” which was “also manifested in the progress of the times.”⁶³ For von Savigny, law at no point reaches a moment of absolute cessation.⁶⁴ Instead, it was the jurist’s task to listen to the spirit of the people, the *Volksgeist*, and translate it into law.

Ibn Khunayn took up von Savigny’s argument and claimed that codified Islamic law would be too static to keep pace with the changing living circumstances in Saudi Arabia today. He argued that if circumstances changed, the state could not react as fast as the jurists and adapt the law to new conditions. The discrepancy between society’s needs and the written law would eventually result in unjust court decisions.⁶⁵ ‘Abd al-Raḥmān bin Sa’d al-Shithrī, a younger scholar with strong ties to leading Saudi ‘ulamā’, used a similar argument. In his book on the permissibility of codification, he wrote,

Codification poses a restriction to rulings that are open to *ijtihād*. It blocks legal change [*taghayyur al-fatwā*] [that is necessary to adapt] to the change over time. [There is] a principle of Islamic law [*qā’ida shar’iyya*]: the law changes with the change over time and the change of circumstances.⁶⁶

Later in his book, Al-Shithrī referred to von Savigny and cited the writings of the Jordanian Islamic scholar ‘Umar al-Ashqar (d. 2012) on the opposition against codification in Europe. Nevertheless, al-Shithrī is more hesitant than Ibn Khunayn to explicitly use a foreign jurist like von Savigny in his argument. He emphasized that Islamic jurisprudence alone sufficiently proved the inadmissibility of codification but that some people preferred to follow worldly opinions such as von Savigny’s argument instead of turning to God, the Prophet, and the ‘ulamā’.⁶⁷

Since von Savigny’s books are not translated into Arabic, the jurists’ references to the German scholar remain superficial.⁶⁸ Ibn Khunayn explained that

on the codification of German law in the nineteenth century later became known as the “codification dispute” (*Kodifikationsstreit*) and eventually ended with the enactment of the German civil code in 1900.

63 Ibid., 27.

64 Ibid.

65 Interview with Ibn Khunayn in his home in Riyadh, 24 April 2018.

66 ‘Abd al-Raḥmān bin Sa’d al-Shithrī, *Taqnīn al-aḥkām al-sharī’a: Tārīkhuhu wa-ḥukmuhu* (Riyadh: Dār al-Tawḥīd li-l-Nashr, 1435/2014), 51.

67 Al-Shithrī, *Taqnīn al-aḥkām al-sharī’a*, 61.

68 For a more detailed discussion of Savigny’s theory of legislation in English, see Karl Mollnau, “The Contributions of Savigny to the Theory of Legislation,” *American Journal of Comparative Law* 37, no. 1 (1989).

it was the language barrier that prevents him from a more in-depth study of European legal theory.⁶⁹

The nineteenth-century German scholar and contemporary Saudi ‘ulamā’ pursue a similar aim: Von Savigny focused on the historical growth of the law over the centuries because his goal was the revitalization of Roman law. He wanted to show that Roman law could be suitable for the nineteenth century.⁷⁰ Likewise, Saudi ‘ulamā’ fear that a law code that is not continuously adjusted to new legal phenomena would strengthen the critique that Islamic law is not suitable for the modern age.

3.5 *The Bond between the Judge and the Law*

Islamic law’s acceptance of normative pluralism empowers the judge. At the same time, judgeship is traditionally considered a dangerous endeavour, especially in early Islam.⁷¹ According to a famous account of the Prophet Muḥammad, of three judges, one will be in heaven and two in hell. The first, who is in heaven, knew the law and judged accordingly; the second knew the law but deviated from it and went to hell, as well as the third, the ignorant judge, who judged nevertheless.⁷² There are several famous reports of pre-modern Islamic scholars who tried to escape forced judgeship. Abū Ḥanīfa, for instance, allegedly preferred prison to an appointment as a judge.⁷³

The notion of judgeship as a dangerous profession is still present in the Saudi legal discourse. ‘Abd Allāh al-‘Asaylān, a judge at the General Court in Riyadh, considered theoretical fiqh debates to be of little relevance for his daily practice. However, when asked about the risks of being an Islamic judge, he expressed his fear of being punished on the day of judgement for his decisions in court.⁷⁴ The before-mentioned account of the Prophet is regularly cited in lectures by Saudi scholars to emphasize the great responsibility of being a

69 Since only a few works of European legal theory have been translated into Arabic, Saudi jurists largely rely on secondary literature in Arabic.

70 Benjamin Lahusen, *Alles Recht geht vom Volksgeist aus* (Berlin: Nicolai, 2013), 8–9.

71 See for example Ibn Qudāma, *Al-Mughnī*, 14:6. Later jurists took a more optimistic stance towards the dangers of judgeship. Since the fate of a knowledgeable judge who simply is mistaken remains unclear in the Prophetic account of the three judges, they argue that a judge can get to heaven as long as he is knowledgeable and attentive. See Norbert Oberauer, “Wahrheitssuche,” 148.

72 Abū Dāwūd, *Sunan Abī Dāwūd* (Damascus: Dār al-Risāla al-‘Ālamiyya, 1430/2009), 5:426 (Nr. 3573).

73 Al-Dhahabī, *Sīyar a‘lām al-nubalā’* (Beirut: Mu‘assasat al-Risāla, 1409/1988), 6:401.

74 Interview with ‘Abd Allāh al-‘Asaylān in a hotel in Riyadh, 23 July 2018.

judge.⁷⁵ The judge's metaphysical accountability for his decisions results in a profound connection between the judge and the law. Against this background, some Saudi jurists fear that the codification of Islamic law would disturb this link. With the introduction of binding law, they assert, the judge would become detached from his own judgement.

To better understand the Saudi jurists' fears, we should briefly look at the general understanding of the role of a judge in jurisdictions with a tradition of codified law enacted by a parliament. Very broadly speaking, the dominant idea in civil law democracies is that laws are an expression of the will of the people, mediated by an elected assembly, with the judiciary being the mere interpreter and applier of the law. It is the parliament, not the judge, that is supposed to create the law. This idea was most radically followed in France after the revolution of 1789 when judges were not even allowed to interpret the written law but had instead to consult the government every time the law was silent or unclear.⁷⁶ The judges' own views did not matter. Whether they approved the law or not, they were nevertheless bound to apply it. Generally speaking, judges were often met with suspicion, as is illustrated by the remarks of eighteenth-century Italian jurist Cesare Beccaria (d. 1794), one of the most prominent critics of the idea of judicial interpretation. In 1764, he warned against giving power to the judges:

Every person has his own point of view, and at different times, every person has a different one. The spirit of the law, therefore, would be the upshot of good or bad logic on the part of the judge and of the state of his digestion, and would depend on the turbulence of his emotions, on the weakness of the aggrieved party, on the judge's relations with the plaintiff and on all those tiny pressures which, to the wavering mind of man, change the appearance of every object.⁷⁷

Ideally, the law should be independent of the person of the judge. Extreme positions, like Beccaria's, were criticized by others as being too technical and

75 This notion of the dangers of judgeship has also been observed in other contemporary legal systems. For example, Morgan Clarke reported that similar ideas are expressed in present-day Lebanon. Morgan Clarke, "The Judge as Tragic Hero," *American Ethnologist* 39, no. 1 (2012): 110.

76 Article 12 of the "Décret des 16–24 août 1790 sur l'organisation judiciaire". See Mathias Gläser, *Lehre und Rechtsprechung im französischen Zivilrecht des 19. Jahrhunderts* (Frankfurt am Main: Vittorio Klostermann, 1996), 4.

77 Cesare Beccaria, *An Essay on Crimes and Punishments* (Albany: W. O. Little & Co, 1872), 22–23.

mechanical. Judges, some European jurists complained particularly in the nineteenth century, resembled slot machines, in which you drop the facts and costs, and it spews out the decision, including the opinion.⁷⁸ The metaphor of the judge as a slot machine was later made famous by the German sociologist Max Weber.⁷⁹ The Saudi jurist Bakr Abū Zayd used the same image when he warned against the codification of Islamic law:

To undertake *ijtihād* is one of the requirements for judges. A binding codification bans *ijtihād* for a legal opinion or an opinion's strength. Then, the judge starts to resemble a machine [*āla*].⁸⁰

Given the judge's personal responsibility for his decision, Saudi jurists are especially concerned that a codification would restrain the judge from following his understanding of Islamic law. In his fatwa on codification, Ibn 'Uthaymīn, for instance, argued that such a process would mean that a judge would have to decide based on someone else's legal opinion. No legal code issued by the ruler (*walī al-amr*) should interfere with the judges' legal reasoning.⁸¹

The Council of Senior Scholars considered this break of the personal connection between the judge and the law a forbidden innovation in Islam, an argument that illustrates the scholars' Salafi background. In their decision on the permissibility of codification, they argued:

1. To force the judges to decide according to what is called the preponderant [*rājiḥ*] [opinion] by those who choose it requires the judges to decide differently from what they believe, if only in some questions. This is not allowed and is different from what was practised at the time of the Prophet, the rightly guided caliphs, and some of the pious predecessors [*al-salaf al-ṣāliḥ*]. ...⁸²
2. To force the judge to decide according to what is called the preponderant opinion is restricting them. It detaches them in their judgement from the Quran, the Sunna, and the heritage of the Islamic fiqh. It damages

78 Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Frankfurt am Main: Vittorio Klostermann, 1986), 40.

79 Weber referred to this idea in his seminal work *Economy and Society*, see Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), 886.

80 Bakr bin 'Abd Allāh Abū Zayd, *Fiqh al-nawāzil* (Riyadh: Mu'assasat al-Risāla, 1416/1996), 1:89.

81 Muḥammad bin Ṣāliḥ Ibn 'Uthaymīn, *Izālat al-sitār 'an al-jawāb al-mukhtār li-hadāyat al-muhtār* (N.p.: n.d.), 85.

82 Here, the Council recounted the story of Mālik and the Abbasid caliph discussed earlier.

this wealth, which is the best heritage that we inherited from the pious predecessors.⁸³

Hence, from the Council's point of view, the disruption of the personal relationship between the judge and the law, not the text as such, constitutes a break with the Islamic legal tradition.

4 New Understandings of Legal Certainty

4.1 *Normative Pluralism as a Liability*

Max Weber famously argued that capitalism required a high degree of legal rationality.⁸⁴ Weber held that a rational legal system relied on formal and generalized rules that transcended the case in question. A legal system that prioritized the individual case over general rules, on the other hand, was irrational.⁸⁵ Weber maintained that it was also because of the rationality of European law that capitalism came into being in Europe and not in other parts of the world.

In Weber's view, the focus on the individual case in the Islamic legal tradition makes Islamic law the antithesis of rational law.⁸⁶ He called Islamic adjudication *Kadijustiz*, a term he had borrowed from the German scholar of Islam Richard Schmidt.⁸⁷ For Weber, the main characteristic of *Kadijustiz* is the absence of abstract rational rules for decision-making.⁸⁸ As Islamic adjudication was guided by revelation and not intellect, it was irrational. Therefore, the adjudication by an Islamic judge was necessarily subjective and rule-free.⁸⁹ Wherever *Kadijustiz* was predominant, Weber argued, capitalism was hindered because of the lack of formal rules and abstract principles.

Weber's depiction of Islamic law has been criticized by many scholars of Islamic law, who point to the sophisticated discourses in Islamic jurisprudence and its high degree of formality.⁹⁰ Yet, the Saudi government, but also many

83 Al-Amāna al-'Āmma li-Hay'at Kibār al-'Ulamā' (ed.), *Abhāth hay'at kibār al-'ulamā'*, 3:234.

84 Max Weber, *Wirtschaft und Gesellschaft* (Tübingen: Mohr Siebeck, 2010), 3:619.

85 David Trubek, "Max Weber on Law and the Rise of Capitalism," *Wisconsin Law Review* 720 (1972): 730.

86 Bryan Turner, *Weber and Islam* (London: Routledge, 1998), 111.

87 Johansen, *Contingency in a Sacred Law*, 48.

88 Weber, *Wirtschaft und Gesellschaft*, 2:571.

89 *Ibid.*, 572.

90 See, for example, David Powers, "Kadijustiz or Qāḍī-Justice? A Paternity Dispute from Fourteenth-Century Morocco," *Islamic Law and Society* 1, no. 3 (1994): 365–66.

‘ulamā’ and lawyers, believe that the acceptance of normative pluralism and the resulting legal uncertainty poses a risk to the economic development of the kingdom. They share Weber’s belief that abstract, general, and transparent laws are a precondition for economic development.

For example, Usāma al-Qahtāni, a trained Islamic scholar and influential lawyer, expressed his frustration that the existing normative pluralism made it fairly impossible to assess the chances and risks of any given case, especially in commercial issues.⁹¹ Generally, lawyers are among the most vivid supporters of a codification since many of them are not educated in Islamic jurisprudence and, therefore, especially struggle to comprehend the judges’ legal reasoning. Judges, too, criticized the divergence of court judgements that results from the acceptance of normative pluralism. For example, Muḥammad Jār Allāh, a senior judge at the Riyadh Court of Appeal, who mostly deals with family law, complained that even with his expertise, he could not predict the outcome of other courts’ judgements. The different chambers at his court, he explained, still differed in their views on several crucial legal questions.⁹²

But most importantly, it was the Ministry of Justice that considered diverging court judgements one of the main problems of the Saudi judiciary. Bashār al-Mufadda, a trained judge, teacher at the Higher Judicial Institute (Ma‘had al-‘Āli li-l-Qaḍā’) and vice president of the Ministry of Justice’s Research Center (Markaz al-Buḥūth), argued in 2018 that court decisions in Saudi Arabia largely depend on the first letter of the plaintiff’s name. Differences in legal interpretations, al-Mufadda admitted, exist in every legal system, even in those with codified law, since the interpretation of a written rule may differ. However, in his view, the situation in Saudi Arabia cannot be compared to the problem of contradicting court decisions in other legal systems. Not only does the interpretation of a rule differ in the Saudi judiciary, but the law itself is not clearly determined. He gave the example of crossing a red streetlight. In other legal systems, he explained, one would ask whether crossing a red light violates the law. In Saudi Arabia, on the other hand, the discussion would start with the question of whether it is the green or the red light that allows you to cross the street in the first place.⁹³

Other Saudi scholars doubt that it is even possible to positively know whether court decisions diverge in similar cases. ‘Abd al-Raḥmān bin Sa‘d al-Shithrī, for example, held that every court decision is deeply connected

91 Interview with Usāma al-Qahtāni in his office in Riyadh, 15 May 2018.

92 Interview with Muḥammad Jār Allāh in his office at the Riyadh Court of Appeal, 31 July 2018.

93 Interview with Bashār al-Mufadda in the Ministry of Justice, 8 May 2018.

to the circumstances and characteristics of the case. Hence, it is difficult for everyone except the judge to see whether the applied law actually differs since only the judge knows the specifics of the case.⁹⁴ Other ‘ulamā’ claim that uncertainty is not a particularity of Islamic law but exists in all legal systems. For example, the Council of Senior Scholars argued,

The judges’ verdicts differ even in the civil courts of countries, in which they judge according to positive law that has been compiled in the structure of articles and arranged by numbers. Inconsistency and mistakes happen. Some of them are appealed and annulled by the appeal court. The laws and the obligation to [follow them] do not prevent inconsistency and mistakes [but] accuse the judges.⁹⁵

However, for the majority of scholars and judges, normative pluralism increasingly becomes a burden. This has resulted in a shift of opinions on codification.

4.2 *Shifting Opinions on Codification*

In the past, not only the Council of Senior Scholars opposed codification, but, as Frank Vogel wrote based on his fieldwork in the 1980s, the great majority of Saudi scholars.⁹⁶ In his 2014 book on codification, ‘Abd al-Raḥmān bin Sa‘d al-Shithrī listed many names of famous Saudi scholars that have expressed their rejection of codification, either in personal conversations with al-Shithrī or in their writings.⁹⁷ A closer look at the names, however, reveals that most of these scholars are now in their seventies and eighties and thus represent an older generation of Saudi jurists.

Today, the stance towards codification is changing, particularly among younger jurists. According to al-‘Utaybī, the number of supporters of codification grew after the introduction of the Basic Law of Governance (al-Nizām al-Asāsī li-l-Ḥukm) in 1992, since the law ensured that the Saudi king was now formally bound to follow and apply the sharī‘a.⁹⁸ Therefore, scholars could be sure that a codification would not include non-Islamic positive law. Former appeal court judge Al-Fāyiz also saw a changing attitude towards codification and estimated that the majority of Saudi judges today support some form of

94 ‘Abd al-Raḥmān bin Sa‘d al-Shithrī, *Ḥukm taqnīn al-sharī‘a al-islāmīyya* (Riyadh: Dār al-Ṣamī‘ī li-l-Nashr wa-l-Tawzī‘, 1428/2007), 27.

95 Al-Amāna al-‘Āmma li-Hay‘at Kibār al-‘Ulamā’ (ed.), *Abḥāth hay‘at kibār al-‘ulamā’*, 3:236.

96 Vogel, *Islamic Law and Legal System*, 340.

97 Al-Shithrī, *Taqnīn al-aḥkām al-sharī‘a*, 60.

98 Al-‘Utaybī, *Maqālāt fī al-siyāsa al-shar‘īyya*, 17.

codification.⁹⁹ Even jurists who do not favor codification generally admit that *siyāsa shar‘iyya* generally grants the king the right to codify Islamic law.

The changing attitudes towards codification reflect a change of generations in the Saudi judiciary and a loss of authority of more senior scholars. Today, many Saudi jurists demand the codification of Islamic law for the same reasons as jurists in other Islamic countries: they hope to establish legal security, create a more transparent legal system, and thereby uphold the authority of Islamic law.

5 Conclusion

Opponents of the codification of Islamic law view the restriction to a single opinion in Islamic jurisprudence as the main problem of codified law. They fear that a binding codification will conflict with their understanding of legal flexibility and normative pluralism. The jurists believe that a codification cannot be adapted to the individual case and changing social circumstances in the same way as the judges' interpretation of Islamic law. The chapter has also shown that the arguments of Saudi jurists are not specifically 'Islamic,' as jurists in European history grappled with very similar problems.

Saudi jurists do not view codified law as state law in the way it is understood in common and civil law system. Hence, the jurists' debate on codification does not center around the role of the state but focuses on how justice can be achieved through rules. As a consequence, Saudi jurists do not consider the codification of Islamic law a turning point in the history of Islamic legal systems. For them, it is not a break with the tradition but rather the next step in adapting the Islamic legal tradition to the challenges of modernity.

The absence of a codification of Islamic law, and hence of a restriction to a particular legal opinion, put the individual Saudi judge in a powerful position. To balance individual *ijtihād* and legal certainty, Saudi 'ulamā' and the Ministry of Justice developed a new understanding of legal precedent and judicial appeal, which will be discussed in the next chapter.

99 Written correspondence with Muḥammad bin ‘Abd al-‘Azīz al-Fāyīz, 4 October 2017. Frank Vogel made similar observations. Vogel, *Saudi Business Law*, 34.