

## Islamic and/or Middle Eastern law?

By John Donohue

Thursday, September 10, 2009

Chibli Mallat's "Introduction to Middle Eastern Law" is the unpretentious title of this provocative approach to law in the Middle East. Why Middle Eastern Law and not Islamic law? After all, it is Islamic law which dominates the region. The answer is that "Islamic law is set in history against a wide Middle Eastern legal continuum that starts with Hammurabi and acquires a unique profile in the various manifestations of the law in the classical Islamic age."

The author's three-decade studies and research at various universities (University of London, Princeton and Yale, and now at Saint Joseph's University in Beirut and the University of Utah) have convinced him that the various manifestations of law in the region blend together to form a "family" of law much as Civil Law and Common Law form "families" in the West.

The book is divided into an Introduction, followed by a historical chapter on the formation of Middle Eastern law, then a section on public law, another on private law and a conclusion. The formation of Middle Eastern law takes up about one third of the book, the rest is devoted to the modern period, with a particular focus on Islamic law.

This book with its broad range of legal detail represents the work of a lifetime, even though it appears that Mallat is still in his prime. His unremitting research, focusing on case law, fully bolsters his basic insight and sweeps aside the prevalent stereotypes of a static Islamic law dispensing arbitrary "Qadi justice."

The introduction on the Autonomy of Middle Eastern law and the first chapter on its formation establish the specificity of this law: collective responsibility, commenda (joint venture) contracts, polygamy and divorce, and agnate inheritance, for example, are not only Islamic but are found in Hammurabi as well as in the Syro-Roman Code of the 5th century.

The development of classical Islamic law, its sources and institutions within this continuum, is presented through an analytic sampling of sharia-fiqh compendia, custom, and literary and historical texts, especially the works of Sarakhshi (d. 1097) and Kasani (d. 1191) wherein development is found in the increasing refinement of style. Then the legal registers of Tripoli (Lebanon) that provide details of the daily working of the judicial system in the 17th century along with collections of fatwas indicate clearly the growth and change of legal doctrine in the schools of law. All of which leads to considering the so called "sources" of Islamic law in a different light: "Sources" should be understood in a less formalistic sense, so that the approach to law in Middle Eastern history takes into account a wealth of primarily written

documents which, all together, form the rich and complex culture of Middle Eastern law.

Mallat offers a rough periodization of Middle Eastern law corresponding to three linguistic blocs: 3000 BC to 1000 BC, the Akkadian-Sumerian period, of which the most significant text is Hammurabi's Code with Akkadian as the lingua franca; 1000 BC to 500 AD, the Assyrian-Syriac period, crowned in the fifth century by the Syro-Roman Code, with Syriac-Aramaic as the lingua franca; late 6th century to present, the Islamic period with the sharia and Arabic as the lingua franca. Undoubtedly this schema will be revised as studies of Middle Eastern law advance. The Islamic period can be divided into periods following Mallat's tripartite exposition of the terms for law: the age of the sharia (the first two centuries), the age of fiqh (with the crystallization of the epigones and the passage to summaries) and the age of qanun (Ottoman statutes as the antecedent of the systematic codification of law by legal codes).

The section on Public Law is introduced by an historical primer to better appreciate the spirit with which modern history has infused Middle Eastern law during the past two centuries: the 1798 invasion by Napoleon; the 1920 end of the Ottoman Empire and the era of oil law and nation-states and the six Arab-Israeli wars from 1948 to 2006. These wars in Mallat's view have wrecked the rule of both international and domestic law. "The military strength of the Israeli state has ensured that law is allowed minimal impact on conflict, and that force governs the two issues central to the contending peoples, land ownership and refugee status ... Might as right has translated domestically in the Arab world as the dominance of crude power, typically by the army or ... a party or sect." The period is also characterized by the phenomenon of sectarian religious law, introduced by the creation of Israel and Pakistan and the revolution in Iran. Over against the liberal age which dominated the first half of the 20th century, a sub-type of legal logic emerged on the basis of religious affiliation.

Mallat also considers the suicide attacks of September 2001 as a defining moment, since on that day the history of the Middle East became part of the domestic history of the US. The aftermath raises the question: will violence continue to rule the Middle East and by extension the world? Can Middle Eastern and Western law find a common language in the midst of violence? In the following chapters Mallat attempts to provide some answers since the era now emerging "suggests a far more intricate common destiny between the Middle East and the rest of the world."

Constitutions exist in all the states except Saudi Arabia and Israel and constitutional review is making halting progress in the region despite the sterile debate on whether or not Islam is compatible with democracy. Nonetheless, Islam is a differentiating factor in the constitutional framework of the Middle East. Islamic law and the corresponding Jewish and Christian laws are personal, not territorial, and communitarianism is a pervasive trait in the region. Mallat argues that some constitutional arrangement should be made to accommodate this factor.

Judicial review is hampered by a lack of systematic reporting and the rejection in theory of precedent in both the Islamic and the civil law system. The independence of the judiciary is often undermined by the executive with the result that the rule by law rather than the rule of law is more often the outcome. Cases from Kuwait, Morocco, Yemen, Iraq and Israel illustrate the tendency.

While public law “is a field of great frustration for lawyers, judges, and the litigant,” the same is not true of civil law. Under this rubric, Mallat presents the legislative monument of Ottoman jurists – the Majalla, which held sway up through the first half the 20th century in most Arab countries and is still in force in the Occupied Territories. A Shiite version based on Jaafarite tradition was codified in Iran and is still in force, but a little known commentary on the Majalla from the Shiite scholar Muhammad Husayn Kashif al-Ghataa was sidelined in Iraq in the early part of the 20th century. The Majalla uses the classical terminology of Islamic law. The other great monument of modern Islamic codification, the Egyptian Civil Code redacted by a committee under Abd al-Razzaq al-Sanhuri in 1949, was less particular about classical terminology and consequently is judged by some as “estranged” from Islamic law. But Mallat’s detailed analysis indicates that such criticism touches style rather than substance.

In the case of commercial law, the Islamic tradition was ignored. Today it appears that tradition is demanding compensation in the form of a rise in arbitration and Islamic banking. Here Mallat puts forward another Shiite scholar, Muhammad Baqir al-Sadr, assassinated in 1980 in Iraq, whose notes on Islamic banking and his book

Our Economy present an “Islamic economic school.”

The chapter on family shows in contrast the continuing importance of classical ‘personal status’ laws, and argues, through case-law and legislation, that the trend over the past two centuries can only be understood as a search for an increased equality between women and men.

All in all, Mallat’s book illustrates his profound respect for the Middle Eastern and especially the Islamic legal tradition. The work belies the stereotyped clichés concerning Islamic law as an obstacle to development and modernization. The problem is not legal, it is political. Let me close with a quote from this extraordinary study: “The name of the game has been rule by law instead of rule of law ... The disappointment is strongest for rule of law advocates who have become frustrated with their own call for democracy, a universal call which they were hoping to see extended to the region after the collapse of the Berlin wall and the democratization achievements in many parts of the world. The Muslim Middle East (here including Israel as a country that rules over the lives of Muslims more numerous than its Jewish population) remains by and large a notable exception to the rise of democracy across the planet.”

Books on law are usually for specialists and are dry reading. Not so this book. Mallat presents enough general information in familiar concepts to make the greater part of the book delightful reading for anyone interested in the region.

**John Donohue**, a Professor at Saint Joseph's University, has taught in Baghdad, Beirut and Georgetown over the past five decades. His latest book is *The Buwayhid Dynasty in Iraq 334H./945 To 403H./1012: Shaping Institutions for the Future*, Brill, Leiden 2003. Chibli Mallat's *Introduction to Middle Eastern Law* was published by Oxford University Press in 2007, paperback edition 2009.