The diversity of Islamic law

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Let me express, in a more down-to-earth way than my *Introduction to Middle Eastern Law* (Oxford 2007) allowed, a radical departure from the way Islamic law has been perceived so far. Based on the scholarship which I hope was displayed in that book, this talk dwells on three central avenues which can be summarized as follows:

1- Islamic law consists of a huge field, which developed over 14 centuries in a fluid area that extends from Spain to Indonesia and China, and now to the rest of the world through the Muslim diaspora in America and Europe. It is not possible to encompass it without thinking the field in its diversity, in what French philosophers Deleuze and Guattari call its thousand planes (Gilles Deleuze and Félix Guattari, *Mille Plateaux,* Paris 1980).

2- Islamic law is no longer an accurate enough concept for people of the law. National jurisdictions are where the law as lawyers know it happens. Should one go beyond these jurisdictions to look more abstractly in the law as applied to and practiced by societies with sizeable Muslim components, then one needs to talk, more accurately, of Middle Eastern Law.

3- In the scholarship of Islamic law, a new phenomenon has taken place over the last twenty years, which is no less than a full overhaul of the field. The Qur'an and the *hadith* are not sufficient, and they never were for classical Islamic lawyers. Even more seriously for the people of the law, *fiqh* books have also lost their preeminence. Instead, scholarship needs to move headily into what makes for law in daily life: the law as applied by courts, and by other forms of adjudications of contending litigants. Courts are central. In criminal law, to focus on this particular field, judges and prosecutors are the closest exponents in the field.

Three central departures from the received notions of Islamic law, whether in Eastern or Western scholarship: (1) its immense diversity; (2) its interface with, and modification-cum-adaptation into Middle Eastern Law; (3) the shift to courts as law-sayers rather than codes, canonical texts and similar textual sources in and around classical *fiqh*.

Let me develop each in turn:

(1) For most people, Islamic law is this rigid interpretation of a defined text, the Qur'an, of less defined adjunct texts, the Prophetic *hadith*, and that is it. I do not dispute this reading, for any reading of a religious tradition seeks to be closest to its meaning, and this gives us literalism, or in American law, what is called originalism. Islamic law is no different, but like any legal family, it bears other readings than a literal one.

Let me give a few examples drawn from contemporary observations.

The example of Saudi Arabia is telling: long before Pakistan was established as the land of 'the pure' (metaphor for Muslims breaking with the dominant Hinduism of India) and Iran undergone its Islamic Revolution, the Kingdom has put Islam centre stage as its politically defining trait. I use political here to underline the weakness of Islamic law in the Kingdom, for the very rich tradition of Islamic law has been constrained and impoverished by a practice which was both narrow in terms of the dominance of the Wahhabi doctrine, itself an impoverishment, in terms of tolerance and liberty, of a more alluring Hanbali school of law; and more fundamentally, impoverishment of debate, considering the lid put on freedom of speech in Saudi Arabia on Saudi Arabian citizens of all persuasions since the establishment of the Kingdom in 1926 on the back of forceful conquest of the Western, far more cosmopolitan Hijaz.

Afghanistan is a far more familiar illustration to this audience. Over the last century and a half of its independence, never was Islamic law an unknown tradition in the country. Whether in family law, obviously, but also in the Constitution, the Taleban did not invent the attachment of all Afghanis to their tradition: consensual work like the Loya Jirga, a unique legal tradition drawn from a millennium-old practice of Islam in the country; collective responsibility and compensation in criminal law as practised in city neighbourhoods and remote villages alike; formal inclusion of the Islamic tradition in the successive constitutional texts since the *Nizamnameh-ye asasi* of 1923. I count no less than twenty references to Islam and the *shari'a* in that short, 73-article text. The Constitution of 2004 has given equal attention, if not more, to the traditional Islamic Afghani legacy.

The relationship of the legal system of Afghanistan to Islamic law is hardly similar to the constitutional experiments in Iran and Saudi Arabia. In the first case, the central concept is *velayat-e faqih*. In Saudi Arabia, the *majlis al-shura* is perfunctory, and the authority of the King absolute. In Afghanistan, the subtle regional distribution of power, and the preeminence of electoral democracy to translate the concept of *shura* in practical modern terms are defining concepts of the present legal system. In Iran, elections as constitutional pillars are acknowledged, but heavily constrained. In Saudi Arabia, elections are all but inexistent. All three societies consider themselves Muslim, and seriously attentive of the Islamic legal tradition.

The diversity of Islamic law is an objective, palpable reality. Of all three, I would contend that Afghanistan pays the most respect to the traditional diversity of Islamic law, because it is unquestionably the freest.

(2) There is another dimension of the diversity of the field, its thousand planes. This is where Islamic and Middle Eastern law meet. Middle Eastern law is not a concept which is offered to undermine Islamic law. Quite the contrary, both in historical and sociological terms, Middle Eastern law pays particular attention to its Islamic component, arguably in a far more serious manner than many jurisdictions have it in the region. The argument for Middle Eastern law becomes therefore an argument for incorporating Islamic law in its richer dimensions, both historical and geographic, without excluding

mother significant traditions to also be recognized and eventually incorporated in the field of study. This is evident for other religiously-defined laws by Near and Middle Eastern Christians and Jews, of course, but also for Zoroastrians or Baha'is.

The field of Middle Eastern law also encompasses a decisive legal component in the modern period, which comes generally under 'secular': this is state-produced law in Western fashion, generally following Western procedures for its enactment, and informed by a concept of citizenship in which the sectarian-religious dimension is not openly taken into account. A legal system in country like Iran could not be understood outside that 'secular', or 'Western' framework, however strong the claim otherwise of anti-Western politicians in Iran.

So Middle Eastern law offers a distance to religious laws, without rejecting the decisive contribution of Islamic, Jewish, Christian and other laws, and without ignoring the Western or secular input so important for the modern period. Such an approach might be rightly criticized for its ideological, programmatic underpinnings. You use it, an irate critic would say, to empty Islamic law from its importance or autonomy, or to lump together the Israeli legal system with Arab legal systems that have nothing to do with it. Worse, the angry critic will argue that the 'Middle East', very much as had been advanced by leading Israeli circles in the early 90s, is a concept designed to water down 'Islam' and 'Arabism', to infiltrate them as it were. On all these counts, the criticism is informed by a dominant political concern. Let me respond to these three arguments against Middle Eastern law.

- In the case of Muslim lawyers who do not like their field to be watered down under 'Middle East', it will be evident from the *Introduction to Middle Eastern law* that a decisive characteristic of Middle Eastern law is its Islamic character, and the immensely rich tradition conveyed in a bewildering array of genres. I have called, and continue to defend to date, Islamic law as the common law of the Middle East.

- On the accusation of lumping together an allegedly 'Western' legal system with uncouth and alien neighbors of Israel, it will be apparent in the public law section of the *Introduction* how close the Israeli legal system is, in its sectarian-religious dimension, to the rest of the Middle East, and how different it remains from the territorial nation-state dominant in the West. Even in private law, evidently in family law, but also in contracts to some extent, and in commercial law, the logic, autonomy and coherence of Israeli law have much in common with the Middle Eastern neighborhood, and more so in some cases than its affinity with the laws of a European or American country.

- Third argument of the dejected critic: the Middle East is a political concept designed to bring down Islamism and Arabism, and Middle Eastern law its expression. This is criticism in characteristically bad faith because a legal tradition is conceived as a provider of battleground slogans designed to weaken or destroy another tradition. I have no particular axe to grind with Islamic or Arab laws, only an intolerant jurist would. I also emphasize in the book the salutary distance between law and politics as a point of departure, even if law and politics are evidently intermeshed in life, in the Middle East as

elsewhere. The point is: Middle Eastern law does not reject, undermine or threaten Islamic law, or Arab, Persian or Afghani laws. It just puts them in a larger context where a specific religion is one amongst many in the region, which is a trite fact, as is a trite fact that Arab law is naturally distinct from Persian and Afghani law, and that the Middle Eastern legal family cannot afford an artificial narrowing down occasioned by language. This does not mean that a lawyer, practicing or doing research, will go very far in Syria, Egypt or Morocco without a thorough knowledge of Arabic, or that she would go very far in legal Iran or Afghanistan without knowing Persian-Dari.

I say irate, and in bad faith, because the above criticism is reductionist, a contrived impoverishment of law in the Mideast. Good faith criticism is more alluring, which we need to be attentive to, because it forces the field to defend its stand as a coherent legal tradition that deserves to be studied as such.

Criticism of a serious nature would first ask: how can you encompass all these traditions which are so different under 'Middle East', -- it may be convenient and alluring, but it does not really work, does it ?

That criticism is strengthened by the absence of an identity, such a Muslim, Arab, Persian, Shi'i, Jewish, Turkish, Algerian, Kurdish, Amazigh, all such identities which one will encounter at one point boasted of by an individual who finds his point of collective anchor in this or that belonging. One will hardly find an individual who will present him or herself as a Middle Easterner, although I discovered recently that my colleague John Tehranian has defended in a seminal article in 2000 the rise of a Middle Eastern identity, and now Middle Eastern scholarship ('Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America', 109 *Yale Law Journal* 817 (2000); 'Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship', 82 *Indiana Law Journal* 1 (2007); *Whitewashed, America's invisible Middle Eastern minority,* New York 2008)

We are talking law, and identity matters less in this regard, for one will hardly conceive of him or herself as 'belonging' to the common law, or being a 'civil law-er'. There remains that within the legal traditions of the world, one will finds 'civilists', but one does not find 'Middle Eastern-ists' among specialists. There are Middle Eastern specialists, though, and experts of law of the Middle East within that regional specialty. The field, however, remains in its infancy, and a Middle East Law course remains the exception, while Jewish or Islamic law courses are increasingly offered in American law schools. Such expertise in Islamic or Jewish law is coherent and legitimate, yet I do not deny the ambition of my research to mark the *discovery* of a new field. Discovery always suggests a start, and an infancy.

A 'new field' requires setting up Middle Eastern law as 'a legal family', or a 'legal tradition' or 'system', which has its autonomy, language and institutions in the same way as we describe the civil law family, or the common law family, as autonomous, coherent, overarching traditions in comparative law. For such field to emerge as a serious subject of scholarship, there needs to be 'a family air' conceived as a coherent unity, and a wealth

of separate source-material to distinguish it from other legal families. *Introduction to Middle Eastern Law* purports to start a process, but the approach, even if scientifically sound, will take time to take root, in the region and abroad.

(3) Let's look more closely at 'coherence' and 'source-material' in that third break that I argue has befallen the field of Islamic-ME law in a way that makes it so very different, and so much more diverse and rich than anytime scholars have ever studied and taught it: the attention to case-law.

I will draw my two examples from the field of criminal law.

One of the conditions of scientificity for Islamic-ME law is its source-material. Here comparative law and history join. The Middle East, more narrowly defined as Near Eastern, offers legal texts that go back to the beginning of the second millennium before Christ. These texts are *law* to any modern reader. The informed modern reader, however, does not connect Hammurabi's law with the contemporary Middle East. Well he should, and I would even say that the Middle Eastern mark of criminal law has now moved westwards. If you want to understand the settlement of the Lockerbie case, then much will be clearer by studying blood-money across the span of civilizations and laws in the relevant articles of the Hammurabi Code (§§ 22-24, and 126, to be precise) and the subsequent understanding of collective responsibility in Islamic law. Without that understanding, the settlement entered into between the Libyan government and the British, American and French governments, despite the decision of the Scottish court sitting in Holland in first instance (2001) and on appeal (2002, then 2008) will make little sense.

The line between Hammurabi and the Lockerbie settlement is one example in the criminal law field of the relevance of Middle Eastern law. More expressive, and far more interesting I think, are criminal law cases as have come down to us in *qadi* decisions. One does have a famous Nippur trial in early Mesopotamia, but the material remains scant on the effective application of criminal law by Mesopotamia's judges. Cases are more readily available in the Ottoman period, and I can dwell on a capital punishment case in July 1668, which is available in full. (*'Antar case*, Safar 1079/July 1668, discussed in *Introduction to ME Law*, 80-1.)

The case is about a thug who is spreading havoc in the city of Tripoli. His name is Shehadeh ibn al-Hajj, a tanner by profession whose nickname, appropriately, is 'Antar. He stands accused of repeated mischief by the people of Tripoli, including the corporation of tanners and its head. Mischief does not seem to include murder, but he is accused of relentless harm, repeated denunciations, destruction of property (*af'al dhamima miraran, itlaf amwal, darar muttasil*). Although he denies the accusations in court, a large number of plaintiffs appear in court to confirm his 'mischief', and the judge ultimately concurs. Interestingly, he does so only after a large process of consultation which appears in the case report as informal reliance on the *mufti* of the city, and a large number of signatories/witnesses to the capital punishment decision.

I find remarkable the judicial process in this case, despite my personal opposition to the death penalty. This case, like so many others which have survived to provide a key component of our understanding of Middle Eastern law, goes against the grain of arbitrariness that was long said to characterize Islamic law. Facts are crucial to the judge, as is the importance of the large number of plaintiffs, and the consultation process.

Mostly, in conclusion, it shows the depth and diversity of Islamic law, including in the criminal process. I have no doubt that the judges and prosecutors of Afghanistan, faced with the immense challenge of violence, are writing an additional, crucial page for the rule of Islamic law. I just would say that they continue a proud legal tradition of scholarship, diversity, and fairness.