SCTIW Review

Journal of the Society for Contemporary Thought and the Islamicate World

ISSN: 2374-9288

February 28, 2017

Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History*, Middle East Studies Beyond Dominant Paradigms, Peter Gran – Series Editor, Syracuse University Press, 2015, 320 pp., $39.95 US (hbk), ISBN: 9780815633945.

Noel Coulson, summing up what he terms "The Classical Theory" of Islamic law, writes that Islamic law "was of necessity basically immutable" and therefore it "does not grow out of, and is not moulded by, society as is the case with Western systems." He goes on to write, of courts in British-ruled India, that they "often experienced extreme difficulty in ascertaining the correct Sharīʿa principles applicable, and in such circumstances naturally resorted to English law as the most convenient and equitable expedient."[1] Ahmed Fekry Ibrahim demolishes both of these mutually reinforcing caricatures of Islamic law—that after its formative period in the late Umayyad and early Abbasid centuries, it became rigid and socially unresponsive, and that as an indigenous legal culture under European colonial rule, it proved insufficiently predictable and doctrinally stable to serve as the basis for a modern legal system. In a book that exhibits considerable scholarly ability and imagination, Ibrahim offers a long-term account of the relationship between doctrinal flexibility and legal predictability in Islamic law. Ibrahim's book is a social history for the period when you can know something about litigants (so mostly from Ottoman times onward), but it is high order intellectual history otherwise, and also to some extent a political history, since the state is always in the background as a centralizing force and as the promoter of different views of judicial authority.

The key idea that Ibrahim follows throughout this study is that of "pragmatic eclecticism," by which he means "the pragmatic selection of less stringent juristic views" (3). Conservative jurists could support instances of pragmatic selection if characterized as *tarjīḥ*, giving preponderance to an extant view within a given school of legal thought (*madhhab*) by weighing the evidence in support of it and of conflicting views. More controversial, however, was the crossing of school boundaries in pursuit of a pragmatic (and less stringent) answer to a legal question, a procedure termed *tatabbuʿ al-rukhaṣ*. The combining of opinions from different schools to achieve pragmatic (and again less stringent) ends was termed *talfīq* and was the most controversial technique. Jurists used these three forms of pragmatic eclecticism to exploit the naturally occurring legal diversity (*khilāf*, *ikhtilāf*: legal disagreement) in Islamic law to solve real-world problems facing litigants by allowing for outcome-driven legal rulings. For example, Ḥanbalī law made it easier for a wife to have her

[1] Noel Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 85, 166.

marriage judicially dissolved in cases of desertion and attendant failure to pay maintenance than under Ḥanafī law and Ḥanbalī law also allowed for the alienation of non-productive *waqf* property, contrary to the rules of the other *madhhab*s. An eighth/fourteenth-century Mamluk decree appointing a Ḥanbalī judge in Damascus makes reference precisely to these and other doctrines that needed legal validation (43-44). (The supposed inability of *waqf*-beneficiaries to sell the underlying *waqf* property, with supposedly negative results for the overall economy, is another, but more discrete, misconception about Islamic law that this book helps to dispel [234]).

In regard to Islamic legal theory, the spectrum that runs from *tarjīḥ* through *tatabbuʿ al-rukhaṣ* to *talfīq* falls within the bounds of *taqlīd*, acceptance of pre-existing juristic views. All the means used to achieve pragmatically driven legal outcomes were thus to some extent opposed to the heroic and individualistic *ijtihād* of the formative period; in the modern period, however, pragmatic eclecticism could be compatible with *ijtihād* in the context of some modernist projects (12, 194). At a systemic level, Ibrahim emphasizes that the various means of achieving pragmatic eclecticism represented the way that Islamic law balanced (and balances) the tension present in all legal systems between the need for doctrinal predictability and the desire for flexibility in individual cases.

One thing that makes Ibrahim's study so rich is that he can be read as using the fortunes of pragmatic eclecticism from the formative period of Islamic law through post-Morsi Egypt as a kind of organizing principle for a complete history of Islamic law. In Chapter 1 he situates Islamic law's "episteme" relative to the Civil Law and Common Law systems. Islamic law exhibits elements of both: a tendency towards codification associated with central political control (a Civil Law trait) and a tendency towards accommodation of local control and flexibility (a feature of the Common Law). In Islamic law, these traits appear in the production of legal compendia, and in the establishment (above all in Egypt, from the Fatimids on) of judgeships for multiple *madhhab*s, respectively. He also ties the predictability:flexibility binary opposition to discussions in Islamic legal theory of whether (or of how it could be that) legal questions have one metaphysically correct answer or several possible correct answers (*hal al-ḥaqq fī wāḥid?*) (49-58).

Chapter 2 surveys jurists' attitudes toward pragmatic eclecticism from the formative period to the nineteenth century. In general, in an era that privileged *ijtihād*, *tatabbuʿ al-rukhaṣ* was disapproved, but with the emergence of an effective judicial system the need for individualized rulings or rulings that facilitated transactions necessary for daily life led to a toleration of flexibility by judges especially, but also by *muftī*s. Such flexibility might be justified on the basis of social need (*ḥāja*), necessity (*ḍarūra*), or the claim that the laity was weak and needed special consideration if they were to comply with their religious obligations. The rise of a new genre of pared down *ikhtilāf* literature under the Ottomans seems to reflect the judges' need for a ready reference to the doctrines of other *madhhab*s. The opposition to pragmatic eclecticism, which Ibrahim terms "purism" (e.g., 185-193), did not completely disappear, however.

Chapter 3 charts the rise of *talfīq*, the combining of doctrines from different *madhhab*s in one transaction. Ibrahim distinguishes between two kinds of *talfīq*: synchronic, in which one doctrine is fashioned from the rules of different *madhhab*s; and diachronic, in which rules from different *madhhab*s are applied at different stages of a single transaction. *Talfīq* was denounced by Mamluk jurists—al-Qarāfī even claimed *ijmāʿ* against *talfīq*—but such denunciations served to create space for justifications of *tatabbuʿ al-rukhaṣ* as doctrinally acceptable. Ottoman jurists made use of *talfīq*, however, and claimed that it was merely a

matter of legal disagreement, not unanimously disapproved. Purist opposition to *talfīq* remained among some jurists and claims by the pro-*talfīq* jurists of precedent for the practice were countered with the argument that such instances had instead been valid exercises of *ijtihād*. Among the reasons that Ibrahim cites for the growing acceptance of *tatabbuʿ al-rukhaṣ* and *talfīq* was the jurists' concern that people's prayer practices often failed to conform to the rules of a single *madhhab* and so could only be justified through pragmatic approaches to the rules governing ritual worship.

Chapter 4 presents a summary analysis of 1,000 court cases from Ottoman Cairo in which Ibrahim demonstrates that certain anomalies in the selection of judges can only be explained by the phenomenon of "forum shopping," that is, the selection by litigants of a judge from a *madhhab* that is more likely than others to validate a favorable legal result. Ibrahim is able to infer, from the overwhelmingly Ḥanafī make up of the judiciary and information about particular cases, that resort to non-Ḥanafī judges was likely for purely pragmatic (outcome-driven) reasons. Ibrahim's inclusion of this data gives some idea of the ambitious scope of this work.

Part IV of Ibrahim's book, which includes Chapters 5 and 6, is entitled "The Sweep of Modernity," the same title given by Wael Hallaq to Part III of his recent, comprehensive history of Islamic law.[2] Whereas Hallaq finds modernity to mark a complete rupture in the history of Islamic law, from which Islamic law never recovered, Ibrahim's deliberate choice of this chapter title perhaps reflects his relative optimism about the prospects of Islamic law in the modern period given its ability to respond dynamically to social and political change through, at least in part, pragmatic eclecticism. Chapters 5 and 6 aim to show that debates over pragmatic eclecticism continue to inform Islamic legal thought in ways that are productive and consonant with indigenous modernist projects.

In Chapter 5 Ibrahim first describes the terminological and conceptual stability of the two main doctrines supporting pragmatic eclecticism, *tatabbuʿ al-rukhaṣ* and *talfīq*, into the modern period (notwithstanding some confusion in the secondary literature) and notes the evolution of the word *takhayyur* and etymologically related terms to refer to the ability to choose among doctrines on pragmatic grounds and thus as a quasi-synonym of *tatabbuʿ al-rukhaṣ*. The chapter then offers a typology of some twentieth- and twenty-first-century Muslim scholars and jurists that includes the following categories: Modernists, such as ʿAbduh, Riḍā, al-Gannūshī and al-Qaraḍāwī, represent one form of Salafism, in which *taqlīd*, including pragmatic selection of appropriate doctrines, and *ijtihād* both play a role; Purists, such as al-Albānī, represent the other wing of Salafism, which views legal disagreement as an inevitable, negative consequence of the substitution of human reason for revelation; and Liberalists, such as Naṣr Ḥāmid Abū Zayd and Fazlur Rahman, often seek to neutralize Prophetic *ḥadīth* and also to develop novel hermeneutical approaches that allow the harmonization of Islamic tradition with "Western modernity" (199). Ibrahim rightly emphasizes that the individual members of these idealized categories can exhibit considerable diversity.

Chapter 6 follows the story of pragmatic eclecticism (a phrase that readers may agree, by this point in the review, is a mouthful) from late-nineteenth century codification efforts to the Arab spring. Ibrahim's main point about codification is that it employed easily recognizable strategies of pragmatic eclecticism rather than representing a complete break with Islamic legal tradition. Changes in substantive law, such as, for example, the dilution of

[2] Wael Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 355.

the male right of unilateral divorce without cause, were achieved by combining or selecting from among the doctrines of several of the *madhhab*s. Even twenty-first century Egypt's courts have generally rejected challenges to pragmatic strategies used in codifying Islamic law. Ibrahim closes Chapter 6 by noting the emergence of a renewed anti-purist, pragmatic tendency at al-Azhar since the Arab spring. A brief Conclusion summarizes the book's argument.

The above summary has not adequately captured a key theme that runs through this stimulating study: that there is a dialectical sway throughout Islamic legal history between predictability and flexibility, a binary that might also be expressed, to capture different aspects of this dialectic, as *taqlīd*:*ijtihād*, content:process, or centralization:local accommodation. Recognizing swings in emphasis over the long-term allows Ibrahim to claim, in Chapter 6 and elsewhere, that modernity need not be seen as an irreversible rupture in the history of Islamic law but rather simply as a renewed emphasis on predictability/*taqlīd*/content/centralization, but not at the complete expense of those tendencies' dialectical counterparts. Ibrahim generally sees evolution and continuity where Hallaq sees destruction and irrecoverability.

Ibrahim does not distinguish much between jurists as private scholars (e.g., *muftī*s) and as political appointees (i.e., judges). One might argue, on the basis of his evidence, however, that the circumstances leading to, and entailing a certain doctrinal comfort with, pragmatic eclecticism presuppose an effective judiciary. If that is right, then one might conclude that, at least for Egypt, the Fatimid establishment of judgeships for different *madhhab*s represents an even more profound change than has been thought in the institutional history of Islamic law, specifically in regard to the reach and effectiveness of the state's judicial apparatus. This possibility could perhaps be investigated in greater detail using Geniza documents. Conversely, we might also tentatively conclude that the judiciary, in a period that privileged *ijtihād* and before articulations of juristic pragmatism, was more a site of patronage than a widely used forum for dispute resolution and legalization.

Alternatively, the transition from *ijtihād* to *taqlīd* in the formative period could be presented as the evolution of concepts of religious authority hand-in-hand with the growth of non-state institutions (*madhhab*s, *madrasa*s) to fill the social spaces left open by perennially weak states. Still another question arises from the substantial codification efforts by early jurists such as Mālik and al-Shāfiʿī. How can what is evidently a major codificatory impulse be reconciled with the juristic individualism that seems incompatible with acceptance of pragmatic eclecticism? (Benjamin Jokisch has suggested that imperial competition with Byzantium impelled the production of early *fiqh* works, but his suggestion has not found much favor in the field.[3])

What does pragmatic eclecticism help to explain about the trends and personalities associated with modernity in Chapter 6? Ibrahim shows that the purist wing of Salafism rejects it and the modernist wing accepts it, but it seems wholly irrelevant to his category of liberalists. The groups in question might equally well be arrayed as a spectrum of responses to nationalism: purists reject particularized nationalisms in favor of a transcendent personal piety; modernists invoke Islamic law as part of a state-building project; liberalists reject particularized nationalisms in favor of a secular internationalism. No doubt other ways of characterizing these tends are possible, as well.

---

[3] Benjamin Jokisch, *Islamic Imperial Law* (Berlin: Walter de Gruyter, 2007). See, e.g, the review by Peters in *JAOS* 129:3 (2009), 529-530.

Ibrahim's book does offer a model of how one might write a new kind of history of Islamic law, one that does not offer a grand, all-inclusive narrative retold from the heights of third-person omniscience, but that instead follows the fortunes of a particular debate or set of ideas. Another possible way of organizing such a history could be regionalism (urban:rural, center:periphery, specific legal geographies)—Ibrahim, like the field of premodern Islamic legal history in general, focuses on Egypt and Syria. In an idealized theological sense, there ought not to be much local variation in Islamic law, but as his book shows, Islamic law evolved mechanisms for accommodating local circumstances that became part of its theoretical literature. This fact, which I accept on the basis of Ibrahim's argument, suggests that maybe we should take a more regional approach to the study of Islamic law, especially for periods after the maturation of its main institutions. The Seljuq, Ayyubid, and Mamluk states were crucial in their patronage of jurists and their activities and institutions, but studies of them must be balanced against studies of Muslim Spain, North Africa, Ilkhanid Iran, and, as a counterbalance to focusing on the Ottoman state, of Safavid Iran and Mughal India.

Another possible rubric for a limited-but-complete history would be the tension between Islamic scholasticism and the state. Ibrahim to some extent equates *muftī*s and judges as structural elements in the Islamic legal system for the purposes of tracking pragmatic eclecticism. He considers Islamic law holistically, as a system that is broadly comparable to modern legal systems in its institutions, structural reach, and possibilities. Tying the history of Islamic law closely to the state enables him to claim that the Islamic legal system as a whole oscillated between codificatory and individualistic impulses. One might argue, instead, that Islamic law followed a long-term trajectory from a more Common Law like episteme to a more Civil Law like episteme, a trajectory that could be understood as resolving the tension between state power and juristic moral (or religious) authority. Framed in this way, the Common Law impulse would have been realized in the interpretation of narratives, mostly Prophetic *ḥadīth*s, through juristic use of analogy to negotiate norms and narratives in a style readily familiar from judicial reasoning in modern Common Law legal systems. This trend, however, was to a great extent confined to the scholastic side of Islamic law. With the maturation of the judiciary in the later Middle Ages, Ottoman centralization, and bureaucratic evolution, the character of Islamic law, due to the state's increasing control of its institutions, gradually changed. Pre-colonial developments under the Ottomans prefigured modern codification efforts and thus suggest that later nineteenth- and early twentieth-century codification also responded to indigenous trends rather than being a culturally unconvincing import. The overwhelming Civil Law character of modern Arab legal systems would thus represent a more or less natural evolution, or recurring trend, of Islamic law. In this narrative, the emergence of doctrinal justifications for pragmatic eclecticism would signal the critical phase during which the judiciary became the focus of the Islamic legal system.

I am not suggesting that Ibrahim has been ahistorical in his account of pragmatic eclecticism, or that he should have told his story differently, only that (as suggested by his very stimulating book) there may be other productive approaches for narrating histories of Islamic law that, like Ibrahim's, eschew closure. One of the great merits of Ibrahim's book is that he does not claim that pragmatic eclecticism is the only lens through which to view the history of Islamic law, but he demonstrates, convincingly, that it can be a highly illuminating one.

Joseph E. Lowry
Associate Professor
Department of Near Eastern Languages and Civilization
University of Pennsylvania

Citation Information

Lowry, Joseph E., Review of *Pragmatism in Islamic Law: A Social and Intellectual History*, *SCTIW Review*, February 28, 2017. http://sctiw.org/sctiwreviewarchives/archives/1344.

ISSN: 2374-9288