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Pragmatism in Islamic Law: A Social and Intellectual History

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Pragmatism in Islamic Law: A Social and Intellectual History, Ahmed Fekry Ibrahim, Syracuse, New York, Syracuse University Press, xii + 363 p., includes bibliographical references and index, hard copy, ISBN 978-0-8156-3394-5 (price not indicated)

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In this excellent book, Ahmed Fekry Ibrahim explores the uses and evolutions of a technique that consists of using in an eclectic way the legal pragmatism intrinsic to Sunni Islam in order to achieve pragmatic goals (p.3). He sets from the beginning that the notion of Islamic law encompasses substantive law (*furu'*), legal methodology (*usul al-fiqh*) and jurisprudence (*fiqh*), and that his "use of 'Islamic law' should therefore be understood to refer to ethical, ritual, and legal doctrines, as well as to legal methodology and the link between the two in which legal methodology is applied to gain an understanding (*fiqh*) of substantive law" (p.2).

Underlying his exploration of pragmatic eclecticism, there is an interrogation about the Sharia and the trajectory accompanying it into modernity, and thus an interrogation on legal reform in Islam as a process of creating modern laws keeping authenticity intact via an engagement with scriptural sources (Quran and Tradition). The technique of pragmatic eclecticism is used today by scholars and activists who refer to the whole set of Sunni Tradition as to a unique code in which they draw to answer the changing needs of the Muslim community. Some scholars, like Wael Hallaq or Nathan Brown, consider this contemporary legal reformism, within the Muslim context, as unauthentic, based on the fact e.g. that it would not preserve "the organic connection with traditional law and society" (p.6). They disqualify pragmatic eclecticism at the same time because it would be a by-product of modernity. For Hallaq again, the traditional rules one finds in nation-states' laws are unauthentic remains, since they are disconnected from classical *fiqh*'s substance and methodology. Ibrahim shows convincingly that it does not hold true. According to him, if it is clear that codification created a legal dynamics deeply novel and that one can observe obvious transformations (e.g. the *waqf* decline, a new class of lawyers, the transformation of jurisconsult-made law into legislative-made law), it is nevertheless in terms of continuity and not rupture that the question must be framed: pragmatic eclecticism is only a new version of classical differentials between legal methodology and positive law, and it is only a nominalist attitude that makes it impossible to see that the eclecticism technique existed already in classical methodology, although under other appellations (p.8, p.167, p.177). This technique was used by judges and jurisconsults as a means to get free of legal methodology when the latter did not permit to reach the desired goal (p.8, p.135). Initially excluded, it was progressively authorized, something that echoes the idea developed by legal historian Alan Watson, according to whom law proceeds to adjustments through new divisions, exceptions, distinctions, in order to broaden or shrink the scope of existing regulations (p.12-13).

For Ibrahim, whereas it was the Common Law model of living tradition that prevailed in the formative period of Islam, it was replaced with the episteme of codification during the classical period. The fixation of rules which is proper to codification (and the legal inertia which resulted from it) made it necessary to create some room for legal change, and this was achieved by pragmatic eclecticism (p.15, p.31-35). This technique, known for long, was embraced by some and rejected by others. It took a sharper tonality with the entry into modernity.

At the beginning of the 20th century Rashid Rida identified, with respect to the fabric of law, five different groups, which Ibrahim takes up while changing their names: traditionalists, who reject reformist interpretation drawing out of the doctrinal sources of one school but accept eclecticism internal to the same school; secularists, who do not accept Islam as a source of law; reformists, who pretend to accommodate Islam and modernity through the search for a “middle way” between the two extremes; purists, who reject *fiqh* schools, any form of human incrementing, and the foreign inspiration of modern discourses; liberals, who pretend to develop new hermeneutic paradigms compatible with the principle of democracy, in order to modernize Islam (p.182-183). Purists, who are generally called “Salafists” today, are prompt to emphasize a pristine Sharia, preserved from human interpretation, which can be disclosed only by the fresh interpretation of the source texts and by the evaluation of correct rules within already existing opinions, through the assessment of available evidence, the exclusion of opinions contrary to *hadith*, and the repudiation of jurisprudential schools. Purists reject any reference to modernity, which they consider as a form of secularization the codification process has already initiated (as it is the case with the use of pragmatic eclecticism in order to codify personal status law) (p.189-190). In this perspective, Islamic law is taken as strictly equivalent to the apparent meaning of the source texts as interpreted by the authorized scholars. For those who hold this line of argumentation, reformists are secularists hiding beyond a façade Islam. The same reformists, like Qaradawi or Ghannushi, have indeed a selective and creative relationship with source texts whose correspondence they seek with the principles of liberal democracy (p.195). As to the liberals, they undertake to re-define hermeneutics and source texts, generally by overcoming the *hadith* literature or by centering on the substance of traditions they put in the perspective of Quranic intent (p.198). Pragmatic eclecticism imposed itself in the modernist discourse more than in the liberal one, since modernists succeeded in arguing that their approach was grounded on the authority of premodern legal tradition (p.200).

The partial codification of Sharia-inspired family law, in Egypt, corresponds, according to Ibrahim, to a return to pre-19th century pragmatic legal pluralism. The 2000 law on *khul'*, reveals clearly this ambivalence: whereas, on one hand, it constitutes a “radical discontinuity” vis-à-vis Islamic law (Arabi) or even a clear example of westernization (Muhanna), it nevertheless testifies, on the other hand, to the legislator’s preference for the passing of texts deriving their authority from the doctrine of an established school. It is also important to note that this law was not repealed under the Muslim Brotherhood’s legislature (p.211-212). Interestingly, Ibrahim shows that the transformation that took place during the legal modernization process is related to the emphasis on the content of rules rather than on the methodology of rules identification. What is called today a “return to Sharia” is actually a reinstatement of substantial Islamic law (p.222). It implicates at the same time that Sharia, as it is understood by the majority of its proponents, is already largely “reinstated”. While recognizing that after codification, Islamic law will never be the same (p.229), Ibrahim concludes that current law – in the domain of family at least – consists of, for law-makers, eclectically drawing among Islamic doctrinal schools for the purposes of satisfying the requirements of the modern world (p.235).

In many ways, Ahmed Fekry Ibrahim’s work is remarkable: documentation, mastering of doctrinal and judicial history in the context of Arab Muslim societies, linking of classical and modern periods. However, it also raises conceptual problems. His over-extensive conception of the term “law” leads him to comparisons which are even more hazardous than they confound the work of jurisconsults and of judges. When insisting several times on the upheaval induced by codification and on the transformation of processual law into substantial law, Ibrahim had the opportunity to show how much it would be more appropriate to speak of legal revolutions. He does not do so because it would run against his continuity argument, but this argument proceeds upside down: it is not present-day

Islamic law that sinks its roots in the *fiqh* of the past, but the *fiqh* of the past that finds extensions in present-day substantive law. In other words, if there is a continuity, it is not that of the concept of law but that of the substance of some rules, doctrinal yesterday and legal today. The question is obviously not, as Hallaq or Brown seem to claim, that of authenticity – authenticity is not an essential property of things but an attribute which is ascribed to them – but that of a revolution in the normative sphere. Purists understood it very well when considering that codification is an instance of secularization.

When drawing a comparison he thinks heuristic between primitive Islamic law and Common law, firstly, and between classical Islamic law and Civil law, secondly, Ibrahim commits a category mistake which creates conceptual confusion. Such a comparison induces the frame of analysis, with the negative consequence that it forces the terms of the comparison to enter into a scheme inappropriate to them. Moreover, the author tends to concentrate on people who are marginal with regard to the evolution of Egyptian family law: *fiqh* scholars, although the law-making process is now in the hands of the legislative power; religious circles, although the law is now defined in the political, governmental sphere. In sum, it would have been more appropriate to say that it is not Islamic law that changed in nature but Islamic *fiqh* that transformed into law.