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Who Cares About Islamic Law?

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Who Cares About Islamic Law?¹

The legal transplant in the Arab world, perhaps even in the Islamic world writ large, hasn’t had much luck by way of close study in US legal academia. Compared to its scholarly treatment in other non-Western contexts, such as Latin America and East Asia, the absence is glaring. This was not for want of scholarly interest in law in the Arab/Islamic world. Much has been published on Arab constitutions for instance, and you’ve had a few speakers in this lecture series, opine on the topic. Nor has there been lack of scholarly interest in types of legislation that had become symptomatic of our globalized world over the past two decades: foreign investment laws, intellectual property laws, oil and gas laws, and one must not forget that most unsavory yet pressing subject, national security and anti-terrorism laws. Rather, what is glaringly absent is the study of the “European Code”, the privileged form in which the legal transplant was first introduced only to become the permanent and defining feature of the contemporary legal system.

There is a simple reason for this and I will state it bluntly. It is because Islamist scholars and their non-Muslim academic sympathizers either liberals with strong multicultural tendencies

¹ This text was prepared as lecture to be given at YLS. It was published in Al Jumhuriyya
or “traditionalists” hostile to the modern nation state, have hogged the study of law in the Arab/Islamic world. A consensus of sorts has for long emerged among this block of scholars that the legal transplant was a colonial imposition that has displaced, with tragic consequences according to these scholars, the organic law of the Muslim. It is the latter that is worthy of study, typically referred to by them as “Islamic law”.

The crimes of the legal transplant seem endless according to the Islamist and co literature. And it all depends on where you want to put the “theoretical accent” so to speak. If you were an ethicist with an Islamist persuasion, you treated the transplant and its administrator modernist legal intelligentsia as symptomatic of the loss of a pre modern ethico-religious educational system with its learned juristic class, a loss that you then claimed caused all sorts of bad things including ethical disorientation among contemporary Muslims. You might even push the point further by attributing the violence of fundamentalist Islam today to this very ethical disorientation.

If you were of the “traditionalist” persuasion hostile to the nation state, your position would be something of a spin off from the ethicist one, where you would treat “tradition” as a form of “discourse” that you argued the legal transplant displaced. Tradition is important because it provided the Muslim with a “world-view”-a way to know the world- that would be lost with
modernity, liberalism, humanism, secularism, all of which the legal transplant would somehow embody. According to this traditionalist, change could only come from within “tradition”-from its bosom so to speak and only incrementally. Any “epistemological” rupture this tradition might suffer would be calamitous and a legal transplant from-liberal, humanist, secular Europe-with its own intelligentsia administrator class would be exactly that.

You might have somewhat of a romantic version of the olden days of “tradition”, in which case you would represent the advent of the legal transplant as a sign of the fallen times never to be recovered. According to this version, in the Muslim pre modern times, jurists and faithful functioned as an organic unit that was distinctly separate from rulers. The latter came and went, but the tight embrace of jurist and faithful community was continuous over time and outlasted the rotating dynasties of rulers. In this embrace, jurists ruled according to the needs of the community with whom they were organically connected. Something akin to the (in)famous Qadi justice. I call this a romantic version because the image is of a “unity” that is not riven with internal social conflicts. The legal transplant came and it blew all that to smithereens.

If you were of an “anti-imperialist” persuasion, you would ascribe to the legal transplant the role of facilitating colonial rule by
centralizing the legal system and codifying the books of the Ulama. Centralization and codification you would then argue turned an otherwise pluralistic pre modern legal system with various jurists espousing different opinions on the same legal issue into a uniform, rule-based formalist system of the continental variety. The reader is then expected to experience a great deal of dismay reading this because surely a pluralist system was superior to a rule-based formalist one as the former gave the judge or jurist options for ruling and room to maneuver while the latter did not.

And if you were of the liberal legal publicist persuasion, you would attribute to the old ulama class the functional role of preserving the “separation of powers” from the ruler (the executive) a role that you would then argue was lost with their demise as transplant displaced jurists’ law. The consequences could only be described as dire: marginalizing the only check on authoritarian rule led to the entrenchment of the latter in the Muslim world.

It follows then that given its outsider status and disruptive sins too innumerable to count, the European legal transplant in the Muslim world should be discarded as “superfluous” and unworthy of academic study. Scholarly interest should more properly be directed to studying that which was lost, and figuring out ways in which to redeem it. Reconnecting Muslim to Muslims’ law from
which he was unjustly and rudely separated should be academics’ most urgent project.

Thus there seems to be scholarly consensus in the US about the law of the Muslim world, which if you break it down turns out to be a consensus about law as an expression of identity. Law might mean different things to different people in the world writ large, but for “Muslims”, law is primarily a depository of identity.

The assertion that for Muslims law is primarily a depository of identity seems to me to suggest a dual political project, the one implied in the other, namely, turning the meaning of “Muslim”-who is properly a Muslim?- and the meaning of “law”-what counts properly as this Muslim’s law?- into a locus of debate, even conflict. If the social tapestry in the “Muslim” world is boiling with various loci of conflict, around wealth distribution, around rights and liberties, around political representation, the Islamist proposition-adopted by Amerian academia- is to open one around the identity of the Muslim and his law. It is an invitation to discourse on identity by turning it into a question of debate.

While the Islamist project in the Muslim world has experienced a great deal of success vis a vis the first leg of the proposition-who is a Muslim?- it has yet to become victorious on the second: Muslim’s law.
Let me explain what I mean by telling you a story. Over the summer, I was approached by BBC Radio Britain to debate an author who had co-authored a book on the Gay International, its virtues and vices, entitled, “Queer Wars”. The “Gay International” is as some of you I am sure know, is premised on international advocacy of gay rights driven by highly motivated Western gay activists. The book was interesting and covered several regions in the world where local gay rights struggle was unfolding. While the authors adopted as their background position the common “cultural imperialism is bad”, as one would expect from academic authors these days, they nevertheless took a nuanced position towards the various regions they discussed in the book highlighting the complexity of the labor of international solidarity. How, yes, it might help local activists to receive international support and how, no, it might sometimes hurt them by exposing them to attack and inciting open public homophobia. Except, they, the authors that is, seemed clear that the Muslim world was not a place where such “nuance” might hold. Their attitude in relation to that “Muslim world” was simple: don’t even go there!

When I pushed back and insisted that there were indeed gay rights activists in the Muslim world, that they too needed “measured” international support and only when they asked for it, and that there was indeed a difference, which the authors of the book seemed to confuse between “internationalism” and “universalism”, the former a question of political deliberation
about the merits of international solidarity, while the latter a question of principle that applied to Muslims just like everybody else for Muslims too have universalist aspirations, my interlocutor begged to differ. Not wise for Muslims, he repeated. Too dangerous, he warned the BBC listening audience. The debate was fast-paced, intense and lasted only twenty minutes. I emerged from it feeling bruised. I felt that somebody had just thrown a bucket of identity at me and asked me to sit in it. What was uncanny was that my interlocutor experienced himself as adopting a “progressive” position.

Why am I telling you this story? Because turning the “Muslim” – a complex social being-into a homo Islamicus-a bearer of identity- is an Islamist project. In fact, I think that the Islamist project is premised on equating the Muslim with the homo Islamicus – turning one into the other- by dropping from its account the multiple ways of Islamist governance taking place over the past three decades or so that had produced this “Muslim”, the privileged subject of Islamist discourse. That is ever since what is commonly referred to proudly among Islamists as “The Islamic Awakening” peeked out its head in our midst. Failing to see the ways in which this “Muslim” had been produced becomes then the progressive marker, the point of pride, the moral certitude, of the liberal multiculturalist like my interlocutor on the BBC radio show. No gay rights for you Muslims because “gay” and “rights” are foreign to who you are!
At 54 years of age, and having born witness to the rise and mounting influence of this Islamic Awakening among my peers, I can give you a brief account of how I myself experienced it especially as a woman. There is nothing dramatic in what I am about to say, so don’t expect stories of cuttings, whippings, and stone throwing. Nothing that would draw your pity juices, or your tears of sympathy for the “oriental” woman, nothing that would invoke the “violence” that would offend your Western liberal sensibilities. It was all “voluntary” as the young Muslim feminists of today- and their Western cohorts of the third wave-like to assert! It was all voluntary, in a Saba Mahmoud kind of way.

The women of my generation witnessed the emergence, and soon enough, hegemony, of what I will call “The Muslim woman governance”. This “Muslim” woman appeared from our midst: our family, our school, our workplace, and our neighborhood. She was like us, and then one day, she was no longer. She “separated herself from us” either affectively or socially or both because she found a God that inspired her to submit to him. This God asked her to cover herself so she wore Hijab. She covered her hair, pulled her sleeves to her wrists and her skirt to her ankles. She promised us his rewards if we were to veil ourselves too and when we ignored her she threatened us with his rage. The torture of the grave was only the beginning of our after death punishment-ordeal for failing to obey his commands- when,
according to the “Muslim woman”, we would be asked by an archangel why we refused to veil ourselves during our lifetimes and failing the test, we would be doomed to the “torture of the grave”. Worms and snakes would crawl up our exposed non hijabi skin and ...well you can imagine where this horror scenario is going.

My generation witnessed the increasing success of this “Muslim woman”: we would meet with our girlfriends to celebrate someone’s birthday, and one of them would show up having adorned al hijab; we would go to school or to work and see a classmate or colleague enter the room, shape transformed with Hijab, we would go on a family visit and a cousin would proudly saunter her way through the room hijab covered.

With the increased success of this Muslim woman and the hegemony of her hijab our non Hijabi attire came to be signified through differentiation as the dress of those Westernized outsiders, or of those non believing “kuffar”, or of those promiscuous harlots who want to seduce men; then towards the end and as hijab became the costume of the majority, non hijab became simply the attire of “Christians”. [Christians here is reference to the Christian minority of the population, for even prostitutes decided to don the hijab.]
It was an astonishing feat! Testimony not just to the success of Islamism as a social governance project but also, to how its epistemology relied upon this social governance project as ongoing background fact. It is when what we wore – whatever that was- became understood socially as the negative of hijab- (non) hijab- and when it became so unusual to come upon it in public space, so much so that its wearer acquired the signification “Christian woman”, it is then that the term “Muslim Woman”, acquired its positivist meaning. To put this in less bullshitty terms, you can't have a “Muslim woman” a term much bandied about these days, unless you've had a social project whose goal it was to create a referent to this term, a person whose social profile fit the signifier “Muslim woman”.

The whole thing was pretty darn awful especially if you were a Christian woman. If you were, it was a double whammy. You found yourself “Christianized” twice: both as a member of a community now itself defined as “ the Christians” who the Islamists rushed to assure us “have their own rights too”, seeing your political citizenship swapped for sectarian membership, and as one who wears her Christianity on her back-or rather her “head”- in the form of a dress that screamed’ “here walks a Christian”.

It wasn’t that when this Hijab of the “Muslim woman” hit our shores that we were not or did not see ourselves as Muslim. We
were and did, very much so. Our non-hijab was already modest. We lived our lives—our friendships, romances, and work relations—with men as one would expect women to do in a socially conservative society. There was of course room to maneuver, interpret, play around and rebel in secret. But the discourse around women’s bodies, dress, and sexuality was and remains to this day supremely conservative. I tried to explain the way all that worked—the norm and resistance to it—in my article on Honor Killings so I refer you to it shamelessly.

The “Muslim Awakening” came and made this non-hijab—rather our bodies themselves—a locus of identity conflict and it did so by declaring our dress un-Islamic. This was open season on our bodies. Not only did we find our bodies suddenly the center of public debates about the propriety of our public appearance, with men as born again Muslims speaking as the supreme authoritative voices, whether in our own families, places of education, work places or from the on high of the minaret, but it also exposed us to the discipline of the street as street harassment put the rising hegemony of Islamist doctrine into practice. We became fidgety walkers, anxious about our public appearance, pulling our sleeves down to the wrists, skirts down to the ankles, cleavage up to neck, mimicking the hijab even when we were not hijabis. The Islamist social governance project was now enacted on the very surface of our skin and deep inside our neuroses. I am reminded of all this when I go back home to visit and I see the hijabi women in my
family rummage frantically reaching out for their scarves to cover their head whenever a “strange” man entered the room. That we didn’t do.

Social governance had turned into self-governance.
It was as if we transitioned within the family from the episteme of “shame”-ayb in Arabic-back when we were a socially conservative society that was Muslim- to the episteme of the religiously prohibited or “haram” in Arabic- when we became Islamism’s homo-Islamicus. Within the first episteme, we negotiated our dress with our mothers who reminded us warningly: “What would the neighbors say if they saw you dressed like that?” aghast at our shorter than usual skirts. We would argue, plead, explain, and offer compromises. Sometimes we won, making our way out of the house feeling victorious, and sexy, other times we lost, making our way back to our room feeling miffed and angry, mumbling to ourselves about the God-awful backwardness of our folk!

Within the second episteme, haram- when our dresses became the locus of public debate, no longer just “the talk of the neighbors” but that of the street, radio, Television, minaret, we came to negotiate our dress with our born-again Muslim brother (or neighbor, or local shopkeeper, or cabdriver) who spoke to us authoritatively in the name of the divine law. Our dress had entered with Islamicization a new discourse, one informed by
“Islamic law” – or haram-it has become if you wish “legalized”- and for it to exit the domain of the prohibited and enter the domain of the permitted- as Islamists like to say, it had to be subjected to a divine test about what could be revealed and what could not, how much hands, how much feet, how much tightness, how much color. It was no longer the neighbors who were watching, it was the very eyes of God and not so lovingly. We were often reminded of his wrath if we disobeyed. It was as if our attire passed from our mothers’ “rational basis” test to our religious brother’s “intermediate” or even “strict scrutiny” one.

Where is this going you ask yourselves and what has any of this to do with the legal transplant? Well, I kind of think of the legal transplant as like our pre hijab dress when we were simply Muslim. Like that dress it became the locus of identity conflict that Islamists had succeeded in triggering in the rest of the social body. And like our pre-hijab, this positive law or al Qanun Al Wad’ee as Islamists like to refer to it disparagingly, it was sufficiently Muslim, it was kind’a Muslim, Muslim in a way nobody paid attention to really or cared about, it was Muslim by default. Like our dress, it was simply Muslim. It certainly had other problems, but an Islamist strict scrutiny test of its identity was not going to fix them. In fact, that proved to be nothing but a terrible distraction, the kind that the right wing succeeds in doing by recasting the problems of society in terms of threat to the tight organic state that society was imagined to be before blacks,
migrants, feminists, etc despoiled it. For Islamists, it was before the modern state and its secular Code despoiled it.

What is interesting is that this Islamist project of subjecting the “European” Code to the test of Islamicity experienced something of a golden age, albeit a brief one, with the rise of constitutionalism in the aftermath of the collapse of the Soviet Union. Like their peers in other places, constitutional courts in the Arab world, for complex reasons that I won’t get into, became increasingly open to the idea of judicial review of legislation. *Silent* constitutional articles such as “Sharia is the sole source of legislation” suddenly came to life, as the practice of judicial review became the hottest law story in town. Different kinds of legislation became judicially reviewed including ones, through pressure from Islamist litigants, considered not “properly Islamic”.

Islamic law scholars based in US academia chipped in with their constitutional law proposals in a parallel movement of rise in constitutional law scholarship. Some returned to books of Muslim jurists, dusted off a few terms and used them to express constitutionalism in Islamic terms, hoping to influence the way *simply Muslim* judges approached their otherwise unfamiliar task. Some offered ways to fashion the Islamicity test in a way that was “normative” rather than strictly “doctrinal”, and some saw in constitutionalism a way to sneak back “Islamic law”, in a kind of a
silent coup d'état in which Muslim’s jurist law acting as a form of “natural law” refashioned, incrementally, rule by rule, the culturally alien positive law. Judges performing judicial review were praised for their “Muslim reasonable” ways, reassuring Western readership that constitutionalism a “Muslim-reasonable” way was what was needed in the Arab world and that there were judges to boot already in place who could pull it all off.

This was not an enterprise that was devoid of anxiety. Islamist litigants had a knack for attacking reform legislation touching on women or religious minorities or freedom of expression and the liberal scholar needed to open the Sharia door without letting in those that would discredit it. While those scholars with liberal sensibility set to work trying to come up with an Islamic doctrine that was “authoritative but not authoritarian”, others declined the defensive posture altogether and adopted instead the more aggressive “difference” counter attack. In this posture, anything that appeared on its face offensive to liberal humanist sensibility was presented as “difference” that required understanding. In other words, others went for the epistemological relativist jugular. (Not lawyers!)

If you were an Islamic law scholar based in US academia and for a good stretch of two decades, those were exciting times for you. Judicial review and Sharia as the sole source of legislation gave you the feeling that your work was relevant, that many lonely
hours spent deciphering what dead brown men said in the tenth century about the different levels of legality to characterize an action was definitely worth it. Gulf countries with oil money to spend lavished elite law schools in the US with money to set up programs on Islamic law that gave value to your scholarship. What you wrote was inserted inside the circuit of conferences and symposiums financed by those programs. What you wrote was hot stuff; it was on demand.

And this was a very good position to be in. The rising prestige of US legal academia after the fall of the Berlin Wall made your presence in it during this time a stroke of darn good luck. What you wrote rode an already traveling vehicle of US academic prestige and was being transported back to the “Muslim” world in a way that was not possible before. You had a good shot at being famous. The near collapse of academic institutions in those countries, worn out by years of failing developmental states, made their scholarship unable to compete. Whatever scholarship was produced was either objectively inferior or acquired a secondary status to your own given its very local location. You could afford to be ignorant of what they did—though increasingly they could not afford to be ignorant of you.

I mustn’t forget to mention- my pet peeve as I will explain in a minute- that you also benefited from the US legal theory “cannon” all of which you used in your Islamic legal reconstructive project.
All of this made you sound smart, different, and original; you turned Islamic law, an impossibly tedious topic to multitudes of law students in the Arab/Muslim world, into something exciting, something intellectual almost. With the rise of Islamism, your scholarship reassured young born-again Muslims that they could be born again and intellectually sophisticated at the same time by reading your scholarship. You were the “Muslim” jurist they had not seen before and wished they did.

With the Arab spring and the rising fortunes of the Muslim Brotherhood in Egypt, there was a moment, especially with the passage of the Islamist Constitution of 2012, when you felt that you were something of a jurist-in-waiting. There was a constitution that was perfectly tailored to give your scholarship a consultative status; surely, it was only a question of time before you received a phone call to become the next sitting-Ikhwan approved-justice on the Egyptian Supreme Court.

Alas with the mass demonstrations in June of 2013 against the Ikhwan and their quick and cruel demise, all this came crashing down. Just when you thought the Muslim had finally merged with the homo Islamicus becoming indistinguishable-(the election results after the fall of Mubarak certainly seemed to promise as much)-and the world was ready for an “authoritative albeit not authoritarian Islamic law”, Egyptian crowds came out by the hundreds of thousands decrying the “Islamists” and their ways.
“They acted like a closed sect”; “they treated themselves as the knowing few whose mission was to educate us on Islam the misguided many”; “they were only interested in their own”...was some of the things you heard!

Oops! It turns out that “the authoritative and the authoritarian” were closely aligned in people’s experience when it comes to fixing their Islam. People were clamoring to become simply Muslim again.

So what do you do NOW? ISIS is everywhere on the news. A whole war, a global war, is declared on them and them alone. They kill invoking the name of Allah. They invoke the rules of the Islamic. Is this Islamic? They ask you everywhere you go. You are exhausted trying to explain to them this was not “an Islam you recognize”. It takes some work but you are already thinking your days of glory have proven brief, much too brief. You explain, this was Wahabism, a purist fundamentalist strand of Islam financed by Saudi Arabia. It was a mistake for Egypt to forcibly remove the Ikhwan from power; we warned them violence would only beget more violence and would empower the fundamentalists. You try again: Muslims have lost their way with the corrupt modern secular state. They have become ethically disoriented. They cannot tell right from wrong. And when it comes to homegrown terrorism, Islamophobia breeds violence, you assert.
You bravely soldier on with explanations, that is until a journalist calls to ask you whether it was Islamic for a 14 year old boy to refuse to shake the hands of his female school teacher as is customary practice in Swiss schools and whether you thought the little town in Switzerland that passed an ordinance fining any student who refused to do so was Islamophobic. You feel like throwing your phone against the wall. While you didn't quite mind being the mufti, it was not this kind exactly. You find yourself thinking how is it that what promised to be a position of Justice on the Egyptian Supreme Court ended up seeing you playing the role of a mufti on the demands for exception of a Muslim minority in the West, while fending off questions about ISIS and Islamist violence.

What I am trying to say is that the Islamic law project that found a friendly home in US academia has reached a dead end. With its eye on transforming the legal system of the Muslim world, its advocates find themselves today in a defensive position trying to explain Islamist violence as it peeks its head in bursts almost on a daily level, or alternatively, acting as mediators between a liberal legal system and a religious minority clamoring for its own Islamic exception.

This is all a shame in my view because this project has hogged resources, intellectual, symbolic and financial that could have gone elsewhere. It could have gone to rescuing the positive legal
system in the Arab/Muslim world, the descendant from the legal transplant, from its jurisprudential glut. All the elements were there to do so. A revolution in rights advocacy had already started in the nineties and showed its metal with the Arab spring. Rights and liberties driven youth led the crowds assertively to the overthrow of Mubarak. Equally assertively they approached the courts. They read their constitution closely and argued their rights from the provision of its articles. If the resources that went to “Islamic law”, in which the Muslim was singled out as an exception to the Comparative law of everyone else, and instead went to lending “a theoretical hand” to the rights movement that was a brewing, especially from US based legal theory, the most innovative and developed in the world, we would be at a different place today. Instead we seem to have been sidetracked by a long and windy conversation on identity and difference, when all the while we should have been talking about rights and liberties.