

Book Review

Law and Islam in the Middle East

By Daisy Hilse Dwyer (ed). Law and Islam in the Middle East. Westport, CT: Greenwood Press, 1990, 168 pp.

This is a collection of anthropological studies on the dynamics of the implementation of law in the Middle East. The basic arguments of the book raise the issue of the context of law and the role of Islamic law in the Middle East. The editor, Daisy Dwyer, contends that context rather than the letter of the law is the core phenomenon determining the handling and outcome of legal cases. The form and impact of Islamic law varies according to the specific regional and cultural context. Dwyer also argues that Islamic law is often invoked not so much for its specific content but as a political symbol relating the past to the present and, ultimately, the future.

These points are significant for understanding the impact of Islamic law in the Middle East. The cultural context will consistently influence which pro-

visions of the law are emphasized and which provisions are deemphasized or conveniently forgotten. Furthermore, social outlooks and cultural habits will in turn impact upon how the specific provisions are interpreted and implemented. As Safia Mohsen demonstrates in an insightful article on women and the criminal justice system in Egypt, the implementation of law responds to the specific situation of women in Egypt. The way criminal law is implemented sometimes discriminates, depending on the context, in favor of or against women.

The relation of law to society, however, is not one-sided. Societal practices not only shape laws but are also, at times, shaped by laws. Rules of law could play an educative as well as an empowering role. Richard Antoun demonstrates the complex interplay of Islamic law and custom in a rural Jordanian court. At times, for example, Islamic law is invoked by litigants in order to escape customary practices that would deny a woman her right to *mahr* (bridal payment).

The social context is only part of the reality with which a legal system has to deal, as the political context plays an equally influential role in the law's interpretation and enforcement. The political reality of the Middle East is such that Islamic law often becomes a popular rallying symbol and a method for gaining political legitimacy. Consequently, the more conspicuous aspects of Islamic law (i.e., criminal sanctions) are emphasized over the less conspicuous legal fields (i.e., commercial law). In a perceptive article, Ann Mayer carefully studies the process of implementing Islamic law in Libya during the early 1970s. She finds that the Libyan regime espoused the cause of Islamic law only as a means of acquiring political legitimacy. After studying the specific provisions of Libyan law, Mayer concludes that Qaddafi only affirmed Islamic law in principle and, in reality, actually devised legal provisions for enforcement designed to render the purported Islamic laws ineffective.

Although Mayer's main argument is correct, one must be careful not to discount legitimate attempts at Islamic reform as unfounded in traditional Shari'ah law. Mayer, for example, seems to argue that Libyan legal provisions providing that a convict be flogged only after a medical examination and in the presence of a physician are not founded on policies promoted by the Shari'ah: most medieval Muslim jurists stated that a punishment involving flogging could not be administered if it endangered the life of the culprit. Likewise, Mayer implies that Libyan legal provisions providing that amputations cannot be carried out if a person steals out of need have no basis in the Shari'ah. Mayer is correct when she says that most jurists did not excuse an act of theft if it was committed out of need. However, Maliki jurists, in particular, considered hunger a form of necessity that excused theft. These examples aside, Mayer succeeds in presenting a detailed study of Libyan law and in proving the manipulation of the banner of the Shari'ah for political ends.

The fact that the issue of the Shari'ah's application in the Middle East is

highly politicized has contributed to modern Islamic scholarship's ignoring the crucial question addressed by this book—one cannot recall a single contemporary book in Arabic dealing with the impact of the social context on Islamic law. This is not solely a question of anthropology or sociology but, from a legal perspective, it is a question of constitutional limits. How far should modern Islamic law accommodate the local customs and the political and social realities of the country in which it is being enforced? As a corollary question, what are the constitutional theories which would permit or preclude such an accommodation?

The book under review cannot be faulted for failing to shed some light on these constitutional questions, but a major shortcoming is that it does not deal at all with at least some of the classical theories expounded by Muslim jurists on the relation of Islamic law to context. For example, Ibn 'Abdīn's *Risālah* on *ādah* or Ibn al Qayyim's *I'lām al Muwaqqi'īn* could have been helpful in these regards. Such a study could have assisted the reader in better understanding not only the anthropological practice but also the theory behind the practice.

In fact this book, like many others which purport to deal with Middle Eastern law, does not deal sufficiently with its specific provisions. Consequently, it is prone to generalize from the practice of a specific locality that it is identifying an Islamic legal phenomenon. Dwyer, for example, in her introduction argues that litigants and judges are the focal actors in Middle Eastern legal processes, and that lawyers play a limited role. She goes on to state:

The often-limited involvement of lawyers in day-to-day judicial affairs in the Middle East has a major implication: the focus of courtroom activity shifts from the bar to the bench. Middle Eastern law has often been characterized by Westerners as functioning through a *qāḍī's* justice, a pejorative term that emphasizes arbitrary decision making. A *qāḍī's* justice, however, is an accurate depiction in the sense that the judge (*qāḍī*) is typically focal in fact finding, and decision making. No jury system exists under Islamic law (p. 5).

As an initial observation, Dwyer joins Islamic law and Middle Eastern law, which, as she recognizes elsewhere, are not synonymous. More fundamentally, if the author would have consulted books on civil and criminal procedure as well as manuals on judicial conduct, she would have been reminded that in the realm of procedure, Middle Eastern law is very similar to the system of civil law, particularly the one found in France. In commercial and criminal cases, judges have far less discretion in dealing with litigants or in fashioning compromises. Importantly, in the urban courts where most lawyers practice, judges abide by procedural laws much more faithfully than do their counterparts in regional courts. The situation is not that different in city versus county courts

in the United States. Furthermore, Dwyer's statement could have benefited considerably from a review of the rules of judicial conduct in traditional Islamic law found in books on *adab al qāḍī*.

Dwyer contends that "context rather than source or origin is most likely the core phenomenon to be delineated in understanding the handling of disputes and law cases" in the Middle East (p. 4). She also argues that the "legal principles and the legal ethos that came to be elaborated in Islam many centuries back continue to provide a vital dynamic in legal behavior and thinking today" (p. 2). Perhaps she is right, but both arguments cannot be made without a clear exposition of the legal principles and origins of Middle Eastern law, as well as of the specific provisions and rules that interact and impact on the context.

An illustrative example of the problems with the nonspecific approach to legal provisions is found in Brinkley Messick's article entitled "Literacy and the Law: Documents and Document Specialists in Yemen." Messick argues that legal documents are pervasively used in Yemeni society although their status is ambiguous. Considerations of personal and social bonds influence the legal status of legal documents. But missing from the article is any serious treatment of what Yemeni law says about legal documents. Additionally, no distinction is made between local Yemeni practices and the dictates of Islamic law. Furthermore, some statements made by Messick could only arise from a misunderstanding of legal concepts. For instance, Messick argues that unlike American law, Islamic legal instruments represent only an after-the-fact documentation of a prior agreement or transaction. Citing Black's law dictionary, Messick seems to argue that legal instruments create rights under American law. However, under American law a contractual right is created by an agreement, and an agreement is created by a meeting of the minds. Writings are only evidence of such meetings.

Messick cites as evidence of the ambiguous status of legal documents in Yemeni society a case in which "[d]espite his presentation of extensive and sound supporting documents, a man widely perceived in the community as a scoundrel was unable to get a firm ruling in his favor" (p. 71). This conclusion is suspect because no explanation is provided on the technical requirements for (so-called) sound legal documents. Furthermore, whether the man was a scoundrel raises the issue of credibility – which Messick does not discuss. Under American law, the credibility of witnesses is a question for the fact finder, and if the fact finder chooses to believe a credible witness and discount written evidence, this is not considered an error as a matter of law. This, of course, does not mean that the status of legal documents in American society or law is ambiguous.

Messick is perhaps correct in his analysis of a particular segment of Yemeni society, but one must be careful not to deduce from these local practices a general characterization of Islamic law. Even assuming that we are in fact dealing with a local practice influenced by Islamic rules, a characterization of Islamic law

in regards to certain legal areas cannot be made without a detailed study of its specific provisions.

Generally, because of the failure to deal with the law's rules on their own merit, the essays are not really about Middle Eastern or Islamic law. Essentially, this collection of essays is about certain legal practices in some localities of the Middle East. Considered from this perspective, and coupled with the fact that it raises the issue of the contextuality of the law, it is an important book. Although varying in quality and thoroughness, most of the articles contain valuable insights.

Finally, as an editorial matter, one should note that there is a certain lack of cohesiveness to the book. Some articles do not fit in well with the general theme, although Dwyer strains quite a bit in the introduction to justify their inclusion. The book grew out of a seminar held in 1980 at Columbia University. As a result of this tardiness, some articles are sharply segmented, it being obvious that an introduction was added by the respective authors to make articles fit within the theme of the book, and a postscript added to update the material.

In conclusion, *Law and Islam in the Middle East* raises an important issue that deserves attention. But like many other edited books, the volume's quality varies with the quality of the articles. Generally, most of the articles focus on the context but shed little light on the textual sources. Such an approach fails to appreciate the fact that law is both a text and a context, and that each must be given its due weight.

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