In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt[1]

Khaled Fahmy
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> This [*ḥadīth*] indicates that the cadaver feels pain (*yata'allam*).
> —Ibn al-Malak al-Rūmī (d. 854/1450-1)[2]

> From this it is evident that dissection (*tashrīḥ*), which necessarily entails opening up the stomach, as we have said, is not permissible (*lā yajūz*).
> —Muḥammad Bakhīt al-Muṭī'ī (d. 1354/1935)[3]

> How can they claim that Muḥammad is the most accomplished of men in practical philosophy, when we find the rulers of Muslim lands (*mulūk al-islām*) obliged to contravene his law to establish proper government and to regulate the civic order? This [contravention takes place] in the *ḥudūd* and the retaliatory punishments (*qiṣāṣāt*) and other matters. If they behaved in accordance with the Sharī'a of Islam, without addition or subtraction, good order would disappear, and people's lives and property would be taken without right. This is evident to anybody who knows *Fiqh*.
> —Ibn Kammūna (d. 683/1284)[4]

Historians have been preoccupied for some time with the question of how Islamic law came to be transformed in the last two hundred or so years and the role this has played in the emergence of modern Middle Eastern states. All too frequently, this conversation has lacked granularity; it has taken place without reference to the vast archival records that document this transition in intimidating detail. Khaled Fahmy's magisterial *In Quest*

of Justice is the latest in a series of publications that draws on this material (among many other sources) to construct a rigorously evidenced narrative of exactly how Islamic law operated and what was novel about its operation in the nineteenth-century Egyptian context. One should note that he deals with a number of other issues, including urban planning (chapter three), prison reform (chapter five), and the intellectual and institutional history of medicine, making signal contributions to these as well. As an Islamicist, however, these subjects will not overly concern me for the purposes of this review. Fahmy explores five major sites of interaction between law and public health, with each of the relevant chapters organized around the theme of individual bodily senses. The first, second, and fourth chapters investigate medical practice and education (particularly the reception of modern medicine), the *Siyāsa-Fiqh* dynamic, and the eclipse of the *muḥtasib* by alternate institutions, respectively.

Fahmy pushes back against those who posit a straightforwardly conflictual account of the relationship between science and religion, not least in the figure of Clot Bey (d. 1285/1868). Lauded in the traditional historiography as the man who almost singlehandedly introduced modern medicine to a benighted Egypt (42), Clot is carefully resituated as part of Mehmed Ali's effort to establish a modern conscript army (46). Almost every major aspect of Mehmed Ali's statecraft seems to have been animated by this one purpose; the Abu Zaʿbal medical school (later established at Qaṣr al-ʿAynī) itself was a military institution, with doctors assigned ranks and attached to army units. Clot self-servingly portrayed himself as surrounded by obscurantism on all sides, throwing his own heroism into greater relief. Opposition to quarantine (48, 58-60) and human dissection (62-75) are understood not as elements of religious dogmatism, but as arising from other, 'nonreligious' grounds. Perhaps Fahmy misstates his case in observing that "there is no evidence that the introduction of anatomoclinical medicine was resisted by Islam" (79) or that "there is no evidence…that the '*ulamā*' believed that Muslim corpses could feel pain" (69). The problematic reification aside (one should speak of individuals or groups rather than using such abstractions), Fahmy seems to make a normative claim about the "*misreading* of the Prophetic hadith 'Breaking the bones of a person when dead is like breaking them while living'" (65, emphasis mine). There is no reason to believe that Clot Bey misrepresented this particular objection of Shaykh al-Azhar al-ʿArūsī (r. 1818-1829) to dissection; as is evident from the first of three epigraphs above, there certainly *were* commentators who understood the cadaver to experience pain. This was not a gratuitous

"assumption" by European observers (276). As it happens, the Egyptian state Muftī Muṭīʿī (r. 1914-1920) felt obliged to reinterpret this gloss on the hadith, citing other authorities who shared his opinion.[5] Even though Muṭīʿī insists that the dead are insensate, he concludes that dissection for teaching purposes is absolutely forbidden. Evidently, the controversy over dissection and autopsy was still very much alive in early twentieth century Egypt (opposition being voiced by a state Muftī, no less); the claim that religious-inspired opposition was not significant or sustained is therefore hard to maintain, or at least demands qualification.[6] One senses that, in this widely successful revisionist account of law and medicine in the nineteenth century, Fahmy occasionally pushes too hard against previous narratives, overstating his argument.

In Quest of Justice renders a major service to Islamicists in restoring the study of *Siyāsa* in/and Islamic law to its proper place.[7] Fahmy focuses on the nineteenth century while indicating that this pattern of *Siyāsa-Fiqh* interaction is far older than is typically understood (126). He demonstrates (building on Ruud Peters) that *Fiqh*-trained *qāḍīs* continued to enjoy considerable jurisdiction over criminal matters (including homicide) for most of the nineteenth century. *Siyāsa*, administered by specifically designated '*Siyāsa* councils', operated a parallel jurisdiction, with its police agents unhindered by the procedural and evidentiary constraints of classical Islamic law (92-120). They were apparently much more successful in the punishment of crime than *qāḍī*-courts, and Fahmy notes case after case that had to be thrown out of the latter for want of evidence (confession or the testimony of upstanding adult male Muslim witnesses). Fahmy perhaps goes too far in implying the indubitable religious "authenticity" of *Siyāsa*, though he is surely right to suggest that it is, as a practice, very old indeed. He seems to downplay the extent to which the *Siyāsa-Fiqh* dynamic functioned as a tension, one evident to outsiders (126-127; see epigraph three above); many disagreed with anti-formalists like Ibn Taymiyya, who sought to rehabilitate *Siyāsa* justice for the *Fiqh*-minded.[8] Juristic resistance to *Siyāsa* as contravening God's Law is widely attested, in various contexts.[9] Similarly, having painted a wonderfully compelling picture of the nature of *Siyāsa-Fiqh* interaction, Fahmy leaves the story unfinished, such that one could be forgiven for leaving with the impression that *qāḍī*-courts retain their jurisdiction over criminal matters in modern Egypt. He thus fails to undermine the "standard narrative" that Islamic law came to be progressively truncated in Egypt in the course of the nineteenth century (22). Narratives of Islamic law that stress continuities are perpetually in danger of missing the wood

for the trees; almost every aspect of its operation is marked by serious rupture in the course of the nineteenth and early twentieth centuries. How else does one account for the obvious fact that Islamic criminal law plays no role whatsoever in Egypt today? Even in the domain of the law of personal status, *Fiqh*-trained *qāḍīs* have been supplanted by civil-law trained judges who are overwhelmingly incapable of (and uninterested in) reading the literary heritage their practice is supposed to draw on. The contrast with the formidably learned judges described in Ron Shaham's *Family and Courts in Modern Egypt* is instructive. These are major changes, and this otherwise superb book does not adequately account for them.

Fahmy is on firmer ground when discussing the eclipse of the *muḥtasib*. Officially abolished in 1837 but taking some years thereafter to disappear, he highlights (citing Jonathan Berkey) the secularization of the institution already in the Mamluk period (196-197). Less a censor of public morals than a collector of surplus taxes, this particular transition seems to have hardly given rise to complaint. The role of the *muḥtasib* in detecting marketplace fraud came to be inherited by a range of public state health officials with the assistance of chemical laboratories and medical doctors (202-204). Fahmy notes that violence, which was always integral to the practice of 'forbidding the evil' (*contra* Talal Asad), was one the major reasons for this transition; the subtle Foucauldian violence of the state replaced the gratuitous and undisciplined use of the whip (*dirra*) and the dunce's cap (*ṭurṭūr*) by the *muḥtasib* (198-201). Again, one could object that violence, though important to the function of *ḥisba*, is hardly the full story; at least the non-coercive aspects of that office, according to most jurists, remain the right of private individuals (even if these are applied in ways that uphold rather than subvert social stratifications).[10] Overall, however, Fahmy effectively undermines the nostalgia of some modern commentators on the subject.

It is the hardy non-elite Egyptian who emerges as the hero of the book; enduring massive state violence in the form of conscription, corvée labor, and imprisonment, it is precisely these who most fully embrace modern means (autopsy, *Siyāsa* councils) with surprising alacrity, in quest of justice. Fahmy has written an eminently readable, persuasively argued account of these and other transformations to Islamic law as practiced 'on the ground'. He advances the case that the subject cannot be studied without reference to documentary evidence, and without proper attention to its social, institutional, and intellectual contexts. One can readily endorse Eugene Rogan's *taqrīẓ*; this book confirms Fahmy as "the

preeminent social and cultural historian of nineteenth century Egypt." And, it is possible to add, as a most impressive chronicler of the modern transformation of Islamic law. This book will be of interest to all students of Islamic legal thought, historians of the Middle East and the colonial period more generally, and anyone fascinated by the rise of the modern state and its various institutions.

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Endnotes

1. I thank my friends Shuruq Naguib, Samy Ayoub, Andrew March, and Mina Khalil for their comments on the initial draft of this review. Any faults remain very much my own.
2. Muḥammad b. ʿIzz al-Dīn ʿAbd al-Laṭīf b. ʿAbd al-ʿAzīz al-Karmānī al-Rūmī al-Ḥanafī, more commonly Ibn al-Malak. See his *Sharḥ Maṣābīḥ al-Sunna*, ed. Nūr al-Dīn Ṭālib et al. (Qatar: Dār al-Nawādir, 2012), 6 vols., at II:373. For biographical details, see I:11-13.
3. This *fatwā* was first printed (posthumously) in *Majallat al-Azhar* (then *Nūr al-Islām*) 6 (1354): 627-633, at 632. It has since been reprinted in the modern edition of Muṭīʿī's *fatāwā*. See *Fatāwā al-Shakyh Bakhīt al-Muṭīʿī*, ed. Muḥammad Sālim Abū ʿAṣī (Cairo: Maktabat Wahba, 2013), 2 vols. I was not able to consult a copy of this edition, and so lack the page reference. For an illuminating account of Muṭīʿī's life and thought, see Syed Junaid A. Quadri, "Transformations of Tradition: Modernity in the Thought of Muḥammad Bakhīt al-Muṭīʿī" (PhD diss., McGill University, 2013). Chapter two is especially concerned with science.
4. *Saʿd b. Manṣūr Ibn Kammūna's Examination of the Inquiries into the Three Faiths: A Thirteenth Century Essay in Comparative Religion*, ed. Moshe Perlmann (Berkeley: University of California Press, 1967), 102. I was not able to consult a copy of Perlmann's English translation. For further information on the biography of Ibn Kammūna, including the disturbances following either

his death or the publication of his treatise, see ix-xii; see also Sabine Schmitdke and Reza Pourjavady, *A Jewish Philosopher of Baghdad: `Izz al-Dawla Ibn Kammūna (d. 683-1284) and His Writings* (Leiden: Brill, 2006), 8-22. See also Tzvi Langermann, "Ibn Kammūna," *EI3*.

5. Muṭīʿī comments on Ibn al-Malak's gloss, "this must be reinterpreted such that it is understood in the sense that it [breaking bones] would cause pain were the person alive." He cites Ibn al-Humām (d. 861/1457) to the effect that the dead are insensate. See note 3 above.
6. E.g., the Azharite Yūsuf al-Dijwī (d. 1365/1946) came under criticism for his (qualified) approval of post-mortem examination; for the full text of the exchange between him and Muḥammad ʿAbd al-Wahhāb al-Buḥayrī, see *Majallat al-Azhar* 6 (1354): 472-473, 577-578, 627-633, 671-688. I thank my friend Muhammad al-Marakeby for first bringing my attention to this discussion.
7. In this respect, it is not unlike Leonard Wood's recent intervention in his chapter "Legislation as an Instrument of Islamic Law" in *The Oxford Handbook of Islamic Law*, eds. Anver Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018), 551-587, esp. 568-572, where he commends Amr Shalakany's 'Law-in-Action' approach.
8. On the nature of Ibn Taymiyya's intervention, see Ovamir Anjum, *Politics, Law, and Community in Islamic Thought: The Taymiyyan Moment* (Cambridge: Cambridge University Press, 2012), 236-238. As Christian Lange points out, "the concept [*siyāsa sharʿīyya*] arguably did more in the long run to compromise *fiqh* than to rein in the arbitrariness of *siyāsa*," in "Capital Punishment," *EI3*.
9. It is implicit in Ibn Taymiyya's critique of juristic formalism. See also, for example, Mustapha Sheikh, *Ottoman Puritanism and its Discontents: Aḥmad al-Rūmī al-Āqḥiṣārī and the Qāḍīzādelis* (Oxford: Oxford University Press, 2016), 153-154.
10. On this point, see Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge: University of Cambridge Press, 2001), 472-477. See ʿUmar b. Muḥammad al-Sunāmī, *Niṣāb al-Iḥtisāb*, ed. M. al-`Asīrī (Mecca: Maktabat al-Ṭālib al-Jāmiʿī, 1986), 322-324.