Introduction: Law Properly So Called, from an Islamic Vantage Point

The expression “law properly so called” was coined by the famous Benthamite jurist John Austin to distinguish the concept of positive law from other types of norm. Positive law and codification, as part of nation-state building, are an extraordinary success story. The nineteenth and twentieth centuries saw them spread throughout the world. The concept of positive law developed in many places beyond those in which it first emerged, including countries and societies characterized as Muslim, into which it was transplanted in different ways and for different reasons. In those places it faced other existing normativities, including the šariʿa.

As a word, “law” is of course not universal. As such, it is used only as an English word or, in other languages, to refer to the legal tradition originating in England: the Common Law. The same holds true for other words, in other languages: “droit” in French, “Recht” in German and Dutch, “diritto” in Italian, “derecho” in Spanish, “qānūn” in Arabic, Sindhi, Turkish, and Pashtu, “falu¨” in Chinese, “sheria” in Swahili, “hukum” in Indonesian. Even as words, these terms have long and complicated histories: qānūn, for instance, comes from the Greek kanon, from where it passed into Arabic, then eventually into Turkish and different Asian and South Asian languages. Remarkably enough, these many languages do not share one common meaning, although there is something like a family resemblance. Words travel and, during the course of their journey, they are semantically transformed, that is, they come to mean something different from their original meaning.

What is true for words is even more so for concepts. Concepts are words expressing an abstract idea of something. Not only can the same word express many concepts but the same concept can be expressed by many words. This holds true for the concept of law, which is expressed by all the words referred to above, although not exclusively. This means that, under specific circumstances, within the specific sites where they are used, they express the same
abstract idea. This statement is indisputable when the sites, especially institutional, in which these words are used are, relatively speaking, the same: what is called “al-qānūn al-madani” in the modern Egyptian nation-state legal system is equivalent to what is called “le droit civil” in the Kingdom of Belgium. This certainty is reinforced by the translation process, which makes an expression in one specific language the equivalent of another expression in another language. The development of technical lexicons is precisely aimed at creating such functional equivalences.

Does this mean that the concept of law can be indiscriminately extended to other times and places in which the concept as understood today in most countries and societies – as expressing a system of norms centered on a nation-state, based on a constitution, formulated through codified legislation and judicial precedents, administered by lawmakers for its inception and judges for its implementation – simply did not exist? Our contention is that such an extension is at best useless, at worst misleading. Producing an intelligible jurisprudence of the concept of law means keeping it within the reasonable boundaries of what is today ordinarily understood by both lay and professional people when practicing “the” law. Remarkably enough, the same people do not confuse the many normative systems surrounding them and do not equate the legal order with, for example, moral or religious normativities. This does not mean that these many normativities do not influence each other. On the contrary, they actively do so, but in ways that enable them to keep their specific characteristics.

Our aim is to develop a sociohistorical jurisprudence of “law properly so called,” which involves a threefold analysis: conceptual, historical, and praxeological. Following the ground broken by analytical philosopher Ludwig Wittgenstein, conceptual analysis requires the exposition of the grammar through which concepts acquire their meaning and are meaningfully used. In a manner inspired by philosopher of science Ian Hacking and historian Reinhart Koselleck, historical analysis focuses on the description of the birth, development, and use of concepts. Drawing on the work of sociologist Harold Garfinkel, praxeological analysis describes the practical methods used by people to make sense of their environment, to produce their local order, and to act accordingly. The three approaches converge in their insistence on adopting an endogenous/indigenous perspective toward social life and its production.

THE CONCEPT OF LAW IS NOT UNIVERSAL

The best way to assess the universal character of the concept of law is to explore the meaning ascribed to words sharing a family resemblance (Wittgenstein,
The Concept of Law Is Not Universal

1963) with its contemporary conception, from its penumbral fringes (Hart, 1961), that is, from situations peripheral to the core of how it is understood. We can take the example of Montesquieu, whose Spirit of the Laws is unanimously considered a pioneering work of “modern law.” First, it should be noted that Montesquieu does not speak of law (le droit) but of laws (les lois). Considering his definition of the word “law,” this is not a mere lexical detail:

Laws, in their most general signification, are the necessary relations arising from the nature of things. In this sense all beings have their laws: the Deity His laws, the material world its laws, the intelligences superior to man their laws, the beasts their laws, man his laws. (Montesquieu, 1914: Book 1, chapter 1)

Onto these immutable natural laws are grafted positive laws, which are the laws that intelligent beings give themselves. However, these laws are inferred by natural relationships of justice: “We must therefore acknowledge relations of justice antecedent to the positive law by which they are established” (Montesquieu, 1914: Book 1, chapter 1). Laws, which proceed from natural justice, are thus meant to correct mankind’s natural propensity to ignorance, error, and passion:

But the intelligent world is far from being so well governed as the physical. For though the former has also its laws, which of their own nature are invariable, it does not conform to them so exactly as the physical world. . . .

Such a being might every instant forget his Creator; God has therefore reminded him of his duty by the laws of religion. Such a being is liable every moment to forget himself; philosophy has provided against this by the laws of morality. Formed to live in society, he might forget his fellow-creatures; legislators have therefore by political and civil laws confined him to his duty. (Montesquieu, 1914: Book 1, chapter 1)

In sum, human law in general is “human reason, inasmuch as it governs all the inhabitants of the earth,” while each nation’s political and civil laws are “the particular cases to which human reason is applied”:

They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government . . . They should be in relation to the climate of each country, . . . to the principal occupation of the natives, . . . to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established. . . . (Montesquieu, Book 1, chapter 3)
The “spirit of the laws” is, according to Montesquieu, the principle that relates laws to their natural, political, and social environment. As this environment is plural, laws are plural too. This is the transposition of the maxim *ubi societas ibi ius*; and of its religious equivalent *cuius regio eius religio*. However, these maxims are not Roman, as often argued, but modern; they already draw on modern conceptions of law, morality, and religion. When using the term “law” in the singular (droit), Montesquieu refers to generic legal domains: the law of nations, political law, civil law. In other words, law in the sense of droit (or Recht in German) already exists in Montesquieu’s vocabulary, but not as a reference to a state-administered legal system (Raz, 1980). The concept of law, as it is understood and analyzed by contemporary jurisprudence (e.g. Austin, 1954; Kelsen, 1945; Hart, 1961; Raz, 1980; Schauer, 1991), was still to be invented.

Our second illustration comes from early-nineteenth-century Egypt. Rifa’a al-Tahtawi is a famous intellectual who was sent with other Muslim scholars to accompany students to France. There, he learned French. Once back in Egypt, he launched a movement to translate European texts into Arabic and was appointed director of the School of Languages. In his book, translated into English under the title *An Imam in Paris*, he related his memories of this educational expedition. Among his comments and thoughts, many sections are devoted to the French legal system, starting with the constitutional framework. “What appears with great clarity is the author’s difficulty in describing a reality for which he does not dispose of an appropriate vocabulary; besides his sometimes approximate understanding” (Parolin, 2015: 6). As Gianluca Parolin nicely adds: “This text provides us with a veritable Rosetta stone of legal semiotics in Egypt” (Parolin, 2015: 6). Tahtawi constitutes the very first instance – or at least available example – of the deep transformation undergone by Islamic normativity between the beginning of the nineteenth century and the second half of the twentieth century, when the lexicon became fixed in its current form. Through this process, the fiqh, that is, the Islamic normative tradition, became more and more understood through the framework of positivist legal cognition. Moreover, it tended to shrink into isolated rules, disconnected from their original context of production, and severed from the flexible hermeneutic that accompanied it. Again, according to Parolin, “the prestigious language of the fiqh was eventually absorbed by positive law, which determines the referential semiotics” (Parolin, 2015: 3–4).

The choice of words used to translate French legal terminology was particularly significant, as it borrowed terms originating in the fiqh to partly or completely express new concepts. For instance, while the translation of the
idea of subjective rights (les droits) was not a major problem for Tahtawi, Arabic having a good corresponding term: haqq (pl. huquq), the idea of objective law (le droit) proved thornier. He opted – with some ambiguity – for that most Islamic word shari’a to designate French law in general. Accordingly, he also used a derivative of shari’a, tashri’, to express the notion of legislation. While the former solution did not succeed in the long run, Egyptian law being nowadays designated under the expression al-qānūn al-misrī – with the choice of the more secular though less objective qānūn to render the idea of the law of a nation – the latter took root and today means the laws passed by the legislative power, without the slightest religious connotation, to the point that it is necessary to add the predicate “Islamic” to speak of a piece of Islamic legislation (al-tashri’ al-islāmī).

CAPTAIN COOK AND THE NATIVES’ CATEGORIES: SEEKING THE INDIGENOUS/ENDOGENOUS

The two examples presented in the previous section are taken from the fringes of the standard concept of law. They constitute metaphorical extensions of a paradigmatic instance: the legal system of modern states understood as the union of duty-imposing and power-conferring rules (Hart, 1961). As a conceptual question, the definition of law is of course “stipulative.” There is no empirically valid definition of law, but there are concepts and definitions which are more heuristic than others. Moreover, it is possible to empirically observe and describe what people say and do when orienting to normative categories, shifting from one lexicon and grammar to another, and using old vocabulary to designate new concepts. In that respect, exploring the concept of law from its fringes makes it easier to see what makes it so specific, contingent, and context related.

Claiming the existence of a universal concept of law may seem virtuous, as it supports both universalist – natural law, human rights, international law – and atomist – legal pluralism, law as culture, living law – discourses. It would break us free from this “prison of the mind” constituted by “positive law”; it would vindicate the individual and its irreducible freedom; it would open the door to the Other’s way of thinking. However, our contention is that, on the contrary, this way of thinking produces effects opposite to those sought by its proponents. Law has no intrinsic virtue and its rules can be immoral without losing their legal character (pace Radbruch, 2015); law is neither just an all-encompassing disciplinary order (Foucault, 1975) nor a mere superstructure hiding power relationships (Bourdieu, 1986). In that respect, the apology of legal pluralism, understood as the coexistence of an indeterminate number of
equivalent normative orders has the appearance of a self-refuting prophecy, as it logically entails an atomistic pluralism negating the very principle of life in society, that is, the prevalence of the rule of all over the interest of everyone. It also means a kind of relativism confining indigenous people within a nativism that conceives of autochthonous law as being intrinsically virtuous. Actually, thinking of autochthonous norms in terms of law is equivalent to denying autochthonous societies the capacity to think for themselves, for example, outside the cognitive grid of law. The classical dispute between Obeyeskere and Sahlins (Hacking, 1999) provides us with a good example of the inverted ethnocentrism menacing the proponents of a universal rationality.

The controversy concerns the historical figure of Captain Cook and how autochthonous people represented him and incorporated his legacy. Gananath Obeyeskere (1992) contended that Captain Cook’s deification by Hawaiian people followed his death and was an answer to local contingencies, while Marshall Sahlins (1995) considered that, on the contrary, Hawaiians had deified him immediately upon his arrival. According to the former, the idea that indigenous people had taken Cook as a god was the academic continuation of a “white myth” regarding Hawaiians, which ignores the good sense of the locals who deified Cook only retrospectively and for intelligible, rational, pragmatic, and political reasons. In other words, Sahlins is accused of adopting an imperialist posture. According to the latter, however, it is much more interesting and fruitful to observe how social structures and, to an even greater extent, conceptual frameworks and practices change over time, following the encounter with, for example, a foreign people. This means, with respect to the story of Captain Cook, examining how a historical event, as designated by historians, was apprehended by the locals in terms of their established beliefs. It is therefore, according to Sahlins, Obeyeskere’s attitude that is imperialist, since it denies the autochthonous people “their own voice” and imposes a cognitive mechanism upon them inspired by rational choice theories.

This detour through the story of Captain Cook’s deification teaches us that, where the law is concerned, it does not necessarily do indigenous societies justice to impute to them categories specific to contemporary Western societies. One cannot speak of the “primitive mentality” or the “primitive soul,” as Lévy-Bruhl (2010) did, as if there was a specific way of thinking of societies not tainted by the West; one can only address ways of thinking about specific questions. Nor can one treat these ways of thinking as if they were amenable only to the canons of Western rationality; one must render them their proper operational modes, which, on the one hand, have their specificities and are laid against a situated and specific background, but, on the other hand, also evolve on contact with others, transform, and sometimes radically change.
This holds true with respect to the concepts of law, religion, and morality. These concepts are specific to contemporary times. They can be usefully mobilized to analyze the normativities of present-day societies. Extending their use to premodern societies or all kinds of normativities is at best useless and at worst misleading, as it deprives these societies and normativities of their own voices and deprives us of our capacity to understand them in their own terms. In other words, ethnocentrism lies in the use of the concept of law to describe any normative system or set of rules, that is, in the refusal to give autochthonous peoples their own voice and to examine their normative systems in their own, nonlegal, terms.

LAW PROPERLY SO CALLED, METAPHORICAL LAW, AND LAW BY ANALOGY

Our contention is that the concepts of law, religion, and morality should be understood from the vantage point of positivism, from which they originate, and not as universal categories which could be applied to any type of normativity. Considered as ordinary categories, they are particularly apt to describe the working of modern legal systems, while proving inapt when addressing other contexts and normative settings.

The distinction between law and morality may be considered one of the basic principles on which modern legal theory was built. For example, John Austin (1832) argued that positive law is distinguished from other normative systems in that it is founded on a command issued by a factually legitimate authority that is endowed with the power to sanction. Austin equally made a distinction between “law properly so called,” metaphorical laws (for example, the laws of nature), and laws by analogy (laws that proceed from an opinion generally shared by a human group). Under “laws properly so called,” however, one can find “the laws established by God for His human creatures” as well as laws made by men for other men. In both cases, there is a conjunction of the two criteria for the definition of a law: the existence of a command and a sanction. What distinguishes the different categories of “laws properly so called” is the third criterion: effective authority, which can only be satisfied through the intervention of a human agent. In other words, according to Austin, positive law consists of intentionality coupled with the effective force of execution (Jackson, 1996).

Although he challenged Austin’s theory of command, Herbert Hart (1961) sought to maintain a moderate positivist understanding of law. He therefore defined legal positivism as an expression of the thesis according to which it is
not necessarily true that rules of law reflect or satisfy certain moral requirements, although in reality they have often done so (Hart, 1961: 224). What is at stake, therefore, is the need to demonstrate that no necessary relationship existed between law and morality. Legal and moral obligations might indeed share certain characteristics, but they remain distinctive forms of social control (Hart, 1961: 232) due to the importance of obligation (no moral rule can be considered unimportant), the inaccessibility of moral rules to deliberate changes, the necessarily intentional character of moral errors, and the form of moral pressure that invites respect for the rules due to their importance and shared nature (Hart, 1961: 203–21). According to Hart, in order to be legally valid, a rule of law does not necessarily have to conform to moral standards, but it does have to conform to the formal criteria of a system of primary rules (i.e. duty-imposing rules) and secondary rules (i.e. power-conferring rules), even though some of these rules violate the specific morals of a society or impinge upon what we can consider authentic morals (Hart, 1961: 250).

This “positivization” of the conception of the law can be considered a global phenomenon through which the technique of positive law was acculturated to settings peripheral to the original core. This book is about how this claim can be documented in a specific context: historical and actual places dubbed Islamic. Egyptian legal doctrine asserts, for instance, that there is a distinction between law and morality. For example, Hassan Gemei (1997: 6) aligns himself with Austin’s theory of command with regard to the definition of law. Gemei sees law as a set of rules governing the behavior of individuals in society, which people must obey, lest they expose themselves to sanctions imposed by a competent authority. According to Gemei, legal rules are not the only ones aiming to regulate and stabilize relations among members of any given society. They act in concert with other rules, like those of courtesy, custom, tradition, and religion. As for moral rules, they are principles and teachings that the majority of a society’s members consider as constraining behavioral rules that aim to achieve elevated ideals (Gemei, 1997: 15). Moral rules share a number of characteristics with legal rules: they change according to time and place; they tend toward organizing society; they have a constraining nature associated with sanctions. However, they differ from legal rules in three domains. First, with regard to their field of application: “Whereas morality includes personal and social manners, law addresses the relationship between the person and the others from the perspective of the ostensible aspect of behavior without taking into consideration intentions that are not associated with physical action” (Gemei, 1997: 16). They also differ with regard to the type of sanction imposed: “Whereas the penalty for violating moral rules is a mere moral penalty ranging from remorse to denunciation and disdain, the penalty for violating legal rules is

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physical incarceration, imprisonment, hard labor, etc.” (Gemei, 1997: 17). They also differ in respect to their objectives: according to Gemei, while moral rules seek to attain perfection in man, legal rules seek to achieve stability and order within society (Gemei, 1997: 17). Finally, they appear in different forms: legal rules, Gemei asserts, generally appear in a clear and specific form, while moral rules are not so clear, because they are linked to internal feelings, which may vary from one person to another (Gemei, 1997: 17). As to religious rules, they have a close relation to legal rules, but their field of action is far wider and violating them is punished in the afterlife (Gemei, 1997: 18). Gemei insists that there is no difference between religious and legal rules and that the latter can “be recognized from the perspective of Islamic Shari’ah” (Gemei, 1997: 18), in the sense that Islam is a total faith that encompasses law. This means that the field of application of shari’ah is wider than that of law: Islamic shari’ah, he notes, is the source of legislation from which legal rules must be derived in Islamic states (Gemei, 1997: 27); “Islamic Shari’ah was ordained as a divine law to govern the conduct of the Islamic society, formulate the thought of the Moslems, and regulate the human relations. Revealed by Allah, Shari’ah guides the society to the highest ideals and seeks to achieve wisdom for which God has created man on earth” (Gemei, 1997: 28).

We do not contend that this modern distinction between law, religion, and morality should be taken as a universal truth. On the contrary, our contention is that this type of discourse regarding the relationships among law, religion, and morality is totally contingent. It is the direct heir of the process of legal positivization and of the building of law as an autonomous order. Studying the anthropology of law today therefore means studying positive law as a concept that has its own historical ontology and practical translation.

CONCEPTUAL ANALYSIS

“We should probably acknowledge the arbitrary element in language more than we do; for that would encourage us to invent new sounds for our new names, instead of taking an old sound and thus creating a new ambiguity” (Robinson, 1969: 158). This sounds very much like Wittgenstein’s prudential remark regarding the necessity of clearing the mist surrounding our conceptual usages. Concepts are abstractions of features characterizing something that can be expressed with different words and in different languages. Of course, what seems relatively easy when that which is referred to is a material object becomes more problematic when this object of reference is by definition a social construct. If one considers that the word “law” is
a concept, the question is thus to know what features are common to the many words referring to this abstraction.

The question “What is law?” per se is irrelevant. There are only words and expressions sharing family resemblances across languages, cultures, institutions, activities, and contexts. As a consequence, there is no universal definition of law that should be sought independent of its context of expression; one can only manage to describe the surface and deep grammars of the “language games” (Wittgenstein, 1963) surrounding words closely or loosely associated with what we mean by “law” in English (or “droit” in French, or “qa’un” in Arabic, etc.). However, when describing the grammar of such language games, we proceed with a paradigm from which to extend the analysis beyond its core of certainty. Our contention is that, although law is not an empirical but a conceptual reality, its core of certainty is contingent and not universal. The core of certainty of law is made of the empirical object of which positivist legal theories were the description. As nicely put by Simon Roberts (1998: 105): “Overall, my feeling is that it is inevitably problematic to attempt to fix a conception of law going beyond the robust self-definitions of state law.” In other words, the concept of law corresponds to what legal theorists designated as positive law, as distinct from natural or religious law, at the time of what one might call the “positivist turn.” Other instances can share some features with this core of certainty – this is what Hart calls penumbral cases, that is, instances having some resemblance with the paradigm – but this is only a resemblance and its relationship with the core is metaphorical. This is not to say that such theories are correct or complete, but that, despite their possible flaws, they constitute generalizations and abstractions from one specific and contingent object working as their paradigm.

Pace Montesquieu, law in the natural sciences does not belong to the same set as law in . . . law. One must therefore identify the language games within which the word is used in order to discern its criteria of intelligibility and the concept of which it is an expression. However, every language set always relates to a core of certainty, in respect of which it is contextual and perspectival: It is “relative to the purposes specific to those people and sensitive to circumstances from which it cannot be abstracted (without detaching it from what constitutes its identity)” (Hutchinson et al., 2008: 75–9). Accordingly, it is clear that not everything normative can be called legal, as it would run against the meaning constitutive of the core object of the concept of law – and this holds true if there are many concepts. Naming all forms of ordering “law” creates an analytical mist. Using a word which has some commonsense meaning to perform an analytical task that runs contrary to this meaning generates an ambiguity, especially when this alleged concept either does not