Contents

Acknowledgments  page xiv

Introduction: Law Properly So Called, from an Islamic Vantage Point  1

PART I  THE CONCEPT OF LAW  27
1 Law as a Concept  29
  1.1 Uses and Abuses of the Concept of Law  29
  1.2 The Concept of Law from Its Zone of Penumbra: The Case of Islamic Law  35
  1.3 A Conceptual Inquiry  43
  1.4 Conclusion: The Contingent Concept of Positivism  50

2 The Great Divide in Legal Discourse: Toward a Global Historical Ontology of the Concept of Positive Law  53
  2.1 A Historical Ontology of the Concept of Law  55
  2.2 The Positivism of the Science of Law: A Paradigmatic Revolution  62
  2.3 The Positivization of the Law: Global Positive Law and Its Local Variants  68
  2.4 For a Historical and Pragmatic Ontology of Law  73

3 Legal Praxeology: Into Perspective and into Practice  76
  3.1 Into Perspective: Some Seminal Studies  77
  3.2 Into Perspective: Ethnographic Re-specification  81
  3.3 Into Perspective: What Relationships with the Sciences of Law?  82
### Contents

3.4 Into Practice: Context, Legal Relevance, Procedural Correctness 86
3.5 Into Practice: The Documentary Method of Interpretation and the Normativity of Legal Cognition 92

**PART II HISTORICAL ONTOLOGIES**

4 Politics Made into Law: Determinism and Contingency in Moroccan Constitutionalism 99
   4.1 Long-Nineteenth-Century Constitutionalism: The Period of Reforms 101
   4.2 Short-Twentieth-Century Constitutionalism: The Period of Independence 109
   4.3 New Constitutionalism: Limited Pluralism and Accountability 115
   4.4 Islam and Constitutionalism 121
   4.5 Conclusion: Constitutionalism and the Positivization of Law 127

5 The Legal Reification of the Mind: The Development of Forensic Psychiatry in Egyptian Law and Justice 132
   5.1 Positivizing the World 134
   5.2 Modern Psychiatry 137
   5.3 Egyptian Cases 141
   5.4 Conclusion 151

6 From ‘Urf to Qānūn ‘Urfī: The Legal Positivization of Customs 154
   6.1 Custom and Customary Law: Clearing the Mist around Concepts 155
   6.2 Islamizing and Positivizing Customs 160
   6.3 Customary Law in Colonial Morocco 165
   6.4 From ‘Amal to Mudawwana: The Place of Custom in Moroccan Positive Law 167
   6.5 Conclusion 171

**PART III LEGAL PRAXEOLOGIES**

7 General and Particular: The Legal Rule and an Islamic Swimsuit in a Secular Context 177
   7.1 The General and the Particular as Legal Categories 178
## Contents

7.2 Praxeological Re-specification: Ordinary Reasoning, Legal Reasoning, and Categorization of the General and the Particular 181

7.3 Community-Based Particularism and National Community: Much Ado about a Bathing Costume 186

7.4 Generality and Particularity as Practical Accomplishments 189

7.5 Conclusion 192

8 Filling Gaps in Legislation: The Use of Fiqh in Contemporary Courts in Morocco, Egypt, and Indonesia 194

8.1 Institutional and Legal Transformations in Morocco, Egypt, and Indonesia 196

8.2 Statutes and Legislative Gaps in Family Law: Marriage Authentication 199

8.3 Marriage Authentication: How Do Judges Manage the Reference to Fiqh? 204

8.4 Conclusion: The Legal Positivization of Islamic Normativity 214

9 Playing by the Rules: The Search for Legal Grounds in Homosexuality Cases – Indonesia, Lebanon, Egypt, and Senegal 219

9.1 Criminal Law and the Repression of Homosexuality 221

9.2 Looking for Relevant Rules: Homosexuality at the Bar 227

9.3 Facts, Evidence, Rules, Procedures, and Interpretation: Legal Reasoning in Practice 236

9.4 How to Do Things with Rules: The Reference to Rules in the Life of the Law 249

Conclusion: A Praxeological Approach to Positive Law 253

Notes 263

Bibliography 277

Index 299