

**WWS 516c, Spring 2007**  
**Islamic and Middle Eastern Law**  
Thursdays 7-10 pm

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**Short description.** This course will offer a survey the ‘one thousand’ planes of Islamic and Middle Eastern law, both historical and contemporary. After getting familiar with the sources and the historical legacy, the course focuses on contemporary discussions in a number of fields: constitutions and constitutional review, transnational law, rule of law and judicial review in criminal and administrative cases, and various aspects of private law: contracts, torts, commercial and family law. Two special topics, on the Iraqi Constitution and on international criminal law in the Middle East, will also be discussed in the seminar.

**\* denotes required reading**

**Most of the required reading comes from Mallat, *Introduction to Middle Eastern Law*, to be published at Oxford UP, 2007. Students will be expected to have read the required texts at least before coming to class. The required reading will be available electronically on Blackboard, and as much of the optional reading as possible.**

**Assignments and Gradings**

**50 % participation in class, individual research**

**50 % final paper (15-25 pp)**

**Syllabus**

- I. Introduction, history
- II. Public law
- III. Private law
- IV. Conclusion

**I. Introduction, history**

**For the first week, the students should have read the following chapter:**

**\*Chibli Mallat, “Comparative law and the Islamic (Middle Eastern) legal culture”, in Mathias Reimann and Reinhard Zimmermann eds., *Oxford Handbook of Comparative Law*, forthcoming, Oxford, 2006, 609-639.**

## Week 1- Introduction

Scope of course, historic, geographical. What is Islamic/ME law ? Is it a regional law ? Is it a 'sacred' law ? In how far is Middle Eastern law Islamic, or vice-versa ? What about non-Islamic religious laws of the Middle East: Jewish, Christian, Zoroastrian... ? What about non-ME countries, Nigeria, Indonesia ? Literature available (linguistic obstacles), bibliographies (Western, Islamic-Oriental), controversies (Orientalism, 'occidentosis', to what extent has there been a 'golden thread' of western scholarship on Islamic law?), systems of education and transmission of knowledge.

Norman Calder, Farhat J. Ziadeh, Abdulaziz Sachedina, Ann Elizabeth Mayer, 'Law', *Oxford Encyclopedia of the Modern Islamic World*, Oxford, 1995  
Chibli Mallat, 'shari'a', *Oxford Companion to World Politics*, Oxford, 1993  
K. Zweigert and H. Kotz, 'Islamic Law', *An Introduction to Comparative Law*, Oxford, 3d ed. 1998, ch.22, 303-313.  
Norman Calder, 'shari'a', *Encyclopedia of Islam* 2nd edition  
Joseph Schacht, 'fikh', *Encyclopedia of Islam* 2nd edition  
Y.Linant de Bellefonds, 'kanun', *Encyclopedia of Islam* 2nd edition  
R. S. Humphreys, 'Islamic Law and Islamic Society', *Islamic History: A Framework for Inquiry*, I.B. Tauris, 1995, ch.9  
Joseph Schacht, *Introduction to Islamic Law*, Oxford, 1964  
Noel Coulson, *History of Islamic Law*, Edinburgh, 1964  
Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases & Materials*, Albany, 1975  
Hossein Modarressi Tabataba'i, *An Introduction to Shi'i Law: A Bibliographical Study*, Ithaca, 1984  
E. W. Said, *Orientalism*, London, 1978, 59-73.  
Mallat, *The Renewal of Islamic law*, Cambridge 1993.  
Mallat, "Islamic law research in the twentieth-century Middle East", *Asian Research Trends*, Tokyo, 8, 1998, 109-136;  
Mallat, "Islamic law: Reflections on the present state of western research", *al-Abhath*, American University of Beirut, 43, 1995, 3-24.

Indonesia as Islamic, non-ME, example:

Clifford Geertz, 'Local knowledge: fact and law in comparative perspective', in C. Geertz, *Local Knowledge*, NY 2<sup>nd</sup> ed. 2000, 167-233.

Major specialised journals in English: *Yearbook of Islamic and Middle Eastern Law*, *Islamic Law and Society*, *Arab Law Journal*.

Weeks 2, 3 - Historical dimensions

**\*IMEL, Chapter 2, The formation of Middle Eastern law**

Pre-Islamic law, the question of foreign influence. Sources of Islamic/ME law. Tracking continuity: the comparative perspective. Major controversies, major categories: Origins, Whence Islam? The Wansbrough school. The Middle Eastern legal koine and early Muslim law, Sources: Qur'an, hadiths (Sunni, Shi'i), 'legal' categories: *naskh* (abrogation), *ijma'* (consensus), *qiyas* (analogy), *istihsan* (preference), *maslaha* (need), *darura* (necessity), *'urf* (custom). *Ijtihad*, Sunni, Shi'i views on *ijtihad* and the Akhbari / Usuli dispute; 'The Closing of the Gate of *Ijtihad*'; schools of law: diachronic, synchronic approaches. Choosing the texts: the genres of Islamic/ME law. Choosing the periods: pre-Islamic, 'post'-Islamic, ages of *shari'a*, *fiqh*, *qanun*. Choosing the agents: prophet(s), judges, muftis, scholars-professors, historians-chroniclers, litigants, literary writers, lawyers. Revisiting Islamic/Middle Eastern law. Islamic law as 'post-modern law'.

#### Sources/Origins

J. Wansbrough, *Qur'anic Studies*, Oxford University Press, 1977, ch. 1

J. Wansbrough, *The Sectarian Milieu*, Oxford University Press, 1978, Introduction & ch. 4

Mallat, 'Readings of the Qur'an in London and Najaf: John Wansbrough and Muhammad Baqir al-Sadr', *Bulletin of the School of Oriental and African Studies*, 57, Part I, 1994  
[Holy Qur'an Resources on the Internet](#)

T. Mahmood, 'Law in the Qur'an, a Draft Code', *Islamic and Comparative Law Quarterly*, 7, 1987

#### Major controversies

Beginnings of Islamic law. Samuel Goitein, "The birth-hour of Muslim law", *The Muslim World*, 50, 1960, 23-29. Discussion of Qur'an v: 44 in a modern context, Mallat, *The Rrenewal*, 62-67. Norman Calder, *Studies in early Muslim jurisprudence*, Oxford 1993.

'Closing of the gate of *ijtihad*'. Classical presentation in Schacht, *Introduction*, 69-73, 209-210 and Coulson, *History*, 81-2. Modern views by Wael Hallaq, "Was the gate of *ijtihad* closed?", *International Journal of Middle East Studies*, 16, 1984, 3-41; see also Bernard Weiss, "Interpretation in Islamic law: the theory of *ijtihad*", *American Journal of Comparative Law*, 26, 1978, 199-212; Rudolph Peters, "*Idjtihad* and *taqlid* in 18th and 19th century Islam", *Die Welt des Islams*, 20, 1980, 131-45. See also 'Count' L. Ostorrog, *The Angora [Ankara] reform*, London 1927; S.Ali-Karamali and F. Dunne, "The *ijtihad* controversy", *Arab Law Quarterly*, 9, 1994, 238-57.

#### Genres: example of fatwas

Masud, Messick & Powers eds, *Islamic Legal Interpretation: Muftis and Their Fatwas*, Harvard University Press, 1996

#### 'New' genre: case law

Nippur trial, decision in J. N. Postgate, *Early Mesopotamia: society and economy at the dawn of history*, London 1992, 278.

Qur'anic/hadiths cases: succession, marriage (*mut'a*).

David Powers, 'A Court Case from Fourteenth- Century North Africa,' *Journal of the American Oriental Society*, 110:2, 1990, 229-254.  
Franjiyyeh case (1667), Tripoli 1666-67 Register, Mallat, 'Formation of ME Law'

## II. Public law

### Week 4 - Constitutional Law in the age of statutes.

#### **\*IMEL, Chapter 4. Constitutional law: the specificity of Middle Eastern constitutionalism**

Is there a special type of constitutionalism in the Middle East ? Islamic law origins of ME constitutionalism ? What institutions in classical Islam ? Is there an argument for economic sources of 'Oriental Despotism' ? Is there a transnational regional peculiarity: the Arab League, the Organisation of Islamic States ? Other types of 'legal' transnationalism. Shi'i *marja'iyah*; Sunni jihadism ? Emergence of federalism in the Middle East: is there room for a new type of 'communitarian federalism' ?

History, politics, ideology

Albert Hourani, *Arabic thought in the liberal age 1789-1939*, Cambridge 1983, original edition Oxford 1962,

Hamed Enayat, *Modern Islamic political thought*, Austin 1982.

Michael Hudson, *Arab politics- Search for legitimacy*, New Haven 1993, original 1977.

Maurice Flory and Robert Mantran eds., *Les régimes politiques arabes*, Paris 1991.

Malcolm Yapp, *The Near East since the First World War: a history to 1995*, London 1996,

Albert Hourani, *A history of the Arab peoples*, London, 1991

Ira Lapidus, *A history of Islamic societies*, Cambridge, 1988,

Bernard Lewis, *The Middle East: a brief history of the last 2000 years*, New York 1995

Entry 'Tanzimat', EI first edition.

Khaled Barazi, *The Majlis Mebusan (Meclis-i Mebusan): The Ottoman Parliament*, Phd London, 2002

Roy Mottahedeh, 'Consultation and the political process in the Islamic Middle East of the 9th, 10th, and in the 9–11th Centuries', in Mallat ed., *Islam and public law*, London 1993, 19-27

Mallat, 'Introduction: on Islam and democracy' in Mallat ed., *Islam and public law*, 1-15

Texts of constitutions, Yusif Quzma Khuri ed., *Al-dasatir fil-'alam al-'arabi 1839-1987* (constitutions in the Arab world 1839-1987), Beirut 1988, Eric Canal-Forgues ed., *Constitutions des Pays Arabes*, Beirut 2000; Albert Blaustein and Gilbert Flanz, *Constitutions of the countries of the world*, New York 1971-, looseleaf, updated

United States Commission on International Religious Freedom, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, released 8 March

2005, available on the commission's website,  
[http://www.uscirf.gov/countries/global/comparative\\_constitutions](http://www.uscirf.gov/countries/global/comparative_constitutions)

Iran: Mallat, *The Renewal*, Cambridge 1993, chs. 2-3

Saudi Arabia: Abdulaziz Al-Fahad, 'Ornamental constitutionalism: The Saudi Basic Law of governance', *The Yale Journal of International Law*, 2005, 30, 376-96.

Nathan Brown, *Rule of law in the Arab world: Courts in Egypt and the Gulf*, Cambridge 1997; *Constitutions in a nonconstitutional world*, New York 1991

Mallat, "Federalism in the Middle East and Europe", *Case Western Journal of International Law*, 35, 2003, 1-15.

### **Weeks 5, 6- Constitutional and judicial review- Protection of basic individual rights, pre- and post-9/11.**

**\*IMEL, chapter 5. Constitutional review: the spread of constitutional councils and courts**

**\*IMEL, chapter 6. Judicial review: criminal and administrative law**

Case law in ordinary courts. Case law in 'constitutional courts' and 'constitutional councils'

Global constitutionalism and the Mideast: terrorism and the GWAT (Global War on Terror).

Middle East courts

Israel: Aharon Barak, 'The Supreme Court 2001 term, Foreword: A judge on judging; the role of a supreme court in a democracy', *Harvard Law Review*, 116, 2002, 16-162

Yemen: Mallat, 'Three decisions of the Supreme Court of Yemen', *Islamic Law and Society* 1/1, 1994

Egypt: Awad el-Morr, 'The Supreme Constitutional Court of Egypt and the Protection of Human and Political Rights', in Mallat ed., *Islam and Public Law*, London, Graham & Trotman, 1993, ch.11

Iran: Mallat, *Renewal*, (on Council of Guardians case-law) chapters 3, 5.

Western response to 'ME/Islamic violence' (and vice-versa)

Much relevant material was put together in Paul Gewirtz ed., *Global constitutionalism: Nationhood, Same-sex marriage*, Yale law school Global Constitutionalism Seminar, 21-24 September 2005, Part iii.

Early literature in Peter Rowe ed., *The Gulf War 1990-91 in international and English law*, London 1993 (articles by Gordon Risius and Bernadette Walsh).

Cases

UK: *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*; *X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56 (House of Lords)

*Secretary of State for the Home Department (Respondent) v. Rehman*, [2001] UKHL 47 (House of Lords).

US: *Rasul v. Bush*; *Rumsfeld v. Padilla*; *Hamdi v. Rumsfeld*.

Comments: in the UK, Johan Steyn, 'Guantanamo Bay: the legal black hole', F.A. Mann lecture, 25 November 2003; in the US, Owen Fiss, 'The war against terrorism and the rule of law', H.L.A. Hart lecture in jurisprudence and moral philosophy, delivered at Oxford University, 10 May 2005.

On legal definition of terrorism, Mallat, 'The original sin: 'Terrorism' or 'crime against humanity'?', *Case Western Journal of International Law*, 34, 2002, 245-248. Mallat, "Appendix 1. The need for a paradigm shift in American thinking: Middle eastern responses to 'what we are fighting for'", in John Borneman ed., *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, Princeton Institute for International and Regional Studies, 2, 2004, 150-175.

### Special Topic I

#### Week 7- The Iraqi Constitution 2004-2005, case study

##### \*Mallat, Article by article commentary on the Iraqi 'final' Constitution (2005)

Transitional Administrative Law (2004) in Iraq discussed in Mallat, 'Constitutions for the 21st Century: Emerging patterns—the EU, Iraq, Afghanistan...', Herbert L. Bernstein Memorial Lecture in International and Comparative Law, Duke Law School, 28 September 2004. Text in Arabic and English of TAL.

Noah Feldman, *What we owe Iraq*, Princeton 2004

Tamara Chalabi, 'Blueprints not bombs', *Prospect*, July 28, 2005

Nathan Brown, comments on Iraqi constitutional process Carnegie Endowment website, [www.carnegieendowment.org](http://www.carnegieendowment.org)

### III. Private law

#### Week 8- Obligations, codification.

##### \*IMEL, Chapter 7. Introduction: from the age of codification to the age of case-law

##### \*IMEL, Chapter 8. Civil law: on style and substance

The Ottoman Majalla and its successors- Controversies over the Egyptian Civil Code. Contracts and torts before the courts. How did colonial powers both influence the development of legal systems and impose their own perspectives of Islamic law? How has the process of codification affected Islamic law? What types of Civil Codes have

been 'received'? Can the Ottoman Majalla and the Sanhuri Codes be seen as contrastive types? How has the structure of codes affected substance and style? What is the relevance of Islamic law in Egyptian and other codes? How is the law of contracts and torts law applied in modern courts ?

Norman Anderson, *Law Reform in the Muslim World*, London 1976, chapter 3.

Enid Hill, *Sanhuri and Islamic Law*, Cairo, 1987

Mallat 'Contract Law', *Oxford Encyclopedia of the Modern Islamic World*, Oxford University Press, 1995

Civil Codes in English

Majalla (Ottoman), Arts 1-100: General Principles; Arts 101-403: Book of Sales; Translation by Young, *Corps de Droit Ottoman*, vol.6; by Hooper, *the Civil Law of Palestine and Transjordan*, Jerusalem 1932

Walton trans. of the 1949 Egyptian ('Sanhuri') Code, *The Egyptian Law of Obligations* (1950)

Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases & Materials*, Albany, 1975, Ch. 8

Cases in English from United Arab Emirates, Richard Price and Essam Al Tamimi eds, *United Arab Emirates Court of Cassation judgments 1998 - 2003*, Leiden 2005. Earlier decisions by the same editors, *United Arab Emirates Court of Cassation judgments, 1989-1997*, The Hague 1998.

## **Week 9- Commercial law**

### **\*IMEL, Chapter 9. Commercial law: globalization and tradition**

The *riba* (interest) controversy. The life of commerce: search for Islamic law in the modern period. How relevant is classical law in the modern commercial world? What is the impact of the prohibition of *riba* in classical and contemporary legal systems? How have jurists dealt with it in the textbooks? in practice? What is the experience of modern legislators and courts? How is the Islamic banking system conceived in theory? What financial instruments have been devised in practice? How is the Islamic state organising the banking network, domestically and internationally? International conventions and their impact. Corporations: how does corporate lawyers work in the Gulf ? New fields: case study of Jordanian legislation and WTO.

S.D. Goitein, *A Mediterranean Society*, Vol.1, Economic Foundations., UC Press, 1967

A. Udovitch, *Partnership and Profit in Medieval Islam*, Princeton, 1970, ch. 6

Ibrahim Warde, *Islamic finance in the global economy*, Edinburgh 2000.

Cases, general, from the Commercial law IMEL chapter, section 1.

Egypt, Supreme Constitutional Court, 'decision on *riba*', *Arab Law Quarterly*, 1985

Pakistan, *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law*, PLD 1992 FSC 1,

also published as a separate book, *Federal Shariat Court judgment on interest (riba)*, Lahore 1992, including the decision (1-188) and Appendices (1-159).

## **Week 10- Family law**

### **\*IMEL, chapter 10. Family law: the search for gender equality**

How should one understand the classical structure of marriage, divorce, custody? the general principles of inheritance? the main differences of schools? the marriage of *mut'a*? What are the main trends in 20th Century Reform? How has the emergence of the feminist agenda in the Middle East affected legislation and courts?

Codes: Arab Draft Unified Code of Personal Status (1986), in English in J. Nasir, *The Islamic Law to Personal Status*, 2nd edn, Graham & Trotman, 1990  
Differences amongst schools: "Shi'ism and Sunnism in Iraq: revisiting the codes", in C. Mallat and J. Connors eds, *Islamic family law*, London 1990, 71-91.

Selection of modern and classical cases from Ziba Mir-Hosseini, *Marriage on Trial*, I.B. Tauris, 1993; S. Haeri, *Law of Desire*, Tauris, 1989; Judith Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*, Berkeley 1998; Lawrence Rosen, *The Justice of Islam: comparative perspectives on Islamic law and society*, Oxford 2000

## **Special Topic II**

### **Week 11- International Criminal law-ME related cases**

**\*John Borneman ed., *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, Princeton Institute for International and Regional Studies, 2, 2004, chapters by John Borneman, Chibli Mallat, Luc Walleyn, Laurie King-Irani, Dan Rabinowitz, Sally Falk Moore, Paul W. Kahn, Reed Brody; Also appendix 2. Belgian Court of Cassation Ruling, February 12, 2003.**

The Sabra Shatila case in Belgium, the Imam Musa Sadr disappearance case in Libya; the Saddam trial; the 'Melhis investigation' (assassination of former Lebanese PM Rafic Hariri), Darfur, UNSC report, referral to ICC ? Death penalty.

Sabra and Shatila case in Belgian courts (2001-2003).

"Special Dossier on the 'Sabra and Shatila' case in Belgium", *The Palestine Yearbook of International Law*, 12, 2002-2003, 183-280.

John Borneman ed., *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, Princeton Institute for International and Regional Studies, 2, 2004, chapters by John Borneman, Chibli Mallat, Luc Walleyn, Laurie King-Irani, Dan Rabinowitz, Sally Falk Moore, Paul W. Kahn, Reed Brody; Also appendix 2. Belgian Court of Cassation Ruling, February 12, 2003.

Saddam's trial, 2005 website at Case Western Law School

Assassination of Rafic Hariri- The UN ('Melhis') investigation. Security Council Resolutions 1559, 1595, The UN 'Fitzgerald' Report  
The case against Qaddafi, www.imamsadr.net

Death penalty: Mallat ed., *Dossier sur l'Abolition de la Peine de Mort*, Beirut, Université Saint-Joseph, 2003, 102 pp

## V. Conclusion

**Week 12-** Lawyering in the Middle East. On the nature of Islamic law

**\*IMEL, chapter 11. Epilogue: justice and lawyering in the Middle East**

**\*Mallat, 'On the philosophy of Islamic law', in Mallat and Tramontini eds., *From Boston to Beirut via Baghdad*, Festschrift John Donohue, Beirut, 2006.**

The scientific basis of 'Middle Eastern law', its heuristic value. Uses and misuses of Islamic law. Islamic law/Middle Eastern law and comparative law; and legal theory. The *usul* puzzle. A philosophy of Islamic/ME law ?

Donald M. Reid, *Lawyers and Politics in the Arab World, 1880-1960*, Atlanta 1981

Farhat J. Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt*, Palo Alto, 1968

Wajdi Mallat, *Mawaqef – Positions*, Beirut 2005, part 2

Mallat, entry 'wakil, attorney', EI 3d ed. 2005

David F. Forte, 'Islamic Law in American Courts', *Suffolk Transnational Law Journal*, 7, 1983, 1–33