Sharī'a

In recent years, Islamic law, or Sharī'a, has increasingly occupied center stage in the languages and practices of politics in the Muslim world as well as in the West. Popular narratives and quasi-scholarly accounts have distorted Sharī'a's principles and practices of the past, conflating them with distinctly modern, negative and highly politicized reincarnations. Wael Hallaq's magisterial overview sets the record straight by examining the doctrines and practices of the Sharī'a within the context of its history, and by showing how it functioned within pre-modern Islamic societies as a moral imperative. In so doing, Hallaq takes the reader on an epic journey, tracing the history of Islamic law from its beginnings in seventh-century Arabia through its development and transformation in the following centuries under the Ottomans, and across lands as diverse as India, Africa and South-East Asia, to the present. In a remarkably fluent narrative, the author unravels the complexities of his subject to reveal a love and deep knowledge of the law which will engage and challenge the reader.

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Sharīʿa

Theory, Practice, Transformations

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Preface and acknowledgments

Following the collapse of the Soviet Union, Islam has come to fill a pivotal conceptual role of an antithesis to the West, the self-described abode of liberal democracies and the rule of law. With the widespread rise of the Islamist movements during the last three or four decades, so-called Islamic law, or Sharīʿa, has increasingly occupied center stage in the languages and practices of politics – mainly in the Islamist camp itself, but also in the Western world. Popular narratives and a staggering array of quasi-scholarly accounts have distorted Sharīʿa beyond recognition, conflating its principles and practices in the past with its modern, highly politicized, reincarnations. This book is about distinctions; about what Sharīʿa – as doctrine and practice – represented in history; how it functioned within society and the moral community; how it coexisted with the body-politic; and how it was transformed and indeed appropriated as a tool of modernity, wielded above all by the nation-state.

Although this book has, in many ways, been in the making for over two decades, it was written between 2004 and 2008, during which period much in my thinking on the subject continued to change and develop. Over time, this thinking and the resultant book became increasingly grounded in frameworks of enquiry beyond the field of law in general and Islamic law in particular. And like many other books, its several chapters and sections were written under variable conditions. In part owing to these variations, and in part because of the inherently diverse nature of its subject-matter, the book deals with issues at various levels of description and analysis, and can therefore be read on more than one plane. Students beginning their exploration of the Sharīʿa and its history as well as readers peripherally interested in theoretical moorings may ignore the theoretical parts of the book, especially the second section of the Introduction and perhaps chapter 13 – a license that neither the specialist nor the advanced student might want to take.

I am fully aware that some readers might find the second section of the Introduction difficult to negotiate, even misconstruing its relevance to the work as a whole. This latter impulse should be resisted, since that

theoretical section is vital to positioning the work in the larger context of scholarship and the manner in which academic discourse has shaped modern politics and, importantly, our conceptions of law. This positioning is normative practice in such fields as anthropology, but has yet to be attempted in Islamic legal studies. Its value resides in depriving scholarly work of a claim to authoritative knowledge, in creating a dialectic between authorial intention and readership, and – more crucially – in positioning scholarship in a specific and highly localized context from which an attempt is made to understand the Other, the Subject. This positioning, which relativizes scholarly discourse, tends to reduce the risk of reconstituting the Other, which has thus far been a problematic enterprise in modern academia. This section, heavily Foucauldian, is therefore *not* about my ways of analyzing the subject-matter of Islamic law throughout the book (although I am no doubt indebted to Foucault, among many others, for certain analyses in Part III), but rather about the *book itself* and its place in the knowledge that has been generated in the field.

In the Introduction, I also point to the Bibliography at the end of this book as a register of the extensive debt I have incurred to others, be they legal historians, legal anthropologists, philosophers or thinkers from other disciplines. I learned a great deal from them even in those cases where I vehemently disagreed with much of what they had to say. Not to be excluded from this register of debt are my "*aṣḥāb*," the traditional Muslim jurists whose brilliant intellects and erudition continue to instruct in the exquisite art of methodical reasoning and systematic thinking. More personally, I have also incurred numerous debts to various individuals at McGill University, the most notable being Robert Wisnovsky, Laila Parsons, and Rula and Malek Abisaab – all of whom challenged my thinking and imagination on various issues of scholarship, and offered their friendship and care. With these colleagues, good dinners invariably turned into intellectual feasts.

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model of generosity, efficiency and perspicacity, to whom I have accumulated a large debt over the years. An anonymous reader of the Press made a host of constructive and thoughtful comments, from which the book benefited. To her/him, I am deeply grateful. As Dean of Arts at McGill, the magnanimous John Hall has created an academic environment from which I have reaped great benefit. His successor, Chris Manfredi, admirably continues his unwavering support to a scholarly tradition otherwise increasingly under attack in North American academia. To both of them, I am immensely grateful. Last but not least, I record my profound debt to Charry Karamanoukian for her patience, immense kindness and moral support, as well as, no less, for her habit of engaging me in the larger theoretical issues that underlie this book.

Introduction

1. The prisons of language and modernity

To write the history of Sharī'a is to represent the Other.[1] Yet, such a representation brings with it an insoluble problem that ensues from our distinctly modern conceptions and modern "legislation" of language.[2] As our language (in this case, obviously, twenty-first-century English) is the common repository of ever-changing modern conceptions, modern categories and, primarily, the nominal representation of the modern condition,[3] we stand nearly helpless before the wide expanse of what we take to be "Islamic law" and its history. Our language fails us in our endeavor to produce a representation of that history which not only spoke different languages (none of them English, not even in British India), but also articulated itself conceptually, socially, institutionally and culturally in manners and ways vastly different from those material and non-material cultures that produced modernity and its Western linguistic traditions.

Take for instance the most central concept underlying this study, the very term "law." Arguably, cultural and conceptual ambiguities related to this term (never to my knowledge identified, let alone problematized, by legal Orientalism) are responsible for a thorough and systematic

[1] If not the Double-Other who is the Other in history. It is taken for granted here that history, both Islamic and European, is the modern's Other, and since in the case of Islam this history is preceded by another Other – namely contemporary Islam – then it would arguably qualify for the status of Double-Other or, if you will, a Once-More-Otherized-Other.

[2] F. Nietzsche saw this "legislation" as constituting a fundamental quandary where a "word becomes a concept" having "to fit countless more or less similar cases ... which are never equal and thus altogether unequal" ("On Truth and Lies," 81, 83). Creating truths of its own, this legislation establishes concepts that become commonly accepted as "fixed, canonical, and binding," when in fact truths themselves "are metaphors" that represent "the duty to lie according to a fixed convention" (*ibid.*, 84). The quandary then resides in the originary fact that "*Every word is a prejudice.*" Nietzsche, *Human, All Too Human*, 323 (emphasis mine).

[3] On the modern condition, see Bauman, *Society under Siege*; Bauman, *Liquid Modernity*; Giddens, *Consequences of Modernity*; Toulmin, *Cosmopolis*.

misunderstanding of the most significant features of the so-called Islamic law. Subjected to critical scrutiny in Europe for over a century, Islamic law could only disappoint. It could never match up to any version of European law. It was seen as ineffective, inefficient, even incompetent. It mostly applied to the "private" sphere of personal status, having early on "divorced" itself from "state and society."[4] Its penal law was regarded as little more than burlesque; it "never had much practical importance" and was in fact downright "deficient."[5] Of course much of this was colonialist discourse and doctrine (though no less potent for all that) cumulatively but programmatically designed to decimate the Sharī'a and replace it with Western codes and institutions. But linguistics played a part here too, for if concepts are defined by language, then language is not only the framework that delimits concepts (no mean achievement) but also that which controls them. Prime evidence of this is the routine and widespread pronouncement, usually used to introduce Islamic law to the uninitiated, namely, that the Sharī'a does not distinguish between law and morality. The absence of distinction becomes a clear and undoubtable liability, for when we speak of any law, our paradigmatic and normative stance would be to expect that that law must measure up against what *we* consider to be "our" supreme model. The moral dimension of Islamic law, in language and in its conceptual derivation, is thus dismissed as one of the causes which rendered that law inefficient and paralyzed. The morality that is so enshrined in it introduces an ideal element distancing it from messy and disorderly social and political realities. Morality is therefore fated to be dismissed as rhetoric, nothing more. Its adverse effects in the law are cause for lament, but not usually for analysis, although when attempted in very recent studies,[6] analysis has yielded some enlightening results.

It turns out that Islamic law's presumed "failure" to distinguish between law and morality equipped it with efficient, communally based, socially embedded, bottom–top methods of control that rendered it remarkably efficient in commanding willing obedience and – as one consequence – less coercive than any imperial law Europe had known since the fall of the Roman Empire. Thus the very use of the word law is *a priori* problematic; to use it is to project, if not superimpose, on the legal culture of Islam notions saturated with the conceptual specificity of nation-state law, a punitive law that, when compared to Islam's jural forms, *lacks* (note

[4] These stereotypes remain tenacious even in recent scholarship. See, for example, the descriptions of Collins, "Islamization of Pakistani Law," 511–22.
[5] The words of one of the foremost scholars on the penal law of Islam. Heyd, *Studies*, 1.
[6] E.g., Peirce, *Morality Tales*; Würth, "Sana'a Court," 320–40.

the reversal)[7] the same determinant moral imperative. (It is in light of these reservations that the use of the expression "Islamic law" in this work must be understood.) In order for this expression to reflect what the Sharī'a stood for and meant, we would be required to effect so many additions, omissions and qualifications that would render the term itself largely, if not entirely, useless. (Yet, such conceptual alterations, if carried out systematically – as they ideally should – for every technical term, would ultimately paralyze expression and writing altogether; hence my earlier insistence that the problem is insoluble.)

Closely related to the issue of state coercion, and its homogenizing effects, is the attribution of failure in the applicability of "Islamic law" to the realia of social, political and other practice, a failure to assert the integrity of the law's order and its sovereign will. Yet this alleged failure represents in fact another modern misreading of history, i.e., of the hands-off approach adopted by the Sharī'a as a way of life and as a matter of course. The notorious and extraordinary diversity of *fiqh*, or legal doctrine, is ample attestation to this approach, although *juristic* diversity was only one of many other forms of pluralism, all of which, even in their extreme forms, were recognized by the so-called "law" of *fiqh*. These conceptual conflations lie at the root of Western misjudgment of the relationship between legal doctrine and real practice, a problem that continues to plague the field today.

Incriminated in this terminological and linguistic distortion is also a vast array of concepts that, charged with latent meanings, seem to be supremely ideological. Witness, for instance, the standard term describing the legal transmutations that were effected in the Muslim world through direct and indirect European domination. The term of choice is "reform,"[8] articulating various political and ideological positions that inherently assume the Sharī'a to be deficient and in need of correction and modernizing revision.[9] "Reform" thus insinuates a transition, on the one level, from the pre-modern to the modern, and on the other, from uncivilized to civilized. It is framed by a notion of universalist historicism in which the history of the Other merges into the major and

[7] Reversal, that is, of the widely used critical pronouncements to the effect that, for instance, "Islamic law does not have a general theory of contract," or "does not distinguish between law and morality," and that it is therefore altogether representative of a history of absences.

[8] Forcefully attesting to the confining effects of the prison of language is the fact that I was, despite all efforts, unable to avoid the use of the term in Part III of this book, where issues of "reform" are discussed in detail. This failure bespeaks not as much of inconsistency (at least not an unconscious one), but rather of the inherently systemic connectedness between perceived "historical facts" and their conceptualization in language.

[9] More on this term, see chapter 16, section 1, below.

defining currents of the European (read: universal) civilizational march. Universalism, a conceptual translation of what was once called "ontological imperialism,"[10] represents a tool of encompassing the Other into the Self through a range of modifications that always aim at altering the Other's essence.

Thus, the very term "reform" epistemologically signifies an unappealable verdict on an entire history and a legal culture standing in need of displacement, even eradication from both memory and the material world. If the study of "reform" is thus engulfed by these ideological associations, then the scholarly trajectory and agenda can safely be said to have been predetermined. All that needs to be done is to show how Western-inspired "reform" was parachuted in to rescue Sharī'a's subjects from the despotisms of the jural (if not also political) tyranny of the past and to escort them along the path of modernity and democracy. Closely intertwined with this project, and stemming from the same set of ideological assumptions, is another goal: that of saving "brown women from brown men."[11] If "reform" is viewed as the most recent stage in Sharī'a's history, then that history has been organically and structurally ordered in a narrative that had no choice but to produce a particular closure, a particular ending, so to speak, to a drama that is seen as having been predetermined from the very beginning of its own history. So much then for a dispassionate study of pre-modern Sharī'a, except as a relic of a dead past that has neither a true genealogy nor a spatiotemporal continuity. The epistemic ordering of historicity from the vantage point of "reform" constitutes an integral, though not the most important, part of a larger field of discourse which continues to deny, and thus fails to integrate, its epistemic and cultural relationship to colonialism.

From another perspective, the ideology of "reform" has also meshed with scholarly discourse, affecting it in fundamental ways, in both Western and Islamic academia. Justifications of "reform" – ranging from corruption and abuse to an endless variety of systemic maladies – are reenacted as historiographical premises and as historical facts.[12] The fundamental ideological assumptions of the reforms, suffused by the political need to centralize, bureaucratize and homogenize (all of which are harnessed in the interest of building and strengthening a modern, controlling state) become paradigmatic scholarly truths. For instance, the logic of modern state taxation

[10] The expression is that of Emmanuel Levinas. See Young, *White Mythologies*, 44–45.

[11] For a theoretical context, see Spivak, "Can the Subaltern Speak?" esp. 91–104. Adverse effects of this project are discussed in chapter 16, below.

[12] Representative of this discourse is Tāriq al-Bishrī (*al-Wad' al-Qānūnī*, 6–7, 78–80) who echoes such notions as those discussed in chapter 17, below.

becomes an unquestionable, nay axiomatic, truth of polity, whereas decentralized salarization – a practice thousands of years old – now translates into "corruption," "abuse," "inefficiency" and "disorder." In all of this, *modern* scholarship proceeds with extraordinary innocence, unaware of the culpable dependency of its project on the ideology of the state.[13]

No less incriminated in the "legislation of language" is the perduring adjective "religious," which seems not only inseparable from the epithet "Islamic Law" but also apodictically and semantically present in its very linguistic structure. "Islamic law" for long did not signify a geography, a living sociology or a materially engaged culture but a religion, a religious culture, a religious law, a religious civilization, or an irrationality (hence the presumed "irrational nature" of this law).[14] By the rules of linguistic entailment, therefore, the "religious" functioned in opposition to such concepts as "rationalism" and, more starkly, "secularism." In other words, the very utterance of the word "religious" spoke of the absence of the secular and the antonymic rational. With this essentialist, yet language-driven, conception of "Islamic law," the emphasis continued to be more on the religious, irrational and un-secular "nature" of the discipline, and less on how it functioned in social/economic/political sites, and what its "religiosity" meant practically to the actors involved in its production, application and reception.

Furthermore, repugnance toward religion, especially when seen to be intertwined with law, undercuts a proper apprehension of the role of morality as a jural form, to name only one effect. Such a predetermined stand *vis-à-vis* religion and its morality renders inexplicable what is otherwise obvious. The cultural logic of capitalism tends to chip away at the centrality of the moral in the pre-modern universe. Historical evidence must thus be fitted to measure what makes sense to us, not what made sense to a "non-rational" pre-capitalist, low-level material culture. For an entrenched repugnance to the religious – at least in this case to the "Islamic" in Muslim societies – amounts, in legal terms, to a foreclosure of the force of the moral within the realm of the jural. Theistic teleology, eschatology, socially grounded moral gain, status, and much else of a similar type, are all reduced in importance, if not totally set aside, in favor of other explanations that "fit better" within our preferred, but distinctly modern, counter-moral systems of value. History is brought to

[13] It is disappointing, but hardly surprising, that this innocence continues to infect scholarship up to this day. See, for one example among countless others, the otherwise commendable work of J. Akiba, especially "From Kadı to Naib," 44–46, and *passim*. Further on this problem, see Bourdieu, "Rethinking the State," 53 ff.

[14] See, e.g., Schacht, *Introduction*, 202–04.

us, according to our terms, when in theory no one denies that it is our (historiographical) set of terms that should be subordinated to the imperatives of historical writing.

2. On being self-conscious

"Knowledge," Foucault wrote,

> must struggle against a world without order, without connectedness, without form, without beauty, without wisdom, without harmony, and without law. That is the world that knowledge deals with. There is nothing in knowledge that enables it, by any right whatever, to know this world. It is not natural for knowledge to be known. Thus, between the instincts and knowledge, one finds not a continuity but, rather, a relation of struggle, domination, servitude, settlement. In the same way, there can be no relation of natural continuity between knowledge and the things that knowledge must know. There can only be a relation of violence, domination, power, and force, a relation of violation. Knowledge can only be a violation of the things to be known, and not a perception, a recognition, an identification of or with those things.
>
> It is for that reason that in Nietzsche we find the constantly recurring idea that knowledge ... simplifies, passes over differences, lumps things together, without any justification in regard to truth.[15]

The most central and determinative fact about the academic field within which this book situates itself is that it was born – like many other fields dominating today's academia – out of the violent, yet powerfully homogenizing ventures of nineteenth-century Europe. It was born within, and out of, a global project of domination whose web-like matrix of power structures would generate the unprecedented analytical prognoses of Friedrich Nietzsche and Michel Foucault. The passage quoted above, however insightful, merely alludes to the epistemic structures of political, economic and cultural power within which "Islamic law" as a field of enquiry was conceived, raised and nurtured. Stated contrapuntally, there would have been no such construction as "Islamic legal history" – and, as a consequence, no such book as the one offered here – outside of, and external to, the discursive parameters of nineteenth-century Europe. Out of "a world without order, without connectedness" and "without form," Europe invented the knowledge that is Islamic law.

The discourses of power that shaped this invented field never presented themselves as a uniform body, but were considerably varied and often internally oppositional. These discourses argued for particular, at times unique, colonialist interests, and simultaneously conceptualized Islamic

[15] Foucault, "Truth and Juridical Forms," 9, 14.

cultures and societies in dramatically different ways. They produced histories of science and geographies, and as many approaches to the study of the Muslim world as the humanities and the social sciences could muster. But these discourses of power, despite their variegated orientations, were at once eminently unidirectional and launched on a trajectory that vigorously labored in the service of a group of mutually integrated and coherent goals. It was precisely these goals that predetermined their linear trajectory.

This is not to say, however, that power's discourses – even when they emanate from a common source and share a single teleology – are inherently, intrinsically or essentially linear, for they often (if not consistently) take into account and embrace those discourses that are produced, *inter alia*, by power's own subjects, the very site of its unfolding effects as well as its temporal and cerebral manifestations. To this extent, Foucault was right when he argued that "[w]e must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy."[16] Such allowances may be neither ignored nor underrated because the actor's will-to-power – whether it unfolds in primeval or systemic and structured ways – is inherently entangled with its subject's negation of both the processes and the effects of that power. The subject not only harnesses these processes and mechanisms to resist that power, but also – and equally, by force of entailment – militates to reverse these processes. It is in the nature of power, therefore, to be not only self-contradictory but, due to this inherent self-contradiction, productive of internally opposing and resisting elements. Power is inherently productive of discourses that both expose and obscure its schemes, as well as discourses that construct and augment – and simultaneously undermine – its own ambitions. It is precisely because of this internal contradiction that power has in every way and consistently been engaged in eternal processes of generation and corruption.

Foucault had thus come to revise an earlier position on this theme[17] and posit, as we see here, the non-linearity of power discourses. It is argued that in his *Orientalism*, Edward Said failed to take note of this non-linearity in Foucault's thought and thus commensurately neglected to account for the subject's agency in the formation of Occidental knowledge about the

[16] Foucault, *History of Sexuality*, 101. For a useful commentary on theorizing resistance, see Hirsch, "Khadi's Courts," 208–11.

[17] Young, "Foucault on Race and Colonialism," 57–58.

Orient.[18] This is certainly possible. But it is also equally possible, and perhaps more probable, that Said was interested not so much in dissecting the mechanisms of colonial power and its oppositional discourses at home and in the colonies, as in analyzing the *effects* of power, not only as the latter stem from a particular body of knowledge but also as they generate and foster a particular set of representations which in turn *constitute* their subjects. These effects – most especially in the colonial context – do not seem to have concerned Foucault.[19]

Yet, when speaking of the programmatic modalities of power, especially as exercised in the colonial context, it is the effects that count most, for they demonstrate – though *ex post facto* – the results of the interplay between actor and subject. These results, the final accounting, adjudge at the end of the day who influences whom (and whose *will* dominates another's). In as much as power is "a field of force relations," and in as much as it inherently encompasses opposing discourses in this field, there must be, in the very name of power, a dominating discourse or set of discourses that not only outdo competing and oppositional discourses but, more importantly, outlive them; hence the centrality of power-effects as a discrete analytical unit. For if power were not productive of a particular hegemony – that is, a hegemony of particular relations – it could no longer be called power; thus, power must continue to embody subversive oppositional discourses that operate against it, both as process and as effect. While the limits of subversive discourse may place restrictions on the dominant relations of power, these relations must ultimately win the day. It bears repeating that this asymmetry must ineluctably obtain in order for us to identify power as power.

The theoretical construct of this asymmetry appears less to have been ignored than to have been tacitly assumed by Said in his *Orientalism*. On the other hand, the "unscrupulously Eurocentric"[20] work of Foucault may explain his emphasis on the process of power relations rather than on their effect, for his justifiable preoccupation with the European complexity of what he called "discursive formations" and "epistemes"[21] diverted his attention from the quite different logic of power relations in

[18] *Ibid.* See also Slemon, "Scramble for Post-colonialism," 50–52.

[19] For Foucault's disinterest in power as "a general system of domination exerted by one group over another," see his *History of Sexuality*, 92, as well as 93–94, 97.

[20] Young, "Foucault on Race and Colonialism," 57 and 61 where Young observes that Foucault's "apparent endorsement of an ethnology which would analyse not the forms of knowledge developed by other societies for themselves but how they conformed to a general theoretical model of how societies function, developed out of western structural linguistics, seems today startlingly ethnocentric."

[21] Foucault, *Les mots*, 14–15 and *passim*; Foucault, *Archaeology of Knowledge*, 34–78.

the colonialist project. This was a logic of asymmetry that refused entry to the oppositional and resistant relations that existed in the wholly internal European scene.

I do not wish to engage in a total negation of such relations in the laboratory of colonialism, but I would argue that this laboratory poses a different set of conditions that cannot successfully be subjected to Foucault's theoretical and critical apparatus. For one,[22] Foucault's field of power relations and discourses did not have to account for sudden and colossal ruptures in epistemologies, cultures, institutions, psychologies, and theologies. His field was applicable to a span of about four centuries that witnessed the *systemic* evolution (however rapid) of surveillance, discipline and punishment, but less so the all-too-quick downfall of the systems from which these new forms emerged. In other words, in the systemic structures he called "episteme," there were – *comparatively speaking* – no genuinely foreign or violently crude impositions, and no qualitatively different and culturally and systemically alien will-to-power.[23] In fact, and again with the benefit of comparative perspective, these new European forms – inextricably connected with the rise of nation-states in particular and modernity in general – *gradually and internally metamorphosed* into their present incarnations. Europe, in other words, emerged out of itself. It is precisely this background that allows, nay drives, Foucault to declare that these discourses of power, in their oppositional trajectories, are inseparable, for discourses "are tactical elements or blocks operating in a field of force relations; there can exist different and even contradictory discourses within the same strategy; they can, on the contrary, circulate without changing their form from one strategy to another, opposing strategy."[24] In the colonialist context, hegemonic strategies cannot turn into their opposite, for if they did, there would emerge the absurdity, if not aporia, of the perfect interchangeability of actor and subject.

Thus, for power to deserve the name it bears, its processes and strategies – in their confluence and opposition – must yield particular effects that both directly and obliquely flow from these processes and strategies. That power can neither exercise total control, nor precisely predict its own effects, is evident both in Foucault's Europe and in the colonial laboratory. But this is not to say, as Foucault does, that the same strategy, as

[22] See n. 19, above.

[23] This colonial "sovereignty" over epistemic and other transformations is powerfully documented and analyzed in Massad, *Colonial Effects*. See also Chatterjee, *Nation and its Fragments*; Merry, "Legal Pluralism," 872–74.

[24] Foucault, *History of Sexuality*, 101–02.

opposed to the effect, can itself turn into an "opposing strategy." For to argue this position amounts not merely to vitiating the substance of power, but to depriving it fully of its *own* agency, let alone potency.

With these caveats in mind as to the lack of predictability in the field of power-effects, and duly acknowledging the non-linearity of power discourses, it is still possible to argue, as this book does, that one of the strategies of colonialist power was the production, in the midst of undeniable diversity, of a considerably linear body of knowledge that invented two interrelated realities: one, thus far, with predictable effects and the other lacking (then as now) any form of predictability. The former consisted of a scholarly narrative of Islamic legal history, a narrative that brought into existence the field of "Islamic legal studies," if not the very constructed entity we now call "Islamic law." For it can easily be maintained that, at the very least, there existed no sociology of knowledge about Islamic law as the law of the Other before the rise of the colonialist project. It remains true, however, that the narrative was a slowly emerging phenomenon, wavering between opposing strategies within power discourses until the end of the eighteenth century, and was not to be streamlined into a more linear strategy until the second half of the nineteenth century, the zenith of the development of the colonialist laboratory. By that time, the foundations of the power discourses on "Islamic legal culture" were established, thereby ushering in the invention of the new tradition we have come to call "Islamic legal studies."

This tradition, to be sure, was not constructed for its own sake, nor was it merely an appurtenance of intellectual curiosity in European academe; for it would be naive of us to think that the fields nowadays subsumed under the humanities and the social sciences were created in isolation from the colonialist project, itself subordinate to the larger project of modernity.[25] Thus, due to sheer relevance – quite evident when compared, say, to psychoanalysis – the tradition came to serve (in the most systemic, though not always systematic, of ways) the imperatives of the colonialist project. The invented narrative of "Islamic legal studies" aided not only in fashioning colonialist policies that transformed the native legal cultures, but also in shaping the culture of empire itself.[26] Yet this culture was not the site where this invented reality proved most unpredictable or where it stood beyond the control of the processes and strategies of power

[25] See N. Dirks' introduction to Cohn's *Colonialism and its Forms of Knowledge*. For a useful critique of knowledge generated in the social sciences, see Wallerstein, *Uncertainties of Knowledge*.

[26] On this theme, see Said, *Culture and Imperialism*; Cohn, *Colonialism and its Forms of Knowledge*; and Dirks, *Scandal*.

itself, although it was no doubt a preeminent instance of this unpredictability. The latter, instead, lay in the effects of power-processes as they unfolded in the native legal cultures of the colonies. And it is here, in the formation and unfolding of these two invented realities, that the concerns of this book lie.

Thus, if every discourse must partake in the field of force relations (here taken for granted), then every discourse inevitably enters into a relationship with the processes of power. Of necessity, this entrance, the ticket to participation, is granted equally to every discourse, whether or not it is subversive and oppositional to the very structures and processes of power. This inclusivism is an essential attribute of power, for power by virtue of its constitution must absorb any oppositional discourse in order to maintain and, when need be, transform itself into new forms. But it does not follow that the field of force relations admits all discourses as equally effectual or equally legitimate. Within that field, total legitimization is the prerogative of those discourses that accommodate the dominant practices of power and validate these practices as a system of knowledge. Oppositional discourses, on the other hand, are often absorbed through silencing, a process that, by allowing these discourses an entry into the field of force relations, guarantees managing them into marginalization instead of permitting their exclusion to develop into an independent field of force relations. Unless, that is, these oppositional discourses gather so powerful a momentum as to displace the otherwise paradigmatic discourses, in which case we will be witness to no less than a Kuhnian revolution that operates on the level of power-systems.[27]

An all too obvious consequence of the foregoing is the contention that there exists no discourse that locates itself in complete isolation from power-systems, entirely outside their structures and interests. Every discourse, to be meaningful and relevant, must take a stance in the field of force relations, a stance that ranges from the ontologically and epistemically affirmative to the contradictory and invalidating. If this much is accepted, then it cannot be claimed that only colonialist and Orientalist discourses are allowed entry into the field of force relations, exclusive of the discourses that oppose them. Yet, if we admit the proposition that every discourse about the "Orient" carves for itself a place in the field of discursive force relations, and that Euro-American Orientalism does not hold a monopoly over that field, then what is the meaning of power in relation to oppositional, even invalidating, discourses? Conversely stated, how would the latter hold up against the hegemonic force relations and the

[27] Kuhn, *Structure of Scientific Revolutions*.

systemic jury that reserve for themselves the right of dismissal or acceptance, legitimation or delegitimation?

If both the jury and advocates – namely, the oppositional discourses competing for a favorable verdict – are necessarily bounded by the system in which they operate, then it would apodictically follow that they themselves are subject to the laws dictating how the power-system runs. That is to say, oppositional discourses within the field of force relations, including those that provide "a starting point for" a subversive and "opposing strategy," stand entirely subordinated to the laws and rules of power-systems. The Kuhnian and post-Kuhnian commentary on shifting paradigms may provide, at least in part, several insights into the workings of subversive discourses, but the point which must be unequivocally stated is that whatever conflictual relations oppositional discourses may develop in their bids to control the arenas of power (power being the only site of their existence) they can only pretend to the ownership of an otherwise non-existent truth.

It goes without saying then that there exists no necessary relation between truth and the systemic rules of power, for power posits its own parameters of truth. The subjecting of these rules to subversive discourses, in which the latter invoke and appropriate the former, constitutes the first act of resistance. Subversive discourses are at their most effective when they feed on the decaying organs of the entrenched power-discourses, those which partook in the very definition of the systemic rules. The post-modern post-colonial critique is such a predator, born out of modernity's deliquescence, out of its weaknesses and the decline of its absolutist claims. It has not been (and is not likely to be) able to free itself of the system or its rules,[28] but, as a subversive strategy, it has effected a metamorphosis in the truth of power. It has provided and (more accurately) is in the process of providing a glimpse into a *transmuted* truth, but a truth of power nonetheless. It is only within these constrictive and inescapable parameters that one can write, and it is squarely within these parameters that any discourse can emerge.

But this is not to say that the transmutation, however modest, is anything less than an improvement, not in the sense of modernity's myth of progress, but in the amoral sense that such a transmutation opens, ever so slightly wider, the door to the articulation of subversive strategies. Some might call this a new knowledge, a state-of-the-art, an epistemic and a scientific progress, and in this they might be right. Some others might call it no more than a pawn in the complex game of power, and in this they might

[28] Spivak, "Can the Subaltern Speak?" 87 ff.

be equally correct. The present book constitutes, in a deliberate and conscious way, a protracted footnote on the dialectic between these two visions.

3. The scope and organization of this book

It is obvious that the present book navigates a vast expanse of territory, both geographically and historically. It sets out from seventh-century Arabia, with all the attendant – though only presumed – backgrounds that find their beginnings in as early an epoch (and legal culture) as ancient Babylonia. For it is one of the central assumptions of this book that Islamic law is a creature of the legal culture of the Near East, especially those forms of it that the Arabs of the south and the north lived and experienced between the fifth and seventh centuries AD. The book ends its narrative with the present, a temporally wide expanse that matches its vast geographical coverage. While a systematic, spatiotemporal account is impossible to achieve, a deliberate effort has been made to break the conventional mold that assigns to the Arab Middle East a privileged status. Although this approach entails maintaining a proper coverage of the Middle East while permitting other areas to be more or less represented, no claim can be made here to the effect that all important Islamic legal cultures in time and place have been accounted for (Sub-Saharan Africa, for instance, readily comes to mind). Such a comprehensive project – where Islamic law past and present will be discussed – presupposes the existence of decades of research and scholarly writing that, in this field, have barely begun.

Nonetheless, a non-exhaustive but still wide spatiotemporal coverage has its own epistemic and methodological problems, especially if attempted within the realistic constraints of page economy (scholarly publication being increasingly subject to the harsh rules of profit and loss). For instance, how, when we posit a theory of universals that insists on the uniqueness of all individuals in the world,[29] do we justify generalizing about any feature of Islamic law? How can we, for example, trust any proposition proclaiming that the law college, the *madrasa*, conducted its affairs in a particular fashion when legal education differed so much between, say, East Java and Egypt? Or, how can any portrayal of the workings of the Islamic law court be trustworthy when courts in one and the same region have been shown to practice and apply law differently? How can we offer any account of the courts, law colleges and every other subject within our purview, without making allowances for spatiotemporal variations?

[29] For a frame of reference, see Aaron, *Theory of Universals*.

It must be asserted once and for all that definitive, water-tight solutions or answers to these perennial questions – about Islamic law or any subject – entail either one of two responses: silence (which *ipso facto* contradicts the very act of scholarly writing, clearly not an option), or the production of strictly micro-accounts that can hardly traverse their atomic realities (for if they were to claim transcendence into the general, they would fall into the same epistemic predicament that forced them into their micro-existence in the first place). The passage from the micro to the macro, furthermore, has been a common practice, often entangled in the same epistemic and historiographical dilemmas plaguing grand narratives. So how can one write any macro-history – without which, arguably, scholarship would remain both atomized and fragmentary – in a manner that avoids the pitfalls associated with generalization?

One possible answer relevant to our context is that such pitfalls, strictly speaking, are inevitable, that they come with the territory, arising whenever a proposition purports to describe more than a single, atomic particular. At a certain level, therefore, this epistemic predicament is also the lot of micro-history, since even here the historian routinely deals with a plurality of particulars, all of which are uniquely individual, but some of which will be, perforce, discursively marginalized in relation to those which stand at the center of the historian's gaze. In principle, this deprivileging of data represents the same predicament we are associating with macro-history. Micro-history's "thick description," it is readily admitted, "succeeds in using microscopic analysis of the most minute events as a means of arriving at the most far-reaching conclusions."[30] It might be said that the intended purpose of this history is to reveal the workings of the larger structures. Yet such leaps from the seemingly insignificant particulars, the subject-matter of the micro-historian, to the general has, in strictly epistemological terms, escaped historiographical scrutiny, whereas macro-history has been an obvious and easy target. And this epistemological bias is hardly the result of qualitative differences in the historiographical practices of the two types of history-writing, despite the obvious external differences in their approaches. It is the undisguised plurality in the heart of macro-history that exposes the latter to criticism. To speak about Cairo, Damascus, Shiraz and Fez in one stroke seems far more objectionable than speaking of a staggering multiplicity of professions, institutions, networks, classes, practices, and a broad variety of cultural and other features of a Cairo, a Damascus or a Kayseri. What makes such micro-accounts more palatable is not particularly a more

[30] Levi, "On Microhistory," 102.

convincing rationale or epistemic, "scientific" justification, but a perception of the historian's successful management of data, a perception (if not the illusion) that the constitutive elements of the subject studied are manageable and therefore can be accounted for, calculated, checked and, ultimately, controlled. That control is the micro-historian's assurance that her conclusions result directly from the evidence she has used and adduced. But what, in the end, makes this so different from the writing of macro-histories?

An answer to this question provides the justification for the scope of this volume. A generalization purporting to describe a class is obviously falsifiable, or deemed problematic, if one or more instances presumed to belong to members of the class turn out to be at variance with, or to contradict, that generalization. An accurate historical narrative is therefore one which can account for exceptions and show that, in all its propositions, it is anchored in a set of valid lines of reasoning that derive from the evidence deployed. Without engaging in Foucault's "evidence as illustration,"[31] I think it is useful to borrow his notion of "episteme," a notion referring to systems of knowledge and practice that share in common a particular structure of concepts which qualitatively distinguish them from other systems of the same species. Foucault's interest lay of course in the distinction between modern systems and their respective predecessors (or corresponding antecedents), as well as in the "epistemic breaks" that occurred in these systems.[32] But the concept of episteme can be usefully applied to map out the system of knowledge and practice that is Islamic law. The local and regional differences of this practice are infinitely varied, having been influenced by a multiplicity of cultural, economic, customary, geographical, historical and myriad other factors, from Morocco to the Indonesian Archipelago. Given this endless variety, how can one, without being reductive, speak of Islamic law?

It is crucial for a proper understanding of this book to distinguish between the systemic components of the Sharīʿa – those referred to as an episteme – and other contingent features that vary from one place or time to another. In other words, until the dawn of modernity, there always existed within the Sharīʿa structures of authority and discursive and cultural practices that did not change over time and space – that is, until they met their structural death[33] in the nineteenth and early twentieth

[31] Gutting, "Foucault and the History of Madness," 47–67.

[32] Foucault, *Archaeology of Knowledge*, 34–78; Flynn, "Foucault's Mapping," 31–33.

[33] "Structural death" refers to the collapse of the organic features that made the Sharīʿa system, in the first place possible, and, in the second, reproductive. The veneer of the Sharīʿa that survives today in the civil codes of Sunnite Muslim countries and in the

centuries. For instance, the function and modalities of legal education, despite the shades of difference in educational practices across time and space, were constants, defining in part what it is to be a Sharī'a-trained scholar or Sharī'a-trained student. The same applies to the functions of the jurisconsult (*muftī*), the judge (*qāḍī*), the author-jurist (*muṣannif*), the law professor (*shaykh*), the notary (*shurūṭī*), the court scribe (*kātib*), and several other "functionaries" who were constants insofar as their *structural* performances were concerned.[34] For these performances were not dictated only by the forces driving the system, by sheer necessity or by a logic of forward motion. Indeed, they were also dictated by a deeply rooted ethic, the realization of which constituted an integral part of the fulfillment of these "functions" and the highest achievement in practicing, performing and living the Sharī'a.

This is not to say that, like education, court practices did not differ from one place or time to another. They did, at times considerably, depending upon the society in which the courts operated, and upon the polity that ruled. In fact, it is eminently arguable that court practices differed from court to court within the same city or town, with the changing of *qāḍī*s in the same court, or even the changing of the scribe. As much as villages adjacent to each other differed relatively in cultural practices, so did their notions of justice and the ways in which their judges, deputy-judges, witnesses and scribes carried these notions through. But the structural mechanisms, procedures, substantive laws, values and ethic of adjudication followed a unified notion of justice, whether adjudication took place in eleventh-century Fez or fifteenth-century Samarqand. This paradigmatic notion of justice was constituted, shaped and defined by a synthesis whose elements ranged from a particular, grounding religious ethic that was overwhelmingly Quranic, to a social ethic that placed primary emphasis on the integrity of community and social harmony; to a fairly unified body of adjectival law; to an undisputable and cohesive body of legal doctrine; to a particular set of assumptions about the moral community as a participant in the law court and legal process; to a particular relationship between legal knowledge and political power; etc. There was, it is true, a great jural variety effected by, among other factors, differences in customs and social norms, but the variety existed within *a structural and systemic unity*. It is this unity that the present work attempts to delineate,

politicized education of "traditional law" has been severed from its juridical, juristic and legal ability to reproduce, precisely due to the absence – or death – of those structural and systemic features that allow us to inspect and speak of the Sharī'a's episteme.

[34] Including the important *waqf* and its educational and legal functions. On this institution as functioning across "chronological, geographical and ethnic boundaries," see Deguilhem, "Government Centralization of Waqf," 223.

but not without accounting – to the extent permitted within the bounds of a single volume – for a number of jural varieties that existed in certain places and times throughout the lands of Islam.

Another point of central importance is that this book is about Islamic law, not about law in Islam – two considerably different subjects of enquiry. Islamic societies, like almost all societies before they were subjected to the imperatives of modernity, were extremely pluralistic in "legal" constitution, permitting several levels of jural and moral governance, legal mechanisms, and mediation-based and arbitrative resolution. Legal norms were generated, among others, by the family, the clan, the tribe, the village, the neighborhood, the socio-religious community and the dynast. To study the Sharīʿa can never amount to the study of the entirety of these forms, for the latter, like the Sharīʿa, stand on their own as subjects of enquiry. Subordinating them to the Sharīʿa amounts to denying their importance, if not existence. And this is precisely what this volume does not intend to do, although there is an urgent need to begin exploring these corollary norms, not only for intrinsic reasons – on their own an abundantly sufficient motive – but also because without such an exploration we cannot hope to understand the Sharīʿa in a better and fuller manner. It is essential for this attempt at understanding to account, in both practice *and* theory, for these corollary systems and norms that the Sharīʿa inevitably meshed with, promoted, resisted or suppressed.

As the subject of this book, the Sharīʿa is taken to be the total sum of its synchronic and diachronic history. In other words, understanding the Sharīʿa of a particular time and place is untenable without coming to terms with its cumulative tradition, for its own history continued to be, at every turn in its life, an integral part of its living experience. History not only provided continuity, a recurring experience on a linear progression, but also augmented its totalistic experiences in every moment the Sharīʿa came to be substantiated in a particular place and time. Its sources, its theoretical and legal principles, and its textual narratives were constantly reproduced and recreated, providing the substrate and subject-matter for its practices and discourses at every turn. To argue that the Sharīʿa is what it is at a particular moment of its subjects' experiences, that its history obfuscates and distorts its spatiotemporal manifestation, is analogous to setting aside considerations of past and childhood experiences in the psychoanalysis of an individual. For every stage in the Sharīʿa, both in fact and in doctrine, has contributed to creating, defining and shaping the next.

Accordingly, in the first chapter, I begin by offering a synopsis of the epoch in which the Sharīʿa came into existence, of the background against which it grew, and of the socio-legal formations within the first centuries.

The demographic, cultural, linguistic and economic ties that existed between the Southern and Northern Arabs constituted a crucial element in the formation of an early Islamic legal culture. The main argument here is that the sources of the Sharī'a's formation were not foreign intrusions such as those which modern legal systems adopt or are forced to adopt from other hegemonic systems. This dominant mode of legal transplantation seems to discolor modern scholarship's perception of the imperceptible ways most pre-modern systems interacted with one another. In the seventh and eighth centuries, when the body of the law – at least as substantive doctrine – came into being, the sources that supplied the raw materials had already permeated the practices of the Near East for centuries. It was not an identifiable source of a Jewish or Roman law book that made contribution, but the aggregate and synthetic practices already existing in the region, in their Iraqian, Syrian, Peninsular and North African variations. In short, it is a vain effort to try to identify discrete sources that Muslims encountered, and from which they derived such materials as could have conceivably been integrated on a wide scale within the expansive geography of legal culture. Nor can one, with any reasonable assurance, determine the exact origins of a legal concept or juridical institution, for such a determination would then be engulfed in arbitrary historiographical exercises, nationalist anachronism, and the remarkable ability to ignore the pliability and mutations of such concepts and institutions in the course of their less-than-neat development.

The first chapter, then, offers an account of the emergence of the Sharī'a out of a synthetic legal tradition that pervaded the Near East for millennia, an evolution whose determinants were many and the foremost of which was a new sociological formation represented in the nascent Muslim community and its private, highly individualistic legal experts. These experts, the jurists (*fuqahā'*), defined the contours of the *shar'ī* system that emerged, not only in its law and legal institutions, but also in its uniquely private, independent, and socially and morally grounded nature. The jurist-as-a-private-individual, as a politically independent, socially responsible figure, was signally an Islamic invention that determined the course of legal history for the next twelve centuries. But this type of jurist was in turn determined and shaped by a new concept of community that the new religion brought into existence.

The remainder of the first chapter follows the evolution of an Islamic judiciary as well as the formation of the legal schools (*madhāhib*; sing. *madhhab*), both of which constituted the first two of four major developments that gave the Sharī'a its final shape. The third of these developments was the rise of a fully formed legal theory and interpretive methodology (*uṣūl al-fiqh*), the concern of chapter 2. Since the fourth

development, i.e., substantive legal doctrine, requires more expansive attention – even if presented in outline – its discussion in the book is deferred to form the entirety of Part II.

In chapter 3, I turn to legal education, the means by which the juristic class was reproduced. Hence, this chapter offers a brief account of the workings of the educational circle (*ḥalaqa*) as well as of the law college (*madrasa*) that oftentimes enveloped the circle's activities. The *madrasa*, an important but by no means the exclusive educational forum, provided not only a point of contact between law and politics, but also an effective corridor through which the ruling class attempted to create and augment political and religious legitimacy. Topics covered in this chapter are no doubt intrinsically important, but they are also fundamental for understanding nineteenth- and twentieth-century developments where the appropriation of the Sharīʿa by the modern state was made possible through dynastic control of traditional legal education.

With chapter 3, and with the doctrinal background provided in Part II, the essential and structural features of the law will have been covered. Chapter 4, "Law and society," assumes this coverage in taking into account the interaction of law with society and its moral props. Customary practices of mediation and arbitration are shown to intersect with judicial practice and complement it as well – a dialectic latent in the prescriptions of legal doctrine. The *qāḍī*'s assembly, the equivalent of the Western court of law, is discussed as an arena of social and moral contestation, where society, notions of honor and the ruling regime compete and strategize for a share in justice. The dependency of the court on the all-important *muftī* (jurisconsult) betrays the latter's centrality to the judicial functioning of the system and to the structural capability of the Sharīʿa in accommodating change through the *fatwā*, a change to which the author-jurist (the *muṣannif*) also contributed significantly. Finally, in the last section, this chapter provides a brief discussion of the place of women in the legal system.

It will be noted that most of our data on the operation of the court in chapter 4 come from the Ottoman period, it being assumed (largely on the basis of pre-sixteenth-century literary sources) that, aside from limited changes the Ottomans implemented, the court practices were continuous until the beginning of the nineteenth century.

Closing Part I is chapter 5, which introduces the role of government that was epitomized in the metaphoric usage "Circle of Justice," a long-standing Near Eastern culture of political management that engaged the Sharīʿa as a means not only toward garnering legitimacy but also toward maximizing administrative capabilities. It is summed up in the following logic of sequence: for good government to achieve its *raison d'etat* there

must be justice, and for justice to be realized there must be good government. The Circle worked well for both the ruling elite and the jurists – the former, in their capacity as utilizers of the civil population; the latter, in their capacity as the population's representatives and its defenders. As the jurists saw it, sustaining just rule was the ultimate means of realizing God's law. As the ruling elite saw it, the law was a means to an end: the welfare of rule and ruler. Be that as it may, it was clear that both the Sharī'a and the ruling elite stood in a mutually beneficial relationship. This chapter then goes on to deal with the legal balance that was achieved through the symbiotic relationship that existed over the centuries between the Sharī'a and executive power, from Iran to North Africa. But the legal balance described here was also the discursive practice that needed to be integrated into the "Circle," and this necessarily reflected the interaction of various elements of a pluralistic legal culture, where within the ambit of the Sharī'a, and constantly interacting with it, there existed customary law, professional regulations, neighborhood by-laws, and royal edicts and proclamations.

With the same spirit of economy practiced throughout the book, Part II provides a synopsis of some important aspects of legal doctrine (cf. Appendix A). One or two caveats must be noted, however. First and foremost, note should be taken of the simplified presentation in Part II. Many works of legal doctrine, notwithstanding their technical efficiency of expression and virtuoso style of exposition, filled multiple thick volumes, at times reaching two or three dozen.[35] Part II, in contrast, purports to give no more than an outline of select topics. Each of these is material rich enough for several analytical and descriptive tomes, in which one could adopt a legal, anthropological, moral-philosophical, economic or other approach, depending on the nature of the subject-matter. Furthermore, although the coverage attempts to account for the four Sunnite schools as well as that of the Twelver-Shi'ites, I cannot claim to have been successful in providing sufficient coverage for each school on every point of law I discuss. On some points, the schools were not equal in coverage, and in some cases one or two of them may have been silent. In most cases, only the school's authoritative doctrine was noted, but no school had a standard, unified body of laws, and so there might be worthy opinions, at variance with the authoritative doctrine of the school, that were not noted. Thus, what I have attempted to do is to present those opinions and substantive principles that show the structure and framework of legal doctrine, for any full, all-school analysis of even a single point of law would

[35] See, for instance, the Bibliography, for the works of Sarakhsī, Māwardī, Ibn Māza, 'Aynī and Majlisī.

require many pages of writing. Finally, the absence from this Part of an account of the all-important law of *waqf* may be noted, but a succinct exposé of it will be necessary for, and is therefore found in, the narrative of chapter 4.

With Part III, the book moves to the modern period, not a chronological measure of time so much as a dramatic transformation in the episteme and structure of the law. Hence, the "modern" takes off where and when such transformations occur, in India, for example, at least half a century earlier than in the Ottoman Empire and North Africa. One of the major themes here is the constellation of effects brought about by the introduction into the Muslim legal landscape of the modern project of the state, perhaps – together with capitalism – the most powerful institution and feature of modernity.[36] The identification of the bureaucratic, corporate and technological state as the major player in modernity requires an analytical dissection – however brief – of its ramifying effects on the Sharī'a, its institutions, epistemologies and paradigmatic, discursive practices. This dissection, conceptual in nature, is the concern of chapter 13. The next chapter begins a historical narrative of legal colonialism in India, Indonesia and the Malayas, three regions that experienced direct military occupation. Chapter 15 turns to the Ottoman Empire, where the absence of such an occupation did not significantly alter the extent of legal transformations or of Sharī'a's dismantling. Similar accounts are given for Egypt, Algeria, Morocco and Iran. The list of countries covered is obviously far from exhaustive, it being the case again that a full discussion and analysis of even a single country would warrant an independent volume, if not many more. But in keeping with our approach to the "episteme" (discussed above), the intention is to draw out through various examples systemic and structural changes that are deemed central to the modern transformation – what Hodgson aptly called "The Great Western Transmutation."[37] In this analysis, Indonesia, India (and in chapter 16, Pakistan), Iran, the Ottoman Empire, Egypt and Algeria are deemed central case-studies illustrating varieties in the transformation of (or break in) the episteme.

Chapter 16 continues the discussion of the transformation after World War I, focusing, first, on the methods through which changes in the law were effected. Second, as the Sharī'a was reduced to little more than altered provisions pertaining to family law, the coverage of this sphere becomes a central concern – a sphere wholly determined by the state's will-to-power. Precisely because family law preserved the semblance of

[36] Hodgson, *Rethinking World History*, 44–71. [37] *Ibid.*

Sharī'a's substantive law, it is of particular interest to examine how a new patriarchy, engineered by the state, came to replace its predecessor. This fundamental change in *legal episteme* is but one register of the drastically different conditions that modernity came to impose on family life and matrimonial relationships, on legal institutions, and on society at large. These changes, coupled with the emergence of oppressive modern states and a deep sense of moral loss, have all combined (together with much else) to produce a massive movement that is dominantly political but also legal and cultural in orientation. This is the Islamist movement which has been influencing much of what is happening in the Muslim world today. The remaining parts of chapter 16 therefore address the intricate relationship between the state, Islamists and the ulama in a number of key countries – key, as developments in them have deeply affected most other regions in the Muslim world.

The place of the Sharī'a in the modern world is no better exemplified than in the debates occurring in today's Muslim world over legal theory, what had been termed in Sharī'a history as *uṣūl al-fiqh*. These debates illustrate the crises that engulfed the Sharī'a, both as a legal tradition and as a marker of cultural – even political – identity. The discourses of several prominent thinkers are discussed in chapter 17, with a view to showing how these discourses articulate the Muslims' self-perception of where they stand in the modern world, in its complex forms of secularity, its counter-morality and its staunch materialist bent.

In writing this book, I have incurred a profound intellectual debt to at least two groups of scholars and thinkers. Although the academic study of "Islamic law" has yet to expand commensurately with its staggering current importance, recent scholarship, particularly since the turn of the millennium, has produced much of scholarly value and use to this book. Standing foremost on the list are, on the one hand, legal anthropologists whose work has helped reinvent Islamic legal studies, and, on the other, social and socio-legal historians of the Ottoman period, the best-covered area in the historical study of the Muslim world. Of no less importance for the theoretical grounding of this book are the works of post-colonial writers, as well as of historians of the formation of modern Europe. The Bibliography represents a register not only of the works I have used, but also of that debt.

Needless to say, the wide scope of this volume makes it necessary that I deal with questions and themes that I myself have previously studied and written about, with the inevitable consequence that some parts of the book have come to draw on my earlier work. Therefore, chapter 1 and section 2 of chapter 3 sum up much of my *Origins and Evolution of Islamic Law*; and

apart from the first, second and last sections of chapter 2 and sections 1, 4, 5, 6 and 10 of chapter 17, the material in those chapters generally derives from my *History of Islamic Legal Theories*, although important abridgment, revision and added analytical commentary have taken place in every case.

It should be noted that a number of footnote citations in Part II are placed in square brackets. These citations, referring to three recent English translations of *fiqh* works,[38] are supplied for the benefit of those who cannot read the original Arabic texts and who wish to delve further into the study of legal doctrine. While most of these references have been added subsequent to the completion of Part II, a few, based on the original texts, had already been relied upon in writing this Part. Therefore, any reference to these works outside square brackets will refer to the original Arabic source, not to its translation.

Finally, a word about calendars. In Parts I and II, this book uses a dual system of dating (e.g., 505/1111). The first date refers to the Hijri calendar, the other to the Gregorian. The Hijri dating is abandoned in Part III, since the sources, many of which are European or Europeanized, generally use the Gregorian dates.

[38] They are: Misrī, *The Reliance of the Traveller*; Marghīnānī, *Al-Hidāya*, I (vol. II yet unpublished); and Ibn Rushd, *The Distinguished Jurist's Primer*.