Recent events have focused attention on the perceived differences and tensions between the Muslim world and the modern West. As a major strand of Western public discourse has it, Islam appears resistant to internal development and remains inherently pre-modern. However, Muslim societies have experienced most of the same structural changes that have impacted upon all societies: massive urbanisation, mass education, dramatically increased communication, the emergence of new types of institutions and associations, some measure of political mobilisation, and major transformations of the economy. These developments are accompanied by a wide range of social movements and by complex and varied religious and ideological debates.

This textbook is a pioneering study providing an introduction to and overview of the debates and questions that have emerged regarding Islam and modernity. Key issues are selected to give readers an understanding of the complexity of the phenomenon from a variety of disciplinary perspectives. The various manifestations of modernity in Muslim life discussed include social change and the transformation of political and religious institutions, gender politics, changing legal regimes, devotional practices and forms of religious association, shifts in religious authority, and modern developments in Muslim religious thought.

Key Features
• Each chapter contains an overview of relevant secondary literature and concludes with a summary of the key ideas presented and a set of questions
• Contributing authors include some of the best-known academics from various disciplines in the field presenting state-of-the-art scholarship in their specialised areas

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CHAPTER 6

Colonialism and Islamic Law

Ebrahim Moosa

Introduction

Commonplaces about Muslim laws in the colonial encounter are as firmly established in folklore as Shahrazad’s uninterrupted thousand nights of storytelling, Newton’s apple or Watt’s steam kettle. The narrative is almost always unidirectional: the colonisers occupied Muslim lands, dislodged native laws and replaced them with European ones (al-Shafie 2003: 8). There is, of course, nothing factually incorrect about this description save for what is omitted in the attempted simplification.

Law is not only part of the ideological apparatus of states; it is also part of a cultural matrix. Apart from mobilising multiple forms of power – military, political and economic – colonial rule also relied on a complex apparatus of cultural technologies to assert itself (Dirks 1992: 5). The domain of Muslim law is one such power-cum-cultural complex. If we view Muslim law through the prisms of colonialism, globalisation and transnationalism in different locales, what emerges is a more complex picture. With the aid of a few snapshots, one can track how the ideas and practices of modernity and colonialism found their counterpoints in Muslim institutions and traditions and, especially, how modernity impacted on the practice of Muslim laws. In order to come to grips with developments in the colonial and post-colonial eras marked by globalisation, it will be helpful to examine Muslim laws by means of the vocabularies of transculturation, counterpoints or contrapuntal developments, evolving social imaginaries, networks and the legacies of legal Orientalism, each of which will be discussed below.

Transculturaiton

If European colonisers intended to make their non-European colonies dependent on the European metropoles, then this aspiration was not entirely successful. The aftermath of colonialism showed a different picture. Against the pretensions of imperial universality, the colonial encounter called attention to globally interconnected communities of the coloniser and colonised, aiming the spotlight on the messiness of transculturation. The pendant to transculturation was acculturation, keeping in mind the significant differences between the two. Acculturation implied the acquisition of culture in a one-directional manner and
a linear arrangement of power: from the powerful to the powerless (Devereux and Loeb 1943). However, when an existing culture was lost or uprooted by a successor culture (deculturation), it was often replaced by a new culture (neoculturation) stemming from a process of transculturation. In the latter scenario, the changes were non-linear and unpredictable. Transculturation aptly applies to what happened to Muslim laws in the colonies. Despite the attempts to eliminate or replace Muslim laws in the colonies, the upshot was that new Muslim legal cultures came into existence. And, as many as the colonisers resisted the laws of the colonised, they were forced to countenance native law even to the point of having to accommodate it in the bureaucracies of the colonial metropoles in legislative activities and appeals processes.

**Counterpoints**

It goes without saying that the economic ventures in the colonies were meant to consolidate the nation state in the European metropoles. Ironically, with these enterprises the colonial powers were, in Dirks’s words (1992: 4), also ‘bringing both colonialism and culture back home’. One way that colonialism came back home to the metropoles was that the British legal and political systems both had to accommodate Muslim law, often called Muhammadan law. Special Privy Council deliberations in Britain were set aside for appeals from India. British lawyers and administrators received specialised legal training in Muslim law; the bureaucracy had to make adjustments, apart from making available translations of Muslim legal texts into English. And, in India, British judges were forced to employ Muslim experts as assessors in courts.

In the self-fashioning of the colonies, what were perceived to be centres and margins were constantly shifting entities. Let us take the case of Egypt. Compared to France and England, Egypt as a colony in the Mediterranean was a peripheral country. But often colonies served as counterpoints to other regional colonial domains. In other words, the ‘peripheries’ were actually turned into ‘centres’ with respect to other ‘margins’ (Coronil 1995: p. xiv). Note how both the French and the British colonial regimes styled Egypt as the centre of the Middle East (Maghraoui 2006: 74–86). Delhi became the centre serving the regions of Malaya and the African East Coast, while Cairo played the same role for parts of the Middle East region. Both Egypt and India as colonies, and hence as peripheries to Europe, were central in the way they each shaped legal and military developments in other parts of the colonial world.

The colonial encounter also forged new cognitive categories and structured sentiments and emotions that can no longer be attributed to any single cause or cultural effect. Edward Said convincingly showed that our existence in the modern world provoked deeply transformative effects marked by what he called counterpoint or the contrapuntal: ‘No one today is purely one thing’ (Said 1994: 407). The outcome of imperialism, Said continued, was that it ‘consolidated
the mixtures of cultures and identities on a global scale’ (ibid.). ‘Survival in fact is about the connections between things,’ he noted and therefore, ‘it is more rewarding and more difficult to think concretely and sympathetically, contrapuntally, about others than only about “us”’ (ibid.: 408). In trying to understand contemporary developments in Muslim laws and politics, it is critical to be vigilant of the colonial legacy (Spivak 1999: 215). Without wishing to mobilise the past in the service of the present, it might be more instructive to view contemporary contestations over Muslim laws as part of the unfinished nature of the past, especially in the post-colony (Banerjee 2004: 261).

**Social imaginary**

Modernity and colonialism ushered in a new social imaginary drawing on new theories of natural law from the seventeenth century (Taylor 2004: 5, 62). New such imaginaries fostered by the insights of John Locke’s notions of social contract gradually pushed older theories of society to the margins. One theory of society that colonial rule attempted to displace was what Muslims referred to as governance, driven by the normative juridical–moral discourses known as *shari’a* or *fiqh*. Popularly known as Islamic law, especially after the formation of nation states in Muslim societies, *shari’a* is the fulcrum of a Muslim moral vision. It is also variegated and shaped by the complex history of Muslim schisms and sects ranging over centuries. And ‘all history’, wrote George Orwell ([1949] 2003: 41), ‘was a palimpsest scraped clean and reinscribed exactly as often as was necessary’.

Like ageing parchment, the encrusted layers of modern Muslim law also personified the layers of turbulent political struggles of multiple Muslim societies and communities vis-à-vis a plethora of conquering colonial powers. Simultaneously, it also revealed the searing internal struggles over the meaning of norms and values.

But there was an additional theological dimension to Muslim laws. Since norms and values were partly framed with reference to a divine or a heteronomous authority, the contestation over what was moral truth had to be negotiated in the dynamic tension formed between human production of norms, on the one hand, and divine instruction, on the other. These contestations gave rise to particularly intense struggles and debates in the history of Muslim societies generating a plurality of intra-Muslim systems of norms. What gave it added poignancy was the fact that these struggles over norms and values occurred in the fertile domain of culture.

**Networks**

What people today view as Islamdom’s globalised networks of power and culture were preceded centuries earlier by certain continuities of Muslim peoples who shared an expansive ‘inhabited quarter’ (*oikumene*). A modality of law was
integral to this Islamicate *oikumene*, as exemplified by the itinerant legal expert cum judge Abu ‘Abd Allah Muhammad b. ‘Abd Allah al-Luwayti al-Tanji, better known as Ibn Battuta (d. 1369 or 1377) (Hodgson 1977: 109; Cornell 2005). Ibn Battuta’s experiences of living in culturally contiguous and networked societies were not an anomaly (Hodgson 1977: 89–90). If history and human life were deemed to be performative acts, then society too was ‘an ever living, never completed network of actions’ (Lapidus 1975: 41). The root metaphor of networks defining Islamic civilisation had not only survived, but, thanks to the European colonisation of Muslim regions, acquired a new meaning considerably different from its premodern instantiation (Gilmartin 2005: 53). Globalisation gives the networks of old a new meaning: expanding integration and integration on a planetary scale. The ideological framework of globalisation is liberalism, which favours free trade and the free movement of capital (Cooper 2005: 96). Now the post-colony was a network of citizens of former colonies who have relocated to former European and North American metropoles by way of myriads of advanced communication technologies. Apart from a certain sense of unity and singularity, more significant were the animated debates and contestations about the meaning of Muslim law and morality in a variety of global networks in both Muslim minority and majority contexts. One had only to reflect on how the controversy over women wearing the scarf in public schools animated Muslims living in France, just as it energised those who observed the wearing of the scarf in Turkey. Similarly, suggestions about a possible role for Muslim family law created heightened anxiety in Canadian and British political circles while raising analogous tensions in Egypt and Pakistan over governance and loyalty to *shari‘a* norms in those states.

At the heart of the debate about Muslim laws in the colonial and post-colonial periods were the narratives pertaining to the *shari‘a* as a moral vision. In both, the displacement and adaptation of Islamic law is the desideratum to recover or reinvent Muslim social imaginaries of gratifyingly complex proportions, a reality often ignored by modern historians of Muslim law. groomed social reformers in their bid to formulate a rationale as to why a practice had to be changed or altered inferred the meaning and purpose of such a practice, denuding it of its complexity and multiple functions. Social reformers engaged in reformulating and restating older practices and doctrines were also imputing new moral economies to practices. The European penchant to reduce phenomena in the legal and social practices of the Orient gave rise to new moral economies, better known as Orientalism.

**Legal Orientalism**

If ‘legal Orientalism’ ever had a far-reaching and invidious effect on discursive and existential domains, then surely it was in terms of Islamic and customary
laws. And very little of this Orientalism has thus far been conceded or even merited serious scholarly attention (Said 1978; Strawson 2001). Edward Said (1978: 78) surely misread legal practices as literary productions, which in his view had only ‘symbolic significance’. He understated the interest of colonial officials in legal writings and translations. If Said were wrong with respect to the artefacts of Orientalism, then his description of Orientalism applied to the European Orientalists as well as to certain traditionalist Muslim modes of thinking, especially those espoused by the ulama: ‘a style of thought based upon an ontological and epistemological distinction made between “the Orient” and (most of the time) “the Occident”’ (ibid.: 2). While some ulama often viewed Orientalist scholars to be persons of dubious integrity, there was also a significant overlap in their respective approaches and methodologies of Islamic law between these two groups of scholars.

Legal discourses and institutions were more than just symbolic; they were also sites that produced the very knowledge that differentiated between the colonised subject and the coloniser. Law provided the apparatus and means for the enforcement of these differentiated types of knowledge. Yet, the ulama and modernised elites in colonised Muslim countries collaborated with the colonisers to enforce different modes of Islamic law, which they felt were vital to the well-being of their communities. Such mutual shackling made it more difficult to unearth the subterranean ways in which power functioned in colonial societies; the legacies of the coloniser and colonised were intertwined (Chaudhuri 2006). Just as the colonised sought to be liberated from the political yoke of the coloniser, they were also equally shackled through legal and economic systems to the legacies of the coloniser. In order to avoid monochromatic maps of the coloniser versus the colonised type, we would do well to interrogate Islamic law during the colonial and post-colonial periods through the prism of transculturation. What legal discourses then reveal are a series of contrapuntal dependencies, networks of movements of people and ideas across multiple temporalities and spaces. Not only does this enable us to plot the transitions in the paradigms of knowledge and social imaginaries more carefully, but it also enables us to view the intertwining of legal, economic and political systems in more nuanced ways.

**Europe’s tryst with Muslim law**

In a curious mix of political and theological sentiments, most European colonial administrators and viceroyls held the studied conviction that it was their manifest destiny to save non-Europeans from their own regressive and unenlightened cultures. It was the Whig theory of history writ large: a near providential plan gradually to spread light into the dark places of the globe. Lord Cromer ([1908] 2000: 124) wrote that every Englishman ‘was convinced that his mission was to save Egyptian society’. He described Egyptians as the ‘rawest of raw material’
out of which the ‘civilised’ Englishman ‘had to evolve something like order’ (ibid.: 126, 131). The Englishman, he continued, will exercise his national genius and adopt a middle course and make compromises in order to work an Arab system that was by all accounts unworkable. Part of that English genius was not to annex Egypt, but to do as much good as if it were annexed; the English would not interfere in domestic governance but would make sure the Turkish viceroy to Egypt, known as the Khedive, and his ministers conformed to English views.

Cromer was completely oblivious of his own contradictions. While claiming not to proselytise, he nevertheless claimed that England, among all of Europe’s nations, will strive to inculcate a ‘distinctly Christian code of morality’ among the colonised subjects (ibid.: 134). Not only did Cromer harbour supremacist beliefs like Warren Hastings or Lord Macaulay did in India, but he held all Orientals, whether Copt, Hindu or Muslim, in contempt. While the Egyptian Copts, unlike the Muslims, adhered to a religion that ‘admits of progress’, they too remained immune to change, thanks to Islamdom’s corrupting influence on Oriental Christianity, which was only further aggravated by the fact that the Copts were first and foremost Oriental people (ibid.: 202).

Most troubling to colonial administrators and many Orientalists was that Islam did not neatly fall into a prescribed framework of religion with which they were familiar. While most wished to see Islam take the same turn as Western Christianity, follow the post-Enlightenment route and turn into a private matter, most were befuddled by Islam as a cultural artefact. Islam as a civilisation, described by post-Enlightenment assessments as a religious tradition, did not neatly fit in with what was familiar in the West and colonialism’s enlightening designs. Islam was a protean ‘savage’, one with a history to boot that made it fall somewhere between the categories of the savage and the civilised, vacillating between the ‘West’s contempt for what was familiar and its shivers of delight in – or fear of – novelty’ (Said 1978: 59). Cromer ([1908] 2000: 134) best illustrated this dilemma by first acknowledging Islam’s great impact on the world stage, but then went on to add that, as a ‘social system, Islam was a complete failure’. Cromer listed among Islam’s premier vices its attitude towards women, a tolerance for slavery, and its reputation of being intolerant towards other religions. All the while Cromer opposed the suffragette’s movement in England.

In the coloniser’s imaginary, the Muslim had first to be cast as a schizophrenic, in the same way that the Spanish theologian Francisco de Vitoria (d. 1546) portrayed the indigenous Indian in the Americas: a person who was curiously encompassed in the sameness of humanity and yet different. The primal divide also became the imperial division between the barbari, who were not sovereign, Christian or civilised, and the European nations, who perfectly embodied all these qualities (Fitzpatrick 2001: 155). This analytic reverberated with John Stuart Mill’s decree (1997: 48) in On Liberty, justifying the claim that ‘despotism is a legitimate mode of government in dealing with barbarians,
provided the end be their improvement, and the means justified by actually effecting that end’.

But the main problem for Cromer, as for most European colonisers, was the *shari’a*. Here Cromer echoed the views of the German philosopher G. W. F. Hegel ([1827] 1988: 357), who deemed Islam, like Judaism, a form of Christianity *manqué*, because it lacked a concrete inward subjectivity in pure thought. What distinguished pure thought from its opposite in Hegel’s view was the specific role and sensate nature of rituals in both Judaism and Islam. The wisdom underlying the practice of ritual, described as the *cultus*, was in Hegel’s view a definite indicator that these traditions were undeveloped, unlike Western Christianity, which aspired to inwardness and pure thought (ibid.: 374). The *shari’a*, in Cromer’s tinted view ([1908] 2000: 135), consisted of ‘traditions which cluster round the Koran, and crystallise religion and law into one inseparable and immutable whole, with the result that all elasticity is taken away from the social system’.

Cromer was, of course, aware of the fact that Muslim scholars in his day were engaged in labours of interpreting ancient doctrines to meet the contingencies of the day. However, all those ‘well-meaning scholars’ only ‘tortured their brains’, he dismissively observed, to show that ‘the legal principles and social system of the seventh century can, by some strained and intricate process of reasoning, be consistently and logically made to conform with the civilised practices of the twentieth century’ (ibid.: 136). If only Cromer had recalled the history of Roman law and Common law, he might have restrained the sarcasm in his utterances. But, as was characteristic of all types of reductionism and visionary cosmologies, of which Orientalism was only one, it was also profoundly anti-empirical. Despite an awareness of the complex intellectual investments Muslims had made over the centuries in the discourses of law, Cromer could with ease dismiss customs and norms that were based on ‘religious law’ to constitute ‘a grip of iron from which there is no escape’ (ibid.). Cromer failed to appreciate that his own insistence on a Christian code of morality might have served as an analogy for him to grasp what the *shariʿa* meant to Muslims. Perhaps he found Christian morality so exceptionally refined that the very thought of comparison was deemed offensive.

Cromer was not the only one to hold such views. Even an informed administrator reputed as an expert in Muslim law, the Dutch Orientalist C. Snouck Hurgronje (1916: 137), could say with ease that the stamp of eternity marked the codes of law of Judaism and Islam ‘whose influence has worked as an impediment to the life of the adherents of those religions and the free intercourse of other people with them as well’. How Islam could have evolved into a transnational community that was upheld by a strong juridical-theology or ethics over centuries went completely unaccounted for. While himself a complex man who might also have converted to Islam in Arabia, Snouck Hurgronje could
with magisterial authority write: ‘The treasuries of Islam are excessively full of rubbish that has become entirely useless; and for nine or ten centuries they have not been submitted to a revision deserving that name’ (ibid.: 139). Though Snouck Hurgronje was better informed than Cromer, given his familiarity with Muslim laws, his Orientalism steered him to view his data about Islam as a closed system. Since his claims sustained an exceptional form of being (ontological reasons), no amount of empirical material could challenge, alter or dislodge his narrowly formulated views. Thus, he too held reservations about the shari’a similar to those that vexed the Englishman, Cromer (Snouck Hurgronje: 141–56).

Scores of Western experts of Muslim law, legal historian John Strawson charged, were guilty of legal Orientalism, including such renowned scholars as Ignaz Goldziher and Joseph Schacht, who went beyond their scholarly assessments and decried the deficiencies of Muslim law as a stagnant entity and, hence, impervious to change. This may in part be explained if we designate language as a site for the discursive practices of colonialism (Spivak 1999). Encoded in language and its dynamism of mediation, colonial authorities were able to declare war on native practices and give effect to invasive transformations. The language of desire and the will to govern deployed by colonial authorities, theorist Gayatri Chakravorty Spivak pointed out, was part of an elaborate ‘fantasy’. From Egypt to India, colonial officials could deploy and project their desires on the colonised with the use of fearful images and figures artfully disguised as policies and law. To do so, it was necessary that desire and the law both appeared to be a singular expression of will, or, as Nietzsche would coin it, it had to be exhibited as a will to power.

Playing devil’s advocate, Spivak (1999: 216–17) verbalises the voice of the colonial master addressed to the colonial subject: ‘Our desire is your law if you govern in our name, even before that desire has been articulated as a law to be obeyed.’ It was from such a privileged location of desire, disguised as law, that Lord Cromer ([1908] 2000: 882–3) could sonorously exclaim his civilising mission: ‘The new generation of Egyptians has to be persuaded or forced into imbibing the true spirit of Western civilisation.’ And, in India, Warren Hastings could, with astonishing candour, state that Muslim criminal law was a ‘barbarous construction, and contrary to the first principle of civil society’ (Jain 1966: 492).

Fuelled by his convictions, Hastings acted unflinchingly. He displaced the existing Muslim criminal law applicable in Bengal. Muslim criminal law was communitarian in ethos; it remedied crimes of injury, homicide and injustice by offering persons and communities appropriate compensation and/or retribution. Under colonial rule, this dispensation was changed. From then on it was the colonial state that designed and implemented criminal law, not the community affected. In other words, a shift was enforced from a previously
communitarian ethos of Muslim public law and ethics to a new state-centred morality that contracted itself to the individual, promoting autonomy and not community. The goal was obvious: to tailor Muslim practices in order that they would synchronise with the demands and rhythms of the nation state that was being crafted in embryonic form.

The state and the transculturation of Muslim laws

Each modern Muslim nation state told a unique story about the transformation of the cultural, political and economic landscapes but also how colonial laws had been transplanted into new domains. How pre-colonial legal and moral systems had morphed into their current iterations will have to be dealt with elsewhere, even though versions of the story of transculturation are fairly well known and documented.6

Less known is how transculturation affected the practice and logic of Muslim laws. Colonial politics inaugurated several significant changes in the conception, practice and articulation of Muslim laws. Generally speaking, before the advent of European colonialism, the ulama, the religious authorities, held a particular place in Muslim society. While many ulama held positions outside the state, some were also in the employ of political authorities. From time to time, either individual ulama or groups were critical of the caliph and his practices, or there was tension between the state and its ulama adversaries. The caliph or his equivalent was merely the steward of the law, in so far as he was required to create an environment conducive to the application of shari'a norms. Such norms were applied by way of shari'a governance (siyasa shar‘yya). Cumulatively, the discourses and practices constituted the ‘norm of revelation’ (hukm al-shar‘) (Kawtharani [1990] 2001: 41). The latter aimed at immunising the community from certain disreputable public displays of drunkenness, adultery and rebellion. In order effectively to create such a public environment, the state could enforce certain laws properly backed up by its coercive authority, so that one can in limited instances talk of ‘law’ proper. Otherwise, Muslim law was really a nomocratic order – one regulated by norms arrived at consensually, enforced by a theocentric moral authority and regulated by individuals and communities of coercion. In such earlier models of norm-based communities, the state had a minimal role. But, with the advent of the modern nation state, the secular state gained a greater and direct stake in the application of the law and thus became a major stakeholder. Alongside the modern nation state’s development, the ulama too have gained a great deal of authority in nation state contexts. As an independent entity they have, in many places, gained the power to legitimate or delegitimate state action in the sphere of religion and public policy matters that were intimately related to religion in ways that might not have been true in earlier centuries.
Colonialism’s most significant transformation in the legal traditions of colonised countries was that it made the nation state a central player in the moral and political life of subject peoples. In an unparalleled manner, the state mediated the social contract between the rulers and the ruled and often represented the interests of the ruling class. Sovereignty, especially the sovereign quality of the European nation state, to put it more finely, also became a feature of Muslim political orders. The nation state exercised its sovereignty by controlling its territory via the application of the law on all subjects contained within its dominion. In a bid to elevate the European model of the nation state and its laws, colonial administrators as well as their post-colonial successors were almost compelled to render all indigenous laws and practices barbaric or to reduce them to local, folk or customary status. ‘From the eighteenth century’, notes the legal historian Peter Fitzpatrick (2001: 157), ‘formerly acceptable civilisations mysteriously degenerated and became uncivilised’.

Hastings’s displacement of Muslim norms of criminal justice in eighteenth-century Bengal not only transformed indigenous modes of justice, but made the state a stakeholder in prosecuting and avenging the murder of a legal subject. Such a right to claim justice was once exclusively the preserve of the family and nearest of kin to the deceased. Under the new legal dispensation, relatives of the deceased were rendered mere spectators to a juridical process. Colonial policies deemed Muslim practices that permitted the perpetrator of a homicide to give material compensation to the victim’s kin in lieu of the death penalty to be an offence. By abolishing the Islamic concept of crime and punishment in the domain of criminal law, Fisch (1983: 54) observed, Hastings’s new laws did away with ‘all distinctions as to the value of human life’ that Islamic law offered. The transplantation of a new criminal code was fastened to new ideas, notes Fisch, such as the European criminal philosophy ‘that human life could not be measured but was a value beyond all comparison’ (ibid.). Whereas Muslim law retained a spectrum of remedies for homicide, colonial laws legislated only the death penalty for homicide. Thus the implicit consequence of the colonial value of ‘life’ was its stark antithesis, namely ‘death’, or, on occasion, the deprivation of freedom through imprisonment. It remains moot whether colonial criminal laws advanced the humanitarian dimension of law or whether the policy to substitute the Islamic legal order was not merely an exercise in the demonstration of colonial sovereignty.

Gradually, in numerous colonial contexts, the status of Muslim law as part of an international legal system was downgraded from being a law of a civilisation to a status closer to customary law. It was also, therefore, not altogether surprising that, in contesting the nature of the secular polity in post-colonial Muslim countries, Islamists in the last quarter of the twentieth century made law the battleground of contestation and identity. Sovereignty was often the major point of contention: while the proponents of a secular polity claimed that sovereignty
was invested in the state via a constitution or parliament approved by the public (demos), their Islamist opponents argued that sovereignty was vested exclusively in God, and was made demonstrable by upholding the law of God – namely, the shari’a.

**Recoding the law**

Parallel to the increased role of the state in everyday life, the translation of key Muslim legal texts into European languages made knowledge of the law accessible to modern Muslim elites who lacked knowledge of these legal texts. While the democratisation of this previously specialised knowledge lessened the monopoly of the religious classes over the discourse of the law, it also had other unforeseen consequences. Among other things, it abstracted Muslim law from its canonical referents and contexts, with the result that it set into motion a process of reifying the law; it borrowed selectively from a complex and organic legal archive, and turned legal discourses into things and artefacts. In the new era, concepts like shari’a, Muslim family law practices such as marriage (nikah) and repudiation (talaq) or Islamically approved commercial practices and bans on usury (riba) were, as ideas and practices, staged more elaborately in order to become symbolic or truncated stand-ins, if not representations of an ‘Islamic’ moral world view.

Continuous legal transplants from English and French laws as well as the codification of Muslim laws only ensured the gradual move of Muslim law towards legal positivism, thus disconnecting law from its ethical and moral moorings. Subtly these processes inaugurated and generated new rationalities and new taxonomies of Islamic law, as ancient practices acquired new meanings in new contexts. The rediscovery of selected texts of Maliki jurisprudence produced in Muslim Spain, such as the publication of Abu Ishaq al-Shatibi’s *al-Muwafaqat* (*The Conciliated*), ushered in a new rationale that made public interest (maslaha) a paramount legal goal and fulfilled the ends of the revealed law (magasid al-shari’a), the primary philosophy of Islamic law (Opwis 2005: 201–2). In the Arab world in particular, law curricula such as those advanced by the Khedival Law School in Cairo or at secular universities invented a new taxonomy for Muslim law along the template of secular law, adding categories hitherto unknown to scholars of classical Muslim laws. The new legal taxonomy included categories now known as civil law, commercial law, private law, criminal law, the authority of written documents and elaborate laws of procedure.

The practice of *khul*, a procedure whereby spouses separated by mutual agreement, was a good example of transculturation. Recall that, in classical Muslim law, adhered to by most traditional ulama, males have the exclusive power to repudiate a marriage tie. However, in order to lessen this unilateral male power, in medieval times Muslim jurists permitted a wife to negotiate a
no-fault exit from the marriage contract with her husband. The negotiation involved the return of the dower or nuptial gift (*mahr*) that the husband had provided to the wife upon inception of the marriage. She could also offer an additional sum of money to the husband in order to be released from the marital tie.

In modern times, the practice of *khul* was given a completely new rationale. Many Muslim legal activists now view *khul* as the female equivalent of the right to initiate divorce. This viewpoint replaced the old presumption of exclusive male power to dissolve the marriage contract with a new presumption where spouses to a marriage have equal power and rights. The modern incarnation of *khul’a*, however, remained a bone of contention between different Muslim constituencies according to the legal ideology they adopted. Reform-minded modernisers favoured the transformation of the law to meet new social exigencies; traditionalists favoured changes to the extent that these were consistent with canonical authority. The fault line between these constituencies became visible when the Egyptian legislature in 2002 equated the *khul* provisions to a female’s right to a no-fault divorce (Arabi 2001; Muhammad 2003). Both religious traditionalists and feminists disapproved of the measure: for the former, the parliamentary act perverted the logic of provisions formulated in classical Muslim law, while the latter deemed the law insufficient from a perspective of women’s rights (Shahine 2004).

The case of *khul* in Egypt effectively demonstrated that, especially in modern contexts, as compared to earlier times, power politics was joined at the hip to law and invariably coloured juridical practice. With the emergence of larger social units, such as society, government and state, the latter often exercised an overriding interest over all other community interests. In doing so, the juggernaut of modern statecraft incorporated Muslim laws into an altogether different legal sociology and anthropology from its pre-colonial iterations.

Under the watch of a variety of colonial authorities from the English, French and Italians, a distinct category of law related to the Muslim family came into existence under the broad rubric of Muslim personal or family law, regulating marriage, divorce, child custody and inheritance. Colonial authority also impacted on a related body of law regulating endowments (*waqf*), which managed religious and social trusts to support a range of public charitable and welfare functions. Historically, the activities of the trusts were not explicitly religious, but under colonial rule new notions of religion and religiosity were secreted into colonised societies. Over time, these trusts and endowments also gained a peculiar religious character in line with modern constructions of religion.

Many have questioned why secular colonial authorities retained Muslim family laws marked by a religious character while repealing other laws inflected by religion. Clearly, law itself was the site of contestation between the colonial
authorities and the colonised, concerning issues such as access to resources and labour or relationships of power and authority over interpretations of law and morality. Gail Minault (1998: 156) explained that colonial authorities marked some practices as peculiar to Muslims, in order to declare them as essentially Islamic. For this reason, an ensemble of legal discourses consistent with very Protestant notions of religion had to fit with the structure of the British colonial state in the sphere of the ‘private’. The combined labours of the coloniser and the colonised over time produced ‘a distinct body of law within the context of the state’ with which Muslim men and women could readily identify (ibid.; emphasis added).

Examining late-nineteenth and early twentieth-century Egyptian law reforms under colonial rule, anthropologist Talal Asad pointed out that colonial authorities attempted to forge notions of religion as a domain of the private via the practices and construction of the family. Asad (2003: 227–8) noted that the codification and restriction of the shari’a in colonial Egypt was in itself a ‘secular formula for privatising “religion” and preparing the ground for the self-governing subject’. In their respective observations, Minault, and especially Asad, each reinforced the point that the modern nation state, beginning with the colonial state, utilised the law in order to construct a different kind of category in the law – namely, the family – in order to constitute a new subject, the ‘private’ subject. Through the family, the ‘individual was physically and morally reproduced and had his or her primary formation as a “private” being’ (Asad 2003: 227).

After a careful analysis of various reformist legal discourses, including the work of the famous Egyptian reformer Shaykh Muhammad ‘Abduh and a less well-known lawyer Ahmad Safwat in colonial Egypt, Asad (2003: 240) observed: ‘If traditionally embodied conceptions of justice and unconsciously assimilated experience are no longer relevant to the maintenance of law’s authority, then that authority will depend entirely on the force of the state expressed through its codes’. Here Asad underlined the transculturation of traditional notions of justice with state-centred ones as a product of colonialism.

Law’s authority in pre-colonial societies derived from the harmony between experience and a subject’s codes of justice. Coercion had very little role in inculcating authority. A result of the colonial interruption is that the discursivity of law – the effortless relation between experience and notions of justice – was disturbed and, as a consequence, fragmented. What defined the colonial moment of law according to Asad (2003: 240) was the state’s ‘power to make a strategic separation between law and morality . . . because it is this separation that enables the legal work of educating subjects into a new public morality’. Family law, backed by the coercive power of the state, became a ‘law’ proper and slowly drifted away from notions of morality, causing deleterious consequences for women and children in many contexts, especially in instances where family laws had been codified (Sonbol 1996).
The strategy of utilising the law to reorganise the moral sentiments of subjects was not only limited to colonial Egypt and India. In colonial Africa too, as Richard Roberts and Kristin Mann (1991: 3) observed, law played a vital role in the moral education and discipline of colonial subjects. Colonialism sought to impose a new moral order that in part synchronised with proposed political and economic orders that were founded on ‘loyalty to metropolitan and colonial states and on discipline, order, and regularity in work, leisure, and bodily habits’ (ibid.).

Scott Kugle (2001) showed how the process of the production of a colonial version of shari’a law in India was a contested one. Kugle documents the efforts of colonial authorities to recast and acculturate Islamic law into becoming Anglo-Muhammadan law. It was this hybrid of Muslim and English laws that became the site for the production of Islamic law in the social-contract theory mode. Coupled with elements of natural law in an Islamic key were the heightened debates about the objectives of the law and the salience of public interest (maslaha) in Muslim law (Abdul Hakim 1953: 27–65). While Kugle did recount the role of some Indians in the production of Anglo-Muhammadan law, the accent of his narrative placed the onus for the construction of Muslim laws on the colonial authorities. However, it was quite self-evident that the involvement of Indian Muslim elites, as well as elites in Egypt, Algeria and elsewhere, each served as a critical voice in making a new version of Muslim law within their specific contexts in collaboration with colonial authorities (Christelow 1985).

Elites also came in different ideological stripes and thus cannot be summarily reduced to a monolith, since a different kind of politics played out in each context, making it hard to generalise. In India and Egypt and elsewhere, modernised Muslim elites were caught on the horns of the dilemma: either to boycott the colonial system or actively to participate in it in order to remake their legal traditions. For practical reasons few could afford to be indifferent. Comparatively speaking, traditional Muslim elites among the ulama in Egypt often directly and consistently engaged in legal reform compared to the occasional reformist interventions of their counterparts in India. In Egypt, the names of Mufti Muhammad ‘Abduh and his student, Rashid Rida, prominently come to mind.

‘Abduh and Rida both energetically cast Muslim juridical philosophy into the mould of social contract theory framed within a specific Islamic natural-law model. They achieved this by reviving discourses of public interest and juridical public policy (maqasid al-shari’a) that had once been marginal, if not controversial, legal concepts among canonical Sunni juridical authorities. However, the encounter of a revised notion of Muslim legal theory with modern political realities canonised the juridical tradition of Egypt with an element of Islamic legitimacy. This took place by means of what Armando Salvatore described as engineering a public sphere in which the vocabulary of reform (islah), divine norm (shari’a) and governance/politics (siyasa) constituted the grammar of an
educational-civilising process (Salvatore 2001). In other regions, similar processes were at work but utilised different modalities and grammars of Islamic reform. Today, few people would question the rationale and validity of public policy (*maqasid*) and public-interest (*maslaha*) considerations and doctrines in the articulation of Muslim law, even though these very discourses were marginal to juridical debates in the past and had only gradually, if not grudgingly, attained mainstream approval. These doctrines were, however, instrumental in harmonising the traditional corpus of Muslim laws with the disciplinary and centralising nature of the modern state (ibid.: 138).

ʿAbduh’s twentieth-century counterparts among the traditional ulama on the Indian subcontinent abjured the radical juridical moves his reformist brand of Islam advocated. The Indian ulama preferred to adopt the formal theories proclaimed by the orthodox schools of Sunni law. Only those modernised Indian elites whose sails became filled with the winds of a progressive Islamic jurisprudence and who engaged in official or state-centred juridical discourse on Islamic law in India, such as Ameer Ali and Asaf Fyzee among others, were inspired by legal developments in the Middle East.

On occasion, however, the Indian ulama intervened in the official juridical discourse. The occasion was when the foremost scholar affiliated to the Deoband seminary in pre-partition India, Mawlana Ashraf ʿAli Thanawi (d. 1943), and some of his colleagues borrowed a legal strategy from their Arab counterparts and adopted an eclectic approach (*talfiq*) to Islamic law, choosing the best law instead of unbendingly adhering to the interpretations of a single law school. They aspired to go beyond the canonical view of the Hanafi school, which was the dominant school of law on the subcontinent. Thanawi and his colleagues sought a way out for Muslim women to obtain a judicial annulment of their marriages should their spouses abandon them or become chronically derelict in providing them with financial support and maintenance. Under the strict rules governing marriage according to the Hanafi school, Indian Muslim women had very few grounds to annul a marriage. Many were forced to end their marriage by becoming apostates: under classical Muslim law, a change in religion rendered a marriage contract nugatory (Thanawi and Qasimi n.d.). In order to facilitate the juridical dissolution of marriages in India, Thanawi borrowed from the Maliki school, which had more flexible grounds for the dissolution of a marriage. With the input of the Indian ulama and Muslim members of the national legislature, a bill known as the Dissolution of Muslim Marriages Act, 1939 was introduced in order to amend the statute laws (Ahmad 1986: 78).

Figures such as ʿAbd al-Razzaq al-Sanhuri in Egypt and Asaf A. Fyzee in India might serve as two paradigmatic figures whose intellectual labours and practical applications translated classical Muslim laws into the form of modern positive law that functioned within a modern state (Hill 1987). Because they had to translate Muslim laws into Occidental models of the secular and the
nation state, they also had consciously to sacrifice certain aspects of it, such as exculpating the moral dimensions of Muslim law.

Commenting on the work of some modern Arab jurists, the legal historian Baber Johansen (1999: 59) wrote: ‘The transformation of a sacred law into a code established by legislation changes its basic structures and sacrifices some of its important dimensions . . . In fact, the Arab authors of the codification period have . . . removed those dimensions of the fiqh which do not enter an occidental understanding of “law” from their legal discussion.’ What the modern legislative process of codification sacrificed or what proponents of the reconstruction of Muslim law failed to address, Johansen worried, was the ethical content directed at the conscience of the individual, their forum internum, a dimension that was always part of historical Muslim law and ethics.

Johansen’s comments would hold equally true for developments elsewhere in the Muslim world. One had only to look at the views of Asaf Fyzee in India. A Cambridge-educated lawyer and later an Indian civil servant, Fyzee framed Muslim law within the confines of a nation state. He was most explicit, compared to his Arab counterparts, in his undisguised articulation of radical theoretical presumptions. Muslim law, he stated, required reformulation in order for it to harmonise with the requirements of the secular nation state. In his realist approach to the law Fyzee was explicit: religion and religion-based morality belonged to the private sphere.

Fyzee (1981: 85) conceded that, in the earliest iterations of Islam, ‘law is not distinct from religion’ and the two streams of religion (shari‘a) and law (fiqh) flow in a single channel and are indistinguishable. Yet, for all colonial and post-colonial Muslim polities the unity of religion and law was an insoluble dilemma or aporia and remains so to this day. In trying to address this problem, Fyzee pointed out that the term shari‘a in essence reminded one of revelation. By contrast, the term law (fiqh) encompassed rational acts and prescribed legal acts. In another construction Fyzee interestingly described the shari‘a as the moral law and called fiqh the civil law (ibid.: 57). Therefore, in his view, shari‘a effectively belonged to the domain of ethics, and, by relating primarily to the holy, it remained subjective and private. Law, on the other hand, consisted of objective rules for outward social conduct (ibid.: 99). Fyzee in this respect pushed for the secular construction of Muslim law.\(^7\)

Aware of this double meaning of fiqh as both law and morality or consciousness, Fyzee proposed an elegant solution. ‘Hence, in order to secure obedience to the law,’ noted Fyzee (1981: 32), ‘Islamic jurisprudence creates two sanctions – a primary sanction and a secondary sanction. The primary sanction is the desire of the human conscience to win grace in the eyes of God; the secondary sanction is created by society, namely, the enforcement of legal commands by the state in the name of the king.’ With this explanation Fyzee showed an awareness of the moral dimension of Muslim law. Fyzee pointed out the growing
incommensurability between the order of conscience and the order of politics in a modern centralising and disciplinary nation state such as India. In a pre-modern world the realm of conscience and politics shared a common cultural and moral universe with some continuity and coherence. This continuity dissolved with the advent of colonialism where political, economic and legal changes triggered a set of transitions resulting in a heterogeneous public sphere that created greater dissonance between the private and public. Morality remained informed by religious discourses, whereas politics entered into a ferment of secularism. Fyzee explicitly endorsed the narrative of secular politics and the changes it ushered in. Aware of the gravity implicit in his proposals, he spoke sagely: “if . . . some elements that we have regarded as part of the essence of Islam have to be modified, or given up altogether, then we have to face the consequences’ (ibid.: 88).

He seemed convinced that it was necessary to ‘separate logically the dogmas and doctrines of religion from the principles and the rules of law. . . . The essential faith of man is something different from the outward observance of rules; moral rules apply to the conscience, but legal rules can be enforced only by the state. . . . The inner life of the spirit, the ‘Idea of the Holy’, must be separated to some extent from the outward forms of social behaviour. The separation is not simple; it will even be considered un-Islamic. But the attempt at a rethinking of the shari’a can begin only with the acceptance of this principle’ (ibid.: 99).

Fyzee’s counterpart in Egypt was another lawyer, the aforementioned Ahmad Safwat, who also distinguished between public law and personal ethics and whose writings Talal Asad (2003: 205–56) has carefully analysed in the context of law in colonial Egypt. Compared to his Egyptian counterparts, Fyzee gave considerably more serious thought to the far-reaching social consequences and intellectual transformations he was proposing for the application of Muslim law under colonial and post-colonial regimes. Often Muslim reformers undertook legal revisionism by stealth. They were sensitive to a backlash from more orthodox ulama and even from laypersons if they were seen to support notions of change that were too radical. On other occasions reformers failed to theorise the implications of their reforms for the epistemology and ontology of the law, evading the more difficult questions concerning the consequences of their reforms. Most Muslim thinkers circumvented discussion of the legitimacy of the nation state, accepting it as a de facto state of affairs and clung to transnational constructions of the confessional community (umma) as more deserving of loyalty and commitment.

However, in pre-partition India some traditional ulama began thinking about how to legitimate the nation state within a Muslim juridical idiom. If Fyzee advocated a secular civil law, then at least one traditional scholar advocated a communitarian notion of shari’a governance. Abu-l-Mahasin Muhammad Sajjad (d. 1940), a traditionally trained religious scholar remembered for establishing a network of informal judicial tribunals for Islamic law in several states of
India, advocated the institutionalisation of ‘shari’a governance’ (imarat-i shar‘iyya) for Muslims. In his numerous writings Sajjad passionately argued that the loss of Muslim territorial power did not mean that Muslims were no longer obliged to follow shari’a norms. In order to do so they had voluntarily to organise themselves in a form of shari’a-based self-governance. Hence, there was also a need to elect an ‘amir of the shari’a’ in every state of India to organise the moral life of the community. After Sajjad’s petitions for constitutionally enshrined fundamental rights for Muslims had failed, he opted for informally regulated private rights for his religious group, without affecting the public character of the Indian state.

In this reconfiguration, the character of shari‘a, apart from a moral law, was also a bulwark against external interference as well as an instrument for the political mobilisation of Muslims. Here again shari‘a became part of the grammar of the emergent Muslim public sphere, as was the case in Egypt. Sajjad did not demand the application of Islamic criminal laws, despite the fact that he proclaimed the revival of the shari‘a and claimed it was a comprehensive and total normative order (nizam). Those who willfully omitted adherence to the shari‘a, were, in words, returning to a state of pre-Islamic ignorance (jahiliyya). This kind of rhetoric differentiating Islam as an ‘order’ or ‘system’ against the morally unsettling state of jahiliyya as part of Sajjad’s sociological analytic prefigured another grammar that would later be popularised by figures such as the Pakistani ideologue Abu-l-A‘la Mawdudi and later the Egyptian ideologue Sayyid Qutb.

For Sajjad and many of his successors in the shari‘a governance movement, the organised and institutionalised practice of the shari‘a stood in lieu of the caliphate. In other words, the shari‘a was a symbolic empire with a crucial difference; now one pledged loyalty to a normative (legal) empire, not a territorial empire, as previously known. Shari‘a governance, as contemplated by Sajjad, was also a form of resistance to modernity. One must point out that modern legal systems were viewed as the final juridical and moral arbiters. Moral norms that were once located within communities, tribes or extensive kinship networks were replaced by juridical norms. By keeping certain domains of the law out of the grasp of state power, as Sajjad suggested, communities could reclaim a certain level of autonomy by exercising moral power over subjects. Today, the informal juridical tribunals established by Sajjad continue to flourish in a secular India while simultaneously also establishing indirect linkages with the formal legal system.

**Conclusion**

Muslim laws are palimpsests or genetic tissues that reveal the complexity of the colonial encounters as well as earlier social experiments. Far from simple one-way exchanges, both the colonial authorities and the colonised subjects
generated and innovated their own internal discourses to meet new contingencies. As Muslim peoples in different locales reconstructed their laws, they also altered inherited social imaginaries through interactions and processes of transculturation that brought about significant transformations: ones that legal historians can only begin to chart decades and centuries later.

While there was no symmetry in power between the coloniser and the colonised, it did not mean that the colonised did not have agency in determining some aspects of their moral and cultural life. In various contexts during the colonial period it became obvious that Muslims made interventions, resisted and were also co-partners in determining Muslim law. The asymmetry in power became most manifest in legal Orientalism – the way Muslim laws were imagined and studied, and on grounds of which policies and attitudes towards them were shaped. Legal Orientalism has an obdurate legacy and continues to cloud perceptions of entire Muslim societies and practices.

If there was one significant change that the colonial legacy made to the construction of Muslim laws, then it was to make the state an integral player in the making of modern Muslim laws. This was a significant shift, one to which scant attention has been paid and that many traditional practitioners of Muslim laws today resist. The traditional ulama preferred to sustain the presumptions of the pre-colonial imaginary of Muslim law, irrespective of the resultant anachronism.

Paradoxically, juridical discourse or moral philosophy was also the one domain in which coloniser and colonised found an elective affinity. From Rifa’ah Raﬁ’ al-Tahtawi and Muhammad ‘Abduh in Egypt and Khayr al-Din al-Tunisi in Tunisia, to Sayyid Ahmad Khan and Ashraf ‘Ali Thanawi in India, to mention a few examples, not all of them judged the European and later post-colonial juridical orders to be completely repulsive. While many a traditional Muslim scholar disagreed with the substance of colonial laws and resented the political philosophy that animated it, they did nevertheless find an elective affinity to the practice, ordered symmetry, procedures and positivist features of colonial laws. Part of this elective affinity was rooted in a shared legal positivism between Muslim and Western juridical traditions.

The colonial past as memory continues in the present in transnational networks on a global scale through mass migrations of Muslim populations to the West, especially in North America and Europe. This memory was also on occasion invoked to fuel the politics of dissent and violence. Acts of terror by a plethora of Muslim non-state actors invoked the memory of colonisation in order to counter Western neo-colonial wars and territorial occupation. In terms of Muslim law this past was thematised in petitions for the implementation of versions of the shari’a in the form of Muslim Personal Law in the United Kingdom, Canada and South Africa. At the same time, Indian Muslims fiercely resisted attempts to dissolve Muslim family law in India, while, in several
northern Nigerian states and in the Sudan, *shari‘a*-based penal codes were enthusiastically implemented for some time. The ghosts of colonialism and its legacies of entanglement with Muslim laws nevertheless live on.

**Summary of chapter**

As overlapping categories, colonialism, globalisation and transnationalism shaped Islamic law, just as internally produced Muslim perceptions of norms, values, order, justice and truth marked the international order. As a normative system at the weaker end of an asymmetrical global geo-political and moral system, much of the transformation of Islamic law also occurs in the mirror of Euro-American knowledge traditions. Liberal capitalism remains a hegemonic discourse, as do secular democratic ideals producing subjectivities and forms of living that reflect those values. Muslim thinkers and societies often feel obliged to respond to these forms of life ambivalently, by both rejecting certain aspects and accepting others. Indeed, law and social norms are part of a complex cultural matrix, which in turn, is at the centre of social and political transformation. Cultural evolution accompanies certain changes in Muslim social imaginaries as well as foments mutations in the conceptions of the self and other (identity). Islamic law and Muslim ethical deliberations are virtually palimpsests with revealing testimony to such transformations in rich details. Instead of thinking of colonialism, globalisation and transnationalism as processes resembling a one-way street – whereby the dominant powers inform the dominated – this chapter presents the relationship of domination to be more complex and unpredictable. The colonised played as much a role in shaping their normative order as did the coloniser, despite the assymmetry of power between the two stakeholders.

In the colonial and post-colonial periods Muslim knowledge traditions became forcibly entangled with Euro-American knowledge traditions with greater intensity than previously documented and produced new hybridities. Certain colonised regions and countries gained greater influence and prominence compared to others and became models for other countries. In the post-colonial world of the late twentieth and early twenty-first centuries, Islamic law drew global attention. In the previously colonised states, there were vocal demands to reinscribe Islamic law into the normative identity of the emerging states. In some countries there were calls to take Islamic law beyond the purview of family law and elevate it as the symbol of state sovereignty with the full gamut of *shari‘a* based laws to be applied. The stated goal of such moves were always that Islamic law made for a superior value system and would lead to social salvation. Outside nation-state contexts where an Islamic reawakening became tangible Islamic law became a desirable norm and value-system in the private domain as integral to individual practices for salvation. Demands for the application or recognition of aspects of Islamic law are made by sizeable Muslim minority communities in parts of Europe and North America.

**Questions**

1. The colonial encounter entailed a clash between different conceptions of religion and normativity. What misperceptions of Islam does the author highlight?
2. The author distinguishes between *shari‘a*, Muslim laws and modern positive law. What is the relationship between these concepts, and how was one transformed into the other?
3. In what sense did the colonial encounter affect legal practice in Britain?
4. What were the processes colonial regimes successfully used in transforming Islamic law in the colonies?
5. How can one describe the agency of Muslim actors in their relations with colonial regimes and in the making of a new version of Islamic law?
6. Discuss the role of Islamic law in terms of Muslim conceptions of the moral life and its relationship to personal salvation.
7. What were the key elements of Fyzee’s adaption of Islamic law to the requirements of the secular nation state?
8. Do you think Sajjad’s communitarian conception of shari’a has any relevance for Muslims living in Europa? Why?

Notes

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1. The inspiration for this phrase as well as the form has been borrowed from A. J. Liebling ([1959] 1986).
2. The analytical keyword that looms large is: counterpoint. Although the term ‘contrapuntal’, meaning the counterpoint in classical music, was popularised by the Palestinian American thinker Edward W. Said (1994), it is indeed notable that some fifty years before Said it was already a powerful concept in the intellectual vocabulary of the Cuban anthropologist Fernando Ortiz ([1947] 1995). Counterpoint in Ortiz’s lexicon demonstrated the play of illusion and power in the making and unmaking of cultural formations. Ortiz’s insights derived from his Cuban context might be equally applicable to African, Asian and Near Eastern colonial settings in their respective encounters with imperialism. See the very helpful introduction by Fernando Coronil (1995).
3. See the works of Gerber (1999), Zubaida (2003) and Hallaq (2005). Zubaida gives some attention to the continuity of the law from the pre-modern to the modern, while most other historians of Islamic law pay attention only to the discontinuities of the law. For discussions about the writing of history and the difference between history and memory, see among others, de Certeau (1988: xxvi) and Chatterjee (2004: 12).
4. For a most illuminating study of how cultural domination works by consent, see Viswanathan ([1989] 1998).
5. For more on legal Orientalism, see Strawson (1993, 2001).
7. The interrelated nature of morality and law is further complicated by the fact that classical legal usage allowed for some slippage between shari’a and fiqh without any neat separation between the two. Furthermore, authorities like Abu Hamid, one of the founders of the orthodox schools of Sunni law, and the jurist-theologian Abu Hamid al-Ghazali, as well as the historian Ibn Khaldun, all conceded to a strong moral interpretation of law (fiqh). Moral discernment, they all agreed, was a kind of consciousness or intuitive perception (ma’rifah) acquired by an individual through knowledge and self-discipline in order to detect what is right and wrong.
References


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