What is Shari'a?

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1 INTRODUCTION: CONCEPTUAL DIFFICULTIES

In writing any history of the other, we encounter a profoundly epistemic, and perhaps insoluble, problem of linguistic representation. The problem is derivative of the fundamental quandary that Nietzsche called the "legislation of language", which establishes "the first laws of truth", where a "word becomes a concept" having "to fit countless more or less similar cases ... which are never equal and thus altogether unequal".[1] This legislation undoubtedly amounts to an enactment of truth through "metaphors, metonyms, and anthropomorphisms" that have been 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".[2] The quandary then resides in the originary fact that "every word is a prejudice".[3]

Derivatively, as our language (in this particular case, obviously, 21st-century English) is the common but structured repository of ever-changing modern conceptions, modern categories, and, primarily, of the nominal representation of the modern condition, we stand before the wide expanse of the Shari'a and its history is nearly helpless. Our language fails us in our endeavour to produce a representation of that history, which not only spoke different languages none of which was English (not even in British India), but also articulated itself conceptually, epistemically, morally, socially, culturally, and institutionally in manners and ways utterly different from those material and non-material cultures that produced modernity and its Western linguistic cultures.

Take for instance the most central concept in the study of law, the very term "law" itself. Arguably, cultural and conceptual ambiguities related to this term (never to my knowledge identified, let alone problematised, by legal Orientalism) are

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1 Nietzsche, "On Truth and Lies in a Nonmoral Sense", pp. 81, 83.

2 *Ibid.*, p. 84.

3 Nietzsche, *Human, All Too Human*, p. 323.

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responsible for a thorough and systematic misunderstanding of the most significant features of the so-called "Islamic law", itself a modernist creation. When looked at in Europe for over a century, "Islamic law" could only disappoint, and in fact was made to disappoint. It could never match any version of European law. It was ineffective, inefficient, even incompetent. It was thought mostly to apply to personal status, having at an early stage "divorced" itself from "state and society".[4] Its penal law was a little more than burlesque, "never had much practical importance", and was in fact downright "deficient".[5] Of course much of this was colonialist discourse and potent doctrine, cumulatively but programmatically designed to desiccate the Shari'a and replace it with Western codes and institutions. But linguistics here is not to be marginalised, for if concepts are defined by language, then language is a framework that not only delimits concepts – not a mean achievement – but that also controls them. Prime evidence of this is the routine and widespread statement, often used to introduce "Islamic law" to the uninitiated, that this law does not distinguish between law and morality. The absence of distinction becomes a distinct liability, for when we speak of any law, our paradigmatic and normative stance is that this law must measure up against what we consider to be "our" supreme model. The moral dimension of the Shari'a, in language and in its conceptual derivation, is thus dismissed as one of the causes which rendered that law inefficient and rigid. The morality that is so enshrined in it introduces an ideal element that distances it from the messiness and disorder of 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 for analysis, which when attempted in recent studies[6] has yielded luminous effects. It turns out that Islamic law's presumed "failure" to distinguish between law and morality did no less than equip it with efficient, communally based, socially embedded, bottom–top methods of control that earned it remarkably willing obedience and – as another consequence – made it less coercive than any church or imperial law Europe introduced since the fall of the Roman Empire. Thus the very use of the word law is *a priori* problematic, for 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 and surveillance-oriented law that by comparison to Islam's jural forms, *lacks* (note the reversal)[7] the determinant moral imperative. In order for the term "law" to reflect what the Shari'a stood for and meant, we would be required to effect so many omissions, additions, and qualifications that we would render the term itself largely, if not entirely, useless. The linguistic predicament, which is my point here, is in no way diminished by substituting the term "Shari'a" for Islamic law, for this word too has been subjected to a new Nietzschean "legislation" that renders it equally, if not at times more, problematic.

4 These stereotypes remain tenacious even in recent scholarship. See, e.g., the descriptions in Collins, "Islamisation of Pakistani Law: A Historical Perspective", pp. 511–534, at 511–522.

5 The words of U. Heyd, one of the foremost scholars on the criminal law of Islam. See his *Studies in Old Ottoman Criminal Law*, p. 1.

6 See, e.g., Peirce, *Morality Tales*; Würth, "San'a Court".

7 Reversal, i.e. of the ubiquitous Orientalist language that ascribes to Islam and Islamic law a long list of absences (e.g. "Islamic law does not have a general theory of contract", or "it does not distinguish between law and morality").

Incriminated in this terminological-cum-conceptual prevarication is a vast array of language that seems to be overcharged with liminal meanings that are often 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", redolent of a well-articulated political and ideological position that inherently assumes the Shari'a to contain deficiencies that need correction and modernizing rectification. "Reform" thus clearly insinuates not only a transition from the pre-modern to the modern, but also passes an un-appealable verdict on an entire history and a legal culture that is perennially wanting and thus deserving of displacement, and – no less – eradication, from memory and the material world, respectively. If the study of "reform" – as a field of academic endeavour – 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 "reform", in its Western inspiration, was parachuted in to rescue Shari'a's subjects from the despotisms of their tyrannical jural past and to set them on the path of modernity and democracy. To view "reform" as the most recent stage of Shari'a's history is to see that history as organically and structurally ordered in a teleological narrative that had no choice but to produce a particular closure, a particular ending, so to speak, to a drama that has been predetermined from the very beginning of its own history. So much then for a dispassionate study of pre-modern Shari'a, except as a relic of a dead past that has neither a true genealogy nor a spatiotemporal continuity.

No less incriminated in the "legislation of language" is the perduring and ubiquitous adjective "religious", which is not only inseparable from the epithet "Islamic Law" but is also apodictically and semantically present in its very linguistic structure. "Islamic law" almost never signifies a geography or a material-institutional culture but a religion, a religious culture, a religious law, a religious civilisation, or an irrationality (hence the presumed "irrational nature" of this law). By the rules of linguistic entailment, therefore, the "religious" emerges as oppositional to such concepts as "rationalism" and, more starkly, "secularism". In other words, the very utterance of the word "religious" speaks of the absence of the secular and the rational. With this essence-based, yet language-driven, conception of "Islamic law", the emphasis would continue to be on the religious, irrational and un-secular "nature" of "Islamic law", and much less on how it functioned in social contexts, and what its "religiosity" practically meant to the actors involved in its production, application, and reception. Furthermore, repugnance to religion, especially when seen to be intertwined with law (an anathema to Euro-American lawyers and jurists), 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 logic and culture of *modern* capitalism tends to chip away at the centrality of the moral in the pre-modern universe. Historical evidence must thus be shaped to fit 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 foreclosure on the force of the moral within the realm of the jural. Theistic teleology, eschatology, socially grounded moral gain, status, and many other notions of a similar type, are reduced in importance, if not totally set aside, in favour of other explanations that are more comprehensible within our preferential,

but distinctly modern, systems of value. History is written according to our "legislated" terms, when in theory no-one denies that it is our set of terms that should be subordinated to historiography's imperatives. But this is precisely why there is theory in the first place.

With these limiting determinants in mind, let me return to the foundational concept "Shari'a". To state that Shari'a is acquiring a renewed importance is to affirm the obvious, but it is, at the same time, to succumb to the conceptual–linguistic fallacy that we have warned against in the preceding paragraphs. It is precisely the fallacy involved in the very use of this expression, together with the affirmation of its renewed importance that will concern me here.

The recent rise in Western scholarly interest in the Shari'a merely reflects the upsurge of powerful political activism throughout Muslim lands, but an activism whose ideological platform centres on the religious–legal desideratum of restoring the "Shari'a". Abundant statistics and data from around the Muslim world show a massive majority supporting the implementation of the Shari'a in one form or another; none of them remotely clear in terms of make-up, features, definition, or character. In fact, there exists today no single systematic account of what this Shari'a is and what it should look like. An expression of this definitional ambiguity is the fierce debate that occurred among Canadian Muslims with regards to introducing Shari'a tribunals in the Province of Ontario. No-one involved in the debate seemed to know what the Shari'a was that was being espoused or opposed. By all indications, the chief reference for both parties to the dispute was, if there was any, the *fiqh* of the schools as stated in legal manuals and commentarial compendia. Some seemed to want to integrate into this reference the Islamic(ised) legislation on personal status adopted in certain Muslim countries, most notably Pakistan. The textual constitution of the law, namely, its capacity to be known and determined from texts, is, I suspect, the hallmark of the call by some British Muslims to apply the Shari'a even in the UK and Europe, if not in North America, Australia, and probably the rest of the non-Muslim world. Some reformers in the Muslim world have proposed a new theoretical underpinning for this revival, arguing for the adoption of foundational concepts that bear little, if any, resemblance to their pre-modern counterparts.[8] But aside from their purely theoretical construction – which is eminently textual – they provided neither for the modalities of realising the project, nor for the social, political, moral, economic, and cultural parameters that ought to obtain as conditions for the implementation of this project. The majority of writers, however, representing almost all political platforms, appear to espouse a revival of what they regard as the historical Shari'a or a modernised version thereof, although the version itself has never been elaborated or even defined. What is notable about such espousals is that, despite their many variants, they seem to possess a perception of pre-modern Shari'a that makes serious claim to objective knowledge. A particular practice, determined by the *fiqh*, is posited to have actually existed, so that nothing more is now required than to restore this practice, modified (as many would propose) only enough to

8 A radical example is Muhammad Shahrur whose views, as intellectually impressive as they are, have been received less than well. For a summary of his proposed reform, see Hallaq, *History of Islamic Legal Theories*, pp. 215–254. On his thought more generally, see Eickelman, "Islamic Liberalism Strikes Back".

accommodate the exigencies of the modern world. The historical practice is never imagined to be other than what the law-as-text is. Few would see it as an anthropological account of a jural phenomenon, where a social, moral or pecuniary occurrence (read: case) becomes a complex site in which law as text merges into custom and social mores, metamorphosing into an organic socio-legal relation that mediates conflict and that, in the process of such mediation, loses its formal juristic connection with the strict demands of the legal text.

It is the chief contention of this essay that the modern uses of the conceptual category of Shari'a is just that, modern, which is to say in no uncertain terms that such uses are as estranged from the reality of the past – whatever that reality is – precisely to the same extent as modernity has ensured the conversion of the past into an ideological tool. For there is no history without modernity's decisive and commanding interference; hence, any imagining of a history detached from the condition that is modernity is ontologically inconceivable.

2 THE SOCIO-MORAL FOUNDATIONS OF THE SHARI'A

But what is this modern conception of Shari'a that we presume here to constitute a metaphor of what its non-modern counterpart was? Specifically, our contention here is that in its present form, the Shari'a distinguishes itself as an entexted entity, in that it was transformed over the past two centuries or so – from a worldly institution and culture to a textuality that not only represents the subtracted differential between the pre-modern organic structure and its entexted version, but also engages the very characteristic of being entexted in a politics that the pre-modern counterpart did not know. Which is to say that even the surviving residue, the entexted form, functions in such uniquely modern ways that renders the very residue foreign, in function and substance, to any possible genealogical counterpart.

It cannot be overstated that the Shari'a originally represented a complex set of social, economic, cultural, and moral relations that permeated the epistemic structures of the social and political orders. It was a discursive practice in which these relations intersected each other, acted upon each other, and affected each other in countless ways (although how this *exactly* happened in *specific* locales awaits multiple micro-studies). This discursive practice involved institutions operating upon, resisting and/or enhancing each other; it involved writing, studying, teaching, and documenting; it involved a political representation in the name of the "law",[9] and a strategy of resistances against political and other abuses; it involved a cultural rendering of law in practice, where cultural categories meshed into *fiqh*, legal procedure, moral codes, and much else; it involved a deeply moral community which law, in its operation, could not but presuppose, for it is a truism that the Shari'a itself was constructed on the assumption that its audience and consumers were, all along, moral communities; it involved an intellectual system in which the jurists and the members of the legal profession were educators, "writers", and thinkers who, on the one hand, were also the historians, the theologians, the men of letters, and the poets (if not also the chemists, physicians, and astronomers), while on the other, men of

9 Again, a highly problematic concept.

ideas who contributed to the forging of a complex set of relations that at times created, or conduced in the creation of, political truth and ideology while at other times confronting power with its own truth; it involved the regulation of agricultural and mercantile economies that constituted the vehicle for the maintenance of material and cultural lives that spanned, perforce, the entire gamut of "classes" and social strata; it involved a theological substrate that coloured and directed much of the world-view of the population whose inner spiritual lives and relationships were in daily touch with the law. The theological substrate encompassed the mundanely mystical, the esoterically pantheistic and the "rationally" philosophical, and so it created complex relations between the Shari'a and the larger spiritual and intellectual orders in which, and alongside which, it lived and functioned. The Shari'a then was not only a judicial system and a legal doctrine whose function was to regulate social relations and resolve disputes, but a discursive practice that structurally and organically tied itself to the world around it in ways that were vertical and horizontal, structural and linear, economic and social, moral and ethical, intellectual and spiritual, epistemic and cultural, and textual and poetic, among much else.

Yet, while being the sum total of these relations, the Shari'a distinguished itself from modern law in another, crucially different way; namely, that it originated from, and cultivated itself within, the very social order which it came to serve in the first place. While in its textual and technical exposition it was, by necessity, of an elitist tenor, very little else in it was elitist. Its personnel hailed from across all social strata, and operated and functioned within communal and popular spaces. The *qadi*'s court, as well as the professor's classroom and the *mufti*'s assembly, was the yard of the mosque, and when this was not the case, the market place or a private residence. Unlike the modern government office, which one does not enter unless obliged to settle an official matter (for it has no other function in the first place), the mosque, the market place and the residential home served, *mutatis mutandis*, a multiplicity of other social and religious-communal functions. The intersection of the legal with the communal and the religious was a marker of populism and communitarianism.

So was the marker of legal knowledge, which could scarcely have been more widespread across the entire range of the social order. To begin with, legal education was informal and accessible to all interested individuals. The *halaqa*, where legal education took place, required no formal application, examination, or any institutional approval for admission. This permitted the curious and the interested to "sit in", thereby contributing to the spread of legal knowledge, to one degree or another, among non-professionals. The neighbourhood imams who spoke of religious matters and who delivered the Friday sermons were agencies of popularising law, and the many students aspiring to a legal career played a similar role. The notary (*shuruti*), a private scholar who drafted legal documents for a fee, also provided advice and expertise in nearly every corner and street in Muslim towns and cities.[10] But it was the *mufti* who perhaps more than anyone else contributed to the spread of legal knowledge among the masses. From minor experts to major legal scholars, *muftis* were routinely accessible to the masses, free of charge or nearly so.[11] The Shari'a,

10 Hallaq, "Model *Shurut* Works", 109–134; see also Tyan, "Notariat".

11 This "free legal advice" was noted by early colonialist officers in India, whose commentary on Islamic justice was otherwise negative. See Strawson, "Islamic Law and English Texts", p. 34, and n.36, below.

and to some extent Sufism, defined the cultures in all regions where it was substantially introduced, giving it the status of paradigmatic cultural knowledge. It was, enmeshed in its various versions with local customs and practices, a way of life.

On the doctrinal level, legal doctrine (*fiqh*) guided and promoted, but did not superimpose itself upon social morality. Because the *qadi* was an immediate product of his own social and moral universe, he was constituted – by the very nature of his function – as the interpretive agency through which the *fiqh* was mediated and made to serve the imperatives of social harmony. Procedurally, too, the work of the court appealed to pre-capitalist and non-bureaucratic social constructions of probity and moral rectitude that directly derived from the immediate local site of social practice. Thus, the shared communal values of honour, integrity, shame, and religio-social virtue entered the court's arena as part of a dialectic with the assumptions of *fiqh*.

The *qadi* was not the only socially linked official in the court. All other functionaries shared the same social and moral landscape, most notably the witnesses and the court examiners. Much of the work of the court related to the investigation not only of events but also, and perhaps more importantly, of the integrity and rectitude of the persons involved in litigation or in a given set of events. Just as the *qadi*'s primary concern in recruiting witnesses for the court was the quality of moral integrity, it was the concern of these witnesses to assess the moral worth of people involved in litigation. The function of witnesses would be rendered impossible without local knowledge of existing customs, moral values, and social ties. Impossible, not only because knowledge of others would be inadequate and insufficient, but, more importantly, because the credibility of testimony itself – the bedrock of adjudication – would cease to be both testable and demonstrable. Rectitude and trustworthiness – themselves the foundations of testimony – constitute the personal moral investment in social ties. To lie means in effect to lose these ties and, in turn, to lose social prestige, honour, and all that is productive of life's network of social obligations.

Yet another marker of a socially engaged court was the very act of evidential attestation to the court's minutes, which required two or more witnesses' signatures. Some of these witnesses were officials of the court, some relatives of the litigants, whereas others were no more than mere bystanders who happened to be present on account of another matter.[12] Although witnesses, retained and paid by the court, hailed usually from the higher social classes, some of them were prominent jurists and provincial magnates; other witnesses who accompanied the litigants obviously represented the entire spectrum of social classes in the larger population, particularly the lower strata. As an aggregate act, their attestation at the end of each record summing up the case, amounted not only to a communal approval of, and a check on, court proceedings in each and every one of the cases heard by the court[13] but also a depository of communal memory that assured the present and future public access to the history of the case.[14] In many ways, therefore, these witnesses functioned as community inspectors of the court's business, ensuring the moral integrity of its procedures, just as their counterparts, the court's legal experts (*ahl al-'ilm*), ensured the soundness of applicable law.

12 Peirce, *Morality Tales*, p. 97; Marcus, *Middle East*, p. 112.
13 *Ibid.*, p. 112.
14 Hallaq, "Qadi's *Diwan (Sijill)*", pp. 415–436.

Like judges and witnesses, the scribe of the court was invariably a member of the local community and himself a jurist of some sort. His ties to the community enhanced the already strong connections between the court and the surrounding population. The scribe, by virtue of his role, was indeed instrumental in preserving the relationships of social and epistemic continuity between court and society, although it was often the case that senior scribes functioned as deputy-*qadi*s. As one scholar aptly noted: "[J]udges and scribes seem to have developed an interdependency that sustained their cooperation, particularly since lower-ranking judges often also shared a similar social background with the scribes."[15]

Furthermore, the consumers of law and of the court's services were themselves the loci of the moral universe. That those who initiated litigation in the court were the social underdogs is now certainly beyond debate. They were women versus men, non-Muslims versus Muslims, and commoners versus the economic and political elite. That they won the great majority of cases and that they found in the court a defender of their rights is equally a forgone conclusion.[16] They appeared before the *qadi* without ceremony and presented their cases without professional mediation. They spoke informally, even disorderly, and employed the discursive and rhetorical techniques that, according to capacity, each could muster. That they could do so was testimony to a remarkable feature of Muslim justice, namely, that no gulf existed between the court as a legal institution and the consumers of the law, however economically impoverished or educationally disadvantaged the latter were.

Yet, it was not entirely the virtue of the court and *qadi* alone that rendered this gap non-existent, for credit must equally be given to these very consumers. Unlike modern society, which has become estranged from the legal profession in multiple ways, traditional Muslim society was as much embedded in a *shar'i* system of legal values as the court was embedded in the moral universe of society. It was a salient feature of that society that it *lived* legal ethics and legal morality, for these constituted the religious foundations and codes of social praxis. To say that law in pre-modern Muslim societies was a living and lived tradition, is merely to state the obvious.[17]

The social underdogs thus knew what their rights were before approaching the court, a fact that explains why they won the great majority of cases when they happened to be plaintiffs.[18] Their counsels were not lawyers who spoke a different, incomprehensible language, nor were they higher-class professionals who demanded exorbitant fees that would have made litigation and recovery of rights as expensive as the litigated object. Instead, their counsels on the technical and more difficult points of law were the largely free-of-charge *muftis* whose opinion the court took very seriously. But the spread of legal ethics and legal knowledge in the social order was

15 Agmon, "Social Biography", p. 106.

16 Gerber, *State, Society*, pp. 56–57, 139.

17 It is in this context that a major revision of the Schachtian school can be made. Schacht and his followers accept the historicity of a "living tradition" during the second/eighth century, a tradition that lost momentum and seemed to disappear with the disjunction that occurred between law, on the one hand, and society and politics on the other. That law continued to be a living and lived tradition, and that society is the carrier of this tradition, are propositions that were dismissed out of hand. It is now unquestionable that the living and lived tradition continued to flourish, with an ever-increasing force, centuries after the formative period of Islam. For Schacht, see his *Origins*.

18 Marcus, *Middle East*, pp. 111–113.

also the function of a cumulative tradition, transmitted from one generation to the next, and enhanced at every turn by the vibrant participation of aspiring law students, *muftis* great and small, and imams, and by the occasional advice that judges and other learned persons gave while visiting acquaintances, walking in the street or shopping at the market. Thus, when the common folk appeared before the court, they spoke a "legal" language as perfectly comprehensible to the judge as the judge's vernacular "moral" language was comprehensible to them.[19] *Fiqh* and social morality, if they could be at all separated, were two sides of the same coin, one feeding on and, at the same time, sustaining the other. Having been a legal as well as a social institution, the Muslim court was eminently the product of the very *moral community* which it served and in the bosom of which it functioned.

From a grass-root system that took form and operated within the social universe and, more importantly, within the moral community;, the Shari'a as law and culture travelled upward with diminishing velocity to affect, in varying degrees and forms, the *modus operandi* of the minimal "state" (if the captioned term is fit for use at all). The jurists emanated from the very society and culture that they served, and the law as ideology and doctrine required that they be so. It was one of the most striking features of the Shari'a, as a substantive and jural system, that it was generated at the very social level at which it was applied. In sharp contradistinction, the law of the modern nation-state (however democratically representative of the "people's interests") is superimposed from the centre in a downward direction, first originating by the mighty powers of state apparatus and thereafter being deployed – in a highly structured but deliberately descending movement – to the individuals of the social order, those individuals who are harnessed as national citizens (fathers and mothers in the nation's families, economically productive agents, tax-payers, soldiers, etc.) It is a virtual truism that a society operating by the legal and cultural norms of the Shari'a was one that was largely self-governing. Self-rule is thus a marker of the state's absence – a situation almost inconceivable in this day and age. To this pre-modern absence and its diametrical obtrusiveness in the modern era we shall return later.

Integral to its being socially based, and communally and morally embedded, the Shari'a developed a unique way of textually dealing with the world (indeed, only one of multiple ways of dealing with the world). It is well known that Islamic jurisprudence was highly individualistic, giving rise to an extreme version of "jurists' law". "Every master-jurist (*mujtahid*) is correct" was at once a maxim, a doctrine and an extensive practice. Each case had two, three, or even a dozen opinions, each espoused by a different jurist and each was located on a spectrum ranging from the norm of permission to that of prohibition, with several grades of each in between. While this staggering plurality is a cardinal feature of *fiqh*, the *usul* system managed to develop juristic mechanisms and strategies that could effectively deal with this multiplicity. Different opinions on a single issue were to be pitted against each other in an effort to determine which of them was epistemologically the soundest or the weightiest, with the clear understanding that epistemology did not operate for its own sake but functioned as both the mechanism and yardstick of rationalising the mundane and not-so-mundane exigencies of social existence.

19 See, e.g., Tahawi's comments on the accessibility of legal documents (*shurut*) to the average person, in Wakin, *Function of Documents*, pp. 10–29.

Notwithstanding all efforts to minimise plurality, Shari'a's *fiqh* was incontrovertibly pluralistic: this is simply one of its most essential features. Pluralism was thus a marker of a strong sense of judicial relativism, where a blindfolded Lady of Justice has no place whatsoever. A blind justice was no justice, for people are never truly the same, and to be just, the law could not treat them as a generic entity. A blind justice was no more to be trusted as a judge than a blind person as a witness to an event. This pluralism, it must also be noted in this context, stood in sharp contrast with the spirit of codification, another modern means of homogenising the law and thus the subject population.

The pluralism of the *fiqh* was not only a hermeneutical expression of the divine will, but also a system, a mechanism, and a process that was created for the social order by the very order itself. From this perspective, then, the *fiqh* operated in a dual capacity: first, it provided an intellectual superstructure that positioned the law within the larger tradition that conceptually defined Islam, thereby constituting a theoretical link between metaphysics and theology on the one hand, and the social and physical world on the other. Secondly, a discrete goal of *fiqh* was the infusion of legal norms within a given social and moral order, an infusion where the method of realisation was not imposition but rather mediation.

In speaking of "legal system", as several legal anthropologists have asserted,[20] it would be neither sufficient nor exhaustive to dwell on the law court as the exclusive vehicle of conflict resolution (nor is it useful, in the first place, to presuppose that the Islamic law court, because we have determined that it is a *law* court, fulfilled any particular set of functions meeting our definition of "law"). What went on outside the court and prior to bringing litigation before it were stages of conflict resolution that should be considered just as significant to the operation of the legal system as any court process. The legal maxim "amicable settlement is the best verdict" (*al-sulh sayyid al-ahkam*)[21] has a long-standing tradition in Islamic societies and in the Shari'a, and reflects the deep-rooted perception, both legal and social, that mediation is not only integral to the legal system and the legal process but also accorded precedence over court litigation, which was usually seen as the last resort.[22] This is particularly true in closely knit social structures where groups tended to manage conflicts before they were brought before a wider public forum, mainly the law court. It was within these groups, from Malaya to Morocco,[23] that the initial operation of the legal system began, and it was through the continued involvement of such groups that the Muslim court was able to accomplish its task of conflict resolution. For, as we noted, it was inconceivable for the Muslim court in particular to process claims regarding disputes without due consideration of the moral sensibilities and communal complexities of the social site from within which a dispute had arisen.

Some anthropologists have rightly argued that the fundamental distinction between mediation/arbitration and adjudication is the distinct absence from the

20 See, e.g., the various discussions in P.H. Gulliver (Ed.), *Cross-Examinations: Essays in Memory of Max Gluckman* (Leiden: E.J. Brill, 1978).

21 In the Turkish-Ottoman tradition, the prevailing maxim appears to have been "*al-sulh khayr*" (amicable settlement is a good work). See Peirce, *Morality Tales*, p. 186.

22 Also see the closing lines of n.25, below.

23 For the Mediterranean region, see the multiple sources below. For the less studied Malay world, see the important works of Sadka, *Protected Malay States*, p. 264, and Peletz, *Islamic Modern*, pp. 49–50.

former of any authoritative decision making (a fact that also distinguishes tribal forms of arbitration from those that exist today in modernised legal systems, where, furthermore, the lines of demarcation between tribal arbitration and mediation were not as clear). For mediators/arbitrators are usually third parties who, because they lack a decision-making competence, are invariably inclined toward flexibility by virtue of the fact that each party is dependent on the other for obtaining a positive outcome.[24] Arbitration thus becomes a viable option if the interests of the two parties are partially overlapping, and not totally incompatible. A typical example is homicide. In modern-state criminal systems, no negotiation or mediation is possible, for the penalty must be meted out. On the other hand, in a tribal (and in this case, Islamic) system, where blood-money was often substitutable for retaliation, arbitration/mediation is rendered feasible by virtue of the possibility of settlement by monetary payment, a possibility enhanced by the mutual desire to avoid both further costly feuding and non-compensable loss. Thus, another significant feature of mediation/arbitration is the win-some-lose-some mode of conflict resolution, which avoids the all-or-nothing solution at any cost. When the latter mode presents itself as the only option, arbitration is *a priori* precluded, and adjudication left as the only resort.

Yet, evidence from the world of Islamic legal practice does not support the anthropological observation that at the level of adjudication, the main, if not only, option available is that of all-or-nothing. Nor does it entirely support the rigid distinction between the roles of judges and arbitrators, in so far as judges, because they possess the power of decision making, are inclined to the all-or-nothing approach. It is true that, in some cases, the Muslim judge was faced with black-and-white juristic options, and this is precisely where mediation has no reason to arise in the first place, and adjudication becomes inevitable. But in many, if not the great majority of cases, the *qadi* or his representatives would have been acting in an adjudicatory-cum-mediatory role. At least in one important respect, the successful result of his mediation often acquired a social meaning of judgment.[25] The *qadi*, furthermore, oftentimes played the exclusive role of a mediator in cases that were not of a strictly legal nature.[26] Not only did he arbitrate disputes, or reconcile husbands and wives, but he listened to the problems between, for example, brothers who might need no more than an outsider's opinion.[27]

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24 Gulliver, "Process and Decision", pp. 33, 42.

25 This aspect still survives even in modern Shari'a courts. Drawing on his study of a Jordanian court, Richard Antoun observes that the judge's role as an agent of reconciliation is institutionalised in the ideology of the court and its procedure. Judges "use their personal authority to reconcile the parties. [. . .] The aim is to give reconciliation, whether through the litigant's own efforts or the efforts of intermediaries, the force of judgment. The importance of compromise in the judicial process can be more readily assessed by the degree to which compromise is institutionalised than by the percentage of court compromise decisions. Frequently . . . the aim of the litigants is not to receive a judgment from the court but rather to effect a compromise back in the village guest house, simply using the Islamic court as one more recourse toward that end. Thus litigation itself does not contradict the goal of compromise" (Antoun, "Islamic Court", p. 463).

26 A practice highly commended by *fiqh* works. See, e.g., Ibn Abi al-Damm, *Kitab Adab al-Qada'*, p. 14.

27 Hanna, "Administration of Courts", p. 54; Peirce, *Morality Tales*, pp. 186, 387. Court records from the Ottoman period are replete with references to cases that were terminated prior to the rendering of a court decision because the mediators (*muslihun*) intervened and reconciled differences. El-Nahal,

More important, however, was the social context in which the *qadi* and his court were positioned. As Gluckman and Rosen have observed – in two different cultural contexts from the present day – judges invariably seek to unravel the wider relational context of the litigating parties, often attempting to resolve conflicts in full view of the set of present and future social relationships of disputants.[28] Like arbitrators, but unlike modern judges,[29] the *qadi* tries, wherever possible, to prevent the collapse of relationships so as to maintain a social reality in which the litigating parties can continue to live together amicably.[30] Such a *judicial* act requires the *qadi* to be familiar with, and ready to investigate, the history of interactions between the disputants. No facts can be determined by the court without reference to what I here call social biography, which comprises data relative to the litigant as a socially constituted entity. Nor does the *qadi*'s adjudication allow for a narrow application of legal doctrine, certainly not without allowing the full range of social biography to come before the eye and discourse of the court. Rosen's apt description of modern-day Morocco is equally, *if not more*, applicable to the overall history of Islamic court justice:

> The predominant goal of the [Islamic] law is not simply to resolve differences but to put people back into a position where they can, with the least adverse implications for the social order, continue to negotiate their own arrangements with one another; . . . even though the specific content of a court's knowledge about particular individuals may be both limited and stereotypical, the terms by which the courts proceed, the concepts they employ, the styles of speech by which testimony is shaped, and the forms of remedy they apply are broadly similar to those that people use in their everyday lives and possess little of the strange formality or professionalised distortions found in some other systems of law.[31]

That the Muslim court is, *inter alia*, both a specific and specialised social unit that has been carved out of society at large is accurately captured in the centuries-long and highly recurrent prescription that a *qadi*, to qualify for service, must be intimately familiar with the cultural text of his jurisdiction and the register of social customs and habits prevailing therein.[32]

The Muslim adjudicatory process, with its *fiqh*, was therefore never remote from the social world of the disputants. Like the arbitrative *process*, the Muslim court was embedded in a social fabric that demanded a moral logic of social equity rather than the logic of winner-takes-all resolutions. Putting parties back into the social roles they enjoyed before appearing in court required social and moral compromise, where each party was allowed to retain a partial gain. Total loss was avoided wherever possible, and was usually allowed only when the culprit caused an irremediable or serious breach of social harmony and the moral code. Nearly everything else was subject to what one perceptive commentator labelled "separate justices," whereby judges *cared less for the application of a logically consistent legal doctrine or principle than for the*

Judicial Administration, pp. 19-20; Gerber, *State, Society*, p. 51. This "non-legal" involvement continues to flourish in today's Middle Eastern societies, as several Shari'a judges have told me. See also Antoun, "Islamic Court", p. 463.

28 For Max Gluckman, see Gulliver, "Process and Decision", p. 46; Rosen, *Anthropology of Justice*, pp. 16–19.

29 Gulliver, "Process and Decision", p. 42.

30 Haviland, *Cultural Anthropology*, p. 331.

31 Rosen, "Justice in Islamic Culture", pp. 39–40.

32 Al-Husam al-Shahid, *Sharh*, pp. 20 ff., 72–77.

creation of a compromise that left the disputants able to resume their previous relationships in the community and/or their lives as they had been lived before the dispute began.[33] But even when this was not possible, and even when the victim recovered all damages, the wrongdoer was also granted a partial recovery of his moral personhood; for by virtue of the informal nature of the Muslim court, the parties and their relatives, neighbours, and friends were allowed to air their views in full and without constraint, defending the honour and reputation of one litigant or the other. Such a collective and public expression permitted even the loser to retain a measure of dignity, having had the opportunity to explain and justify the compelling circumstances under which wrongdoing had to take place. This amounted to a moral exoneration that could, in the community's imagination, border on the legal. For although the jural punishment here may have been inevitable, the circumstantial compulsion under which the wrongdoing occurred left the loser and, particularly, his relations (who are both the moral extension and moral predicate of the culprit and who must resume their lives in the community following a trial) able to retain at least a modicum of moral worth sufficient to reinstate them in the normative and morally structured social world. Yet, the moral foundations of such a reinstatement constituted the means by which the court – with its socially oriented structure – fulfilled one of its chief tasks, namely, the preservation of social order and harmony. And it was this social order that defined not only the function of the court but its identity, its *modus operandi*, even its *raison d'être*. In other words, and to state my point even more forcefully, the death of this social order will entail the death of that type of court.

The task of preserving social order presupposed a court, and a legal (read: *fiqhi*) malleability that is deliberately and subtly attuned, by the nature of its own social make-up, to the entire system of social and economic cleavages. But predicating the maintenance of the social order on the universal and "ecological" balance of a moral system posed for the court a challenge. While cleavages, and thus class and other prerogatives, existed and constantly asserted themselves, morality was the lot and natural right of everyone:[34] the poor, the rich, women, men, religious minorities and, no less, slaves. Social equity, the unquestionable mission of the court, was thus defined in moral terms, and it rendered indispensable a high degree of attentiveness to the morality of the weak and underprivileged, no less in fact than that allowed to the rich and mighty. As the former undoubtedly saw themselves as equal members of the moral community, the court had to accord them the same kind of treatment it accorded the latter, if not be, indeed, more attentive to their redresses. It was particularly its open and informal set-up that permitted plaintiff and defendant from the same micro-community to argue their cases and special circumstances from a moral perspective. But it was also the commitment to universal principles of law and justice that created a legal culture wherein everyone expected that injustices against the weak would be redressed and the wrongdoing of the powerful would be curbed. This was an expectation based on a centuries-long proven practice where peasants

33 Peirce, *Morality Tales*, p. 387.

34 This is my description, admittedly projecting modern categories onto pre-modern realities. The language of natural rights as we understand it today never existed in Islam. Like so much else before the rise of Western European modernity, it had no reason to arise in other cultures. The question to be asked therefore is not why it did not arise in Afro-Asian civilisations but why it arose in Europe in the first place?

almost always won over their oppressive overlords, where Jews and Christians often prevailed in court not only over their Muslim partners in business and neighbours but also against no less powerful figures than the provincial governor himself.[35]

The Muslim court thus afforded a sort of public arena for anyone who chose to utilise that space and its *fiqh* for his or her defence. The highly formalised processes of the modern court and its structure of legal representation (costly and tending to suppress the individual voice of the litigants, let alone their sense of morality), were unknown to the Shari'a court. So too were lawyers and the excessive costs of litigation that inhibit the weak and the poor from pressing their rights.[36] The Muslim court succeeded precisely where the modern Western court fails, namely, in providing a sanctified refuge within whose precincts the wretched of the earth could win against the most powerful and affluent. A case in point is women. Considerable recent research has demonstrably shown that this group received not only fair treatment in court but also greater protection than other groups,[37] a tradition that survives in some Muslim societies even today.[38] From unrestricted accessibility to the court, to litigating pecuniary and other transactions, women asserted themselves in the legal arena in massive numbers,[39] and argued as loudly as, if not louder than, men.[40] Protected by a moral sense of honour and sanctity, they asserted their rights and privileges within the court as well as without it, against men and against other women. And when *fiqh* was restrictive toward them, they developed strategies in response. The female moral code and sanctity, and the strategies that were developed in response to (what we now regard as) the restrictions of legal doctrine, were all understood and accommodated in the law court.[41] For the latter, benefiting from a centuries-long tradition of moral and socio-legal praxis, understood that no social order and its prerequisite of moral "ecology"[42] could be maintained without an equitable justice.

That the court was embedded in both society and social morality is attested to by the very nature of the court's social constitution on the one hand, and by the legal-mindedness of the society the court was designed to serve, on the other. The *qadi* himself was typically a creature of the very culture in which he adjudicated disputes, a practice that pervaded the entire Muslim world, with few exceptions. One of these was the Ottoman realm, and yet even here the *qadi*s, who were shuffled every two

35 Marcus, *Middle East*, p. 112.

36 *Ibid.*, p. 111. The virtue of this practice (especially when contrasted with the lengthy and costly litigation in the United States and other Western countries) has recently been celebrated in a new codification in Saudi Arabia. Speedy and free-of-charge court hearings is a feature of the recent Shari'a Procedural Law (1421/1999–2000), where the general objective of both the Shari'a and "King's law" is said to be effective and short trials, because "slow, dilatory and expensive justice is a form of injustice". See Hejailan, "Saudi Arabia", p. 272.

37 Jennings, "Women in Early 17th Century", pp. 61–62, 98, 112; Peirce, *Morality Tales*, p. 7; Zarinebaf-Shahr, "Women, Law", p. 84.

38 Hirsch, "Kadhi's Courts", p. 218; Mitchell, "Family Law in Algeria", pp. 201–202.

39 See Marcus, *Middle East*, p. 106. See also sources cited in the preceding two notes.

40 Peirce, *Morality Tales*, p. 176.

41 Jennings, "Women in Early 17th Century", pp. 61–62.

42 By "moral ecology" I mean that socially based order of moral organisation and structured moral functioning, where a high degree of predictability is predicated upon the ways the "moral system" functions and where *any* fundamental alteration in *any* part of the moral site will change the "ecological" balance of that site. The analogy with natural ecology is pre-eminent.

years or so from one province to another, did not always themselves adjudicate disputes in their jurisdictions, but left this task mostly to their local and native deputies (known as *na'ib*s, but also *qadi*s/*hakim*s).[43] Embedded in the moral fabric of social relations, the *qadi* could have no interest but the preservation of these relations. He operated within established modes of mediation that preceded and defined his professional involvement. If mediation offered an opportunity to achieve social equity and preserve the individual's sense of morality, the *qadi* had to absorb these imperatives into his court and accommodate them within a normative legal framework. Every case was considered on its own terms, and defined by its own social context. And the *fiqh* repertoire not only allowed for attention to particular cases as unique events; it in fact encouraged it. Litigants were captured in time, not strictly in legalistic terms, but as integral parts of larger social units, structures and relations that informed and were informed by each litigant. The *qadi*'s accommodation of the litigants as part of larger social relations was neither the purely customary mode of negotiation (prevailing in the pre-trial stage) nor the black-and-white, all-or-nothing approach (mostly prevailing in systems where the judge is socially remote from the disputants).[44] Instead, the *qadi* mediated a dialectic between, on the one hand, the social and moral imperatives - of which he was a participant - and, on the other, the demands of the *fiqh*, which in turn recognised the supremacy of the unwritten codes of morality and morally grounded social relations. It is crucially important to note however, that the *fiqh*, *read as a text*, deceptively appears devoid of any assumption about the existence of such morally grounded relations, when the world of judicial practice could not in fact have operated outside of such an assumption.

As a text, the *fiqh* is also silent on a variety of other real world aspects with which it commonly dealt: in contracts, for instance, complex financial and commercial assumptions enter into the application of the *fiqh* in the judicial world, but are entirely absent from the chapters on sale, *salam* and other contracts with which the *fiqh* abounds; the same is true of the *fiqh* of *waqf*, which barely discloses the complex social and family relations that affected the application of that law. Yet another prominent example, of particular relevance to our modern concerns, is the family law of *talaq* (divorce). Read as a text, the *fiqh* law seems arbitrary, capricious, and downright oppressive. But the *fiqh* was interpreted - if not articulated and elaborated since its early formation - in light of particular social facts that, once factored in, yielded results quite at variance with the letter of the *fiqh*, as a text.

On the basis of court records and biographical data, we are able to determine that in many regions of the Islamic world extensive litigation took place about property in the context of lapsed *talaq* payments and inheritance settlements.[45] In each case, the documented extensive presence of women in court, mostly as plaintiffs, attests to the advantageous position they enjoyed within the judicial system. *Talaq*, as the

43 Hanna, "Administration of Courts", pp. 50, 51.

44 Gulliver, "Process and Decision", p. 42. In modern judicial systems, Gulliver observes, "all or nothing is a characteristic feature of the ordinary judicial method. *An action is proven and sustained or not proven and dismissed*... [The] verdict of the court has an either/or character; the decision is based upon a single, definite conception of what has actually taken place and upon a *single* interpretation of legal norms" (emphasis mine).

45 Seng, "Standing at the Gates of Justice", p. 202.

jurists understood very well, and as legal practice testifies,[46] was a very costly financial enterprise for the husband, let alone the fact that in many cases it was effectively ruinous for him. Upon *talaq*, the wife was entitled to maintenance for at least three months (*'idda*), delayed dower, children's maintenance, any debts the husband incurred to her during the marriage (a relatively frequent occurrence),[47] and if the children were young, a fee for nursing. And if the husband had not been consistent in paying for his marital obligations (also a relatively frequent occurrence), he would owe the total sum due upon the initiation of his *talaq*. In this context, it must be clear that when women entered marriage, they frequently did so with a fair amount of capital, which explains why they were a source of funding for many husbands and why so many of them, relatively speaking, engaged in the lucrative business of money-lending in the first place.[48] In addition to the immediate dower and the financial and material guarantees for her livelihood, the wife secured a postponed payment, but one that she could retrieve at any time she wished (unless otherwise stipulated in the contract). But more financially significant was the trousseau that she received from her parents, customarily consisting of her share of inheritance paid in the form of furniture, clothing, jewellery and at times cash.[49] (It is notable that neither the presence nor, *a fortiori*, the socio-legal function of the trousseau is mentioned or even alluded to in the *fiqh*, this being explicable by the fact that it did not play a contractual role.)

Many women, before or during marriage, were also endowed with a *waqf* portion, giving them further income. Whatever the form of the trousseau and the total wealth they could accumulate, women were entirely aware of their exclusive right to this wealth, and understood well that they were under no obligation to spend any portion of it on others or even on themselves. They apparently spent their own money on themselves only if they chose to do so, since such expenses as pertained to sustenance, shelter and clothing (which could be considerable if the husband was prosperous) were entirely his responsibility, not hers. In other words, unlike that of husbands, the property of wives was not subject to the chipping effect of expenditure, but could instead be saved, invested and augmented.

Considering the unassailability over the centuries of these rights – which on balance availed women of property accumulation – it is not surprising that, in the historical record, *talaq* appears to be less common than *khul'*, the contractual dissolution of marriage. The relative frequency of the latter in Istanbul, Anatolia, Syria, Muslim Cyprus, Egypt, and Palestine has been duly noted by historians,[50] and explains – in this context – three significant features of the Muslim approach to

46 Zilfi, "We don't Get Along", pp. 269–271; Rapoport, *Marriage, Money and Divorce*, p. 70.

47 The practice of husbands borrowing from their wives was frequent, but also that of women engaged in the business of money-lending at interest. See sources in previous and next note.

48 See Marcus, "Men, Women and Property", p. 145, for Aleppine women money-lenders whose customers often included their own husbands. See also R.C. Jennings, "Women in the Early 17th Century", pp. 97–101.

49 On the size of many a trousseau, see Rapoport, *Marriage, Money and Divorce*, pp. 12–22; e.g. a sultan's manumitted slave-girl commanded a trousseau worth 100,000 gold *dinars*.

50 Rapoport, *Marriage, Money and Divorce*, p. 4; Peirce, "She is Trouble"; Marcus, *Middle East*, pp. 205–206; Jennings, "Women in the Early 17th Century, pp. 82–87; idem., "Divorce in the Ottoman Shari'a Courts", p. 157; Ivanova, "Divorce between Zubaida"; Tucker, "Revisiting Reform"; Zilfi, "We Don't Get Along", p. 272, and sources cited in n.22 therein.

terminating a marriage. First, while *talaq* was the unilateral prerogative of the husband, there was also the "price" that he paid for this prerogative. In other words, *talaq* may appear in the *fiqh* text to be an unrestrained prerogative, but for most divorcing husbands this prerogative was constrained in practice by hefty financial deterrents, coupled with legal and moral deterrents instilled by jurisprudential doctrine and social norms to boot. Secondly, *talaq* in effect also amounted to a unidirectional transfer of property from the husband to the wife, beyond and above all that he was – for the duration of the marriage – obliged to provide his wife by default. Indeed, an important effect of this transfer is the fact that many repudiated women purchased the husband's share in the matrimonial house, funnelling the *talaq* payment due to them toward such a purchase.[51] Thirdly, *khul'*, within the economic equation of Muslim marriages, was in a sense not so much a depletion of the woman's property as a concession on the part of the woman of privileges due to her. The case of Ayse, who petitioned the court to dissolve her marriage by a *khul'* – which cost her her delayed dower plus her waiting period allowance[52] – was an extraordinarily typical one. So typical was it that the juristic manuals reflected this practice as a normative doctrine, not the other way around.[53] But this mirroring in the *fiqh* text is the exception that proves the rule. The point remains that it is the very financial promise made by the wedding husband (i.e. delayed dower) and the financial guarantees he makes for the three months of the *'idda* maintenance that are used as the bargaining chip for *khul'*.[54]

Almost every branch of *fiqh* manifests a dialectic similar to the *talaq* example discussed above, although the dialectic may involve an altogether different variable – social, moral, material, political, etc. Another case in point is the much-discussed "law" of religious minorities, a "law" now hotly debated in human rights discourse. Recent research, especially that of Najwa al-Qattan, has shown a seeming disparity between the "law" of the *fiqh* and practices on the ground, where Christians and Jews seem to have enjoyed jural rights above and beyond those prescribed by the *fiqh*.[55] This has led to the conclusion that judges did not care to apply strictly the legal doctrine of *fiqh*, the implication being no different from that reached by classical Orientalism about the divorce between the Shari'a and social and political realities.

But the *fiqh* never was "the law" in its full range, in its realisation within a social environment, nor did it ever constitute a totalising statement of the law *in practice*. The *fiqh*, in other words was a discursive practice on its own, playing by its own rules, neither engaged in transforming reality, nor managing or controlling society as modern law does as a matter of necessity. Attributing to *fiqh* roles of control and management is a distinctly modern misconception, a back-projection of our notions of law as a state vehicle for social engineering. This misconception perhaps also

51 Marcus, "Men, Women and Property", p. 155.

52 Zilfi, "We Don't Get Along", pp. 276, 284. Zilfi does not argue that 18th-century marital dissolution necessarily resulted in reducing the economic status of women, which is "axiomatic in the contemporary world". But, she says, *khul'* divorcees "could not have been better off economically immediately upon divorce" (p. 284). While this may be true, the evidence of the two cases in support of her argument is, uncharacteristically, too speculative and severely lacking in detail to be persuasive.

53 Nawawi, *Rawda*, V: 693.

54 A similar point is made by Zilfi, "We Don't Get Along", p. 295.

55 Al-Qattan, "Dhimmis in the Muslim Court"; idem., "Litigants and Neighbors".

explains why legal Orientalism, as I just intimated, had insisted on the "divorce" between "Islamic law" and social and political realities since the early third/ninth century,[56] to the chief exception of family law. What Orientalism took to be a divorce was really a state of affairs in which law as doctrine functioned in a particular social order, whose make-up, structure, moral values, and much else are only now being understood through the valuable efforts of legal anthropologists. It would be mistaken then to equate *fiqh* with law in the sense we use this term in modern contexts. *Fiqh* was a process of understanding, which is what the Arabic term literally and lexically means and what its technical and professional corollary implies; it was the study (*ishtighal*) and intellectual engagement (*tahqiq, tanqih*) of the school doctrine, intended to understand all possible ways (*aqwal*) of reasoning on, and interpretation of, a particular case.[57] It was not the case that was important, but rather the principle illustrated by the case as well as other cases which constituted an illustration of how the principle is to be defined, delimited, refined, articulated, restricted, and, very importantly, distinguished from another group of cases that yield another cognate principle, and yet not allowed to overlap with another. It was the principle (*asl*; pl. *usul*) of the *fiqh*[58] which mattered, not the individual cases and opinions, which were more illustrative than prescriptive. Individual opinions, strictly speaking, did not constitute law in the sense modernity forces us to understand either "law" or "case law", nor was it the "legal effect" of stating the will of a sovereign that the Muslim jurists intended to accomplish in the first place. Their law was an interpretive project, not "a body of rules of action or conduct prescribed by [a] controlling authority".[59] It was not a "solemn expression of the will of the supreme power of the state",[60] for there was no state in the first place. It was the intellectual and hermeneutical work of private individuals, jurists whose claim to authority was primarily epistemic, but also religious and moral. It was not political in the modern sense of the word, and it did not involve coercive or state power.

Furthermore, the law was not an abstraction. It did not apply equally to "all", for individuals were not seen as equal to each other. Each individual and circumstance was deemed unique, requiring *ijtihad* that was context-specific. This explains why Islam never accepted the notion of blind justice, which also explains why there was no point in *stating* the law *in the sense* we see in today's legal codes. Rather, the law was an *ijtihadic* process; a continuously renewed exercise in hermeneutics; an effort at mustering principles *as located in life-situations*; a mission requiring the legists to do what is right in a particular moment of human existence. The *fiqh*, even in its most detailed and comprehensive accounts, was no more that a juristic guide that directed the judge and all legal officers on the ground to resolve a situation in due consideration of the unique facts involved therein. The *fiqh* as a *shar'i* manifestation, as a fully realised and realisable "law", would not be revealed until the jural principles meshed with social reality and until the dialectic of all human, social, moral, material, and other types of relations involved in a particular case was to come to full circle.

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56 See the discussion about this "divorce" in Hallaq, "Model *Shurut* Works".

57 Ibn Abi al-Damm, *Kitab Adab al-Qada'*, 1.

58 Which is not to be confused with *usul al-fiqh* as a theoretical discipline. On the *asl* in *fiqh*, see Hallaq, *Authority*, pp. 89–99.

59 A definition of (Western) law, given in *Black's Law Dictionary*, p. 795.

60 *Ibid.*

3 ENTEXTING THE SHARI'A

If *fiqh* was not "law" in the sense modernity has come to construct notions of law, then what happened and why has "*fiqh*" come to mean what it has never meant? At the risk of over-simplification, I want to venture the statement that this transformation was the direct result, as well as the by-product, of the confrontation between the Shari'a and the most significant and weighty institution that emerged out of, and at once defined, modernity: the state. Conceptually, institutionally, and historically, the state – whether the colonialist or its native surrogate – came into sustained conflict with the Shari'a, and tentatively co-existed with it in a state of contradiction. The two were systemically incompatible, and in the fight against a highly militarised, materially rich, and aggressively bureaucratic state, the Shari'a had no chance. Among the effects of this confrontation – a grand term for such an unequal contest – was the desiccation and final dismantling of the Shari'a's institutional structures, including its financially independent colleges and universities, and the very jural environment that afforded Muslim legists the opportunities to operate and flourish as a professional group. The dismantling finally led to the extinction of this group as a species.

Another effect was the setting aside of much of the Shari'a's contents, what is now mistakenly seen as "positive law". This process was the fate of much "law", the first to undergo this process being "commercial law" and "penal law". But there remained a thin slice of "Shari'a law" that survived in the civil codes of modern Muslim states. And it was through this venue, with the state forces operating on it as well, that the meaning of *fiqh* was transformed into law. To begin with, and as already intimated, there is a fundamental conceptual contradiction between the state and Shari'a as an institutional, cultural, epistemic, juristic, and judicial entity. First, both are designed to organise society and to resolve disputes that threaten to disrupt their respective orders – however different from each other these orders are. Secondly, and more importantly, both are legally productive mechanisms, in that they provide the law or – in the case of the Shari'a – the jural principles needed to deal with the social order (although, again, "dealing" will mean different things in each case). And it is due to the relative similarity in their function that they found themselves in a state of competition. Although the Shari'a could and did accommodate a measure of intervention by the political sovereign, it did so only in what is regarded as peripheral and marginal, as opposed to substantial, in the law. Thus, while the Shari'a was tolerant of administrative competition, it was only thinly tolerant of substantive juristic intervention. The state, on the other hand – also judged by the very fact of its historical evolution –[61] gradually developed even less tolerance to legislative, administrative and bureaucratic competition. Its staunchly centralised nature *ab initio* precluded any palpable tolerance of other systems.

Thirdly, in theory as well as in practice, both systems claim ultimate sovereignty. At least in juristic political theory, government (*siyasa*) – the incomplete, and certainly "stunted", equivalent of the modern nation-state – is subservient to the Shari'a. The *raison d'être* of *siyasa* (whose invocation must *always* presuppose and announce the

61 For an excellent account of the rise of the nation-state, See van Creveld, *Rise and Decline*.

presence of the civil population) is to serve the interests of the law, not the other way round. That legal sovereignty remained, in both theory and practice, within the realm of the Shari'a is a fact that hardly squares with the modern nation-state's totalistic appropriation of this paramount form of sovereignty. A nation-state without jural sovereignty is no state at all.

Fourthly, the Shari'a and the state operated in two opposing directions, the latter compelling and pushing towards an exclusive and ultimate centre, whereas the former was demonstrably centrifugal. Fifthly, the Shari'a was a grass-root system, emanating from "professional" groups and legal institutions that were socially grounded. The pulsing heart of the legal system lay in the midst of the social order, not above it (the most characteristic feature of the modern state). Finally, while the Shari'a and the state shared the general goal of organizing society and adjudicating disputes, they did so to significantly different effects. Intrinsic to its behaviour, the modern state is systemically and systematically geared towards the homogenisation of both the social order and the national citizen; and to accomplish these goals, it engages in systemic surveillance, disciplining and punishing. Its educational and cultural institutions are designed to manufacture the "good citizen" who is respectful of the law, submissive to notions of order and discipline, industrious, and productive. Discipline-cum-punishment is integral to, and a unique feature of, the modern nation-state. The resultant "good citizen" is one who can *efficiently* serve the state, the father – and much less frequently the mother – of all. Obedience to the law, which presupposes submission and – more importantly – discipline, is then the prop upon which the state stands. Without the law and its tools of surveillance and punishment, no state apparatus can exist;[62] ergo, the centrality of the element of violence, and of the threat to use it, in the definition of the nation-state. The state, in so far as I am aware, is the only entity in human history that has arrogated to itself the exclusive right to exercise violence or to threaten with its use. That the citizen has accepted – or has been conditioned into accepting – this right of the state is perhaps the most salient indicator of the success of its project.

By contrast, the Shari'a has not concerned itself with creating the national citizen, and to this extent it shares none of the features of the state in this regard. Aside from the higher transcendental aims, the *shar'i* juristic order had no interest in the social order other than that of resolving disputes in the least disruptive manner to that order. For it assumed that the force of social and religious morality will guarantee conformity to the "law", but this was conformity to a pre-existing order, the social status quo, not to a newly conceived project of social engineering (a typical project, that is, of both the *modus vivendi* and *modus operandi* of the nation-state). That the general goal of the Shari'a has always and everywhere been to restore individuals – to the best extent possible – to their social positions, remains one of the most valid generalisations about this legal system. Put differently, unlike the punitive nature of the state which creates the citizen by subduing him along with society at large, the Shari'a mediated conflicts and arbitrated disputes in a constant effort to mend the ruptures in the social fabric. Its prescribed harsh punishments, whenever they were

62 Foucault, "*Society Must be Defended*", pp. 250–251, 258–261, idem, *Foucault Reader*, pp. 170–238; Leonard, "Foucault", p. 139 ff. For the introduction of this apparatus to Egypt, see Khalid Fahmy, "The Police and the People", p. 344.

applied (and mostly they were not), were conceived of as exemplary, intended to deter the forces of corruption which always translated into disrupting social harmony. But it seems also true that, because the Shari'a never constituted part of a machinery of coercive justice, its prescribed penalties represented the highest limit beyond which human conduct could not go. This did not mean that punishment was applied wherever an infraction took place (which explains why every large Middle Eastern city boasted, among other features, a healthy population of prostitutes); rather, the limit was designed as a possible invocation against excesses whenever there was enough social force to call for the strict application of penalties. (This perhaps explains, as we shall see in due course, why the British colonialists, among others, thought of "Islamic criminal law" as unduly lenient, lacking in punishments, inefficient, and conducive neither to the propagation of discipline nor to the imposition of "law and order".)

The victory of the nation-state was not only one of displacing Islamic law, but also one which *entailed* the reordering of the Muslim social and legal orders. The state confronted the Shari'a as a purely legislative entity, our second point above. Its jural *modus vivendi* was codification, a method that entails a conscious harnessing of a particular tool of governance. It is, put differently, a deliberate choice in the exercise of legal and political power, a choice that at once accomplishes a multitude of tasks. The most essential feature of the code is the *production* of order, clarity, concision and authority.[63] Modern codes, the legal experts agree, have come to replace "all previous inconsistent customs, mores, and law".[64] This replacement is also totalistic, since codes must also fulfil the requirement of completeness and exclusivity. They must comprehensively cover the area they claim to regulate, an act that perforce precludes both the substantive application and – equally significant – the authority of any competing law. Were an exception to be made, permitting the co-existence of other forms of (pre-existing) law, it is by virtue of the very permission granted by the code that such laws are allowed to exist. And when they are permitted to come to effect, it is always on terms dictated by state law, not the other way around. In other words, modern codes always claim exclusive and superior authority, over and above all previous law.

Nor is this all. Codes must be systematic and clear, arranged rationally and logically, and rendered easily accessible to lawyers and judges.[65] In their very nature, they are not only declaratory and enunciating of their own authority, but also universal in the statement of rules; hence their conciseness. They pay no attention to the individual, whether it is the particular case or a particular human being. As an enhancement of this feature, they are always abstract, "to the point", and deliberately preclusive of the concrete. It was held a virtue that the "French and German Civil Codes could be held within the boards of a volume while the common law required a full library" to house it.[66] But the prime attribute of the code is its capacity to create uniformity, an

63 Stone, "A Primer on Codification", pp. 303–310, at 303–304, acknowledges that codification is a tool of the state, including its reformers, as well as a means to effect a "new economic and social order", but all this, he says, harks back to a single function of codification, namely, "to state the law clearly and concisely".

64 Bayitch, "Codification in Modern Times", pp. 161–191, at 164.

65 This, according to Stone ("Primer", pp. 303–304), being the *raison d'être* of the code.

66 Stone, "Primer", p. 306.

attribute subsidiary to the universal modern condition as an uncompromisingly homogenising one. This also explains why it was to the civil codes of Western Europe – and not to the English common law – that the Afro-Asian reformers turned. Thus, codes must create uniformity not only within themselves, but also in their application. The sway of the code's authority therefore over-extends its own definition and encroaches upon the administration and implementation of justice.[67]

The Shari'a, on the other hand, runs counter to the great majority of the code's attributes. First, the Shari'a did not lay any claim to exclusive authority. In fact, it *depended* on the cooperation of customary and royal law. Nowhere did the Shari'a operate exclusively, and everywhere customary law was entwined with it in the realm of practice. Nor, in this connection, was the Shari'a declaratory, in that it never in practice[68] pronounced itself as the bearer of exclusive authority that had come to replace others in the field. On the contrary, custom was not only to be taken into consideration, but was judged necessary for the proper operation of the Shari'a. Admittedly, however, the Shari'a cannot be claimed to have internal uniformity, since plurality of opinion – the so-called *ijtihadic* pluralism – is its defining feature par excellence. It is on the diversity of its own character that, interestingly, it thrived (and insisted), and it is *in* this diversity that it found the flexibility to accommodate, through variant legal norms, different situations that would otherwise have "blindly" come under the same codified rule. The plurality of opinion answered not only the multiplicity of particular and special situations but the exigencies of legal change.[69] This plurality, though, ran counter to the spirit of uniformity, since homogenisation was largely absent from its agenda. And since its interest lay in the individual as a singular worshipper of God, there was no need for an abstract and universalising language. Most importantly, it is the declaratory nature of the code, as well as its uniformity of substance and legal effect, that betrays a will-to-power emanating from the higher offices of the nation-state; by contrast, in the Shari'a such a will-to-power could not exist on any level beyond the purely abstract and theoretical (if not the metaphysical and theological).

These conceptual oppositions, combined with the state's effective victory against all Sunni legal institutions, were bound to colour (or discolour), by the force of hegemonic discourse, any surviving conception of the Shari'a, for history is written by the victor. The (dis)colouring was a complex process that operated at nearly every level in the uneven relations between colonialist modern Europe – the creator of the modern state – and Muslim societies around the world. The discolouring agents (or properties) were, among others, centralisation, codification (in the widest sense of the word), bureaucratisation, and jural homogenisation, all of which constituted the backbone of the modern state project. And they all operated in tandem against all opposing forces. Take, for instance, the example of British India, where the "entexting" of *fiqh* first occurred – where, that is, the *fiqh* was *fixed* into texts as an act of codification. I choose to deploy the case of British India because it illustrates, in obvious ways, how this rigidification came about. "Obvious" in the sense that India, perhaps because it was gripped by direct forms of colonialism, displayed the

67 See Bayitch, "Codification", pp. 162–167.
68 In theory it may be said to have done so, although this theory remained wishful thinking.
69 Hallaq, *Authority*, Chapters 5–6.

processes and effects of crude power and hegemonic discourse more clearly than, say, the Ottoman Empire, although the latter was no less affected by hegemonic modernity, in all its aspects, than any other directly colonised subject.[70] In their major features, the legal transformations of British India are therefore prototypical of the changes that took, and still are taking, place elsewhere in the Muslim world.

The (Warren) Hastings Plan of 1772 conceived a multi-tiered system that required exclusively British administrators at the top, seconded by a tier of British judges who would consult with local *qadis* and *muftis* (*mulavis*) with regard to issues governed by the Shari'a. At the lowest rung of judicial administration stood the run-of-the-mill Muslim judges who administered law in the civil courts of Bengal, Madras, and Bombay. The plan also rested on the assumption that local customs and norms could be incorporated into a British institutional structure of justice regulated by "universal" (viz., British) jural ideals.

Hastings's tax collectors also doubled as chief justices of two types of court: the Diwani and Faujdari. The former, applying "Islamic law" to Muslims and "Hindu law" to Hindus, was a civil tribunal but also charged with the task of tax levy. The latter, with criminal jurisdiction, applied "Islamic law" in the way these collectors, after consulting their *pandits* and *mulavis*, understood that law. [71] These magistrates-cum-collectors are said to have been stricken by both the staggering variety of opinions and the pliability of Islamic (and Hindu) law,[72] features that reportedly led the British to gradually phase out these indigenous experts of which they grew increasingly suspicious.[73] And in order to deal with what was seen as an uncontrollable and corrupted mass of individual juristic opinion, the Oxford classicist and foremost Orientalist, Sir William Jones (1746–1794), proposed to Hastings the creation of codes or what he termed a "complete digest of Hindu and Mussulman law".[74] The justification for the creation of such an alien system within Islamic (and Hindu) law was articulated in a language that problematised this law by casting it as unsystematic, inconsistent, and mostly arbitrary – attributes that were to be much later elaborated in a virtuoso sociological typology by no less than Max Weber himself. (It was probably Jones's idea of an undisciplined and uncontrollable legal interpretation of the Mussulmans' magistrates and *mulavis* that gave Weber – and the entire field of Orientalism before Weber – his burlesque notion of *Kadijustiz*.) The challenge thus represented itself in the question of how to understand and legally manage native society in a fiscally economic manner, which in part shaped Jones's ambition to construct a system that offers "a complete check on the native interpreters of the several codes".[75]

Hastings appears to have been as impressed by Jones's proposal as by the cultural and legal assumptions on which they were based. For it was not long before he commissioned the translation of Marghinani's *fiqh* work, *al-Hidaya*, into Persian, a

70 On the jural transformation of both British India and the Ottoman Empire, see Hallaq, *Islamic Law in History and Practice* (Cambridge: Cambridge University Press, forthcoming).

71 Singha, *Despotism of Law*, pp. 1–35; Cohn, *Colonialism and its Forms of Knowledge*, p. 62; Anderson, "Legal Scholarship", p. 67.

72 See generally Menski, *Hindu Law*; and Kugle, "Framed, Blamed and Renamed".

73 On William Jones's own suspicions, see Strawson, "Islamic Law and English Texts", pp. 36–37.

74 Cited in Cohn, *Colonialism and its Forms of Knowledge*, p. 69.

75 *Ibid.*, p. 69; Anderson, "Legal Scholarship", p. 74.

translation that Charles Hamilton in turn used for his own translation (1791) into English. A year later, Jones himself translated *al-Sirajiyya*, this time directly from the Arabic.[76] This treatise on inheritance was adopted in translation to compensate for the silence of the *Hidaya* on this important branch of the law.[77]

The choice of the *Hidaya* was not fortuitous. It was authored by one of the most esteemed jurists in the Hanafite school, to which adhered the great majority of India's Sunnite Muslims. To cite it, it was thought, might be the most effective way of reducing to silence any juristic objection. Furthermore, it was the briefest authoritative manual of Hanafite law that could approximate the size of a code. And it is precisely here where the usefulness of this text lies. Its brevity reflected the authoritative doctrine of the Hanafite school as Marghinani, the distinguished author-jurist, saw it. It did not sum up the doctrine of the school, much less its range; it merely stated what Marghinani thought, in his own era and region, to be the commonly practised and accepted doctrines of the school (common acceptance and practice of a doctrine being constitutive of epistemic and juristic authority).[78] The importance of the *Hidaya* in the Hanafite school did not lie in its own, intrinsic virtues, but rather in the fact that it afforded an authoritative basis and a convenient platform on which to compile the numerous commentaries that emerged throughout the centuries to come. In so far as application of the law was concerned, it was the commentary as a hermeneutical project (if not process) that was the practical judicial desideratum; it was not the *Hidaya* as a legal text.

The *Hidaya* was and remained, until it was translated, important as a commentarial substrate as well as a *madrasa* textbook – although even in this latter function it also required the professor's commentary. In and by itself, it was therefore far less important than what the British appeared to assume, for their formal use of it qualitatively differed from its nativist, heuristic use as a peg for commentarial jurisprudence.

The translation of the *Hidaya* amounted in effect to its codification, for by severing it from its interpretive and commentarial tradition, it ceased to function in the way it had functioned until then. Thus, the "codification" of the *Hidaya* (and through it, of Shari'a's personal status at large) served at least three purposes: First, it accomplished what the British had long aimed at, namely, to curb the judicial discretion of the *qadi* and, more specifically, the *mulavis* and *muftis* who assisted the courts. By making the text available to the British judges, these Muslim legists were eliminated as jural middle-men, leaving the British with the sole power and prerogative to decide, in the name of the Shari'a, what is law. The elimination of these middle-men also represented the elimination of an independent jural class (the historical '*ulama'*/jurists) which no modern state can tolerate. Secondly – a further step toward totalistic control – the act of translation-cum-codification represented a replacement of the native system's interpretive mechanisms by those of English law. Thus, the

76 *Al-Sirajiyah or the Mahomedan Law of Inheritance* (Calcutta: The Sanskrit Press, 1861). Two more translations on inheritance appeared in subsequent years: Macnaghten, W.H., *Principles of Moohummudan Law* (Calcutta: Brahma Samaj Press, 1861); and Elberling, F., *A Treatise on Inheritance, Gift, Will, Sale, and Marriage* (Calcutta: Baptist Mission Press, 1832).

77 On omissions from the translated text and on its later use in colonial education, see Strawson, "Islamic Law and English Texts", pp. 27–28.

78 Hallaq, *Authority*, pp. 121–165.

seemingly innocuous adoption of the translation and its integration in the system of Anglo-Muhammadan law amounted in effect to depleting, if not decimating, both the interpretive process that constituted the heart of the Shari'a, and the sociological knowledge that produced this process. Thirdly, the very act of creating a "*fiqh*-code" had the effect of stamping out customary law, which was not only multifarious but essential to the smooth functioning of the law. The adoption of the *Hidaya* as both a summary and a code of personal status represented for the British the equivalent of a nation-state's legal decree that was to apply by virtue of that state's will-to-power. By definition unwritten, customary law did not qualify for the same status of written law, and was consistently described as "primitive," "tribal", "traditional", or "native",[79] terms that carried highly pejorative and condescending connotations.[80] Stamping out custom was intended, first, to streamline if not homogenise the otherwise complex and complicated jural forms with which the British had to deal, and secondly, to deprive the Shari'a, on yet another level, of one of its props: the communal and customary laws that were entwined with the Shari'a on the level of application. Thus the very act of translation drove the Shari'a from its interpretive juristic soil, and, at once, from the native social matrix in which it was embedded and on which its successful operation depended.

The impact of the translations on the administration of justice was not to take effect until the beginning of the next century. But they served an immediate epistemological function in the colonialist articulation of Islam, for, as Michael Anderson insightfully averred, the translations engendered not only the notion of an "essentialist, static Islam incapable of change from within", but also created and promoted the fundamental discursive practice of all classical Orientalism, namely, that a proper understanding of India and the Orient "could not be had without a detailed study of the classical legal texts".[81] Orientalism thus made it clear to itself as well as to the newly transformed - Orientalised - Muslims that Islam can and should be understood and analysed through texts, not through the human, sociological, and worldly experiences of the law and the social order in which it functioned. (It is noteworthy that Orientalism has, in this respect, made a correction since the early 1990s, but the Muslims' reading of their own history remains within the epistemic framework of the Orientalised and Textualised Orient.)[82]

The translation and codification of the Shari'a must thus be seen as causally linked not only to the production of the so-called Anglo-Muhammadan law, but to

79 See Hooker, *Legal Pluralism*, p. 119 ff.; Glenn, *Legal Traditions of the World*, pp. 56–57; Fisch, "Law as a Means and as an End", p. 15.

80 The British attitude to unwritten law represented a microcosm of the general European attitude to colonised cultures. This way of thinking was perhaps best explained by Toynbee who averred that "[w]hen we Westerners call people 'natives' we implicitly take the cultural colour out of our perception of them. We see them as wild animals infesting the country in which we happen to come across them, as part of the local flora and fauna and not as men of like passion with ourselves. So long as we think of them 'natives' we may exterminate them or, as is more likely to-day, domesticate them and honestly (perhaps not altogether mistakenly) believe that we are improving the breed, but we do not begin to understand them." See his *A Study of History*, Volume I, p. 36.

81 Anderson, p. 74; also see Kugle, "Framed, Blamed and Renamed", pp. 258–259; Strawson, "Islamic Law and English Texts", p. 26.

82 A transformation that signals an advance in our knowledge, although it has developed problems of its own. But this is obviously not the place to discuss them.

the very colonialist notion that to govern India (or any other territory) meant having to change its jural *modus operandi*. And to do so, it was ineluctable that not only the native agency had to be suppressed at any cost, but a new and "improved" *local* (but not necessarily native) agency had to be cultivated. As Thomas Macaulay (a member of the EIC's ruling council) declared, the aim of the British was to foster a group of educated men, "Indian in blood and colour, English in taste, in opinions, in morals and in intellect."[83] It would in no way be an exaggeration to say that with the substitution of "Muslim" for "Indian", and "Modern" for "English", the statement was and remains prophetically accurate.

All this is a necessary but not sufficient condition for "entexting" the Shari'a and its *fiqh*. Another rigidifying process was the conversion of the Shari'a court into a body that operated on the principle of *stare decisis*, the obligation of courts to follow the uncontroversial previous judicial decisions of higher courts. This system could have evolved in Islam, but for a good reason did not. The Shari'a assigned legal expertise and, more importantly, epistemic authority to the *mufti* and author-jurist,[84] not to the *qadi* who, while possessing more or less the same amount of legal knowledge as did his British counterpart, was deemed – as *qadi* –[85] insufficiently qualified to "make" law. *Ijtihad*ic hermeneutics was the very feature that distinguished the Shari'a from modern codified legal systems, a feature that permitted this jural system to accommodate and reign supreme in cultures and sub-cultures as varied as those which flourished in Java, Persia, Madagascar, Morocco, and all countries in between. But in so far as judicial practice was concerned, the bindingness of a ruling according to the specifically British doctrine of precedent deprived the *qadi* of a wider array of opinions to choose from in light of the facts presented in the case. Once a determination of law in a specific case was made binding, as would happen in the British court, the otherwise unceasing hermeneutical activities of the Muslim *mufti*-cum-author-jurist would have no place in judicial life; nay, they would subsequently disappear from the legal as well as intellectual life of the jural community – as indeed happened.

Enshrining Anglo-Muhammadan law in a doctrine of *stare decisis* in effect transformed the sources of legal authority altogether (and the Indian experience is both an epitome and a prototype of the structural transformations that were to take place in all legal systems across the Muslim world). Instead of calling upon the school (*madhhab*ic) principles and the juristic authorities whose props were the dialectics of textual sources and context-specific social exigencies, the Anglo-Muhammadan lawyer and judge now looked to the higher courts, and these in turn looked to the Privy Council which sat in London, not Delhi or Bombay. That the highest source of legal and political power was later to revert to New Delhi, Kuala Lumpur, and Algiers should not, and in fact did not, alter the effects of modernizing colonialism. The transformations were both structural and permanent.

83 See Macaulay's "Minute on Indian Education" (2 February 1835).
84 Two distinct juristic roles, discussed in detail in Hallaq, *Authority*, pp. 166–235.
85 On the epistemic authority of the *qadi* as *qadi*, see Hallaq, *Authority*, pp. 170–174.

4 CONCLUSION

The transformations we are speaking of here were structural and deep because they achieved at least three goals that colonizing modernity had set for itself: first, was the gradual but effective demolition of the traditional legal and other institutions and their near-simultaneous replacement by European models. Secondly, through processes of entexting Islamic legal doctrine (nicely illustrated by the experiment in British India, but less obviously elsewhere), the Shari'a and its *fiqh* were severed from their socio-epistemic infrastructures. The *fiqh* was thoroughly taken out of its own substrate of sociological knowledge that had earlier guaranteed the integrity of legal production, including the production of juristic multiplicity and plurality of judicial meanings that catered to local social, moral, and other exigencies. And thirdly, the utilisation of a weapon without which the first two transformation would not have been possible, namely, that of cultural technologies. As Nicholas Dirks poignantly observed, it was the channelling out to the non-European world a mass of such technologies that sustained and strengthened British – and other – jural colonialism. For without these technologies neither Anglo-Muhammadan law nor its successors could have been possible.

> The cultural effects of colonialism have too often been ignored or displaced into the inevitable logic of modernisation and world capitalism; but more than this, it has not been sufficiently recognised that colonialism was itself a cultural project of control. Colonial knowledge both enabled conquest and was produced by it.[86]

The integration and final transformation of *fiqh* into a code-like genre is wholly attributable to the successes of modernity, in all its jural, bureaucratic, administrative, military, centralising, homogenising, and cultural powers. Yet, the transformation into this new reality not only represented a metamorphosis but also announced the demise of the Shari'a and its *fiqh* as Muslims knew and *lived* them until two centuries ago. Elsewhere, I have discussed the institutional causes of this demise.[87] The case made here pertains to the appropriation and fundamental epistemic transformation of the remnants of this process. Whatever *fiqh* was left enshrined in the civil codes of modern Muslim countries is a stunted version of its predecessor, a deformed re-enactment that is deprived of juristic life: of reasoning and an inner, organic hermeneutic; of malleability through plurality and jural relativism; of relevance – nay connection – to a type of moral community that no longer exists. Instead, enshrining the remains of *fiqh* in the civil codes marks the final sanction that interred these remains in the soil of the state, where they become a "solemn expression of the will of the supreme power of the state".[88] Whereas the *fiqh* once was wholly geared to maintaining social harmony and confirming existing moral settings, the codified *fiqh* (and by extension the "reading" of *fiqh* as a genre) has joined the machinery of the bureaucratic state in performing the essential functions for which the latter was created to accomplish in the first place, namely, social engineering.[89]

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86 See the introduction of Nicholas Dirks to Cohn's *Colonialism and its Forms of Knowledge*, p. ix.

87 Hallaq, "Can the Shari'a be restored?"

88 See nn.59–60, above.

89 An extreme case of this "social engineering" amounted to a process of "weeding" the "garden" of the state. See the informative analysis of Bauman, *Modernity and the Holocaust*.

This transformation, therefore, is one of staggering proportions, in that it turned the functional significance of *fiqh* and its semiotics upside-down. If the jural, social, economic, and moral history of *fiqh* has been interred beneath multiple layers of modernist ideologies, whose thrust diametrically counters the very spirit and soul of *fiqh*, then what is the meaning of the current Muslim call to restore the Shari'a?

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