# Introduction

## 1. The prisons of language and modernity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] The expression is that of Emmanuel Lévinas. See Young, *White Mythologies*, 44–45.
[11] For a theoretical context, see Spivak, "Can the Subaltern Speak?" esp. 91–104. Adverse effects of this project are discussed in chapter 16, below.
[12] Representative of this discourse is Ṭāriq al-Bishrī (*al-Waḍʿ al-Qānūnī*, 6–7, 78–80) who echoes such notions as those discussed in chapter 17, below.

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

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

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

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

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

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

## 2. On being self-conscious

"Knowledge," Foucault wrote,

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

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

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

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

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

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

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

[16] Foucault, *History of Sexuality*, 101. For a useful commentary on theorizing resistance, see Hirsch, "Khadi's Courts," 208–11.
[17] Young, "Foucault on Race and Colonialism," 57–58.

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

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

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

[18] *Ibid*. See also Slemon, "Scramble for Post-colonialism," 50–52.
[19] For Foucault's disinterest in power as "a general system of domination exerted by one group over another," see his *History of Sexuality*, 92, as well as 93–94, 97.
[20] Young, "Foucault on Race and Colonialism," 57 and 61 where Young observes that Foucault's "apparent endorsement of an ethnology which would analyse not the forms of knowledge developed by other societies for themselves but how they conformed to a general theoretical model of how societies function, developed out of western structural linguistics, seems today startlingly ethnocentric."
[21] Foucault, *Les mots*, 14–15 and *passim*; Foucault, *Archaeology of Knowledge*, 34–78.

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

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

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

[22] See n. 19, above.
[23] This colonial "sovereignty" over epistemic and other transformations is powerfully documented and analyzed in Massad, *Colonial Effects*. See also Chatterjee, *Nation and its Fragments*; Merry, "Legal Pluralism," 872–74.
[24] Foucault, *History of Sexuality*, 101–02.

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

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

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

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

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