Chapter Three

The Trajectory of Islamisation

3.1 A Mode of Interrogation

In tracing the narrative of the universality of the secularisation on the withdrawal of religion from the secular, such a debate undergoes a shift when it encounters Islamic law. This is particularly in contemporary India in the context of debates over the Uniform Civil Code. Islamic law is seen as impervious to the process of secularisation wherein Hindu law is seen as having undergone social reform.\(^1\) Such a position is linked to a global narrative of Islam’s failure to modernise and its intrinsic incapability to do so (Lewis 2002). Thus demands by Muslims for the retention of the shariah are seen as part of this narrative. This leads to a counter-narrative that Muslims are entitled to their cultural rights, rendering the character of Islamic law as self-explanatory. Thus one is compelled to ask the question—what is the nature of Islamic law? In order to answer this question we need to acknowledge (as we have done in the previous chapters) the role of Orientalism. Therefore one must examine the descriptions of Islam by the West and the role of colonialism in the contemporary understanding of Islamic law.

In order to do this I propose the following route. I first begin by attempting to arrive at a conceptual understanding of the sharia in comparison with modern law. I then trace the Orientalist narrative on this question and the challenges to the Orientalist narrative by Islamic scholars. The conceptual foundations behind such a narrative are unearthed which reveal that the assertions and counter-assertions by both Western and Islamic scholars are about rival

\(^1\) An good overview of some of these debates can be found in Anveshi Law Forum (1997).
truth claims by the Semitic religions. Therefore, the assumption that Islam is unable to secularise is an incorrect way of understanding Islamic law in India. A different way of understanding these truth claims must be formulated which is through an understanding of Western law. One then attempts to formulate a hypothesis to understand Islamic law in India by making a suggestion that that the various traditions of Indian Islam need to be understood in the context of the arrival of Islam in pagan Arabia, wherein the practice of the Prophet was identified with the sunna or the idealized practice of the community. Such a process did not achieve the complete identification with sunna that was essential for Islam to come into being, although it retained the potential to do so.

I then examine the legal transformation of these traditions by the British through this hypothesis. Such a transformation involved two aspects, the rival claims of the Semitic religions and the application of concepts and frameworks in Western cultural history. Therefore the development of the legal category of religion in India in the context of Islam must be understood as a movement with these dual aspects that draws on the structure of the Indian Islamic tradition and their potential to be truly Islamic. I propose to call this process Islamicization.

3.2 Explaining the Sharia: “More than Law” “Less than Law”? 

The Shari’a finds no equivalence in western vocabulary. Abdullahi An Na’im (2008) describes the sharia appropriately when he says:

On the one hand the common perception of Shari’a makes it “more than state law” because of its comprehensive scope, from doctrinal matters of belief and religious rituals, ethical and social norms of behaviour, to apparently legal principles and rules. This comprehensive scope itself, on the other hand, means that Shari’a is also “less than law” in the sense that its enforcement as law requires the intervention of the legislative, judicial and administrative organs of the state (323).
A.Y Fyzee (1999,16) refers to shari’a as being the road to the watering place i.e. the path to be followed and a guide to ethics that embraces all human actions although it cannot be called “law” in the modern sense. The Sharia is the divine will of God which mankind has glimpsed through Revelation. Jurists have on the basis of this revelation formulated the science of fiqh which is formulating legal rules. The science of fiqh is human and contestable, whereas the Sharia being given by God cannot be contested. Thus the term sharia can be used to refer to the Islamic legal rules that are applied in daily existence and fiqh can be considered the science that is used to derive legal rules from their sources. (Vikor 2005:2-3).

The all encompassing nature of the sharia thus makes an analogy with modern law impossible. Its contents cover every aspect of human life including ritual and religious practice of prayer, alms, food taboos and purity regarding ritual washing and bodily functions including sexual intercourse (Zubeida 2003, 10-11). It is thus not feasible to make a clear division between religion, politics, and law as one can find in the West.

There are four schools of law in respect to the shari’a among the Sunnis which are the Hanafi, the Maliki, the Hanbali and the Shafi’i. A diversity of legal thought may characterize these schools, these differences can be best described as differences in methodology, there is no sectarianism as such which would characterize differences between Sunnis and Shias. These differences are best understood as the differing weightage and use of the sources of law which comprise of the Quran, the sunna (practice) qiyas (analogy), ijma (consensus) and others.

Most scholars consider the Quran to have around 500 verses of what may be considered legal content. These are verses on ritual matters, issues of marriage, trade and contracts, justice, 

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2 The Shias are divided into subschools such as the Zaydis, Itna Asharis and the Imamis. I have chosen not to focus on them as the peculiar problems of the reconciliation of contradictions that has been manifested in the Sunni school, is more revealing of the problem that I am posing.
crime and punishment. The sunna of the Prophet refers to the conduct and behaviour of the Prophet which is to be emulated as someone who has reached human perfection being closest to God. Such sunna is recorded in the form of hadith or stories about the Prophet and his sayings and doings. The Quran and the sunna have equal status and the two cannot contradict each other being God’s revelation. There are many different ways of reading these sources together. Qiyas is the application of rules through analogy. For instance if in a particular case there is an alleged violation of a rule the case is examined as to whether it can encompass the situations envisaged by the rule.

The methods of arriving at qiyas or analogy were varied depending upon the nature of the rule and the hermeneutic principles involved. This was however not like the doctrine of precedent in common law wherein one case is binding on another. Due to the varied interpretations that would arise due to the lack of a centralized authority such as the church or the state in the West, the principle of ijma or consensus occupies a significant role in the sharia. This meant that the decision on the validity of the derivation or interpretation of a rule based on the divine revelation depended on whether a body of scholars belonging to that particular school validated it or not. Such a consensus was established by ascertaining the agreement of scholars over a particular generation. Such a consensus was not for a region but for the whole world. There were also other principles such as istihan which is understood as “seeking the best” and others such as istidlal which is understood as the common good or the social good. This could be used to ignore a rule established by qiyas. Ijtihad was a mode of reasoning using the sources to arrive at new rules. There was also the doctrine of taqlid which stated that such reasoning had to be applied within the set limits.

\[3\text{ The description of the sharia in this section is taken from Vikor (2005).}\]
The Islamic legal system varied a great deal from modern western legal systems that are conspicuous for their structures of appeal and the authority of codes. Despite the absence of a centralized authority to enforce the sharia, the political authorities such as the caliph or local governors appointed the qazis or judges. It was however not the qazi’s decision to ascertain the law but the mufti’s task. The mufti was a learned scholar who would formulate a fatwa based on the question posed to him by the party instituting the case. The qazi used the mufti’s statement of law to arrive at a decision. He could also ask for a second opinion if he was not satisfied with the mufti’s statement of law. The fatwa was not a court judgment and was merely to confirm the law and was not the actual decision of the qazi himself. There was no appeal from the qazis’s court, the qazi’s decision being final. A verdict could only be reversed if it was contrary to the revelation or the principle of qiyas.

There were many other authorities such as the mazalim court known as the private court of the sultan, and the shurta court which in modern parlance could be described as having police functions. These however did not depart from the shari’a but fulfilled certain functions that the qazi or the mufti could not fulfill (such as if the qazi did not have the strength to enforce a verdict). The sultan was bound by the principle of siyasa shari’a which meant working for the common good. The shurta court did not directly apply principles of shari’a while making its decisions but was bound by the shari’a.

In looking at these various descriptions of authorities by western scholars such as Vikor (2005), one cannot help but notice how certain patterns are predominant in describing what Vikor considers legal processes such as enforcement and judgment. These descriptions depend heavily on conceptions of western legal processes i.e. there must be an enforcement machinery in the form of the police. Judicial decision making requires to take on a certain

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4 The muftis were not usually appointed by the state but were chosen by the party instituting the case.
character performing certain functions of enforceability and consistency that is reflected in the nature of the decision making itself i.e. as evident in describing each authority’s role in adjudication.

3.3 The Orientalist Narrative

Western scholarship on Islamic law has been accused of various prejudices and biases against Islam. One seeks to examine these allegations by broadly looking at what is considered Orientalist scholarship and tracing this in the form of a narrative. This Orientalist narrative is characterized by the explanation of Islamic law by its history, such history itself being an explanation of what the law is. The construction of such a narrative follows a certain pattern assigning Islam a certain place within the model of historical jurisprudence. Such a pattern begins with the origin of the Koran in God’s revelation, the formative period of Islamic law in the first century of its existence, the emergence of the legal science of us-ul-fiqh by Shafi’i and the subsequent development of the four schools of law. This finally leads to the closing of the gates of itjihad or independent reasoning and the subsequent stagnation of Islamic legal science. The narrative finally concludes by pointing out the revitalization of Islamic law in the nineteenth century by following western forms of codification.

Such a pattern merely confirms and projects Western ideas that Islam is inherently backward and therefore its law must also be backward. For an indication of this narrative we will examine the work of Joseph Schacht and Noel Coulson. However in unraveling the narrative one will try to focus on the explanation that the narrative provides, rather than the chronology.

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5 Theories of historical jurisprudence suggest that there has been a certain evolution of law. Initially law could not be separated from religion, politics and society and evolved progressively to being a distinct category (a proponent of this theory is Henry Maine). This progress has to be seen in consonance with western political theory wherein the development of the modern state also bought a change in the conception of law. This subsequently developed into theories of legal positivism with its emphasis on the division between law and morality.
of the narrative itself. One also seeks to see the structure that holds the narrative together and not individual differences of opinion or analysis of content between different scholars.

As pointed by Wael Hallaq (2003), Orientalist scholarship shows an obsession with the origins of Islamic law. Schacht (1982, 6-9) paints a picture of disorganization in pre-Islamic Arabia where there was no organized political system or organized judicial system. Dispute resolution was usually through arbitrators called hakams who were chosen because they belonged to families that had expertise in dispute resolution and probably for his supernatural powers. Because these supernatural powers were often found among soothsayers they were frequently chosen as arbitrators. If the hakam agreed to act the parties had to give security such as hostages or property. The decision of the hakam was final but not an enforceable judgment, it was merely an authoritative statement of what the customary law or the sunna was. The arbitrators applied and developed the sunna which was authenticated by the society as a whole.

The advent of Islam made the concept of sunna one of the most important agents in the mission to transform a pagan society into a religious one. Due to his authority, the Prophet Muhammad was asked to arbitrate in disputes and thus became the ruler-lawgiver of a new society on a religious basis. His refusal to be considered a soothsayer carried with it a rejection of the traditional form of pagan Arab arbitration (Schacht 1982, 10). However the Prophet did not reject the customary law or the sunna as such but introduced innovations that changed its character in a fundamental manner. Such an innovation is best observed in a Koranic verse wherein a reference to the Prophet’s judicial activity is made by counterposing the verb hakama (arbitration) with the verb kada which refers not to the judgment of a judge but to a sovereign ordinance either of Allan or of the Prophet. Schacht suggests that this indicates the arbitrative aspect of the Prophet’s activity along with the authoritative character of his decision. More than this Islam had a profound change on the manner and way in which
everyday life was viewed incorporating moral norms contained in the divine revelation in order to pass the Day of Judgment.

Schacht further elaborates the nature and process of the transformation of pagan society by Islam. He remarks that Islamic law in the technical sense did not exist for the major part of the first century and the notion of sunna or custom reasserted itself as the Arabs were bound by tradition and precedent. He stresses the change that the concept of sunna underwent:

> Whatever was customary was right and proper; whatever the forefathers had done deserved to be imitated …..The idea of sunna presented a formidable obstacle to every innovation, and in order to discredit anything it was, and still is, enough to call it an innovation. Islam, the greatest innovation that Arabia saw, had to overcome this obstacle, and a hard fight it was. But once Islam had prevailed, even among one single group of Arabs, the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do, a thing hallowed by precedent and tradition, a sunna (17).

How did this happen? Schacht hints at the process when he says that sunna actually had a political connotation and referred to the policy and administration of the caliph. Discontent over the policies of the third caliph Uthman which led to his assassination in 35/655\(^6\) led to the charge that he had deviated from the policy of his predecessors and thus implicitly from the Koran. This led to the question as to how was one to regard the previous policy of the predecessors Abu Bakr and Umar. It was then that the concept of the sunna of the Prophet appeared, providing a doctrinal link to the policies of Abu Bakr and Umar and the Koran. Thus Abu Bakr and Umar’s policies became examples to follow only if they could be linked to the example of the Prophet itself, based on his narration of the divine revelation embodied in the Koran.

Despite this change in reference, Schacht reiterates that such a concept took a great deal of time to take root, although many distinctive features of Islamic law appeared during this

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\(^6\) These refer to dates in the Islamic calendar and the Christian calendar respectively.
period. During the Ummayad rule that preceded the Caliphs the Arab hakam was replaced by the Islamic qadi. This period also saw the emergence of the ancient schools of law which emphasized on the living tradition represented by the doctrine of its authorized representatives. These schools are described as being geographical in nature, Kufa and Basra in Iraq, Medina and Mecca in Hijaz and Syria. The idea of such an living tradition presented itself under two aspects, retrospective and synchronous. Retrospectively it appeared as sunna or ‘practice’(amal) or ‘well-established precedent’ (sunna madiya) or ‘ancient practices’ (amr kadim). Such ‘practice’ partly reflected the actual custom of the local community, but also contained a theoretical or ideal element which made it normative ‘sunna’ the usage as it ought to be. The Iraqians went even further transferring the term ‘sunna of the Prophet’ from its political and theological context into a legal context and identified it with the sunna, the idealized practice of the local community and the doctrine of its scholars “The term expressed an axiom but did not as yet imply the existence of positive information in the form of ‘traditions’ (which became prevalent later) namely that the Prophet by his words or acts had in any fact originated or approved of the practice in question” (Schacht 1982,33). Each ancient school of law also projected its own doctrine back to its eponym, a local companion of the Prophet and claimed his authority as his teaching. Schacht also describes that the legal reasoning during this period as consisting of “discretionary decisions or crude and primitive conclusions by analogy (38)”. Schacht also identifies the difficulties that Islamic law had in establishing a new order in the adoption of many legal concepts from pre Islamic Arabia, and Roman law. He suggests that key elements such as the concept of ijma or consensus had its origins in Stoic philosophy introduced by non-Arab converts who were exposed to Hellenistic ideas. Coulson also highlights what he sees as the diversity of law in the Ummayad period and reasons that this may be due to the local law and the personal discretion of the qadi. (Coulson 1997, 30).
The ancient schools generated an oppositional movement known as the Traditionalists whose main thesis was that formal traditions (hadith) deriving from the Prophet superceded the living tradition of the school. It was not enough for the ancient schools to claim that their doctrines were based on the teaching of the Prophet as that was not evidence of authenticity. The formal traditions had detailed statements and witnesses which were reports of ear or eye witnesses on the words and acts of the Prophet, handed down orally by a chain of reliable persons (isnad). This stand, which differed considerably from the ancient schools, led to clashes between the groups. Such differences disappeared when Shafi’i the founder of us-ul-fiqh or the science of jurisprudence formulated his new science. Under Shafi’i sunni was no longer the idealized practice that the ancient schools recognized but was identical with the formal traditions of the Prophet and superceded the traditions of the ancient schools.

According to Shafi’i one cannot conclude as the ancient schools did that the Companions of the Prophet would not have held opinions incompatible with him. Traditions could not be invalidated in light of the Koran; the Koran had to be interpreted in light of the traditions and not vice versa (Schacht 1982, 47). The thesis of the Traditionalists thus prevailed but legal reasoning was developed in a more sophisticated and systematized manner. Thus “sunna” after undergoing a shift in reference now underwent a shift in meaning casting off its old character as pagan Arab customary practice and becoming the normative behavior of the Prophet in accordance with the divine revelation embodied by the Koran.

It was not surprising that legal reasoning underwent a greater systemization as its analogical approach had to be confined to two sources, the Koran and the sunna. The development of geographical schools then developed into personal schools of law i.e. the Hanafi, Maliki Hanbali and Shafi’i. This marked the end of the formative period coinciding with the rise of the Abbassid regime and the beginning of the stagnation of Islamic science or the closing of the gates of itjihad or independent reasoning.
Although Schacht highlights Shafi’i’s contributions he does not see such contributions as being fruitful to the growth and development of Islamic law calling it “the first indications of an attitude which denied to contemporary scholars the same liberty of reasoning as their predecessors had enjoyed” Coulson ([1997) confirms this and attributes it to the divine nature of shari’a when he says:

This development, initiated by ash-Shafi’i, determined the whole future course of Islamic law. With the spread of the area of law covered by divine revelation came an increasing rigidity of doctrine; the scope for independent activity was progressively restricted as the particular terms of the law, through the Traditions, were identified with the command of God (73)

However Shafi’i had always affirmed the duty of the individual scholar to use his own judgment in drawing conclusions from the legal science he had developed. But by the beginning of the fourth century of the hijra (about 900 A.D.) the point had been reached when the scholars of all schools felt that essential questions had been discussed and a consensus established itself that all activity would have to be confined with the interpretation of the doctrine already laid down (Schacht 1982, 69)

Schacht and Coulson’s scepticism do not end with the pronouncement of Islamic legal science as being defunct in nature. They throw doubt on the genuineness of the isnads or chains of transmission and the hadith or the stories of the Prophet. Coulson mentions that the tendency to project the sunna backwards into the past led to many false rulings and that “the genuine core became overlaid by a mass of fictitious material” (Coulson 1997, 43). Schacht comes to remarkably similar conclusions stating that “we find therefore a number of alternative names in otherwise identical isnads where other considerations exclude the possibility of a genuine old doctrine by several persons” (Schacht 1950, 163). He also goes on to say that:
….every legal tradition from the Prophet, until the contrary is proved, must be taken not as an authentic or essentially authentic, even if slightly obscured, statement valid for his time or the time of the Companions, but as the fictitious expression of a legal doctrine formulated at a later date (149).

Both Schacht and Coulson also talk about the nature of the Islamic state. Schacht (1982) remarks that there is no distinction between the public and the private, public powers are reduced to private duties. He also notes that the Arabic language possessed an abstract term for “authority, domination, ruling power” in the word sultan but Islamic law did not develop a corresponding legal concept. He further says:

For the same reason, the essential institutions of the Islamic state are construed not as functions of the community of believers as such, but as duties the fulfillment of which by a sufficient number of individuals excuses the other individuals from fulfilling them; in fact, the whole concept of an institution is missing (206).

Coulson also suggests that there was no division of executive and judicial functions. He also suggests that the lack of a clear division between law and morality has led to an abstract science rather than a science of positive law, telling the courts what they ought to do rather than what they will do. This state of affairs is due to the rigid and immutable nature of the law itself as it represents God’s will.

3.4 Challenges to the Orientalist Narrative

The response to the Orientalist narrative by Islamic legal scholars has been polemical with several conclusions of the Orientalists being disputed. For the sake of clarity I will focus on two main issues that the Islamic legal scholars raise 1) the construction of the narrative itself i.e. its ordering that results in a selective interpretation of events 2) inaccurate description of Islamic legal concepts and Islam itself and 3) that Western concepts are used to describe Islam.
Wael Hallaq (2003, 7) accuses the Orientalists of seeking to prove that Islamic law was not really Islamic law but “Roman law in Arab dress”. Such Orientalist scholarship has veered to the thesis of non-Arab origins of the sharia because it is impossible for a law as technically sophisticated as the shari’a to originate in a desert culture. This led scholars to look for its origins in other places such as the Fertile Crescent or Mesopotamia. This is evident in the conclusions drawn by Schacht that Mesopotamia was the locus of the most advanced school. Hallaq (2005, 32) also suggests that the conclusion drawn by Orientalists on customary law becoming part of Islamic law is false. This is as the new Quranic laws created their own juristic problems that rendered many of the old customary laws irrelevant.

Hallaq’s view is also shared by Syed Abul Hassan Najmee (1989, 59) who states that Orientalists have not produced evidence to show the pre-Islamic customs were adopted by Muslim jurists and allowed to be assimilated into the system although it contradicted the text of the Quran. Hallaq (2003, 16) further critiques Schacht for ignoring the first century of Ummayad administrative practice and not providing enough detail about the transformation of Arabian sunna to Ummayad administrative practice. This is due to not wanting to mention that the jurists law came from Caliphal law and thus acknowledging that a sophisticated system of law was developed in Arabia. This also involves not understanding that Arabia was part of an integrated culture of the Near East.

Such a lack of explanation is also accompanied by the assertion of the fabrication of prophetic hadith. Hallaq acknowledges that there is not sufficient evidence to prove that prophetic hadith is true, but says that Schacht is unjustified in coming to the conclusion that such hadith is false unless proven true. The transition of geographical schools into personal schools of law is also criticized. This once again allows Schacht to give Islamic law a new beginning wherein nothing else existed but administrative and popular regional practices and the Caliphal law, and doesn’t allow for the concession that this represented the beginning of
legal doctrine. Hallaq (2003, 26) also criticizes Schacht’s description of the schools of law as personal schools saying that doctrinal schools would be a more appropriate term as they were an illustration of overarching methodological and epistemological doctrine not the contribution of a personal founder as Schacht suggested.

Finally Hallaq discredits the importance that Schacht gives to Shafi’i as the founder of us-ul-fiqh suggesting that such a description is required to describe the later legal developments in terms of the closing of the gate of itjihad or independent reasoning. Hallaq (1997, 31) suggests that nowhere in the texts of that period that Shafi’i’s contributions were considered outstanding by the jurists of that period and that a host of questions fundamental to us-ul-fiqh are entirely absent from his work the Risala. He also refutes the suggestion that Islamic legal science had stagnated by the closing of the gate of itjihad, on the ground that new problems continued to be raised and answers formulated. Itjihad was a religious duty which jurists were required to perform as a way of uncovering the will of God and there was discussion of it in texts at the time of its supposed disappearance. Although the doctrine of taqlid gained support at a later period during the 14th century the methods of itjihad continued to be employed but mostly without being recognized under its proper name (Hallaq 1984, 32).

Hallaq’s main contention through his entire critique that is through the construction of the narrative the Orientalists have arrived at inaccurate description of Islamic legal concepts and Islam itself. Such a narrative has been constructed in a manner to show that Islam is a backward religion with a backward law. Such a narrative with its emphasis on the formative and the reformatory periods is intended to show how Islam is indebted to the West. This is why Islamic law is shown as having emerged from Roman law which the West claims as its heritage and the Ottoman empire, codification as being inspired by legal developments in

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7 Syed Abul Hassan Najmee comes to similar conclusions calling this period “legislative germination”.

Europe itself.  

A different contention is however raised by Syed Abul Hassan Najmee who suggests that Western Orientalists have misunderstood many things about Islamic law because of the use of western concepts. He says that Orientalists err in adjudging Islamic law on the basis of western concepts where law is the creation of human will divorced from a transcendental moral norm (Najmee 1989, 41). He also suggests that while it is correct to say that Islamic law is the will of God it is misleading to assume that the human intelligence has no role in uncovering it and that the system is rigid and immutable.

3.5 Reconstructing the Narrative

The counter narrative poses certain difficulties, as one is not clear as to why these objections have been made. Therefore I propose a reconstruction of the narrative and a reexamination of the objections. In such a process one will try to understand not just the epistemic perspective that leads to the debate, but also what the epistemic perspective produces in the reactions of these scholars.

Let us reduce the narrative to its bare facts. 1) There was a transformation of Arabian sunna which was a slow process wherein the Prophet’s sunna was included as part of the general customary practice 3) The term sunna began to be solely identified with the Prophet’s sunna and Shafii was the first to significantly theorise on this issue.4) There was the use of the doctrine of taqlid in later years which did lead to a decrease in innovation in Islamic legal science.

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8 It appears that a better objection to the thesis of debts and borrowings could have been made by Hallaq through showing that such an approach was one sided, the West also being influenced by Islam. The work of George Makdisi (1974; 1970) shows that methods of legal reasoning such as the scholastic method and the structure of the madrasa as an institution were also developed in the West presumably being influenced by Middle Eastern contacts.

9 Najmee’s remarks show ignorance of the origins of Western law as theological in nature. A detailed explanation of the theological origins of western law has been provided in the first chapter.
It appears that Hallaq has no problems with this narrative. He says that:

"...the process that ultimately led to the emergence of Prophetic Sunna as an exclusive substitute for sunan was a long one, and passed through a number of stages before its final culmination as the second formal source of the law after the Quran" (Hallaq 2005, 49)

Hallaq (2005, 109) also agrees that Shafii was the first person to significantly theorise on the prophetic sunna becoming identical with sunna itself. We have seen that he mentions that the doctrine of taqlid was used to a great extent although much later than the period that Schacht had mentioned.

Hallaq’s allegations against the Orientalists are that they have deployed this narrative in a selective manner highlighting and drawing interpretations to show that Islam is a backward religion. How should one rectify the narrative? According to him 1) Their scholarship has been faulty and they have not been rigorous 2) Even if they had a good grasp of the Arabic language and the nature of Islam like Schacht they have let their own prejudices and biases colour their research. In his own words:

"The proprietary epistemological rights over the Orient also dictate that whatever Orientalism posits as knowledge must be guarded as a paradigm, and though unproven, no critique or refutation of it may be adduced unless it is thoroughly documented. And even then, the critique may fail to shift the paradigm, especially if is authored by an Oriental" (Hallaq 2003, 21)

However the response to Western Orientalists has been very much within this paradigm that Hallaq talks about. To understand this, let us look a little more closely at the responses:

On the fabrication of Prophetic hadith Hallaq agrees that there was a wide spread fabrication of hadith (Hallaq 2005, 104). He also says that in the context of his research that he makes the assumption that the Quran originated during the Prophet’s time and is an authentic representation of the events and ideas that occurred during the Prophet’s life time. Although
there has been fabrication of hadith, there still is a body of material that can be dated to the Prophet’s time and therefore one cannot preclude the entirety of Prophetic reports as unauthentic material or accept their majority (Hallaq 1997, 2-3).

Why is Hallaq so anxious to prove that the hadith is true and why have other Islamic scholars reacted so vehemently against this thesis put forward by Orientalists? This is because the thesis put forward by the Orientalists makes the claim that the normative behavior of the Prophet, which is an integral part of Islam does not have the status of divine revelation. Such a claim is tantamount to suggesting that their religion is not true. Why has there been a refusal by the Orientalists to recognize even the genuine prophetic hadith? As Hallaq (2003, 15) himself says Muhammad’s claim to prophethood has not been substantiated in the long history of Christianity. For Christianity, Islam is a false religion and Muhammad is not a Prophet and no creditworthiness needs to be attached to the stories around him.

I suggest that when Hallaq and the Orientalists make their claims they are making claims about religion and the nature of Islam or Christianity. Such claims result in arguing within a religious framework without any awareness of the same. The allegations that the West uses its own concepts to understand Islam does not hold good as one is also responding within the same framework. The question of inaccurate scholarship also does not arise as it is the paradigm itself that determines the scholarship.

3.6 Formulating An Alternative Inquiry

The question arises that if such a framework is religious, how does one study Islamic law? How does one understand the concepts and frameworks within Islamic law? Therefore what one requires is not the perception of Islamic law by its own scholars or the Western scholars themselves but an alternative form of inquiry. Such an inquiry acknowledges that Orientalism has been responsible for these descriptions of Islamic law. Such
acknowledgement necessitates asking questions about the nature of western law. A description of western law in the context of the manner in which it represents itself, i.e. distinction between law and morality, rules of sovereign, etc is inadequate and does not allow one to develop an understanding of western law and the epistemic framework that is used. An inquiry into western law has to be made in the context of its role and emergence in western culture i.e. its origins in religion itself. This understanding of western law has already been developed by Harold Berman and some of the key features of his study such as the distinctive nature of modern legal systems including how law can be distinguished analytically from religion, culture, and politics unlike systems of non-Western law have already been discussed.

However what is relevant is that the basis of the Western legal tradition is something that is shared by the Semitic religions. Berman (1983, 179) mentions that Christianity, Islam and Judaism postulate both a radical separation and radical interconnection between God and Man. They also postulate that God is a judge and lawgiver, and man is governed by divine law. God is a loving father and a righteous judge. At the end of the world God will come to judge the nations of the world, including the souls of all people who have ever lived. However what is special about Western Christianity is the emphasis on incarnation as the central reality of the universe, which released an enormous energy for the redemption of the world, thus splitting the legal from the spiritual, and the political from the ideological. This was due to the manner in which it viewed the Last Day of Judgment which was through the idea of purgatory. The idea of a Last Judgment presupposes that life has a purpose and that man is responsible for that purpose. One’s life on earth is to be accounted for in the Last Judgment. The idea of purgatory presupposes that there will be an accounting of one’s misdeeds through an elaborate system of rules and standards. The pope may administer merits in purgatory equivalent to the time period of penance on earth to expiate one’s sins.
Such an action lessened the time that one spent in purgatory. Sin was seen as specific wrongful acts or desires, or thoughts for which various penalties must be paid in temporal suffering, whether in this life or the next. Specific sinful acts or desires or thoughts were to be punished, and by what degree of suffering was to be established primarily by moral law revealed by God in scripture (divine law) and in the hearts and minds of men (natural law) but it was further to be defined by the church (ecclesiastical law) which was to be tested by divine law (Berman 1983, 171). Such a legalisation of life after death led to the redemptive force in Western law being responsible for its organic growth.

Such a viewpoint underwent a greater transformation in the Protestant Reformation. Lutheran legal philosophy believed that natural law was thought to be immediately accessible to human reason in sacred texts and the traditions of the church. At the same time human selfishness, pride and desire for power are sources for unjust law, which are contrary to both natural law and divine law. Thus human law though a response to divine will was also seen to be a product of the defective human will that could be corrected by human reason (Berman 2003, 73). Luther also had a passionate belief in the secular law of the prince which was the law of the State. Lutheranism carried on the Roman Catholic belief in the infusion of divine and natural law into legal institutions, into secular legal institutions not the ecclesiastical (Berman 1983, 197) The civil ruler is God’s vice regent so his law needs to reflect God’s law (Berman 2003, 74) The modern foundations of legal positivist theory have been built on Lutheran skepticism of the ability of man’s power to build a human law which would reflect eternal law, and the explicit denial of the church’s ability to make law.

Such a story provides us more clarity on the contestations between the Orientalists and the Islamic scholars. The Orientalists arrive at an explanation of Islamic law by its history because the nature of their law is determined by its history i.e. its capacity for organic growth. Coulson’s assertion that law in Islam is an academic venture and its authority was
merely in its theoretical formulation without any relevance to practice, unlike western law where law grows out of the practice of courts or remedies is an indication of this (Coulson1997, 82-83)

However the yardstick to judge Islamic law becomes more apparent in the following statement by Schacht:

Whereas Islamic law presents itself as a rational system on the basis of material considerations its formal juridical character is little developed. Even the two formal legal concepts valid and invalid are continually pushed into the background by the Islamic legal concepts allowed and forbidden (Schacht 1982, 203).

This suggests that Islamic law is not quite law because it does not possess strong enough distinctions between valid and invalid that are required in any sound legal system. This also suggests that Islam does not possess the formal rationality that one can see in western legal systems where law can be analytically distinguished from religion and politics. Such a blurred system of norms suggest that Islam does not possess the moral categories of right and wrong which allow for the legal categories of valid and invalid i.e. there are no clear distinctions between right and wrong because of gradations in the system. Since it does not do so it cannot reflect the will of God. It also carries with it with it the implication that there is no universality in the legal system, judges do not make decisions on the basis of universally applicable principles but hazy norms. Such a perspective also reflects the distinction between law and morality that has characterized descriptions of Western law.

Syed Abul Hassan Najmee’s (1989, 33) comment that Western law is characterized by the use of “unbridled reason” and the absence of any grundnorms i.e. a transcendental moral norm is false as it becomes clear that divine revelation is the basis for the law of both Islam and Christianity. Abul Najmee’s contention that one cannot see Islamic law as rigid and immutable because it is based on divine revelation does not hold good as the Orientalists do
not see it as divine revelation, it is more an indication that it does not possess the characteristics of growth that western law possesses.

Such an alternative inquiry into the nature of Western legal culture and the concepts through which it has described other legal cultures therefore yields certain results, such as the assumption that Islamic law is an inferior variant of Western law and that it lacks the perfection of the latter. A comprehensive inquiry about such assumptions is outside the scope of this thesis. I will instead focus on the subject of investigation which is Islamic law in India. I would like to suggest that an investigation using this form of enquiry provides an explanation for certain kinds of reforms by the colonial administrators particularly the development of a body of Anglo-Muhammadan law.

3.7 Islamic Legal Culture in India: The Colonial Encounter with “Syncretism”

The transitions and histories that have been described in earlier sections on the history of Islamic law that have taken place in the Middle East may not necessarily reflect the history of Islamic law in other parts of the world. India is well known for its history of plural traditions and such pluralism manifested itself in unusual forms in the Islamic law. An illustration of this, were the various Muslim communities in the colonial period who preserved many Hindu customary laws such as the Khoja and the Cutchi Memoms who followed Hindu laws of inheritance. In the contemporary period similar communities such as the Meos of Rajasthan have been seen as” mixed” communities having intermediary and fluid identities based on specific sacred texts and historical practices. These practices are seen as “Hindu” or “Muslim”

10 The study of these Meo traditions and practices by Shail Mayaram (1997) have necessarily involved looking at practices which are “Hindu” in nature, and those that are “Muslim” in nature. The composition of a Mewati Mahabharatha is seen as Hindu. The various referents for divinity by the Meos such as “Kartar” (Creator) Datar (Giver), are seen as Hindu whereas referents for divinity such as “Allah” “Rab” and “Rasul” are seen as
Such a perception of mixed communities emerges from the colonial characterisation of these traditions. In the colonial encounter such traditions were viewed as being “syncretic” - they were a mixture of religions. Such perceptions led to serious problems in the context of legal regulation as we have seen earlier in the case of the Pirana dargah. I would like to suggest that the notion that these identities are mixed and fluid does not allow us to understand them conceptually. Instead I propose an alternative argument to show that these traditions cannot be understood as intermediary identities but need to be understood in the context of how a Semitic religion is made intelligible to a pagan society.

In order to understand the existence of such communities one needs to look at the transformation of pagan society in Pre-Islamic Arabia. In this context the transformation of sunnah or practice. Hallaq (2005, 104) notes that the assumption by Orientalists that the sunnah prior to the Prophetic hadith was not religious is false, as modern research has shown that the emergence of the hadith involved a lengthy process that projected back Companion and other post prophetic hadith on to the Prophet himself. He however says that:

…it is instructive to note that with the gradual metamorphosis of the content of past, secular experience into a Prophetic and religious narrative, authority- statements became gradually less secular, acquiring an increasingly religious meaning. (53)

It is this metamorphosis that one needs to be concerned with in looking at traditions of pluralism in India. The nature of the metamorphosis is revealed in Hallaq’s examination of the treatment of the Prophet’s sunna by the Medinese and the Iraqians. He suggests that there is a duality in the model of the Prophetic sunna for the Medinese scholars; the sunna of the Prophet was attested by their own practice (sunnah madiya) the ultimate proof of past Muslim. This approach of marking certain practices as Hindu or Muslim not only reinforces the logic of colonialism, but also does not let one know how these referents operate.

Refer to Chapter One. The colonial perception of these communities as being mixed led to census classifications describing communities as both Hindu and Muslim (Mayaram 2004).
Propethic sunna and not by a literary narrative. This is evident in the words of a Medinese scholar Ibn al-Qasim:

This tradition [hadith] has come down to us, and if it were accompanied by a practice passed to those from whom we have taken it over by their own predecessors, it would be right to follow it. But in fact it is like those other traditions which are not accompanied by practice. These things could not assert themselves and take root [for] the practice was different, and the whole community and the Companions themselves acted on other rules. So the traditions remained neither discredited nor adopted in practice and actions were ruled by other traditions that were accompanied by practice.\(^\text{12}\)

Therefore the continuous practice of the Medinese, as reflected in the cumulative practice of the scholars became the final arbiter of the Prophet’s sunna. Therefore there was a duality in the Prophet’s sunna, the Medinese practice represented the logical continuation of what the Prophet said and the newly circulating hadith was false if it did not conform to the Prophetic past as continuously documented by their lived experience of the law (Hallaq 2005, 106).

Therefore the prophet’s practice had to conform to their existing practices that had been handed down for generations. Such a duality was also manifest in the Iraqians’s conception of the sunna, but this conception was different as they did not have the continuity of practice that the Medinese had. Their reliance on Prophetic sunna was by accepting as part of their doctrine those Prophetic traditions, along with those of his Companions.

Such a mechanism of transforming practice appears to be similar to that of Christianity as it sought to subject practice to a higher end which was that of God and His Law as manifested in the Prophet and his traditions. In the case of the Medinese the adoption of such traditions depended on whether it was accompanied by practice. However I would like to argue that such a mechanism was arrested due to contact with the cultural forms that it came into contact with. Prophetic traditions were incorporated and made part of local customary

\(^\text{12}\) Quoted in Joseph Schacht (1950, 63).
practices. Such a process led to acceptance of Islam but not in the manner in which it occurred in the Middle East where a shift in meaning took place and the Prophet’s sunna became an exclusive substitute. In the Indian context there was merely a shift in reference.

These transitions are clearly marked in many syncretic traditions across India. The most prominent example is that of the Nizari Isma’ils. The Nizari Isma’ils in South Asia are considered an offshoot of Ismailism a branch of Shia Islam. Various Ismaili scholars undertook the work of conversion in the fourteenth to nineteenth centuries. According to Nanji (1988) one of the chief modes of proselytisation was primarily through texts known as ginans which contained a set of narratives that traced the arrival and establishment of Nizari Isma’ilism in the subcontinent. These narratives reveal visible patterns (Nanji 1988, 65) such as 1) the anonymous arrival at a well known religious center 2) performance of a miracle to draw the attention of the rulers of the area and to win disciples 3) confrontation with a local saint and triumph over him 4) conversion of people in the city 5) departure from the city.

Nanji explores the content of the ginans and mentions that they used already existing Hindu or Indo-Muslim hagiographical narratives to transform the narratives into vehicles of Isma’ili teaching. He calls this process “mythopoesis” which is a criticism of social norms and points out to a futuristic social order which is envisaged as integrating the residues of the past and the present. Such a narrative aimed at inner transformation. This literary “mythopoesis” in the ginans was complemented by the development of ritual processes. After gaining converts, the pirs (Islamic religious figures) initiated the converts into Islam through a ceremony called ghat pat. This was a group ritual where they drank a sip of sacred water after having given up the traditional jane’u which was the sacred thread that they had worn as practising Hindus. With such a ceremony a link was established between this ceremony and the practice of the Prophet.
Nanji comments that the ceremony marked a transition from the Hindu to the Muslim world. In medieval times such a process of conversion affirmed a notion of purity but revised it through a ritual form that had Indian roots. Nanji also mentions that such a ceremony enabled the individual follower to participate in the most profound religious experience possible in Indian Isma’ilism. He remarks:

As described in various ginans, in terminology analogous to that of Sufi literature, the drinking of the sacred water was symbolic of the heart being illuminated by divine light (the Qu’ranic nur of sura 24). At one level, the ritual merged the individuals into the new community; on another, they were able to transcend the merely structural or zahiri aspects of ritual, enabling them to experience the dimension of batin, the interior religion, through which an individual quest for spiritual knowledge and understanding was attained...........(Nanji 1988, 67).

More light on this transition from the Hindu to the Muslim world is provided in an examination of the Bengali Muslim traditions by Richard Eaton (1993). Eaton suggests that the term “conversion” is far too simple to express the process if it merely connotes a sudden and total transformation in which a prior religious identity is wholly rejected and replaced by a new one. He suggests that this process needs to be understood as Islamization. However if one needs to understand the rooting of Islam in Bengal it is a process which was so gradual that it was imperceptible. In viewing this process in a historical context one discovers three analytical aspects which are inclusion, identification and displacement.

Eaton elaborates on the process of inclusion by which Islamic superhuman agencies became part of Bengali cosmologies. This is particularly evident in pre-modern Bengali literature with deities such as Manasa, Chani, and Satya Pir. A relevant illustration is the Bengal tiger god Daksin Ray and a Muslim saint called Badi Ghazi Khan. This dual religious authority was represented by the installation of the symbol of the tiger god’s head at the burial mound of the Muslim saint. The two were however not fused into one religious personage but
remained mutually distinct. The agent who resolved the conflict was neither the Hindu God nor the Prophet Muhammad, but a single figure represented as half Krishna and half Muhammad. Such a process of inclusion could also be seen in the attempt to include Islamic religious figures amongst local divinities in folk ballads. Eaton’s comments on the nature of Islam in the context of this aspect of the transition are relevant:

One can by no means assume that the gap between “Islam” and “non-Islam” in sixteenth century Mymensingh was the same as that of the late twentieth century. Indeed, the idea of Islam as a closed system with definite and rigid boundaries is itself largely a product of nineteenth and twentieth century reform movements, whereas for rural Bengalis of the premodern period, the line separating “non-Islam” from “Islam” appears rather to have been porous, tenuous, and shifting (273).

He further says:

........the worldview of the people here considered was the very opposite of a zero-sum cosmology, in which the addition of any one element requires the elimination of another. When Bengali communities began incorporating techniques or beliefs that we could call “Islamic” into their village systems, they did not consider these as challenging other techniques or beliefs already in the system, far less as requiring their outright abandonment (274-275).

The second aspect of this transition was the identification of Islamic religious figures with local deities. Eaton provides an example of a bi-lingual Arabic and Sanskrit inscription wherein God in the mosque is worshipped as Allah in the Arabic part of the inscription. However in the Sanskrit part of the inscription reference is made to a “supreme god” by the names Visvanatha viswarupa and Sunyarupa. This identified the Islamic conception of God with local deities. This had the result of the local population perceiving a Muslim monument dedicated to God as being dedicated to Visvanatha.

Eaton criticises descriptions of such a phenomenon as syncretism. In analysing the legend of Sathya Pir which has been characterised as a synthesis of Hinduism and Islam, he makes the
point that such an assumption postulates the existence of “Islam” and “Hinduism” as self-contained systems which was a form of consciousness brought about by colonial rule. He suggests that one needs to understand this phenomenon as being merely identification which is part of the process of Islamization. Sathya Pir was a Muslim being the son of a Sultan. But the same text that states this also mentions that Satya Pir has been born of the goddess Chandbibi and has come to down to earth to redress human ills. Other texts identify Satya Pir with the divinity Satya Narayan.

The last dimension of the process of Islamization is displacement which is the displacement of local Bengal cosmologies by Islamic ones which took place in the nineteenth and twentieth centuries when Islamic reform movements swept Bengal. Eaton cautions that it would be wrong to think of these movements as a response to modernism, and that movements which are comparable in terms of theology could be found in early Arabia and pre-modern Bengal where lesser superhuman agencies came to be absorbed under the sovereignty of a single deity. Prior to the mission of Prophet Muhammad, Allah the patron deity of the tribes of Arabia was already gaining importance over other deities. This process was reflected within the Quran itself where the existence of lesser divinities and angels were affirmed but their effectiveness as intercessors for Allah was denied. Eaton terms this an evolutionary process which shows how divinities other than Allah were not merely dismissed as ineffectual but denied altogether.

Eaton makes a comparison between the Nabi-Bamsa an epic by Saiyed Sultan a sixteenth century Sufi poet from the Chittagong region of Bengal and Ibn Ishaq a mid eighth century Arab writer who wrote an early Islamic biography of the Prophet known as Kitab-al-Mubtada. The Nabi-Bamsa in its various couplets sought to treat the major deities of the Hindu pantheon, including Brahma, Vishnu, Siva, Rama and Krishna as prophets of God, followed in turn by Adam, Noah, Abraham, Moses, Jesus and Muhammad. Such an attempt
to construct a history of Islam was similar to that of the Kitab-al-Mubtada which sought to write a universal history which began with Creation and continued with the life of the Prophet Muhammad. This showed that the teleology of humankind led to Islam which in turn embraced the Christian and Jewish prophets. Such an endeavour structurally resembled the Nabi-Bamsa which saw Islam as the necessary conclusion of not just Christianity and Islam but the religious traditions of Bengal.

Eaton’s account of Islamization is insightful but not complete. I would like to expand on his description of such a process. In doing so I would like to suggest that the aspects of the process which are inclusion, identification and displacement should not looked at in a historical context but as forces within the process which are dictated by theological concepts including idolatry. In doing so, the emphasis shifts from the analytic aspects of the process to its transformation of practice as well as the consciousness of the people themselves. As in early Arabia and in early Rome, the advent of Islam and Christianity necessitated a change in the attitudes of people towards their own customs and practices. The arrival of Islam in medieval Bengal thus was subject to these cultural shifts. Islamic holy men i.e. the pirs and the sayyids faced dilemmas akin to the early Christian and Islamic missionaries in their attempts at conversion. Ahmed (1988) describes how they resolved these dilemmas in conveying the principles of Islam to the Bengali people.

They had to formulate religious questions in such a fashion as to make these look similar to existing local concepts while at the same time giving the truth about Islam. Their mission was to preach tauhid (the unity of God), but they preferred to use the familiar local model of avatar, the Hindu belief in reincarnation (125).

In order to convey certain kinds of principles inherent in Islam such a process had to use local symbols and figures in the manner Eaton has described. However such a process of conversion was not complete, the Bengali Muslim not abiding by basic principles of Islam
and in indulging in activities that would be considered idolatrous. This involved the reading of the Mahabharata, social hierarchies and restrictions on inter dining (normally described as caste distinctions) and the consulting of Brahmin priests on important occasions (Ahmed 1988).

Whereas many Islamic preachers including Sayyid Sultan saw a need to make concessions to the local culture (Ahmed 1988) these views were not necessarily shared by conservative sections of the ulama or the Muslim clergy. Their views often clashed with those of the liberal preachers which led to divisions in society. They considered such concessions as deviations from Islam and emphasised the observance of Islamic rituals such as namaz and living a pious life in accordance with Islamic tenets (Ahmed 1988, 126).

Therefore it appears that these analytical aspects of the process i.e. inclusion, identification and displacement are contradictory forces and the emergence of one over the other depended on the indigenous cultural forms that they come into contact with. Therefore one would agree with Eaton that the analytical aspect of displacement always existed in the culture of Bengal after the arrival of Islam. However in comparing the nineteenth century reform movements with other similar movements in early Arabia and medieval Bengal, Eaton completely ignores the arrival of Western concepts and ideas that were introduced by colonialism. This diminishes his account of Islamization and does not interrogate the specific conditions that allow the particular drive of displacement in Islamization to become active.

What were the effects of nineteenth century reform movements in Bengal? Ahmed rightly points out that the impact of western colonialism created powerful reactions and that the tendency was “oppositional” and “identity-preserving” (Ahmed 1988, 128). He comments that there were three kinds of reaction that he characterises as 1) fundamentalist reaction by the ulama to revive orthodox Islam 2) reinterpretation of Islam by the urban intelligentsia 3)
sections of the traditionalist ulama who supported the urban group. He describes two
fundamentalist movements which were the Fara’izi movement and the Tariqa’i
Muhammadiya.

These fundamentalist movements sought to emphasise tauhid (the unity of God), the right of
the individual to interpret the Quran and hadis; opposition to intermediaries such as the pir,
and removal of any animistic or syncretic practices from Muslim society. This often sought to
challenge the existing traditional practices such as reverence to pirs and beliefs in chants,
amulets and incantations. In return the pirs and mullas defended themselves trying to show
the significance of such practices. Ahmed argues that the basic character of Bengali life did
not change due to such movements. The villagers continued with their own older ways and
their practices and ceremonies. However an Islamic garb was cast over these activities, the
mullas importing Islamic incantations to give them an Islamic character. Therefore the
Islamization of Bengal led only to a limited imposition of the fundamentalist conception of
the shari’a. Ahmed suggests that the modernist project of reinterpreting Islam in light of
Western knowledge took its cue from the fundamentalists. This was due to its defence of
Islam and its endeavour to formulate a valid conception of Muslims in reconciliation with
Western ideas.

Ahmed’s argument that this Islamization was incomplete does find opposition. As we have
seen Eaton’s theorisation allows such Islamization to be complete in the form of the drive of
displacement. He also fails to analyse the exact impact of such “modernism”. However in
order to understand the effect of Western ideas, we need to look at the conceptual
frameworks that allow these ideas to spread. The Nizari Isma’ilis and the changes wrought by
colonial law are relevant in this context.
The legal identity of the Nizari Isma’ilis came under public scrutiny in 1866 in a case before the Bombay High Court. A certain section of the Nizari Isma’ilis sought to obtain a decree of the court to remove the Aga Khan from his position and authority as spiritual head and hereditary imam. According to Nanji this case revealed certain tensions among Indian Isma’ilis. The first was the issue of authority. The Aga Khan I had shifted headquarters from Iran to India in 1841. Therefore what had merely been a symbolic link became a physical presence. The second was the issue of how the Isma’ilies perceived themselves. This came to the forefront in the Aga Khan case in the context of the application of Anglo-Muhammadan law which could only be applied to Muslims. Therefore the Isma’ilis were forced to identify themselves as being part of Shia Islam. Nanji mentions how declarations were made by various groups who were covert Ismailis due to the practice of taqiyya (known as pious dissimulation). These groups now could no longer practice taqiyya due to the court’s attempt to identify Isma’ilis as being part of Islam. The judgement affirmed the right of the Aga Khan to make decisions on property, affairs of the community and practically all aspects regulating religious and daily life.

This had far reaching consequences. In 1905 the Aga Khan III began the process of reorganising the administrative structures in the community by establishing a Constitution. This stated that now the affairs of the community had to be conceived in the spirit of Islam and that the Aga Khan as the sole imam had the authority to do so. This provided for various rules and regulations designed to root the community in Shia Islam and eliminate Hindu practices. Nanji mentions how several practices were allowed to gradually lapse due to the

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13 A detailed analysis of some of the questions in this case is provided in Shodhan (2001).

14 This was the denial of one’s religious beliefs in order that one may escape potential persecution. An insightful account of the exceptional manner in which the practice of taqiyya was used in the subcontinent is provided by Virani (2011). He shows how the Gupti community lived as Hindus while being nominally Muslim in order to retain their cultural forms and practices.
need for taqiyya being eliminated. Birth, betrothal and marriage ceremonies, practices associated with visits to pirs and the observance of traditional muharram practices were discontinued. However the most significant change was the modification of some ritual practices that served to create an impetus for greater self-identification in the context of a modern Isma ’ili identity. Nanji mentions one such modification which was the use of one of the ginans associated with the dasa avatara (the ten descents or manifestations) which was a key doctrine of what Nanji calls the mythopoesis of the doctrine of imamat. This was modified to only include the last manifestation which was that of Ali and his descendents (thus placing Isma’ilism at the beginnings of Shia Islam) and the references to the first nine who were traditional Vaishnavite figures were removed, thus disassociating Isma’ilism from its Hindu antecedents.

The significance of such changes was its impetus to accelerate the process of “becoming Islam”. As one has mentioned earlier, in early Arabia the making of Islam was a long process. The practice of the Prophet was incorporated into local customary traditions and finally became the source of all law. Thus colonialism through various categories including that of colonial law served to **accelerate** the drive of **displacement** wherein cultural forms considered “less divine” were subordinated to the ultimate divinity that was Allah and his Law. However one cannot understand these changes as being wrought by colonial law alone but must be understood as the compulsion within Islam and its drive to see what it perceives as inferior variants of itself. This takes on a peculiar dynamic in its encounter with the West wherein its attempt to show itself as the inevitable conclusion in the history of humankind is framed in Western terms. This becomes particularly evident in the making of Anglo-Muhammadan law.

### 3.8 The Dynamic of the Public and the Private in the Transformation of Islamic Legal Institutions and the Development of Anglo-Muhammadan Law
In her analysis of Muslim identities in the context of colonialism Ayesha Jalal (2001) pertinently points out that Islamic law was transformed by the British who modified it by making a distinction between the public and private and that such a transformation was crucial to redefining social identities.

What does this distinction between the public and the private mean? Jalal comments that non-Muslims retained their “personal laws” but were subject to aspects of Islamic criminal and civil law. This distinction did not exist for Muslims prior to the establishment of law by the East India Company. Such an assumption seems to presume the existence of an entity called “personal laws” which is a modern legal concept with constitutional significance. This raises the question as to how non Muslims were treated legally under Islamic rule.

This becomes difficult to answer as studies of medieval Islamic legal systems are scarce and there is not too much evidence to understand the interaction between the different legal systems such as state law, customary law etc. (Chatterjee 2010). However historical evidence is clear that the Hindus were given the status of Zimmis. In Islam the term “Zimmi” was given to a non Muslim subject of a Muslim state. The term ‘Zimmi” was derived from the word zimma meaning contract and referred to the contracts between the non–Muslim subjects and their Muslim conquerors entered into at the time of conquest (Srivastava 1980). Initially such contracts were only applicable to people of the Scripture such as the Jews and the Christians but were later extended to include Zoroastrianism and those who practiced idol worship and polytheism. The Zimmis were not subject to the laws of Islam, but had certain political and civil disabilities imposed upon them.15

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15 These disabilities included wearing distinctive clothing to identify themselves. They were also not allowed to build new temples. In the Hedaya ( Hamilton 1957 ) details the manner in which property taxes were levied in excess on the Zimmis. The evidence of a Zimmi was not admissible in a case concerning a Mussalman ( Hamilton 1957, 362). A detailed analysis of the position of the Zimmis under different Muslim kings is provided in Roy Choudhury (1951).
Relying on the work of Syed Ameer Ali, Srivastava mentions some of these disabilities were technically not enforced by Muslim rulers in India. There was no discrimination between a Zimmi and a Muslim and if the latter is killed by a Muslim he was subject to the same penalty as in the reverse case. (Husain 1934). Husain also mentions that Zimmis were allowed to carry out their own modes of worship and rites and ceremonies. They were also allowed to be governed by their own laws. They were not subject to the laws of Islam and thus could sell liquor and pork unlike the Muslims themselves. Husain further says that the laws and customs of the non-Muslim subjects were respected by the Muslim sovereigns. He adds that on “this principle the Indian Muslim sovereigns did not interfere with the Hindu customs of widow burning, polyandry, dedication of girls in temples (Debadasi), etc (150).”

This raises another question. Does one understand the contract offered by Muslim kings towards peoples whom they perceived as infidels and their ways of negotiating the pagan world as “public” and “private”. This appears to be conceptually wrong as it may pick similar descriptions but not have any conceptual significance. I would like to go a step further and suggest that it may not even pick a similar description as most matters that would fall under the realm of civil disputes fell under the village panchayat. Ahmad (1941) mentions that in civil disputes one had the option to have the dispute resolved by a Brahmin priest. He further says that the Islamic criminal law which guaranteed security of life and property was made applicable to Hindus. However Hindu villages enjoyed self government and autonomy in local affairs.

Jalal’s position that the distinction between the public and private did not exist in Islam is however correct. In understanding the development of the legal category of Islam as Anglo-Muhammadan law, I propose to understand how such a distinction affected the development

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16 The realm of personal laws as a modern concept technically involves only inheritance, marriage and family law.
of such a category. I suggest that such a line of inquiry is productive due to the findings in 3.3 wherein Schacht and Coulson suggest that this distinction between the public and the private is not to be found in Islam and that there is no concept of an institution. Such an observation seems significant as it does not merely reduce Islam to an inferior variant but provides certain reasons for doing so. As we shall see, it also helps resolve the problem set out in Chapter Four 17.

In tracing the development of Anglo Muhammadan law one observes that it follows a similar pattern to the codification of Hindu law by the British. Kugle (2001) comments that there were two distinctive types of codification. The first was conceptual and the second was textual. At a conceptual level Islamic law was viewed as a code. At a textual level it could be produced as an authoritative text and it was envisioned that the law codes would replace the qazis or the native law officers. Thus the project of translation and codification began in earnest. The first translation was that of the Hedaya18 by Charles Hamilton who translated the Persian version of the Hedaya into English. The Hedaya was considered insufficient which led to another text known as the Sirajaiyya being translated into English by William Jones. Kozlowzcki (1985) writes that Hamilton’s translation of the Hedaya remained the standard until Baillee’s Digest of Muhammadan law appeared in 1865. Baillee’s digest was a highly selective and partial rendering of the Fatawa-i-Alamgiri (a compilation of the fiqh (rulings) rendered in the Hanafi school of law during the time of Aurangzeb).

Various other commentaries followed including the works of Shama Charan Sarkar, Ameer Ali, and Abdur Rahim (Hussain 1934). The fatwas of the moulvis was analysed and

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17 The productivity of such a line of enquiry is demonstrated in both Chapters Four and Five.

18 The Hedaya (translated as the Guidance) was a qazi’s handbook by Burhan al-din al-Marghinani in the twelfth century A.D. Kozloweski (1985) points out that this was only one text in the large body of Muslim literature in India.
organised by Francis Macnaghten in his “Principles and Precedents of Muhammadan law”. Legal textbooks thus became the most important source of information for lawyers and judges.19

Kozlowcki (1985, 96-106) throws light on the transformation of Islamic law by colonialism. He mentions that there were three basic assumptions about Islam in India behind this transformation. The first assumption was that Muslims belonged to a single community with a single set of laws governing almost every personal, social and political activity. The second was that Muslims conscientiously adhered to law and ritual and the third was that this made Muslim law static and conservative and Muslims orthodox. He goes on to say that this was how Muslims perceived themselves but the power of colonial legal rationality allowed for a unification and definiteness to concepts that they had not themselves visualized. Such assumptions were rooted in an understanding of the shari’a as “law employing a European conceptual vocabulary that allowed for the transformation of shari’a into “a legal system”. This ignored the all pervasive nature of the shariah which included all aspects of public and private life being the path for Muslims to attain peace in this life and salvation in the next. Shari’a was merely a guide to conscience and was as powerful as each individual wanted it to be. Although the state appointed qazis and supported ulemas, there were many parallel authorities such as Sufi leaders who advised the people who came to them on ideal behaviour. This allowed for a wide range of shari’a to be practiced, many different Muslim communities

19 Kozlowscki criticizes these textbook writers stating that most of them such as Abdur Rahim and Ameer Ali had been educated in the Western legal tradition and did not have any knowledge of Islamic jurisprudence. Therefore their understanding of Islamic law reflected their British legal education and they used British legal concepts and ideas to understand Islamic law.
practicing a range of shari’a. Islamic rulers including the Mughals did not impose a uniform shari’a on their subjects.\textsuperscript{20}

Kugle suggests that the transformation of Islamic law by the British involved imposing a formal rationality on a substantially rational system.\textsuperscript{21} The division of substantive law from procedural law provided the means of creating a formally rational system. Kugle points out that the shariah in the Mughal period consisted of extraordinary justice and ordinary justice, the first being required by justice and the other by the qazi or governmental policy. Such a dual system allowed jurists to address new situations through the practice of fiqh. The mufti was allowed to continue the practice of fiqh and search for appropriate modes of religious behaviour instead of the application of formal rules. Codification thus allowed judges to develop a huge body of precedent. This allowed for a more consistent application of decisions which was enforced under the label of “Islamic law”. The sharia as a system of law was thus reshaped to fit the demands of Western legal rationality. Precedent as a legal principle was absent from the qazi’s decisions which were now read as being bound by precedent. The British form of adjudication wherein one party was the loser and the other was the winner was incompatible with the decision making adopted by the qazi in Islamic jurisprudence. In an analysis of a judicial decision on wakfs, Kugle comments insightfully:

"...the goal of Anglo-Muhammadan law that demanded the suppression of Mughal legal procedures; at other times, British magistrates expressed the same ideal in terms of ‘humanity’ or ‘natural law’. By using such terms, the colonial state enforced a split between public and private spheres through ‘Islamic law’ a dichotomy not previously present. They advocated the concept of an individual living

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\textsuperscript{20} This was further compounded by the diversity of scholars who has no uniformity in training or background. (Kozlowcki 1985, 104) The lack of any central institution providing such training as the Al-Azhar in Egypt also contributed to the diversity of the shari’a practiced.

\textsuperscript{21} In this context Kugle uses typologies that have been used by Max Weber but disagrees with Weber on his application of the typologies. He argues that Weber’s characterization of Islam as a substantively irrational system is incorrect due to the logic of extraordinary and ordinary justice.
\end{footnotesize}
in an abstract entity called ‘society’ the poles of which were mediated by a centralised state. The responsibility of such a state would be to patrol religious or social institutions which are defined as ‘public’. Such a dichotomy between public and private affairs seems intuitive to those living in the world shaped by modern European norms such that the importance of such an innovation could be easily overlooked. Their advocating this dichotomy affected religious leaders very early: the qazi was enframed in a state bureau while the mufti was pushed into the role of private citizen with no state recognition or authority. Within the courts, the state first asserted veto rights, then controlled staffing, and then claimed outright authority on its own terms. The state justified its interference through references to reason, natural law, and humanity (288).

Kugle further comments that the state defined the public realm and that crime became a violation of public order. Thus the state assumed the right and responsibility to prosecute and punish. In the Mughal legal order crime was an affair between two parties. The Mughal state did not repress crime but saw that the aggrieved party achieved some retribution.

I would like to argue that both Kozlowscki and Kugle are both correct in their different conclusions which are in fact inter-related. The many ways in which western jurisprudence and its concepts reshaped Islamic jurisprudence was not possible without the institutions that allowed such restructuring. Therefore Kozlowiczki’s point on the existence of different sharias points to different kinds of authority being valid. Therefore the transformation of Islamic law involved a transformation of authority itself. The British transformed various Mughal legal institutions to reflect their own legal categories. 22 In this context Kugle’s point on the division between the public and the private becomes relevant. There was a reorganisation of authority and institutions to reflect such divisions.

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22 In this context I would like to disagree with Kugle who suggests that Mughal legal systems and the English legal systems of the late eighteenth century by virtue of their “decentralization” were similar systems. He suggests that a centralized state reformed both systems and common law as an institution took shape during the time of the East India Company. The comparison is faulty as the nature of authority in both systems is entirely different (as Kugle himself has acknowledged). His comment on the common law is incorrect and shows a lack of historical understanding.
Mughal legal institutions were varied in nature and authority. The qazi was not a judge in the Western sense of the term, being the sole arbiter of a dispute but was one among several authorities such as the kotwal, the faujdar, the village panchayat and the king himself (very often conflict arising between these authorities). The qazi was not merely a judge but a registrar, a reporter, a religious leader, a teacher and sometimes a mutavalli of a tomb (Bhatia 1992, 99). Along with the qazi, the faujdar also took up criminal cases for trial and performed judicial functions. The kotwal was responsible for monitoring various transactions relating to employment and income and also had to patrol the city at night (Bilgrami, 1984). He had powers to levy fines on those that he considered criminal elements. The qazi also acted as a reporter to the extent that several petitions from individuals or groups were sent to the higher authorities in the form of a mazhar (requests for grants or actions by government individuals) through him. He also acted as a registrar as his seal on several documents was necessary and kept a record of civil transactions. Therefore his position overlapped with that of the kotwal and the faujdar whose authority was superior due to their responsibility of implementing imperial decrees. The qazi was excluded from trying cases of a political nature and land revenue cases which fell under the purview of the sadarat. In many cases the kings themselves tried various disputes in consultation with the qazis and other judicial officers (Bilgrami 1984).

In a study of legal institutions through orders and documents during the period of Aurangzeb, Bhatia (1992) reports that there had to be mutual coordination between the faujdar and the qazi. The faujdar was required to decide cases in consultation with the qazi which often led to confrontations between them. Bhatia (1992) suggests that the faujdar could override the strict interpretation of the shariat on the ground of public expediency. But the qazi through his religious position could also use public opinion to get orders passed in his favour.
The position of the qazi within the village community is of interest as it transcended religious boundaries catering to both Hindus and Muslims (Bhatia 2006). Most villages dominated by the Hindu population had no qazi of their own but were free to bring their suits and matters before the qazi for his seal. The disputes in Hindu villages were settled by the caste panchayats and the local qazi did not interfere in their functioning which indicated coordination and understanding between the two. However both Hindus and Muslims approached the qazi for ensuring the safety of records and agreements. The qazi’s seal was thus essential for the attestation of documents, registration of sale and transfer deeds, certificates and property disputes. The qazi thus became a secular functionary, responsible not just for maintaining the shariat but also maintaining administrative reports of various kinds. These included investigations and reports on behalf of the Mughal government itself, the qazi’s own grievances, and representations made by others in the form of mazhars (as already mentioned).

Bhatia (2006) comments that this position of a qazi as a secular functionary was an indication of the importance of local custom and usage in the Mughal empire. Even during the reign of Aurangzeb the norms of the shariat were not strictly enforced and remained on paper. This was despite Aurangzeb’s efforts to uphold the principles of the shariat through various government orders and compilations such as the Fatawa-i-Alamgir. According to Bhatia (2006) there were two levels of law, the theoretical norms within the shariat and the local customary practices followed by the Hindu population which was not totally given up by the Muslim converts. The peaceful co-existence of these systems was the unique characteristic of law in the Mughal era. He says:

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23 Hasan (2004) argues that the provisions of the sharia were invoked by non Muslims including Brahmans and bania merchants and provides illustrations of how sales and purchases were registered by the qazi in respect to transactions between Hindus. Although it is unclear at a conceptual level whether such practices actually involve the sharia as a legal order, it is an indication of the non sectarian nature of the Mughal legal order that Bhatia (2006) has elucidated.
The rejection of qazi’s advice on important state matters and failure to follow the Shariat in revenue administration indicate the force of local customs and usages that prevailed almost everywhere in the Mughal empire (193).

From the above it is clear that the straightforward division attempted by the British into civil and criminal jurisdictions exemplified by the Diwani-Adalat (as a civil court) and the Nizamut Adalat and the Faujdari Adalat (as a criminal court) could not be made in the Mughal legal order where there was an overlap of authorities which regulated actions that were both civil and criminal in nature. Therefore it is not really possible to say that these institutions were inherited by the British. Instead they were reshaped by the British to fit their own judicial needs. In this restructuring they not only adopted a rigid understanding of law being two separate personal laws governing two different religious communities i.e. Hindu and Muslim but also implemented a categorisation of the legal order being either public or private.

This had other results namely the dismantling of other structures and modes of communication between the Mughal state and its subjects. The institution of the sadarat which was concerned with grants disappeared. This institution was the link between the emperor and the ulama and the religious establishments requiring grants. The sadr was responsible for recommending, renewing and verifying grants for both Muslims and non-Muslims.\textsuperscript{24} The sadr was not merely a state appointee but was required to possess administrative acumen and learning and had to enjoy the respect and confidence of the people. Such an institution was different from the various state structures that were put into place by the British to regulate these religious institutions such as the wakf boards. The

\textsuperscript{24} These grants were referred to as madâd-i- maâsh. These grants were revenue free and were provided to a wide variety of religious institutions such as dargahs and mosques. Non Muslims were also provided grants and a number of Hindu priests, scholars, musicians and mathas were recipients of these grants. Jains and Parsees were also recipients of these grants (Bhatia 2006).
emphasis was on the accountability of the religious institutions themselves to a broader social
grouping which was the “public”. Therefore the informal social relationships which
characterised the maintenance of these institutions had to give way to a more formal mode of
interaction. This mode of interaction placed importance on the visibility and information
about the institution itself rather than institutional relationships.

As we shall see later in Chapter Five there was resistance to Western legal frameworks being
imposed in the context of the wakf or the Muslim endowment as a legal category. However
the change in the modes of interaction and the conceptual structures that allowed such legal
frameworks to operate such as the abstract concept of the “public” was not questioned.

3.9 Conclusion

We have begun by analysing the reasons for the change in direction in the narrative of
secularisation in the context of Islamic law. In examining descriptions of Islam by the West
and the counter narratives by Islamic scholars, we discover a certain pattern which consists of
rival truth claims. Such claims have theological foundations as they seek to prove that one’s
own religion is true and the other is false. Therefore in order to arrive at an understanding of
Islamic law one has to move beyond this paradigm which is within a religious framework.
One has to make an alternative enquiry based on the Western perception that Islam is an
inferior variant of Christianity and also acknowledge the Muslim response as being in a
religious framework. The development of Anglo-Muhammadan law i.e. the legal category of
Islam in India must be investigated through this mode of enquiry.

In pursuing this inquiry one finds that syncretism as a term occurs very often in the
descriptions of the colonisers. Certain communities were perceived as being mixed and as
being both Hindu and Muslim. One then seeks to understand how certain community
identities were reorganised through the mechanism of colonial law and the various kinds of
structural changes that took place due to the introduction of Western ideas. One then tries to understand the structural dynamic behind Anglo-Muhammadan law which is that of the public and the private. Such a dynamic is analysed in the context of its ability to resolve the problem of the regulation of religion in the context of the religious place. In doing so one provides a bare outline of the process of Islamisation in the development of the legal category of Islam.