Stato, Chiese
e pluralismo confessionale

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The Development of Laws and Jurisprudence in Islam: Religious and Imperial Legacies **

SUMMARY: 1. Scholar challenges and epistemological pitfalls - 2. Traditional Muslim hermeneutics and the development of schools of Jurisprudence - 3. Jurist's authority and ruler's governance from a comparative perspective - 4. Muslim legal tradition of plural jurisdictions - 5. The open scholar question of reciprocal legal influences with other juridical systems - 6. Conclusive remarks.

1 - Scholar challenges and epistemological pitfalls

The emergence and early expansion of Islam, aside from conventional narratives and stereotyped interpretations, was the result of an Arabization of the Abrahamic legacy, and probably an effect but not a cause[1] of a long period of wars, rebellions, migrations, political instability, and uncertainty in the borderland between the Roman and Persian empires clashing with each other for almost seven hundred years. For centuries, pre-Muslim Arab tribes and states were often at the service of both empires developing gradually new religious, social, cultural, and political models shaping proto-Islam and paleo-Islam in many ways.

Mystery religions, Gnosticism, Messianic, Prophetic and holy book traditions, Mazdeism, Judaism, Judeo-Christianities, and different heterodox Christian communities living in the desert and distant from orthodoxies implemented by imperial powers, in one way or another nourished the emergence of multiple cultural, political, and religious identities converging under the umbrella of Islam. According to the Muslim tradition, this new religious space was shaped after Muhammad accepted his leadership as Prophet, and later when the Qur'an became a

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* *http://www.icmes.net/?page_id=4037*. Last update to all digital links on August 3, 2020.

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[1] GONZÁLEZ FERRÍN, E. *La Angustia de Abraham*. Los orígenes culturales del islam. (Córdoba: Almuzara, 2013), 8 and following. Also, see "Islamic Late Antiquity and Fath: the effect as cause". Nangueroni Meeting, Milan, 2015. Digital access: *https://www.academia.edu/12634825/Islamic_Late_Antiquity_and_Fath_-_the_Effect_as_Cause*

Holy Book, able to attract followers massively, expanding its message toward the East and the West, becoming the ground soil of new communities, brotherhoods, laws, and common ethics. A complex process in which the Arab language became a new *lingua franca* from the Middle East to Al-Andalus, taking the cultural leadership inherited from the Mesopotamians, the Greeks, the Romans, and the Persians, revitalizing and expanding the Hellenistic legacy from Aramaic[2], Greek, and Latin sources, among others.

The interaction among Muslim and Christian kingdoms and empires channeled political struggles and military clashes, but also crucial cultural encounters and economic exchanges in the Medieval and Modern eras. The dynamics of Muslim identities, from the Arab and Persian legacies to the Umayyad, the Abbasid, the Safavid, the Mughal, and the Ottoman dynasties and their polities as the most remarkable examples, created a rich and diverse cultural space, breeding from the very same Hellenism as the Christian kingdoms and empires. However, the development of Muslim orthodoxies, territorial expansions, and military confrontations in continuous warfare stimulated a simplistic and anachronistic retrospective narrative of a drastic separation and bipolarity between Christianity and Islam from the beginning, presenting them as initially opposed and even irreconcilable religious identities. It is a dominant narrative increasingly settled down and driven by the powerful rhetoric of religious clashes, refueled by medieval chronicles, apologetic literature, and miraculous legends. It is a stereotyped narrative that emerges periodically reinforcing political ideologies carrying out mistrust and strong prejudice against Islam in the West. Even the 19th and 20th centuries Orientalist studies made by Western scholars are breathing from a colonial patronizing mindset and promoting, directly or indirectly, neo-colonial types of domination[3]. On the other hand, the reaction against Western colonialism stimulated a post-colonial perilous culture of victimization and resentment, refueling once more the ideological antagonism created by the artificial and simplistic Orientalist division between the East and the West.

Nevertheless, many of the so-called Orientalist artistic and intellectual contributions shouldn't be rejected or devalued by post-

[2] As an example, see GRIFFITH, S. H. "From Aramaic to Arabic: The Languages of the Monasteries of Palestine in the Byzantine and Early Islamic Periods". *Dumbarton Oaks Papers* 51 (1997): 11-31.

[3] See the well known criticizing and provoking seminal analysis by SAID, E. *Orientalism*. (25th Anniversary ed.) New York: Vintage Books, 1979. *Culture and Imperialism*. New York: Vintage Books, 1993.

colonial resentment, or by the drastic binary distinction between the East and the West, between Orient and Occident, because the symbiosis in the intercultural dynamics is a continuum reciprocal feedback process of influx, transmission, absorption, revivals, and re-creations without clear geographical borders. From this approach and under the trending revisionist wave, Western scholars from the 19th century onward proposed several alternative interpretations to the traditional Muslim narrative[4],

[4] For the main scholar analysis, doctrinal evolution and academic debates since the 20th century on proto-Islam in Arabia and the rise and expansion of the Saracens, see: CAETANI, L. *Annali dell'Islām*. Milano: U. Hoepli, 1905. Digital access *https://catalog.hathitrust.org/Record/000840860*; CAETANI, L. *Studies on the Oriental History: Islam and Christianity: pre-Islamic Arabia, the Ancient Arabs.* Lahore: Brite Books, 2008 (English translation of a classic reprint); BECKER, C. H. "The Expansion of the Saracens", *CMH,* II (1913) Ch. 11. Digital access: *https://archive.org/details/HeExpansionOfTheSaracens--theEast*; HITTI, P. K. *The History of the Arabs*. MacMillan Edu, 1970 (1st ed. 1937, 10th ed. 2002). Digital access: *https://archive.org/details/HistoryOfTheArabs-PhilipK.Hitti/page/n3;* LEWIS, B. *The Arabs in History*. Ch. 1. Hutchinson´s University Library, 1950; HOURANI, A. *The History of the Arab Peoples*. (Warner Books and Harvard University Press, 1991), 7-79; Von GRUNEBAUM, G. E et al., *The Arabs and Arabia on the Eve of Islam*, vol. 3, 1st ed., 1999. Latest ed. F. E. Peters, Routledge, 2017; FIRESTONE, R. Jihāh: The Origin of the Holy War in Islam. *Oxford University Press*; HOYLAND, R. G. *Arabia and the Arabs*. Routledge, 2001; AMSTRONG, A. *Islam: A Short History*. New York: Modern Library, 2002; ERNST, C. W. *Following Muhammad: Rethinking Islam in the Contemporary World*. University of Carolina Press, 2003; HILLENBRAND, C. "Muhammad and the Rise of Islam", *NCMH,* I, Ch. 12 (2005): 317-345; ASLAN, R. *No God but God*: *The Origins, Evolution, and Future of Islam*. Random House, 2011; BROWN, J. A. C. *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet´s Legacy*. One World, 2014.

For a critical analysis rejecting and reviewing the Islamic tradition developed and compiled from diverse Muslim sources recorded after 150 years of the factual history, see: WANSBROUGH, J. *Quranic Studies.* Oxford University Press, 1977 (later ed. Prometheus Books, 2004); CRONE, P. and COOK, M. *Hagarism: The Making of the Islamic World*. Cambridge University Press, 1977; CRONE, P. *Slaves on Horses*. Cambridge University Press, 1980; OHLIG et alt. The *Hidden Origins of Islam*: *New Research into Its Early History*. New York: Prometheus Books, 2009; OHLIG et alt. *Early Islam: A Critical Reconstruction Based on Contemporary Sources*. New York: Prometheus Books, 2013; HOYLAND, R. G. *In God´s Path: The Arab Conquests and the Creation of an Islamic Empire*. Oxford University Press, 2015.

For alternative and revisionist interpretations based on different Monotheistic movements and Communities of Believers exploring also non-Islamic and non-Arabic sources, see: GOITIEN, S. D. *Jews and Arabs: A concise History of Their Social and Cultural Relations*. 1st ed. 1955. Ed. used, Dover, 2005; DANIEL, N. *Islam and the West: The Making of an Image*. OneWorld, 1960; MEYENDORFF, J. "Byzantine views of Islam". *Dumbarton Oaks Papers* 18 (1964): 113-132; WASSERSTROM, S. M. *Between Muslim and Jew: The Problem of Symbiosis under Early Islam*. Princeton University Press, 1995; LECKER, M. *Muslims, Jews & Pagans. Studies on Early Islamic Medina.* In *Islamic History and Civilization*. Vol. 13. Ed. Ulrich Haarmann. Brill, 1999; HOYLAND, R. G. Seeing Islam as Others Saw It. Princeton, The Darwin Press, 1997; GODDARD, H. *A History of Christian-Muslim*

challenging the factual validity of the Muslim sources, written almost two centuries after those events took place[5], some of them still carrying out the Western Orientalist legacy in a subtle style.

Consequently, from the middle of the 19th century forward, Islamic scholar literature offers different analyses, interpretations, speculations, and narratives opening up a complex debate between Muslim and non-Muslim scholars. Most of the non-Muslim scholars challenge the traditional Islamic historiography from some of the different fields of Social Studies as secular disciplines, mainly, Medieval History, Legal History, Philology, Philosophy, Political Science, Comparative Religious Studies, Sociology, and Anthropology.

Besides, from a few decades ago, a polarized debate among islamologist scholars arises regarding the thesis of conquest or non-conquest by the Arabs or by the Muslims after the death of Muhammad (Mohammad). As standing point, we should keep in mind, that the concepts of conquest and conversion always linked to political and religious ideologies carrying dominant interpretations used as propaganda of 'undisputed' truths; and, at the same time, revisionist scholar interpretations can hide new forms of neo-Orientalism when

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Relations. N. Amsterdam Books, 2000; TOLAN, J. V. *Saracens: Islam in the Medieval European Imagination*. Columbia University Press, 2002; KÜNG, H. *Der Islam: Geschichte, Gegenbart, Zukumft Islam*. München: Piper Verlang, 2004; GALLEZ E. M. *Le Messie et son Prophete: Aux origines de l'Islam.* Studia Arabica I-II, Paris 2005; DONNER et alt. *The Expansion of the Early Islamic State (The Formation of Classical Islamic World)*. Routledge, 2008; KRECH et alt. *Dynamics in the History of Religions between Asia and Europe: Encounters, Notions and Comparative Perspectives*. Leiden, Boston: Brill, 2012; DONNER, F.M. *Muhammad and the Believers: At the Origins of Islam*. Cambridge: Harvard University Press, 2012; SHOEMAKER, S. J. *The Death of a Prophet. The End of the Muhammad's Life and the Beginning of Islam*. Philadelphia: University of Pennsylvania, 2012; HOLLAND, T. *In the Shadow of the Sword: The Birth of Islam and the Rise of the Arab Global Empire*. Doubleday, 2012; AL-AZMEH, A. *The Emergence of Islam in Late Antiquity*. Cambridge University Press, 2014; BOWERSOCK, G. W. *The Crucible Islam*. Harvard University Press, 2017.

Reconsidering the traditional narrative of Islamic or Arab conquests (*Fath*) and proposing a new paradigm of Islam as an effect and not as a cause: GONZÁLEZ FERRÍN, E. "Mesianismo Proto-Chii del primer Islam". ARYS 12 (2014): 453-480. Digital access: *https://e-revistas.uc3m.es/index.php/ARYS/article/view/2951/1659* and "La Antigüedad Tardía Islámica: crítica al concepto de conquista" *IV Jornadas de Arqueología e Historia Medieval de la Frontera Inferior de Al-Andalus*, 2 (2015): 29-52. Digital access: *https://www.academia.edu/12759590/La_Antig%C3%BCedad_Tard%C3%ADa_Isl%C3%A1mica_cr%C3%ADtica_al_concepto_de_conquista*

[5] For a general overview of the Western scholar *status quaestonis* from a post-revisionist approach, see IBN WARRAQ, W. B. "A Personal Look at Some Aspects of the History of Koranic Criticism in the Ninetieth and Twentieth Centuries". The *Hidden Origins of Islam*: *New Research into Its Early History*, 225-261.

defending Western secularism as a 'superior' ideology, in a similar way that Western Christianism played in the colonial ideology.

Keeping these two hermeneutical pitfalls in mind, new challenging academic interpretations about early Islam emerged in the 20th century rejecting in part the 19th century Western Orientalist approach based on traditional Islamic sources only. According to Islamic sources, the official standardized compilation of the Qur'an took place when Uthman, the 3rd caliph, ordered the compilation of 114 surahs from the Abu Bakr´s copy, and the destruction of any other Qur'anic text in the middle of the 7th century. The so-called revisionist school developed in the 1970´ onward is mainly integrated by Western non-Muslim scholars applying the historical-critical method and questioning the historical validity of the Islamic records during the early Islam period until almost 9th century, including the biography of Muhammad[6], the formation of the Qur'an, the Rashidun caliphate, and the orchestration of the conquest by the early Islamic state. Their analysis includes non-Muslim written sources, mainly Greek-Byzantine, Greek-Coptic, Maronite, Syrian, Armenian, Old Georgian, Hebrew, Latin, Old Persian, and Middle Chinese. Their research often incorporates archeological, epigraphic, and numismatic findings as well, challenging the traditional and widely accepted version of early Islam based on the Islamic sources from the Abbasid era[7].

The frontrunners of this movement are the scholars of the *Inârah Institute for Research on Early Islamic History and the Koran*[8] while applying a rigorous historical-critical method are deconstructing and challenging previous academic interpretations. Their provocative thesis defies the traditional understanding of early Islam and the word "muhammad", while offering an alternative scenario of the emergence of Islam[9] by

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[6] See the early historical-critical legacy summarized in 1926 by JEFFERY, A. "The Quest of the Historical Muhammad", *The Muslim World*, 16 (1926): 327-48. Also for a recent and challenging interpretation see SHOEMAKER, S. J. *The Death of a Prophet. The End of the Muhammad's Life and the Beginning of Islam*. Philadelphia: University of Pennsylvania, 2012.

[7] GRODZKI, M. "´Muslims´ and ´Islam´ in Middle Eastern Literature of the Seventh and Eighth Centuries:

An Alternative perspective of West European oriental scholarship". *Studia Orientalia* 112 (2012): 3.

[8] To overview their publications, see *http://inarah.net/publications*

[9] For a general overview of their arguments, see GROSS, M. "Early Islam: An Alternative Scenario of its Emergence". Ed.Herber Berg. *Routledge Handbook of Early Islam* (Ch. 18), London-New York: Routledge, 2017. *https://www.routledgehandbooks.com/doi/10.4324/9781315743462.ch18*

rejecting its unified early history, and, indeed, creating the most confrontational debate among scholars since the last decade.

The origin of the Muslim legal system presents similar problems and debates like the origin of Islam itself plus an additional limitation, the comparative juridical barrier between religious and secular legal systems, because: 1) the notion of divine law and its juridical implications does not exist, theoretically, in secular legal systems; however, in Roman law, for example, the classical definition by Ulpian (Digest, 1.1.10.2) of jurisprudence is "Iuris prudentia est *divinarum atque humanarum rerum notitia, iusti atque iniusti scientia"* could fit in the Islamic notion of *Fiqh*; 2) the relationship between law and theology is not correlative to the connection between ideology and secular legislation.

When comparing religious jurisprudence, like Jewish, Zoroastrian, Christian, and Muslim, with a secular one, it is essential to keep in mind that all of them are rooted in divine law. They are theocratic legal systems because their ultimate submission is to the supreme ruling of God; so, legal reasoning is always theologically limited by the absolute divine rules, and the interpretation of the relationship between human and divine law is as intricate as multifaceted.

Besides, there is the challenge for non-legal scholars dealing with legal history, legal theory, and jurisprudence. Most scholars addressing this topic are historians, linguists, philologists, theologians, and islamologists in general, mainly, with linguistic skills in Arabic but with no classical legal education, particularly in Roman-Byzantine law or in religious law, like Jewish law or even Early Canon law. This scholastic limitation can easily confine, reduce, or hoodwink their analysis by missing some crucial juridical aspects involved. Romanists and religious legal scholars face similar barriers because of their limited knowledge of the Arabic language and the Muslim legal system. As a result, up to now, just a few comparatist legal scholars revised the origins of the Islamic legal system as a comparative endeavor. Being aware of this challenge, I will try, as a comparative legal scholar, to present in a balanced synthesis this multifaceted trans-disciplinary academic debate among Traditionalists, Orientalists, post-Orientalists, and neo-Orientalists, jurists, and non-jurists, Muslim and secular scholars, all of them filtering their analysis from their academic research, bibliography used, and intellectual backgrounds.

For this task, it is essential to be aware of two epistemological risks: first, the dangers of a simplistic binary debate like traditionalists v. revisionists, religious v. secular, or even Sunnis v. Shiite reducing the analysis to an ideologically polarized and ineffective dispute; and second, the improper use of juridical neologisms applied to the Islamic legal

system, mainly from codified European continental law and English common law as a result of the Orientalist, colonialist, and secularist mentalities that, instead clarification create confusion. The foremost example to make clear my point of view is the term Islamic law, widely used today as it was by Orientalists in the Ottoman and colonial eras, applied to *Sharia* that oversimplify and mislead the Muslim notion of *Sharia* as divine law and divine guidance from the Qur'an and *Hadith* (a compiled collection of sayings and practices of the prophet Muhammad). In the words of Walter Young, "the relative neologism of 'Islamic law' paint over, in a monotone pigment, a rich plurality of normative, opinions, practices, and systems"[10]. In Wael Hallaq's view[11], the modern nation-state brought deep changes to the *Sharia*, initially absorbing it, and later destroying it under the codification structure; the *Sharia* submission to an 'entexting' process started in British India continuing up to now in the Muslim nation-states. For Amir Shalakany[12], the dominant Islamic historiography is scripturalist -not in the sense elaborated by the Akhbari Shia School relying on scripture[13] - but as a discursive phenomenon in binary terms, Tradition v. Modernity. In his opinion, there are two types of revisionist scholarship on Islamic law history, one based on "anti-Orientalist variations on the two binaries structuring scripturalist historiography, and the other by contrast, offering glimmers of a 'new historiography' that can take of Islamic-law-past into a new methodological sphere that transcends the binaries of dominant scriptural historiography"[14].

Epistemological risks, hermeneutic dilemmas, and methodological failures often linked to anachronisms that, unfortunately, many scholars ignore or dismiss, contributing to misrepresentations of the *Sharia* and to a binary, bias, and oversimplified analysis that disregard its complexities as a religious legal system.

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[10] YOUNG, W. E. "Origins of Islamic Law." In *The [Oxford] Encyclopedia of Islam and Law*. *Oxford Islamic Studies Online*, *http://www.oxfordislamicstudies.com/article/opr/t349/e0106*

[11] HALLAQ, W. B. "Islamic Law: History and Transformation". *The New Cambridge History of Islam*. Ch. 4. Ed. Robert Irwin, (Cambridge University Press) 141, *http://dx.doi.org/10.1017/CHOL9780521838245*

[12] SHALAKANY, A. A. "Islamic Legal Histories" *Berkeley Journal of Middle Eastern and Islamic Law* 1 (2008) 78. Digital access, *http://dx.doi.org/doi:10.15779/Z38CC7W*

[13] On the Akhbari School, see GRAVES, R. *Scripturalist Islam: The History of the Akhbari Shi'i School*. Leiden: Brill, 2007.

[14] SHALAKANY, A. A. "Islamic Legal Histories" 78.

At the same time, we have to keep in mind that the development of the Muslim juridical system is closely related to the development of Islamic theology. In the Abrahamic faiths, law and theology are breathing from the same religious space, as we can also see in Judaism and Christianity. The notion of divine law interconnects law and theology with social struggles and political leadership in each community, conveying tensions between belief and reason, divine law and its legal interpretation, tradition or reform, and indeed, between religious authority and political power.

As most scholars suggest, in the last decades of the 7th century began the earlier Muslim legal reasoning in the former Byzantine and Sasanian territories under the Arab hegemony. They were societies permeated not only by Arab tribal legal customs but also by the previously established juridical systems, customs, and legal practices. Roman law, provincial law, the Sasanian Circle of Justice, Jewish, Christian, and Zoroastrian legal traditions were part of these communities. Comparatively, in the Western Roman Empire, an analogous cultural blending process took place under the new Germanic rulers between the 5th to the 6th century, particularly, with the Visigoths and romanized Iberians in the Iberian Peninsula, the Franks in the Gaul-Roman domains, and later between the Lombards and Romans in the Italic Peninsula. This overlapping process allowed first the emergence of the vulgarized Roman laws, then the codified Roman-Germanic legal systems, and later the European Common law, the *Ius commune*. It was a slow process that took several centuries combining the Roman law legacy and the emerging Canon law, creating new legal techniques, structures, and institutions borrowed and reshaped from a secular and religious origin.

The Islamic legal system was able to develop a full identity under the Traditionalist movement, a theological current that emerged in the 8th century and gained strength in the 9th and the 10th centuries, becoming the dominant theological movement in Islam from the 11th century onward. Theoretically, Muslim traditionalist jurists reject any foreign legal influence and defend its exclusive development from Muslim sources, mainly, the Qur'an and the *Sunna*. However, the question about the influences of other legal systems remains unclear, and how took place the success of Muslim traditionalist factions still is quite obscure; nowadays, both topics continue to be highly controversial among scholars.

2 - Traditional Muslim hermeneutics and the development of schools of Jurisprudence

The origin of Sharia as divine law and guidance follows a prophetic narrative, by which God revealed the Qur'an to Muhammad by the archangel Gabriel, and inspired the *Sunna*. Let's remember that Sharia rules on human behavior are only in five hundred verses out of more than six thousand of them.

For Sunnis, this guiding process took place initially by Muhammad, and then by his Companions, their Successors, and later the *mujtahidun* and the *fuqaha*, as independent experts with authority from the four legal Muslim schools (*madhahib*) of jurisprudence (*fiqh*): Hanafi, Maliki, Shafi'i, and Hanbali, which emerged in the 9th century. These schools had a cumulative doctrinal knowledge based on legal opinions from leading scholars channeling a collective legal authority. Their theological foundation provided the dogmatic guidelines connected to the three schools of theology also developed in the 9th and 10th centuries: the *Athari* defending the traditionalist theology proclaiming the sole literal authority of the Qur'an and *hadith* and rejecting the rationalist methodology; the *Maturidi*, focusing in the role of reason; and the *Ash'ari*, based on the power of the clerical authority. The tension between the rationalist approaches, mainly represented by the *Mu'zalila* movement, and the traditionalist literalism, mostly by the *Athari* theological school, increased in the 10th century. The *Maturidi* and the *Ash'ari* schools of theology tried to mediate between this polarized scholar debate offering a theological synthesis; however, the traditionalists rejected it[15].

According to Patricia Crone's opinion[16], the jurists (fuqaha) and theologians (*mutakallimun*) began their rational building-system before the traditionalists appeared on the scene. In Daniel Brown's view[17], the *hadith* input was insignificant during the early proto-Sunni period, and *Sunna* was not always identified with specific reports about Muhammad because the sources of religious authority were delineated later by scholars.

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[15] This debate, in LEAMAN, O. and RIZVI, S. "The developed kalām tradition". Ch. 5: *The Cambridge Companion to Classical Islamic Theology.* Ed. Tim Winter. Cambridge University Press, 2008; El SHAMSY, A. "The social construction of orthodoxy". Ch. 4: *The Cambridge Companion to Classical Islamic Theology.* Ed. Tim Winter. Cambridge University Press, 2008, DOI: *https://doi.org/10.1017/CCOL9780521780582.005*; HALVERSON, J. R. *Theology and Creed in Sunni Islam: The Muslim Brotherhood, Ash'arism, and Political Sunnism.* New York: Palgrave McMillan, 2010; ABRAHAMOV, B. "Scripturalist and Traditionalist".*The Oxford Handbook of Islamic Theology*. Ed. Sabine Schmidtke. Oxford University Press, 2014, DOI: *https://doi.org/10.1093/oxfordhb/9780199696703.013.025*

[16] CRONE, P. *Medieval Islamic Political Thought*. Part II, Ch.16. The Sunnis.

[17] BROWN, D. *Rethinking Tradition in Modern Islamic Thought*. (Cambridge University Press, 1996) 8.

In sum, the conflict in Islam between traditionalism represented by the *Ahl al-hadith* movement, and rationalism defended by the *Ahl al-Ra'y* movement, did not find an unequivocal common ground. The aftermath of this dispute reformulated the caliph's power, changed the development of the Islamic legal system, and empowered the *ulema* as the religious authority.

The Sunni narrative defends, as Walter Young point out[18], that the Islamic legal system is a complete juridical system, in which the source of the authority flows from the Qur'an and the *Sunna*, allowing the discoveries of additional rulings and the implementation of universal legal principles. In the juridical golden age, from the 9th to 10th centuries, the development of the *ijtihad* flourished as a rational endeavor to find solutions to juridical problems by legal scholars and experts, *mujtahidun* and *fuqaha*. Most Muslims legal scholars consider al-Shafi'i (767-820 CE) the principal legal scholar that redefined *Usul al-fiqh* as a complete juridical system. He was born in Gaza, trained as a legal scholar first in Medina, then in Bagdad in Abu Hanifa's school, and finally, opened his juridical school in Cairo. In his work *al-Risala,* al-Shafi'i analyzed the principles of jurisprudence, establishing the main guidelines for *ijtihad,* and developing a methodology to mediate in the tension between reason and revelation[19].

The role of *ijtihad* changed over centuries, and according to the dominant thesis among legal scholars, the orthodox Sunni schools sealed their doctrinal position, interpreting that after the 10th century it is a closed door. Consequently, the doctrinal corpus of *Sharia* became ossified[20]. Nevertheless, according to some scholars, this debate still is open. After an extensive analysis, Mohammad Kamali affirms[21] that *ijtihad* in Sunni Islam is forbidden if it contradicts decisive Qur'anic, *Sunna*, and *ijma'* rules. In his opinion, today, this debate faces a foremost challenge, the harmonization between statutory laws and *Sharia* principles.

For Shiites, the sources of law, mainly the Qur'an and the *Sunna*, remained substantially the same as for Sunnis[22], although *igma'*

[18] YOUNG, W. E. "Origins of Islamic Law", *http://www.oxfordislamicstudies.com/article/opr/t349/e0106*

[19] SHALAKANY, A. A. "Islamic Legal Histories"13.

[20] Further analysis exploring Schacht and Coulson legal analysis and historiography in SHALAKNY, A. A. "Islamic Legal Histories", 9-38.

[21] KAMALI, M. H. *Principles of Islamic Jurisprudence,* 318-338.

[22] Main differences between Twelvers and Sunnis, in STEWART, D. J. *Islamic Legal Orthodoxy. Twelver Shiite Responses to the Sunni Legal System*. University of Utah Press, 1998.

(consensus), *qiyas* (analogy), and legal reasoning are often interpreted differently. In Devin Stewart's opinion[23], Sunni legal doctrines influenced Shiite legal theorists through the mainstream of Islamic jurisprudence. The two schools of Shiite jurisprudence (Imamiyah and Ismaili *madhahib*), consider the Fifth Imam Muhammad al-Baqir (677-733) and his son the Sixth Imam Jaʿfar al-Sadiq (702-765) descendants of Ali and founders of the Ja'fari *Madhab.* According to the Islamic records, both were born and died in Medina. The debate over al-Sadiq's successor divided the Shiites into two branches: the Ismaili or Sevener, followers of his first son Ismail and his bloodline, that later found the Fatimid dynasty (909-1171) in North Africa developing the Ismaili jurisprudence, mainly, by the 10th century scholar Al-Qadi al-Nu'man[24]; and the Twelvers, also named Ithna-Asharis or *Imamiyah*, followers of Ismail's younger brother Musa al-Kahdim and his descendants. Musa (745-799) was imprisoned several times by Harun al-Rashid and died in jail in Bagdad.

The Twelvers' theology is the cornerstone of the Shiite legal theory, based on the tradition that Muhammad appointed Ali as his successor and Commander of the Faithful. This tradition laid the foundations of dynastic political-religious leadership, and established a straight blood lineage from Ali, as the first Imam, and Fatima, the daughter of Muhammad, to his sons Hassan and Hussein, as Second and Third Imams, and Hussein's descendants as successive Imams[25]. This theology facilitated the development of a powerful religious hierarchy later -perhaps, from the cultural substrate of the Zoroastrian priestly caste- linking the authority of the highest Shiite clergy, the Ayatollah, with the latter Imam, the Mahdi.

The Ja'fari school of legal theory split into two most important branches, *Usuli* and *Akhbari*; both accept the same *hadith* but differ from the Sunni schools in some legal interpretations regarding family law, allowing temporal marriages, inheritance, contracts, and religious taxation. The main divergence between these two branches is regarding

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[23] STEWART, D. J. *Islamic Legal Orthodoxy. Twelver Shiite Responses to the Sunni Legal System*. University of Utah Press, 1998.

[24] For a general overview, see the "Isma'ili Jurisprudence" at *http://www.iranicaonline.org/articles/ismailism-xi-ismaili-jurisprudence*

For further analysis, see the English translation of his main work, AL-QADI AL-NU'MAN, *Disagreements of the Jurists: A Manual of Islamic Legal Theory*. Ed. and trans. by Devin Stewart. Library of Arabic Literature. New York University, 2015.

[25] Ali ibn Hussein al-Sajjad, Muhammad ibn Ali Baqir al-Ulum, Jaffar ibn Muhammad al-Sadiq, Musa ibn Jaffar, Ali ibn Musa al-Reza, Muhammad ibn Ali al-Jawwad, Ali ibn Muhmmad al-Haddi, Hassan ibn Ali al-Askari, and Hujjat Allah ibn Hassan al-Mahdi.

the analysis of *ijtihad.* The *Akhbari*[26] is a minority Shia group that takes a closer approach to the Sunni restrictive interpretation of *ijtihad*. The *Usuli* is the dominant branch among the Twelvers, and their distinctive *Usul al-fiqh*[27] was earlier developed by Al-Shaykh al-Tusi[28] in the 11th century.

The Twelver legal theory, as theological jurisprudence, has four main features strongly influenced by its esoteric exegesis: 1) *Ismah* is the infallibility of Muhammad and the Twelve Imams, mostly, reinforced by Al-Shaykh al-Mufid's works[29], from the 10th to the 11th centuries. The infallibility of the Twelve Imams is an additional major source of legal authority, besides the Qur'an and the *Sunna*; 2) the leading role of the jurists-theologians as guardians of Islam and general deputies of the Imam; according to Devin Stewart[30], this role did not emerge until the 16th century, during the Safavid era, as a result of the works of Al-Muhhaqiq al-Karaki, later fully incorporated into the Shiite legal system by Zayn al-Din al-Juba'i al-Amili. In the 20th century, Ayatollah Ruhollah Khomeini developed a further notion of the supreme governance of the jurist, *velayat-e faqi*[31]; giving to the religious authority the role of vigilance and control over the exercise of political power; 3) *Taqiyah,* as a legal dispensation, to conceal religious beliefs in order to avoid persecution; 4) the broad interpretation of *ijtihad* through the role of reasoning, from the distinction between conventional and dynamic *fiqh.*

Following the Shiite interpretation on *ijtijad* from the creative jurisprudential works of Al-Shaykh al-Tusi onward, in Muhammad

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[26] *http://www.iranicaonline.org/articles/akbariya*

[27] For a complete overview, see the collective work *Expectation of the Millenium: Shi'ism in History*, ed. by Seyyed Vali Reza Nasr, Hamid Dabashi, and Seyyed Hossein Nasr. Albany: State University of New York Press, 1989. For alternatives views dissociated from Usulis, see NAQVI, A.A. M. *Shia Dissociation from Usuli School*. Bloomington: AuthorHouse, 2013. For Shia answers to Sunni jurisprudence, see STEWART, D. J. *Islamic Legal Orthodoxy. Twelver Shiite Responses to the Sunni Legal System*. University of Utah Press, 1998.

[28] *http://imamreza.net/eng/imamreza.php?id=4524*

[29] MCDERMOTT, M. J. *The Theology of Al-Shaikh Al-Mufid*. Series arabe et pensee islamique. Dar el-Machreq éditeurs, 1978.

[30] STEWART, D. J. "An Eleven-Century Justification of the Authority of the Twelver Shiite Jurists" in *Islamic Cultures, Islamic Contexts. Studies and Texts.* Essays in Honor of Patricia Crone. (Leiden,Boston: Brill), 472.

[31] KHOMEINI, A. R. *Governance of the Jurist. Islamic Government*. The Institute for Compilation and Publication of Imam Khomeini's Works, Tehran, (*sine anno*). Further political discourses at *http://en.imam-khomeini.ir/en/s351/Memoirs/Islamic_government_and_governance*

Jannati's opinion[32], the most outstanding achievement of Shiite *fiqh* has been to keep open the gates of *ijtihad* throughout history. From his perspective, *ijtihad*, as an independent source of law, is an evolutionary dynamic force, renewing, developing, and expanding the boundaries of *fiqh,* offering practical updates while maintaining the stability of the legislation. From his viewpoint, *qiyas* is one of the types of *ijtihad* that is a free and independent effort of legal scholars providing solutions to contingent issues to fulfill the needs in times of change.

3 - Jurist's authority and ruler's governance from a comparative perspective

Mujtahidun (jurist-theologians entitled to give legal opinions) and *fuqaha* (legal scholars), built from the 9th to the 10th century the backbone of the Muslim juridical system. Their opinions, as legal theory, were recorded and compiled in treatises organized systematically, not chronologically, known as the *fiqh* literature, or doctrinal jurisprudence. In general terms[33], two types of *fiqh* can be distinguished: *Usul al-fiqh,* as principles or roots of the Muslim jurisprudence exploring the principal four sources of law (Qur'an, *hadith*, *ijma'*, or consensus, and *qiyas*, or analogy); and *Furu al-fiqh*, as branches or case collections of rules, *ahkam* (*hukm* in plural) and social relations tagged as mandatory, recommended, permitted, abhorred, and prohibited. Besides, as Mohammad Kamali explains[34], *Usul al-fiqh* is different from *Usul al-qanun*; the latter are the laws and statutes product of human reasoning, like Roman law, *Ius commune*, and Common law. *Usul al-qanun* is closely related to *al-siyasa* as the art of Muslim ruling; it was extensively studied as a part of Islamic Jurisprudence, *Fiqh*, by outstanding Muslim scholars from the 11th to the 14th century, like al-Marwardi, al-Ghazali, and Ibn Tamiyya[35].

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[32] JANNATI, M. I. "Ijtihad: Its Meaning, Sources, Beginnings and the Practice of Ra'y". *Al-Tawhid Islamic Journal* 5, 2 -3; 6, 1; 7, 3 (Qum, 2003). Digital access, *https://www.imamreza. net/old/eng/imamreza.php?print=880*

[33] "Islamic Law". *The Oxford Dictionary of Islam*. Edited by John L. Esposito. Digital access, *Oxford Islamic Studies Online*, *http://www.oxfordislamicstudies.com/ article/opr/t125/e1107*

[34] KAMALI, M. H. *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society, 1991) 17.

[35] NAJJAR, F. M. "Siyasa in Islamic Political Philosophy" in *Islamic Theology and Philosophy: Studies in Honor of George F. Hourani*. Ch. 7. Ed. Michael E. Marmura (Albany: State University of New York Press, 1984) 97.

However, the distinction between *Usul al-fiqh* and *Usul al-qanun*, often blurred in practice, shows the complexities of the relationship among religious, legal, and political structures under Muslim ruling. In medieval times, the vague edge between religious law and political governance presents some similarities between Christian and Muslim religious legal systems.

In legal theory, the distinction between *auctoritas* and *potestas,* initially developed by Roman jurists and later applied to religious and political spheres, is useful discerning between these two types of jurisdictional power, and it is comparable to the Muslim difference between *fiqh,* as related to the authority of the religious legal scholars and *qanun,* linked to the ruler's secular power.

In the first century, the Octavius' policy modified the traditional Republican distinction between *potestas*, as judicial power, and *autorictas*, as the moral authority of the Senate, the jurists, and the College of Pontiffs, blending moral and religious spheres under the single ruler's control. The *Princeps'* role embodied both powers, religious one, as *Pontifex Maximus*, and political, vested with *imperium*, the supreme power to rule, enacts laws, and command military armies. The tension between the legitimacy to exercise religious authority, as *auctoritas*, and the implementation of political power, as *potestas*, arose when the Church turned into an imperial institution demanding *auctoritas*, and religious and political spaces became even more entangled. Two remarkable examples are the *Episcopalis audientia* and the imperial nomocanons, correlated to Muslim legal practices.

The Christian Roman emperors granted the bishops with judicial and jurisdictional authority in the *Episcopalis audientia* as religious courts on civil and ecclesiastical matters. In Islam, the caliph granted the *ulema* with religious and secular jurisdiction to his appointed judges (*cadis*) in a comparable way. The development of judiciary structures with appointed *qadis,* or judges, from the Abbasid era onward, made possible the intertwined relationship among *Sharia*, *fiqh,* and *siyasa* with pre-Islamic administrative, juridical, and judicial traditions. One classical example of religious and political entanglement is *al-mazalim*, as the caliphal institution of complaints and grievances to remedy injustices that was used in the Abbasid era and probably borrowed from the Sassanian legal system, surviving until the Ottoman times; however, in Mathieu Tiller's opinion, the pre-Islamic influence in al-mazalim as a caliphal institution is already present in the Umayyad era; in his view, it was a political tool

used by Muslim rulers as an exercise of their sovereignty, and an ethic mechanism when the *fiqh* was unable to achieve equity[36].

The nomocanons compiled imperial and ecclesiastical laws that survived as a Byzantine model of law collections in all Eastern European kingdoms and empires. Their influence of the Byzantine Imperial Church structure remained in the Bulgarian, Serbian, and Russian empires, as best examples. Possibly, the earliest was the Nomocanons of John Scholasticus composed in the 6th century; the best known is the *Nomocanon in Fourteen Titles*[37], recorded in Greek not in Latin probably in the Heraclius' era during the first decade of the 7th century, including a collection of Justinian imperial laws and ecclesiastical canons from the Church councils[38]. Islamic rulers through *Siyasa al-shar'iyya* legislated over religious and secular matters. *Al-Siyasa*, as proper political governance, includes legislative powers enacting administrative, fiscal, and criminal norms implemented by Muslim rulers in their territorial domains, mostly after the 13th century, from the Mamluk to the Ottoman sultans[39]. In sum, *Siyasa al-shar'iyya* enshrined the Muslim ruler governance following *Sharia* principles and *fiqh*, like nomocanons absorbed Christian principles and included canons of Church councils and imperial legislation.

The struggle between political power and religious authority, represented by the Caliph and the *ulema*, present similar tensions like those between the Emperor and the episcopate, that in Medieval Christianity became particularly strained between the Emperor and the Bishop of Rome, as the Roman Pontiff, demanding not only the independence but the supremacy of the religious authority over the

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[36] Further extensive debate on the Mazalim courts in TILLIER, M. "The Mazalim in Historiography". *The Oxford Handbook of Islamic Law*. Edited by Anver M. Emon and Rumee Ahmed. Online publication, 2015. DOI: *https://doi.org/10.1093/oxfordhb/9780199679010.013.10*

[37] The Nomokanōn in 14 titles: with Theodore Balsamon's Commentaries: manuscript. "Contains the Nomokanōn, a compilation of ecclesiastical canons generally attributed to Photius, bishop of Constantinople, but more probably compiled in the sixth century by an anonymous jurist known as Enatiophanes; and incomplete copies of the commentaries by Theodore Balsamon, a twelfth-century patriarch of Antioch, on the canons of the apostles and the canons of the councils". Robbins MS 121. Robbins Collection, Berkeley Law School, University of California.

[38] STOLTE, B. H. "The Challenge of Change. Notes on the Legal History on the Reign of Heraclius". *The Reign of Heraclius (610-641). Crisis and Confrontation*. Ed.by Gerrit J. Reinink and Bernard H.Stolte. (Peters, 2002) 193-198.

[39] VIKØR, K. S. Between God and the Sultan. A History of Islamic Law. (London: C. Hurst & Co., 2005) 206-207. Also, in SHALAKANY, A. A. "Islamic Legal Histories", *18-19.*

political power. Medieval catholic theologians and canon lawyers - following the papal policy initiated by Pope Gelasius in the 5th century- applied the legal notion of *auctoritas* to the episcopate and the papacy identifying it as spiritual power (*autorictas sacrata*). From this approach, spiritual power became a power above the imperial/royal power (*potestas imperialis/regalia).* As we reviewed in previous pages, the contest between political and religious spheres in Medieval Western Europe ended in the erosion of both institutions.

In Islam, the triumph of the Traditionalist movement empowered the *ulema* and the Muslim jurists as legitimate interpreters of the Qur'an and the *Sunna.* The Medieval historian Deborah Tor explored the transition from Caliphal o Prophetic Sunna and the role of clergy, in the collective book *Islamic Cultures, Islamic Contexts*, a collection of essays in honor of Patricia Crone published in 2015. In her analysis, Tor explained[40] that in the rivalry for religious authority the clergy gained the upper hand when the clerics proved their superiority in religious matters, the conviction that al-hadith and not the Caliph was the true heir of the Prophet's spiritual legacy succeeded, and the rightful custodian of the *hadith* assuming the position of religious authority was the clergy[41]. As Wael Hallaq explains[42], jurists and judges became not only law experts but also civic leaders, role models, and guardians of religion, facilitating a "dialectic of mutual dependence" between jurists and rulers, law and politics, that dominated the Muslim societies until the dawn of Modernity.

The hegemony of the Traditionalist movement in the 10th century changed the course of Muslim history, as the Gregorian reformers in the 11th century transformed the path of Western Christianity. The *ulema* and the jurist-theologians *mujtahidun* retained their authority independent from caliphs and sultans from the 9th century. Comparatively, the Catholic episcopate and papacy maintained their religious authority from the 6th century onward, achieving papal supremacy from the 11th century to the Avignon papacy, thanks to the papal ideologists, mostly theologians and canon lawyers, developing theological and legal arguments demanding primacy of the religious authority, as spiritual, over the imperial power, as secular.

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[40] TOR, D. G. "God's Cleric: Al-Fuḍayl b. ʿIyāḍ and the Transition from Caliphal to Prophetic Sunna". *Islamic Cultures, Islamic Contexts. Studies and Texts.* Essays in Honor of Patricia Crone. (Leiden, Boston: Brill 2015): 195-228.

[41] *Ibid*, 222-224.

[42] HALLAQ, W. B. "Islamic Law: History and Transformation", 167-168.

4 - Muslim legal tradition of Plural Jurisdictions[43]

During the Islamic Golden Age, from the 8th to the 13th centuries, legal schools implemented analogical reasoning and explored innovative legal institutions. Some of them resemble legal techniques applied at about the same time and mostly later in the European and the English legal traditions, offering remarkable similarities[44]. Previously, Roman law also had some influence in the political and civil structures under the Muslim rule, mainly in the former territories of the Eastern Roman Empire, Byzantium; for example, compiling collections of laws in Byzantine style during the Abbasid dynasty, or the parallelisms between the legal work of one of the founders of the Hanafi school, al-Shaybani (749/750-805), and the Justinian Code[45]. Later, the relationship between Islamic and European medieval legal practices and norms took place in the Muslim world in, Sicily, Spaniard Christian kingdoms, the Crusaders states, and the Italian city-states.

The paradigm of legal separation between Muslims and non-Muslims prevailed in the early Muslim polities, as it did in the early Germanic kingdoms between Romans and Barbarians and later between Catholics and non-Catholics. Nevertheless, the outcome process was different, because the Arabization and Islamization of the locals took place at a large scale; the Barbarians, on the contrary, were romanized and progressively abandoned their Arian faith becoming Catholics as the local Romans, channeling the integration process by assimilating the Roman heritage. It was a blending process along the 12th century in which took place the cultural transition from Romanesque to Gothic art, as an expression of a new urban society in Europe that was born from the synthesis of Roman and Germanic legacies, and the influence of Islamic architectural canons and knowledge.

One of the challenges of the Muslim rulers was to elaborate regulations over non-Muslims, as it was for the Barbarians that initially

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[43] MORAN, G. "The Challenge of Pluralistic Societies with Dissimilar Identities and Religious Legal Traditions: ADR and the Role of Religious Mediation and Arbitration.", *Stato, Chiese e pluralismo confessionale* (2017), Digital access: *https://www.statoechiese.it/contributi/challenges-of-pluralistic-societies-with-dissimilar-cultural-identities-and*

[44] For a general analysis and legal literature, see. POTZ, R. *Islamic Law and the Transfer of European Law, in European History Online* (EGO), published by the Institute of European History (IEG), Mainz 2011-11-21. URL: *http://www.ieg-ego.eu/potzr-2011-en*

[45] JOKISCH, B. *Islamic Imperial Law: Harun al-Rashid's Codification Project*, Berlin 2007.

followed Arianism, and later converted into Catholicism[46]. The Islamic legal solution was more tolerant than the Visigoth policies, particularly on the Jews, based on the development of the notion of *dhimmi*, as a protected non-Muslim but not legally equal to Muslims, from the exegetical interpretation of the Qur'anic verse 9:29[47].

Dhimmis were enforced to pay a tax (*jizya,*) but at the same time, they did not fulfill the Muslim duties. Legally speaking, it was a compulsory membership applicable to the religious communities with a "Sacred Text". Most of the schools of Jurisprudence Sunnis and Shias include as *dhimmis* Christians, Jews, and Zoroastrians. Aside from the scholar debate about its origins linked to the Covenant of Omar, as apocryphal or non-spurious text, the heritage of this pact contributed to the interaction pattern with non-Muslims through the *dhimma* legal tradition.

It was a unified model of accommodation for religious minorities that did not distinguish between Jews and Christians. Those regulations were, in general, less oppressive than the Byzantine and Visigoth anti-Jewish legislation. Based on the verse of Qur'an non-compulsion in religion (Q. 2:256), the principle of forced conversions was not imposed as a general rule. However, episodes of forced conversions took place similarly as those in the Christian kingdoms. For example, during the Wars of Ridda (632-633), or the Wars of Apostasy under the military campaigns of Abu Bakr; later, in 12th century under the Almohad rule; or in the Ottoman era, under the *devshirme* practice collecting Christian boys from Anatolia and the Balkans as a tax of blood, forcing them to convert to Islam and training them to be Janissaries; and under the Safavid dynasty in Persia forcing conversion of Sunnis to Twelver Shiism.

In the 9th and 10th centuries, Muslim regulations imposed more degrading restrictions on the Jews and Christians, many of them in parallelism with the Byzantine Jewry legislation. In the Medieval Muslim world, the most common limitations for Christians and Jews were the following: forced to wear distinctive clothes or badges, restrictions in jobs and government positions, use of riding animals, and the prohibition to

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[46] For a comparative analysis, see the collective work: *Religious Minorities in Christian, Jewish, and Muslim Law* (5th -15th centuries). (Edited by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman, and John Tolan) Brepols Publ. 2017.

[47] ABDEL-HALEEM, M. "The jizya Verse (Q. 9:29) Tax Enforcement on Non-Muslims in the First Muslim State" *Journal of Qur'anic Studies*, 14/2 (2012): 72-89.

For a critical legal analysis on the *dhimma* system, see EMON, A. M. Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law. Oxford University Press, 2012.

build new churches or synagogues[48]. Many of those rules were part of the so-called Covenant of Omar[49]. However, there were many differences among Muslim territories, depending on geographical locations, the rulers, schools of jurisprudence, and different theological divisions in Islam; as a result, there was a wide variety of adaptations of the *dhimma* system[50].

The system ensured that non-Muslims must be separate and subordinate to the Muslim rule, preventing any religious contamination of Islam from non-Muslim religious beliefs. This structure also reinforced the identity of those communities imposing a strict formal separation. The separation was often spatial by having Jewish and Christian quarters, sometimes by choice, others by imposition. This communal space facilitated by one hand, a sense of identity of each religious group, by another, the firm control of their leaders and elites over them.

In the Iberian Peninsula, Jews under Muslim or Christian rule lived mostly in *juderías* and *morerias,* often isolated by walls and gates, in which Jewish communities, *aljamas*, had their compulsory legal, fiscal, and judicial systems applicable to them.

The Muslim legal tradition was more flexible regarding mixed marriages and, on the contrary to the Christian rules, allowed Muslim men to marry non-Muslim women if their religion has a sacred text.

Religious minorities under the Muslim rule were able to have their jurisdictional structures, mainly in civil cases, generally regarding Family law. Criminal offenses were usually held by Muslim judges, as the Barbarian courts did it. Similarly, in cases of civil conflicts between Muslims and non-Muslims were resolved by a Muslim judge.

Under the juridical space created by the *dhimma* system, legal pluralism expands. In the former territories of the Eastern Roman Empire and the Sassanian Empire, the Islamic rule allowed the development of multiple institutions, formal and informal, and plural interpretations into a single Muslim order, adjusting the diversity and the dynamics of those cultural and religious identities; Uriel Simonsohn called it a "judicial bazaar"[51].

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[48] Further analysis in GOITIEN, S. D. *Jews and Arabs: A Concise History of Their Social and Cultural Relations*. Chapter3, New York: Dover Publications 1955, latest ed. 2005.

[49] See the prohibitions and regulations in one of the well-known texts of the Treaty of Omar in: *https://sourcebooks.fordham.edu/source/pact-umar.asp*

[50] For an overview in the Islamic West, see the collective book *The Legal Status of the Dimmi-s in the Islamic West*. (Edit. by Maribel Fierro and John Nolan) Brepols, 2014. *https://halshs.archives-ouvertes.fr/halshs-01079944*

[51] SIMONSOHN, U. I. *A Common Justice*, 63.

The Islamic legal system allowed the interaction between the principle of personality and the principle of territoriality. It means that Muslim and non-Muslims could apply to the Sharia regarding contract law, property law, family law, and inheritance litigations, even if both parties were non-Muslim[52], besides having their courts. In Al-Andalus, for example, the Jewish judges interpreted Talmudic law mainly according to the Babylonian School. Iberian Mozarabs had their tribunals and judges, named *censors*, applying Canon Law and the Visigothic Code enacted in 654 known as *Liber Iudiciourum* or *Forum Iudicum*.

Certainly, Al-Andalus was a cultural mosaic of religious identities; even the Muslim identity was not homogeneous, Berbers and North-Africans, Middle East descendants, and mainly Iberian Neo-Muslims created new social dynamics shaping the Andalusian Moorish identity. Progressively, the last ones were incorporated into the ruling elites during the Caliphate, and throughout the *Taifa* period.

However, in Al-Andalus and Maghreb the secular cultural space, shared by Muslim, Jews, and Mozarabs, changed drastically when the Almoravid and Almohad violent expansions took place, from the 11th to 13th centuries, creating two successive Muslim Berber militarized polities expanded from Africa to the Iberian Peninsula, that imposed harsh restrictive measures over the population, mainly over Jews and Mozarabs. Many Muslims, Jews, and Christian seek out refuge in Christian lands or other Muslim territories. Probably, at that time emerged the social distinction between Moor (*moro*), as Muslim Andalusian speaking Arab, and Christian, from the northern Iberian kingdoms, speaking Romance languages; Jews and Mozarabs often were holding positions of power, as *Diwan* members, viziers, and ambassadors. As Thomas Glick explains, in the 11th century, Jews were a counterbalance between Berbers dynasties and Arab elites; Jews managed taxes and bureaucracy, while the Berber militia imposed social order[53].

Following the interpretation of the Qur'anic verses Q. 5:42 and Q. 5:49, some Muslim jurists were in favor to designate Islamic courts as an optional place for arbitration between *dhimmis;* others interpreted those verses as the primacy of the Islamic jurisdiction over *dhimmis'* legal controversies[54]. There is an ongoing scholar debate about how rigid in practice was such a separation, and which were the dynamics of the

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[52] Al-QATTAN, N. "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination" *International Journal of Middle East Studies.* 31 (1999): 429-44.

[53] For a detailed analysis, see GLICK, T. F., Chapter 5.

[54] U. I. SIMONSOHN, *A Common Justice*, 6.

Islamic paradigm of autonomy. Uriel Simonsohn suggests the revision of this paradigm[55], taking into account that, have been regulations sporadically enforced, and often the religious leaders of those communities demanded the intervention of Muslim authorities when it was convenient. In his view, the symbolic separation allowed them to maintain a discourse of resistance, having their place and identity[56]. Indeed, it was also an effective way to keep the power of the religious elites over their communities.

According to Goitein and Glick, Jews became more acculturated, not assimilated, in the Muslim domains than in the Christian territories, because under the Islamic rule there was more secular cultural space for scholar studies and sciences; as a result, Jews in the Islamic world, were Arabized by the 11th century[57].

The next two examples show the flexibility adjusting the *dhimma* tradition by different Muslim Imperial models in two different eras: by Medieval Muslim dynasties in Egypt, and by the pre-Modern Turkish Ottoman Empire.

In the first one, extensive documentation confirms that the status of *dhimmi*s under the Medieval Muslim dynasties in Egypt -Fatimids, Ayyubids, and Mamluks- was not too restrictive, allowing them to interact with Muslim institutions and authorities in many legal ways, beyond the limits of the Sharia frame. As Marina Rustov proves[58], the petition-and-response procedure provides evidence that invoking a precedent or a rule, Muslims and *dhimmi*s were subject to similar treatment by the state in the *Mazalim* courts; however, it does not mean that they were equal in court proceedings.

The second example is the Ottoman *Millet* system[59], rooted in the *dhimma* legal tradition. It was the framework used by the Ottoman Turks

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[55] *Ibid*, pp. 6-10.

[56] *Ibid*, p. 9.

[57] For further readings, GOITIEN, S. D. *Jews and Arabs: Their Contact Through the Ages*; GLICK, T. F. Islamic and Christian Spain in the Early Middle Ages. Brill, 2005.

[58] RUSTOV, M. "The Legal Status of Dimmi-s in the Fatimid East: A view from the Palace in Cairo" *The Legal Status of the Dimmi-s in the Islamic West*, 305-332, particularly, page 326.

[59] Further readings, BRAUDE, B. "Foundation Myths of the Millet System", *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society - Vol. 1*. Ed. B. Braude & B. Lewis. (New York, 1982): 69-89. CEYLAN, E. "The Millet System in the Ottoman Empire", *New Millennium Perspectives in the Humanities*. Ed., by Judith Urton-Ward. (Fatih University, Brigham Young University, 2002): 244-265; BOR, Y. "Millet System in Ottoman Empire: An Extraordinary Policy with Extraordinary Implications". Available at: *https://www.academia.edu/7521006/Millet_system_in_Ottoman_Empire* CHABOU, A.

to interact with their religious minorities; it was institutionalized by Mehmet II in 1453 and built up gradually.

Each *millet*, or religious community, was entitled to have their authority, their legal system, and their jurisdiction. The three main *millets* were: the Rum (Orthodox Greek Christians under the Patriarch of Constantinople), the Armenian (not subjects to the Orthodox Patriarch but having their Patriarch of Constantinople, as authority erected in the Ottoman era) and the Jews[60] (under the authority of the Chief Rabbi, *Hakham Bashi*). It is important to remember that arbitration was extensively used by the Ottomans, following the Hanafi interpretation in favor of the contractual nature of mediation; the first Ottoman codification of Sharia, the Medjella, dedicates a complete section to arbitration[61].

The Muslims under the Ottoman Empire did not have a *Millet* system. This model -as the *dhimma* system itself- established a structure of control exercised simultaneously by Muslim authorities and by religious and civil leaders of those religious minorities. It had three purposes: 1) maintain the segregation among religious minorities under a certain degree of jurisdictional autonomy; 2) prevent any contamination from Islamic beliefs; 3) avoid any assimilation to the Muslim identity.

The Millet system survived during the colonial era and still, today, is in place in many Middle East nation-states, including Israel[62].

Treatment of Religious Minorities under the Ottoman Millet System: Case of Study of Greek Orthodox Christians, Armenian Christian, and Jews. 2016. *https://www.academia.edu/30934024/TREATMENT_OF_RELIGIOUS_MINORITIES_UNDER_THE_OTTOMAN_MILLET_SYSTEM_CASE_STUDY_OF_GREEK_ORTHODOX_CHRISTIANS_ARMENIAN_CHRISTIANS_AND_JEWS_Acknowledgement*

[60] Additional readings, SHAW, S. J.*The Jews of the Ottoman Empire and the Turkish Republic*. NYU, 1991. Coll. work, *The Jews of the Ottoman Empire.* Ed. by Avigdor Levy. Princeton, 1994. Further analysis on Syria, Tunisia, Tripolitania, Morocco, Yemen, and Iran in the collective work, *Jews among Muslims. Communities in the Pre-colonial Middle East*. Ed. by Shlomo Deshen and Walter P. Zenner, London, 1996; POTZ, R. "Islamic Law and the Transfer to European Law". *European History Online* (EGO), Institute of European History (IEG), Mainz, 2011. Available at: *http://www.ieg-ego.eu/potzr-2011-en*

[61] AL-RAMAHI, A. "Sulh: A Crucial Part of Islamic Arbitration", LSE Law, Society, and Economy Working Papers 12/2008. (London School of Economics and Political Science. Law Department): 16-17. Digital access, *http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-12-Al-Ramahi.pdf*

[62] Further analysis in MORAN, G. M. "Challenges of Pluralistic Societies with Dissimilar Cultural Identities and Religious Legal Traditions, 22-32.

5 - The open scholar question of reciprocal legal influences with other juridical systems

In the last part of this research, I will try to summarize in a chronological synthesis the evolution of the most remarkable critical historiography and academic literature on the disputed origins of the Islamic legal system, aside from the traditional Islamic version, and the reciprocal influences with other legal systems explored by philologists, islamologists, and legal comparatists with Orientalists, post-Orientalists, and neo-Orientalists perspectives.

In the 18th century, among the earliest European Orientalists interested in the parallelisms between Roman and Muslim legal institutions was the Dutch scholar Adriaan Reland[63]. During the middle of the 19th century, one of the first European legal experts addressing this topic from a comparatist approach was an Italian lawyer living in Alexandria, Domenico Gatteschi. He published one of the first handbooks of public and private Ottoman legislation[64] to facilitate the knowledge of the Ottoman legal system in Egypt to Italian lawyers. He used a comparatist point of view, following the Napoleonic codification blueprint and searching for the concordance between European codifications and the Ottoman legislation. Gatteschi was able to organize the principles of the Ottoman Public law; and in Private law, he focused on the commercial code enacted during that period, and in civil non-codified statutory laws. Besides, as Leonard Wood explains[65], on the one hand, Gatteschi handbook proved the similarities between Islamic and continental European laws; on the other, his classical education on Roman law allowed him to cross-referencing with the Justinian Institutions and Digest, influencing Muslim jurists of that era in different ways, and becoming the foundational work in Islamic-European comparative juridical studies.

Later, in the last quarter of the 19th century, the Austrian jurist and diplomat Alfred von Kremer[66] reached similar conclusions like Reland and

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[63] *http://emlo-portal.bodleian.ox.ac.uk/collections/?catalogue=adriaan-reland*

[64] GATTESCHI, D. *Manuale di Diritto Pubblico e Privato Ottomano*. Alessadria: Tipografia di la Posta europea di V. Minasi E C, 1865. Digital access, *https://archive.org/details/bub_gb_A7-rkURvhy8C*

[65] WOOD, L. *Islamic Legal Revival. Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875-1950*. Oxford Islamic Legal Studies (Oxford University Press, 2016): 103-104.

[66] VON KREMER, A. *Culturgeschichte des Orients unter den Chalifen*. Wien: Wilhem Braumüller, 1875. Digital access *http://archive.org/stream/culturgeschichte00kremuoft*

Gatteschi about the close parallelisms between Roman and Islamic legal institutions, contradicting the traditional narrative about the prophetic and theological origin of the Muslim legal system.

The trend of comparative legal studies between the Roman and the Islamic legal systems, following the findings of von Kremer and other German-speaking Orientalists, began in the American academia in 1907 with several works of Theodore Ion[67], professor of the School of Law at the University of Boston. He focused his innovative research on the similarities between the Roman and the Muslim legal system and the eventual influence that the first could have over the second; although, his Orientalist mindset was negative toward Islam as an intolerant religion. According to Ion[68], Roman law, as legal theory, continued its existence through the legacy of the famous legal schools of Beritus (Beirut) and Alexandria, influencing the initial development of the Muslim legal system; mainly, borrowing through analogy the Roman legal reasoning, *dicta*, if it was consistent with the spirit of the Qur'an and the early *Sunna.* In his research, Ion explored some of the similarities between both legal systems and legal theory, like the parallelism between Roman *gens* and Arabian *Akila*, citizenship, slavery and manumission of slaves, wills and testaments, contracts, and judicial organization; even he addressed the similarities between Roman jurisconsults and Muslim Muftis, both entitled to give legal opinions[69]. Even though some of his conclusions later proved wrong, Ion's legacy had a powerful influence on the next generation of comparatist legal scholars.

A few decades earlier, the Hungarian Jewish scholar Ignác Goldziher, considered one of the founders of European Islamic studies, was among the first islamologists at the end of the 19th century defending the clear traces of the influence of Roman law on the Islamic jurisprudence; in his opinion, such impact mainly took place in Syria during the Umayyad era[70]. From a philological non-juridical point of view,

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[67] It was published initially in several successive articles, ION, T. "Roman Law and Mohammedan Jurisprudence I" *Michigan Law Review*, 6/1 (1907): 44-52 *https://www.jstor.org/stable/1272666*; "Roman Law and Mohammedan Jurisprudence II" *Michigan Law Review*, 6/3 (1908): 197-214 *https://www.jstor.org/stable/1273339*; and "Roman Law and Mohammedan Jurisprudence III" *Michigan Law Review* 6/5 (1908): 371-396 *https://www.jstor.org/stable/1273823*

[68] ION, T. "Roman Law and Mohammedan Jurisprudence I", 49.

[69] ION, T. "Roman Law and Mohammedan Jurisprudence III", 371-377.

[70] GOLDZIHER, I. *Mohammed and Islam*. (New Haven: Yale University Press, 1917): chapter 2. Kindle Edition of the original text.

he explored the foreign elements assimilated by the Islamic faith, including sentences from the Old and New Testament, apocryphal gospels, rabbinical sayings, even Persian and Indian wisdom, that, in his opinion, found their space in the *hadith* collections. Goldziher challenged the traditional Muslim narrative affirming that the origins of the Muslim Jurisprudence are initially in the scholars' *ra'y* as a rational enterprise, not in the Qur'an and *Sunna*. Goldziher inspired several scholars to comparatively research particular Roman and Muslim legal institutions, among them, Joseph Schacht.

Following Goldziher's footsteps, the British-German philologist, expert in Semitic languages, Joseph Schacht was one of the leading islamologist scholar in the middle of the 20th century; his book *The Origin of Muhammadan Jurisprudence*[71] became iconic and an obligatory reference for critical studies on Islamic Jurisprudence. He analyzed in detail how took place the development of the Muslim legal theory taking into account the role of traditions[72], consensus[73], and analogy[74] in the emerging schools of law of three distinctive geographical areas, Iraq, mainly in Kufa and Basora, Hijaz, in the Arabian Peninsula along the borderland of the Red Sea, and Syria[75]. In his opinion[76], the analogy, as a source of law, allowed the influence of Jewish and Roman legal sayings, almost literally recorded by Muslim legal scholars; at the same time, Schacht attested that some Christian scholars used al-Shafi'i techniques, like the Syrian Bishop Theodore Abu Qurrah (750/825) living under the Islamic rule; however, he attested that the tendency to Islamize increased, taking various forms by collecting or modifying popular and administrative practices. For Schacht, the Muslim legal theory reached a culminating point with al-Shafi'i.

Joseph Schacht's research provoked continuous vivid debates among scholars, accepting or rejecting his conclusions. Joseph Schacht's discussion with Noel Coulson, in the mid-sixties, focused on the analysis of the *Sunna*; for Schacht, many legal *dicta* from *hadith* were apocryphal, Coulson agrees, however, in his opinion they could represent the essence of Mohammad's ruling in Medina. Coulson offered alternative hypothesis

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[71] SCHACHT, J. F. *The Origins of Muhammadan Jurisprudence*. Oxford: Clarendon Press, 1950. Kindle Edition, 2011.

[72] *Ibid*, Chapter 6.

[73] *Ibid*, Chapter 8.

[74] *Ibid*, Chapter 9.

[75] *Ibid*, Chapter 2.

[76] *Ibid*, Chapter 9.

to Goldziher and Schacht by examining the legal practice in early Islam. In his view[77], the practice of adopting the previous administrative structure opened the door to a broader reception of foreign juridical elements, and, gradually, Sasanian and Roman law permeated and infiltrated the Muslim early legal practice. Coulson considers[78] that the development of a pious current of Muslim scholars, from the 8th century onward, implemented the spirit of the Qur'anic laws, distinguishing legal doctrine and legal practice; however, the process of integration of both during the early Abbasids took place with Abu Yusuf, as Chief *cadi*, when he composed at the request of Harun al-Rashid treatises on fiscal and criminal law. In his opinion[79], the master architect of the Muslim legal system was al-Shafi'i with his work al-Risala, which represents a compromise between divine law and human legal reasoning, and contains his mature legal theory, emphasizing the authority of Muhammad as a lawgiver.

In 1978, the legal scholar David Forte explored the impact of Joseph Schacht[80], affirming that, for the most of non-Muslim Western scholars, Schacht confirmed: 1) the original hypothesis of Goldziher; 2) many of the Muslim traditions were apocryphal and fabricated in the 8th century; concluding that, as a result of the impact of Schacht's historical criticism, Sunna can be a creative and dynamic force of reform in the Islamic legal system.

John Wansbrough was an American Islamic historian teaching at the University of London, who had a powerful influence in many of his students, like Patricia Crone and Norman Calder, channeling the so-called Revisionist movement. His meticulous and innovative exegetical research titled *Quranic Studies*, published in 1977, challenged the traditional approach to the early origins of Islam[81]. Wansbrough applied the historical-critical method, suggesting that the Qur'an is a literary construction that took more than two hundred years to collect, and as a source of law was antedated to fit into the Muslim narrative.

In 1987, the remarkable Danish-American islamologist Patricia Crone challenged the Roman influence thesis defended by Goldziher and Schacht. She affirmed that not only they didn't prove a single item of

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[77] COULSON, N. H. *A History of Islamic Law*. (Edinburgh University Press, 1964), 21-30.

[78] *Ibid*, 36-38.

[79] *Ibid*, 53-55.

[80] FORTE, D. F. "Islamic Law: The Impact of Joseph Schacht", 1 Loy. *L.A. Int'l & Comp. L. Rev*. 1 (1978): 1-36. Digital Access *http://digitalcommons.lmu.edu/ilr/vol1/iss1/1*

[81] WANSBROUGH, J. *Quranic Studies*, 1-84.

Roman elements listed by them, but several of them were wrong. She categorically maintained that "the Romans knew of *interpretatio prudentium* and *reponsa prudentium,* but neither has anything to do with *ra'y* or *igma"* [82]. In her opinion, provincial law is the key, or the alien factor, that included Roman and non-Roman elements composing a kind of legal *koiné*, which was the widespread legal practice used in the Near East. She defended that the earlier Muslim wave of scholars emerged in Syria under the Umayyad rulers, not in Iraq, under the Abbasids, as Schacht sustained. She tested her thesis exploring the role of provincial law and how it could influence the Muslim legal system. She focused her analysis in the legal institution of Muslim patronage, *wala'*, generally linked to an Arabian tribal origin; however, in her hypothesis she offered an alternative explanation by which the crucial features of the *wala'* institution are from Roman and provincial law, reshaping its elements to fit into the new context[83]. Crone concluded that "the evidence suggests that the Muslim restriction on testamentary dispositions originates in provincial law"[84].

Crone's 1987 book was positively evaluated by several revisionist scholars. Nevertheless, in 1990, Wael Hallaq rejected Crone's thesis in his review[85]. His major objections are the following: first, the polarized notion of provincial law, linked to a sophisticated culture and opposed to the primitive Arab background, underestimates the long period of migrations, trade routes, and Arabian *foederati* settled in the Near East for centuries, and therefore, Crone did not take into consideration the substantial evidence in the *Romano* and *Byzantino-Arabica*[86]; and second, Crone did not distinguished clearly two types of legal institutions, *wala' al-itiq*, that could involve converts, and *wala' al-mubalat*, that is an instrument of freeing slaves into de Muslim society not linked to conversion[87]. Consequently, in Hallaq's opinion[88], the speculative research of Crone did not prove any single influence upon Islamic law from Roman provincial law. For Hallaq,

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[82] CRONE, P. Roman, provincial and Islamic law. The Origins of the Islamic Patronate. (University of Cambridge, 1987), 11.

[83] *Ibid*, 41.

[84] *Ibid*, 96.

[85] HALLAQ, W. B. "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law". Reviewed Work: *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* by Patricia Crone. Journal of the American Oriental Society 110/1 (1990): 79-91.
DOI https://www.jstor.org/stable/603912

[86] *Ibid*, 83.

[87] *Ibid*, 85-88.

[88] *Ibid*, 89.

this is not a surprising conclusion, because "the ingenious process of assimilation, systematization and Islamization managed to dissipate all the indigenous features of legal institutions and to recast them in a fashion that is not in the least reminiscence of the older institutions"; and it is virtually impossible the identification of influences, some of them could link not only to a Roman legacy but to previous Semitic and Babylonian roots[89]. Hallaq, indeed, is in favor of a polygenic remote and complex origin of the Islamic legal ancestry.

Anver Emon's analysis of Patricia Crone 1987 book gives a different approach focused on the creative dialogue that Crone opened between History, Philology, and Anthropology[90]. However, from Emon's legal perspective, Crone's juxtaposition implicitly reads texts as a mirror of society, though in a backward projection of society to corroborate her analysis of a much earlier set of texts"[91]. In his view, Crone failed in appreciates the discourse of law as a subject in itself, because her approach never abandons the narrow positivism that marks the philological enterprise[92].

Although most of the research on foreign influences in the Islamic Jurisprudence and legal practice focuses on Roman and provincial law, a few scholars also analyzed Jewish and Zoroastrian parallelisms.

In 1982, Judith Wegner explored the common roots of Islamic and Talmudic legal traditions and the striking parallelisms between the jurisprudential bases elaborated by al-Shafi'i and the Talmudic law, taking into account that the editing process of the Talmud ended in the 6th century[93]. Wegner proposed that the four sources of Islamic Jurisprudence, Qur'an, *Sunna*, *ijma,* and *qiyas,* correspond, linguistically and conceptually, with the four correlative classic Talmudic sources, *Miqra*, *Mishna*, *Ha-kol* consensus of the *Gemara*, and *Heqqes*. In Wegner's opinion[94], al-Shafi'i pursuit the unification of the *Sunna* redefining it as a divine oral tradition, in the same way that *Gemara*, as the rabbinical analysis on the Mishna and a part of the Talmud, defends the divine oral revelation. Wegner suggests

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[89] *Ibid*, 90-91.

[90] EMON, A. M. "Fiqh". The Oxford Handbook of Islamic Law *Edited by Anver M. Emon and Rumee Ahmed 2015*. 4-7. DOI: *https://doi.org/10.1093/oxfordhb/9780199679010.013.4*

[91] *Ibid*, 6.

[92] *Ibid*, 7.

[93] WEGNER, J. R. "Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts". *The American Journal of Legal History* 26/1 (1982): 25-71. Digital access *https://doi.org/10.2307/844605*; *https://www.jstor.org/stable/844605*

[94] *Ibid*, 54-55.

that al-Shafi'i's Jurisprudence could be a Talmudic synthesis; however, it requires further investigation[95]. She concludes that, the early Muslim jurists had both motive and opportunity to follow the Jewish model, and the parallelism between the four Islamic legal sources with the correlative Talmudic suggests that "in the early stages (…) was consciously or subconsciously adapted to Islamic needs"[96].

In a similar style and methodological approach to Wegner's analysis, in 2005, Jany János searched for the similarities between the four sources of law in Zoroastrian and Islamic jurisprudence. Nevertheless, his conclusions contradict Joseph Schacht's conviction that the Sasanian legal system influenced the Islamic one. In János's opinion[97], the Sasanian four sources of law somehow could correlate the Islamic sources: 1) The Avesta; 2) oral law; 3) consensus of the sages; 4) judicial practice (*kardag*). Nonetheless, "the possibility of Iranian influence on early Islamic jurisprudence is limited by historical, cultural, geographical, and chronological factors, and the evidence of the sources suggests that Sasanian legal thinking was distinctive from that of the Sunni *usulis*". Although they had some similarities, like those between the Zoroastrian circles of justice and the Muslim schools of jurisprudence, and the similar roles of the judge and the sage with *qadi*, *mufti,* and *mujtahid,* they are not sufficient to prove that Sasanian legal theory infiltrated *Sunni Usul al-fiqh*[98]. On the other hand, he points out that the Zoroastrian law functioned under the principle of personality for non-Muslims, and at the same time, the role of Persian converts is hard to establish[99].

In 1993, the British historian Norman Calder analyzed the early Muslim jurisprudence, asserting that Goldziher, Schacht, and Wansbrough broke the historical link between *hadith* and *fiqh*[100]. For Calder[101], four interrelated factors facilitated the alliances between the political and scholarly elite: 1) oral creativity; 2) notebooks circulation; 3)

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[95] *Ibid*, 67.

[96] *Ibid*, 66.

[97] JÁNOS, J. "The Four Sources of Law in Zoroastrian and Islamic Jurisprudence". *Islamic Law and Society* 12/ 3 (2005): 291-332. Digital access *https://doi.org/10.1163/156851905774608279*
https://www.jstor.org/stable/3399405

[98] *Ibid*, 324-328.

[99] *Ibid*, 321-323.

[100] CALDER, N. *Studies in Early Muslim Jurisprudence*. (Oxford: Clarendon Press, 1993), Preface, vii.

[101] *Ibid*, 162.

social basis; 4) the gradual process of bureaucratization in a social and ideological context. As a result, it emerged a particular social class, the *fuqaha*, linked to the development of the *fiqh* as an academic discipline[102], progressively developing hermeneutical skills[103]. From Calder's perspective, Muslim laws share many features with Jewish, Christian, Roman, and provincial laws, even some Bedouin features, all of them part of the diffused practice in the Near East culture open to cross-cultural influences, in an oral, dialectical, and creative style, and not merely receptive[104]. In Calder's view, the competition was about authority, not on rules, and the final result was the ideological unity of the Muslim legal system. The diversity of norms and the separate school identities competing for authority needed the Prophetic and Qur'anic traditions as the sourced of the supreme authority[105]. He disagrees with Patricia Crone regarding the argument that it was a caliphal creation; for Calder, caliphs played an insignificant role in the elaboration of law-books[106]. In sum, Calder insisted that the early juristic literature reflects an organic development of jurisprudential thought, a logical consequence of the analysis on real problems and the search for solutions through creative thinking; a process that required to be backed up by the authority of Muhammad's sayings and Qur'anic norms[107].

This process is similar in many religious legal systems, and their legal experts often borrowed or adjust norms, institutions, and technical solutions from other legal structures, concealing its origin by appealing to the higher religious authority as a backup. For example, the early canon lawyers borrowed legal texts from Roman law, attributing their authority to popes and Church councils, often through forgeries and apocryphal attributions. It was a practice widely spread from the 8th to the 12th centuries in the Western Catholic Church. The best-known example is the false Decretals known as the Pseudo-Isidorian, invoked initially by Pope Nicholas I (858-867), that during more than seven centuries were used to fortify papal independence. It was a collection of papal Decretals that include over one hundred forged documents attributed to the bishops of Rome in the early centuries, and an almost similar number of authentic ones but falsely interpolated. Its importance is capital for Western Canon

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[102] *Ibid*, 184-188.

[103] *Ibid*, See Chapter 9.

[104] *Ibid*, 213.

[105] *Ibid*, 217, and 222.

[106] *Ibid*, 220-221.

[107] *Ibid*, 222.

law, because this collection of papal Decretals penetrated almost in all Western canonical collections of the 11th to 13th centuries, giving substantial legal support to the medieval papal primacy doctrine.

In 1997, Muhammad Zaman analyzed the emergence of the proto-Sunni elite under the early Abbasids[108]. In his research, he upholds[109] that the early Abbasids participated in the patronage of proto-Sunnis, and the *hadith* played a political and ideological role. Zaman considered the caliph's authority, as a part of the religious authority, justifies his participation in resolving legal questions. In his view[110], the Abbasid caliph al-Mamun supported the triumph of the Traditionalist movement through the Muslim inquisition, the *Mihra*, which reinforced the caliphal authority and the caliphal role as guardian of a particular orthodoxy, testing the orthodoxy of *qadis, fuqaha, and mujtahidun*.

In 1999, the German-Dutch islamologist Harald Motzki, studied the role of non-Arab converts in the development of early Islamic Jurisprudence challenging Goldziher and Schacht statements about the quantitative and qualitative crucial scholar role played by non-Arabs with Hellenistic education borrowing from Roman and Roman provincial law, Christian early Canon law, and Jewish law, focusing in the first and second centuries of Islam[111]. Motzki's statistical research of ethnical Arab and non-Arab *fuqaha* does not support this assumption; however, "the results of this study do not affect the theory that Islamic law borrowed resources from other legal systems"[112]. In 2002, Motzki focused his attention in the early Meccan *Fiqh*, using a new source *The Musannaf* of the Yemeni al-San'ani, contemporary of al-Shafi'i. He affirmed that the chronology suggested by Schacht on the beginnings of Muslim Jurisprudence is incorrect because can be dated almost a century earlier, and many of his conclusions are no longer tenable or need modification. Regarding possible influences on Islamic Jurisprudence from previous pre-Islamic non-Arab legal systems, Motzki limits his scope to the 7th century in the Arabian Peninsula[113]. Although he agrees that even in this

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[108] ZAMAN, M.Q. Religion and Politics under the Early Abbasids: the Emergence of the Proto-Sunni Elite. Leiden, New York, Köln: Brill, 1997.

[109] *Ibid*, 103-105.

[110] *Ibid*, 106.

[111] MOTZKI, H. "The Role of non-Arab Converts in the Development of Early Islamic Law", *Islamic Law and Society* 6/3 (1999): 293-317. Digital access *https://www.academia.edu/16025102/The_Role_of_non-Arab_Converts_in_the_Development_of_early_Islamic_Law*

[112] *Ibid*, 316.

[113] MOTZKI, H. *The Origins of Islamic Jurisprudence, Meccan Fiqh Before the Classical*

time-lapse and geographical location the fertilization by Near East provincial law, strongly infused by Roman law, and mainly by Jewish legal forms, was possible, as Patricia Crone tried to prove; however, in his view, concrete evidence remains speculative[114].

From a comparative historical legal perspective, George Makdisi, in 1981, published a pioneering work on a comparative analysis between institutions of learning in Islam and the West. It is an extensive and detailed analysis[115] focused on the rise of schools of law (*Madhab*) and colleges of law (*Madrasa*) in Islam, the relationship with theological movements, the Madrasa structure as a charitable institution (*waqf*) for learning, and the foundation of institutions of secular foreign sciences of knowledge. He also studies the effect of the Traditionalist movements on them, mainly after the bloody inquisition (*Mihra)* that took place during the ruling years of the caliph al-Mamun when "Orthodoxy is defined in legal terms"[116]. George Makdisi paid close attention to the organization of learning, its methodology, and the scholastic community. In chapter 4 of his book[117], he analyzed the influence and parallelisms of Islamic institutions of learning regarding the development of similar institutions in Europe; mainly, the university as a corporation and the college as a charitable trust. He proved numerous correspondences between Islamic and European learning institutions and many similar components of the scholastic method; however, their origins remain obscure as a borrowing process. In his opinion[118], after the borrowing of essential elements, the parallelisms progressively diminish, and their courses diverge.

In another novel work, published in 1989, George Makdisi comparatively explored Scholasticism and Humanism in Classical Islam and the Christian West[119], aware of the general lack of knowledge and interest among secular scholars with a Christian background on the cultural debt to Classical Islam; most of them stoutly attached to western-

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Schools. Islamic History and Civilization. Studies and Texts. Vol. 41, ed. by Wadad Kadi, and English trans. from German by Marion H. Katz. Leiden, Boston, Köln: Brill, 2002.

[114] *Ibid*, Introduction, xv.

[115] MAKDISI, G. The *Rise of Colleges. Institutions of Learning in Islam and the West.* Edinburgh: Edinburgh University Press, 1981.

[116] *Ibid*, 284.

[117] *Ibid*, 224-281.

[118] *Ibid*, 287.

[119] MAKDISI, G. "Scholasticism and Humanism in Classical Islam and the Christian West" Journal *of the American Oriental Society* 109/2 (1989): 175- 182. Digital access, *http://www.jstor.org/stable/604423*

centrist mentalities. In the field of legal theory and practice, as Makdisi explains, the development of professional legal guilds allowed in Sunni Islam the growth of an individual and autonomous legal system that "led to the determination of Orthodoxy"[120]. A system that found his way to London, in the development of Inns of Court as autonomous, professional, and unincorporated guild schools of law, like those of Classical Islam[121]. In his opinion[122], the humanistic and scholastic movements arrived simultaneously to Italy in the 11th century from two Islamic cultures located at that time in Sicily and in the Iberian Peninsula, and two centers of translation, Monte Cassino and Toledo. For all of it, George Makdisi affirmed[123] "that an essential part of our intellectual culture, namely, our university and scholarly culture, is Arabo-Islamic".

In 1999, John Makdisi, following his father's footsteps, offered a suggestive hypothesis about the influence of the Islamic legal theory and practice on Sicily under the Norman control and the ruling of Roger II, and the opportunity to influence the juridical changes made by Henry II in England before the birth of the English Common law. In his avant-garde research, he found that the sources of the three Classic English legal institutions (contract in the action of debt, property in the assize of novel disseisin, and procedure in a trial by jury) often connected to the Roman juridical legacy, may trace their origins directly to Islamic legal institutions probably transplanted from Islam through the Norman Sicily[124]. He concludes that until now, all scholars attributed the source of the revolutionary changes introduced by King Henry II (1154-1189) to English law in the 12th century to some European legal systems, primarily, Roman, Germanic, or even Anglo-Saxon. However, we should keep in mind: 1) that the Islamic legal system was far superior to the primitive English system prior the birth of the Common law; 2) those three legal institutions played a substantive role in the development of the Common law system; 3) the high probability of importing them from the Islamic legal system through the Sicily of Roger II (1130-1154) after the Normans conquered Muslim Sicily[125].

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[120] *Ibid*, 176.

[121] *Ibid*, 177.

[122] *Ibid*. 182.

[123] *Ibid*.

[124] MAKDISI, J. "The Islamic Origins of the Common Law" *North Carolina Law Rev*. 77/5 (1999): 1635-1739.

Digital access, *http://scholarship.law.unc.edu/nclr/vol77/iss5/2*

[125] *Ibid*, 1731.

In the 21st century, a new scholar impetus retook the analysis of the Roman legal influence on the Muslim system. In 2005, the legal comparatist Ayman Daher centered his attention[126] on three issues: 1) the pivotal role of jurists in Roman and Muslim systems; 2) the juristic reason as a nexus of influence; 3) possible parallelisms between three similar institutions and legal concepts (the Roman agnatic line and the Muslim *asaba, donatio propter nuptias* and *mahr*, and the Roman Patronage and *wala')*. His research took into account the Syro-Roman Code, a compilation of Roman law, Provincial law, and eastern custom from the late 5th century; originally, written in Greek and translated into Syriac, Armenian, and Arabic, possibly used in the Eastern *Episcopalis audientia*, as bishops' courts, applied as personal jurisdiction of Christians under the Muslim rule, and introduced it in Iraq in the 8th century. However, the influence of the Syro-Roman Code on the Muslim legal system still is insufficiently studied[127], although its Arabic version has remarkable parallelisms in Daher's opinion[128]. He concluded that "by comparing legal institutions of Roman and Islamic law, it is possible to perceive a Roman influence on the *sharia'h*", and indeed, it followed a pattern of law evolution "from the

[126] DAHER, A. "The Sharia'h: Roman Law Wearing an Islamic Veil?" *The McGill Journal of Classical Studies* 3 (2005): 91-108.

[127] "There is much scholarly debate about the provenance and nature of this latter collection of laws, which exists in several related but significantly different texts in various manuscripts and languages (Syriac, Arabic, Armenian). Originally written in Greek and first translated into Syriac, Gottfried Schiemann follows many others in thinking it probable that the Syriac translation was made in the fifth century. Crone, following Nallino, makes a persuasive case for thinking the translation to be post Arab conquest. How much eastern provincial practice it reflects is also debated, although it is clear that its basis is Roman law. It seems that it was not intended as a practical code of law, but had some other function, possibly a purely symbolic one. Cf. CRONE, P. *Roman, Provincial and Islamic Law*, 12, 14, and the references cited there; Schiemann, "Syro-Roman Law Book." The evidence of its various references to what it calls in Syriac the *rahbūnā*, therefore, should probably be taken as reflections of the Roman law on the *arrha* as it existed in the early Christian era". HAWTING, G. and EISENBERD, D. M. "Earnest Money" and the Sources of Islamic Law.*Islamic Cultures, Islamic Contexts. Studies and Texts.* Essays in Honor of Patricia Crone, 124.

For the translation of the text see SCHIEMANN, G. *Syro-Roman law book*, Antiquity volumes edited by: Hubert Cancik and, Helmuth Schneider, English Edition by Christine F. Salazar. Classical Tradition volumes edited by Manfred Landfester. English Edition by Francis G. Gentry. First published online: 2006 in: Brill's New Pauly *http://dx.doi.org/10.1163/1574-9347_bnp_e1127750*

[128] DAHER, A. "The Sharia'h: Roman Law Wearing an Islamic Veil?", 97.

code of Hammurabi, through Assyrian law, Rabbinic law, Greek law, Roman law, Byzantine law and finally to Islamic law"[129].

In 2007, Benjamin Jokisch published his exhaustive research on Islamic Imperial Law, focused on the theoretical Harun al-Rashid's codification Project[130], presenting the most challenging and meticulous hypothesis based on the reception theory. Unfortunately, most of the academia paid little attention to it because of his conjectural approach. However, he opened an untraveled detail-oriented road worth it to explore regarding the origins of the Islamic legal system.

For his research, Jokisch[131] took into consideration historical correlations and contextual parallelisms, like the conflict between Orthodoxy and Monophysism with Sunnism and Shiism, the *hadith* movement and Karaism, or the Islamic, Byzantine, and Carolingian Humanism as cultural renaissances. For Jokisch[132], there are several indicators of an indirect reception from Babylonian Judaism, Sassanid legal system, Monophysite and Nestorian nomocanons, and Roman and Provincial legislation. All of them fueled by the blossom of Islamic humanism, the wave of codifications in the 9th century, and the translator's movement sponsored by the caliph and *diwan* through commissions. Specifically, he investigated the possibility of a commission for a legal reception reworking Byzantine-Roman law, because the Byzantine Empire was the essential reference for Abbasids[133].

According to Jokisch[134], there were three stages of development of the Muslim legal system: pre-imperial, imperial, and post-imperial. During the imperial period, Jokisch investigated the possibility that al-Rashid established the mentioned commission of legal scholars integrated by Muslims (mainly, Shaybani and Abu Yusuf), Jewish (probably, Simon Qayyara and Pirkoi ben Baboi) and Christians (like Bitriq) using as working material the *Digestsumma* (Anonymus) and the Gloss of Enantiophanes. It was not an easy task that required skillful translators. In Jokisch's opinion[135], the best suitable scenario was in 780-798, probably in Bagdad; however, there is no indication of the promulgation of this code

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[129] *Ibid*, 105.

[130] JOKISCH, B. Islamic Imperial Law. Harun al-Rashid's codification Project. Berlin, New York: Walter de Gruyter, 2007.

[131] *Ibid*, 7-11

[132] *Ibid*, 77-96.

[133] *Ibid*, 274.

[134] *Ibid*, 3-7, and 99-105.

[135] *Ibid*, 261-264.

and the triumph of the Orthodoxy in the middle of the 9th century could transform the Islamic imperial law into a jurists' law.

In his comparative analysis, Jokisch interconnects non-Arabic sources, like the *Digestsumma and the Enantiophanes' Gloss,* the Talmud, and the Syriac law book, with Shaybani's *Mabsuf*, although Calder considers that later jurists composed this book[136]. Jokisch's analysis[137], paid careful attention to the structural parallelisms between the Justinian's Pandect and the Shaybani's *Mabsuf,* taking into consideration two comparative elements: legal fields and deficiency law, including casuistry, terminology, style, and legal reasoning.

In Jokisch's opinion[138], from the 9th to the 10th centuries, it was a general predisposition to cultural exchanges intertwining Byzantium and Islam and enriching both in a reciprocal relationship. Particularly, Jokisch mentions the role of Photios in this process during the controversies with Pope Nicholas I regarding his appointment as Patriarch of Constantinople. Jokisch speculates with the possibility that Photios visited Bagdad returning to Constantinople in 845 with a *Digestsumma's* copy and the Shafi'i's *Risala*, becoming the source of inspiration for Photios's contribution to the Byzantine collection of laws ordered by Emperor Basil I, and enacted by Leo V, known as *Basilika*, and for Photios's doctrine of two powers[139].

In the second part of his book[140], Jokisch focused his analysis on the notion of imperial law as a comprehensive legal system origin of the Islamic Jurisprudence. A new hypothesis that rejects the initial formulation by independent scholars; his main argument laid on the imperial ideological basis of the Abbasids, who considered Byzantium, the political model to imitate. This argument, in Jokisch's opinion, justifies the codification enterprise, although the Arabic sources keep silence on the official promulgation. However, Jokisch defends his hypothesis on the following reasons[141]: 1) the foundation of Bagdad and Constantinople as the new center of the empire, in political and religious terms; 2) the process of reception, translation, and transfer into a novel system requires a sophisticated organization, impossible to assemble by any pious independent scholar; 3) the government maintained close connections

[136] *Ibid*, 97-98.

[137] *Ibid*, 105-259.

[138] *Ibid*, 322-515.

[139] *Ibid*, 375.

[140] *Ibid*, 261-311.

[141] *Ibid*, 281-282.

with those who elaborate the code. According to Jokisch[142], it was a process intra-connected to the centralization of the Judiciary which requires: 1) formation of a jurist class; 2) definition of judgeship; 3) appointment of a Chief justice; 4) appointment of judges (tentatively surveyed between 786 and 850 in and outside Bagdad).

In the third part of Jokisch's book, he analyzes the transformation from an imperial endeavor to a jurist's law system. In essence, he considers[143] that Shaybani and Abu Yusuf smoothed the path for this evolution by mixing "secular law" and religious authority by the use of *hadith*. Later, during the conflict between *ahl al-ra'y* and *ahl al-hadith* movements, Shaybani's pupil, Shafi'i, defended the absolute priority of the Qur'an and *Sunna* rejecting the biding force of Shaibany's code but using his hermeneutics on the Qur'an and *Sunna* and borrowing substantive law from the *Digestsumma*. After the triumph of Orthodoxy, Jokisch sustains[144] that the Abbasid caliph al-Mutawakkil (847-861) officially endorsed a systematic process of traditionalization, the redefinition of the concept of *umma* as the Muslim community, and the development of the *Madhab* system as the primary instrument for controlling Islamic legal and theological education. In Jokisch's hypothesis[145], the triumph of the Sunni Orthodoxy emphasizing the divine origin of the Qur'an addressed the legal scholars toward methods to define the nature of the Qur'an as the cornerstone of the Muslim legal theory. He comparatively explores Shaybani's *Usul* work and the Digests, his shift to Orthodoxy in his *Risala,* and the four sources structure of the Muslim legal system implemented by Shaybani[146]. In Jokisch's proposal[147], the early development of *usul al-fiqh* was in three phases: "1) the reception of a section on legal theory in the Digests by Shaybani; 2) the combination of Shaybani's legal theory in the *Risala* of Shafi'i with the four-sources scheme borrowed from Orthodox Christianity; and 3) the integration of Shafi'I's theory into the Organon of Aristotle", "as a systematic integration of law into a thoroughly developed system of logic". If this is true, Jokisch concludes that "the impact of Islam on the development in Europe goes far beyond what has been supposed" and "this would mean that in fact,

[142] *Ibid*, 287-311.

[143] *Ibid*, 313.

[144] *Ibid*, 314-316.

[145] *Ibid*, 517-519.

[146] *Ibid*, 520-577.

[147] *Ibid*, 573-574.

Islam inspired this development"[148], and consequently, the new European scholasticism that emerged in the 11th century based on Roman law but inspired but the legal Muslims achievements. It is a captivating and fascinating conclusive supposition, although, is not sufficiently proved and requires further research.

In sum, Benjamin Jokisch made a stimulating, detailed, and original thesis that offers a complete alternative explanation of the origin of the Muslim legal system. He defends that, initially, was codified in Bagdad and sponsored by the caliph, using the Justinian *Corpus Iuris Civilis* as a blueprint, extensively based on the *Anonimus Digestsumma* and the Enantphanes' Gloss, and some indirect receptions of provincial, Jewish, and Eastern Christian laws and practices. The development by independent religious jurist scholars was a later stage after the triumph of the Muslim Orthodoxy[149].

Almost a decade later, in 2018, Irem Kurt explored a topic related to Jokisch's research but not examined by him on the possible relation between Roman and Muslim legal maxims[150]. As Kurt explains, legal maxims existed at a very early stage of development of the Islamic legal system, which was a product of the spirit of the age (*Zeitgeist*)[151], under the social and theological unrest of its era and the eventual influence of the Byzantine-Roman culture. In Kurt's opinion[152] Roman jurists and Hanafite jurists had similar methods, both used legal reasoning with a causative input, and Muslim jurists knew Roman *regulae* as legal principles rooted in the early sacral time of Roman law. Kurt carefully reviewed the parallelisms between some legal maxims, among them, the *nuptia regula* ("*Pater est quem iustae nuptiae demonstrat"*) with the Muslim *firash* maxim ("*al waladu li sahihil firash*"). After an extensive analysis, Kurt concluded[153] that both maxims have clear parallelisms, and both affirm that "the child belongs to the marital bed" as a legal rule, even if the Muslim jurists traced the aphorism to a Prophetic hadith. For Kurt, the Muslim legal system emerged with terminology and background of Late Antiquity, and Muslim jurists did not copy Roman law, since introducing substantial

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[148] *Ibid*, 616.

[149] See his detailed conclusion at *ibid*, 616-625.

[150] KURT, I. "Legal Maxims in Islamic and Late Roman Law" *Usul İslam Araştırmala*rı, 30 (2018): 55–84.

[151] *Ibid*, 57-62.

[152] *Ibid*, 63-78.

[153] *Ibid*, 79-82.

innovations, some of them rooted in Byzantine-Roman law, that allowed merging in a coherent and creative juridical system.

In 2008, Walter Young confronted two questions regarding the origins of the Islamic legal system, initially framed as an Orientalist topic[154]: 1) the lack of a consistent datable formative period; 2) the problematic reasoning and arguments presented by scholars, primarily oriented to lessen the multifaceted patterns of cultural inheritance. In essence, he agrees with the balanced analysis of Motzki and Hallaq, pioneers of critical theory in legal history. In his opinion, the origins of the Islamic legal system "remained a dynamic field of exploration", where cross-germination, Islamic juridical pluralism, the role of Islamic axioms, the under-lying forces of dialectical disputation, and the avoidance of unsupported assumptions, should be taking into serious consideration.

Many Muslim scholars take a quite antagonistic and belligerent approach to the Roman influence on the Muslim jurisprudence from an anti-Orientalist and anti-colonial attitude. One of the most recent articles, from 2019, was written by the Afghan scholar Zahid Jalaly, focused on possible parallelisms in International law, between the Roman notion of *ius gentium* and the Muslim term of *siyar*, as international law (*qanun al-dawli)*[155]. A fascinated topic to explore that, unfortunately, became a shallow analysis defending the non-direct or indirect relationship between both without substantial evidence or arguments to support his hypothesis.

In 2009, Aibek Ahmedov attempted to evaluate the distinction between direct and indirect influences of Roman law[156], the first by copying Roman legal books, as Jokisch suggested, the latter transmitted by Jewish, Syriac, or provincial laws and practices, as Crone affirmed. In his opinion[157], although both types of influence were possible, in some cases, the impact of Roman law in the Islamic legal system is apparent or minor, and should be tested by focusing the attention on Roman-Syriac law books.

The same year, John Hursh focused his analysis on the role of culture as a socio-historical element that influenced the origin of Islam and

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[154] YOUNG, W. E. "Origins of Islamic Law." *The [Oxford] Encyclopedia of Islam and Law. Oxford Islamic.* Digital access, *http://www.oxfordislamicstudies.com/article/opr/t349/e0106*

[155] JALALY, Z. "Is Islamic Law Influenced by Roman Law? A Case Study of International Law". *Kardan Journal of Social Sciences and Humanities* 2 /1 (2019): 32–44. Digital access, *https://kardan.edu.af/data/public/files/KJSSH-v2i1-320112019114050.pdf*

[156] AHMEDOV, A. S. "On Question of Influence of Roman La won Islamic Law". *Diritto e Storia* 8 (2009). Digital access, *http://www.dirittoestoria.it/8/Contributi/Ahmedov-Influence-%20Roman%20law-on-Islamic-law.htm*

[157] *Ibid*, 18.

the development of the Muslim legal system[158]. Hursh supported his argument considering that Muhammad allowed the practice and adoption of pre-Islamic Jewish and Christian cultural and legal practices, as long as they did not contradict the Qur'an, and this pattern of selective adoption continued after Muhammad's death[159].

In 2011, the Austrian legal comparatist in civil and canon law Richard Potz challenged the traditional role of Islam as an external and antagonist factor in the European legal history, following in part the arguments of George and John Makdisi[160]. As Potz explained, Europe, although it has a long history of antagonism between Christian and Muslim rulers, also has two legal histories, the Roman-canonical, in the Christian lands, and the Islamic, in the territories under the Islamic rule; besides, the Islamic legal influence on Christian lands was also factual, principally, in commercial law, contract law, and trades relations. There is no doubt that Western Canon law regulations confirmed this antagonism in the *Decretum Gratiani* (1114) that included a letter by Pope Alexander II (1073) emphasizing the different treatment between peaceful Jews and aggressive Muslims. From the end of the 12th century onward, the collection of Pontifical Decretals, reinforcing the papal authority over Christendom, always contained a section dedicated to the interaction and severe legal restrictions with Jews and Saracens. As I recorded before[161], in the case of Muslims under Canon Law - following David M. Freidenreich's analysis - between the 7th to the 11th centuries, it is not always evident in Canon law that any given statement about non-Christians refers specifically to Muslims. In addition to the terms Saracens, Hagarenes, and Arabs, Christian authorities regularly refer to Muslims as pagans, gentiles, and barbarians[162]. In general terms, all restrictions applied to Jews were applied to Muslims[163]. There is also important to

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158 HURSH, J. "The Role of Culture in the Creation of Islamic Law," *Indiana Law Journal* 84/4 (2009): 1401-1423. Digital access, *http://www.repository.law.indiana.edu/ilj/vol84/iss4/11*

159 *Ibid*, 1423.

160 POTZ, R. "Islam and Islamic Law in European Legal History" *European History Online* 2011 *http://ieg-ego.eu/en/threads/models-and-stereotypes/from-the-turkish-menace-to-orientalism/richard-potz-islam-and-islamic-law-in-european-legal-history*

161 MORAN, G. M. "The Challenge of Pluralistic Societies with Dissimilar Identities and Religious Legal Traditions, 14-15.

162 D. M. FREIDENREICH, "Muslims in Canon Law, 650-1000". *Christian-Muslim Relations. A Bibliographical History. Volume 1 (600-900)*. Brill, 2009, pp. 83-98.

163 Further analysis, in STANTCHEV, S. K., "Apply to Muslims What Was Said o the Jews:" Popes and canonists Between a Taxonomy of Otherness and Infidelitas. *Law and History Review* (2014): 65-96. Digital access, *https://doi.org/10.1017/S073824801300062X*

keep in mind the distinction between Islamic Law from Saracen Law. The latter one is applied by the Christians, from early medieval times, and by the 19th century´s Orientalists, mostly in a derogatory narrative style[164]. Regarding to commercial relations, in the 3rd (1179) and 4th (1125) Lateran Ecumenical councils included specific trading regulations prohibiting Christian to sell weapons, wood, and iron to Saracens, under the penalty of excommunication; however, in the Iberian Peninsula emerged an specific Christian-Islamic contractual practice[165]. Besides the Classical Muslim distinction between the house of Islam (*dar al-Islam*) and the house of war (*dar al-harb*), Muslim jurists developed a third category, the house of treaty (*dar al-'ahd*)[166]. As Potz, pointed out[167], after the conquest of Sicily by the Normans, in the 11th century, when a large population of Muslims became subjects to Christian rule, the *dhimmi* concept was borrowed from the Muslim legal system, and in the Kingdom of Aragon after the conquests of King James I in the 13th century, a tolerant attitude toward Muslims prevailed to avoid massive depopulation of the conquered lands.

Finally, regarding the role of Islamic law in European legal history as an intermediary between Antiquity and European Middle Ages, Potz mentioned the possible influence of Islamic law on English Common law, as John Makdisi previously explored. Potz pointed out, not only the adjustments made by Muslim practice on the ancient Mediterranean Maritime law, that remained in practice for centuries, but also the extensive contractual terminology borrowed from Arabic terms, like *aval*, and perhaps *commenda.* Principally, in Spain and Sicily, this process and practice were intensive, whereas, there is an ongoing debate[168] on the influence of Islamic legal system on the Visigoth *Liber Iudiciorum* and the *Siete Partidas* of the Castilian king Alphonse X, and there is a need of further studies in legal history on such an influence[169].

In 2015, Anver Emon, a Canadian law professor leading expert in Islamic legal history, offered an innovative and enlightening approach to the origins of the *Fiqh* and the scholar debate that emerges in the

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[164] For a complete analysis see J. V. TOLAN, *Saracens. Islam in the European Medieval Imagination*. Columbia University Press, 2002.

[165] POTZ, R. "Islam and Islamic Law in European Legal History", *ibid*, 19.

[166] *Ibid*, 16-17.

[167] *Ibid*, 20-21.

[168] BOISARD, M.A. "On the Probable Influence of Islam on Western Public and International Law" in *International Journal of Middle Eastern Studies* 11 (1980): 429–450.

[169] *Ibid*, 25-38.

Modernity. In his opinion[170], and taking into account the outstanding analysis of Suzanne Marchand on German Orientalism[171], the European narrative on Orient, from the Orientalists onward, is a binary distinction between Europe and the East. Many scholars are still attached to it from a western globalist approach. I agree with Emon and Marchand in considering the European narrative on Orientalism, a cultural phenomenon with political, racial, and religious implications from an imperial worldview. Also, I must recognize like them that the Orientalist wave in Islamic philological and legal history studies could not disengage itself from the European Positivist trend of the 19th to the 20th centuries.

In Emon's opinion, the role of the philological research in legal history is essential and in Islamic history takes back to the pre-Modern Madrasa model. However, the implicit positivism of the philological enterprise focusing on the texts themselves often embodied them with a canonical status in the European academe[172].

Indeed, Orientalist and neo-Orientalist debates between the past and the present involve at least two distinctive and multifaceted academic dialogues, those of historical-philological-anthropological analysis and those requiring social-legal-historical hermeneutics.

From a historical approach, for Emon, Arabic philology still plays a substantial role in respect to *Fiqh* sources. Nevertheless, in his opinion[173], philology often evidences a historical positivism that runs against the interpretative turn in human sciences, particularly, in literary studies; for this reason, he opposed to the hegemonic role of philology because Islamic legal texts required a harmonizing approach paying attention to the text, the contest, and its limits. Many legal Islamic studies are paying attention to the ritual frame connecting Law to Anthropology, shifting from a positivist approach to a socio-cultural one.

From a legal approach, Emon takes into account Behnam Sadeghi's argument[174] affirming that "juristic reasoning about *fiqh* was not a deductive process from the sources to legal rule, but rather the opposite"[175]. It means that the early Muslim jurists as the Christian canon

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[170] EMON, A.M. "Fiqh" The Oxford Handbook of Islamic Law *Edited by Anver M. Emon and Rumee Ahmed 2015*. DOI: *https://doi.org/10.1093/oxfordhb/9780199679010.013*.4

[171] MARCHAND, S.L. *German Orientalism in the Age of Empire: Religion, Race, and Scholarship*. Cambridge University Press, 2010.

[172] EMON, A.M. "Fiqh", 4.

[173] *Ibid*, 8-10.

[174] SADEGHI, B. *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition*. Cambridge: Cambridge University Press, 2015.

[175] EMON, A.M. "Fiqh", 16.

lawyers later started with a legal doctrine known and accepted, and moved back to the source texts to create a legitimating platform for legal support.

6 - Conclusive remarks

Let me summarize and emphasize the main ideas explored and developed in this article.

- The symbiosis in the intercultural dynamics of history is a continuum reciprocal feedback process of influx, transmission, absorption, revivals, and re-creations without clear geographical borders. Mystery religions, Gnosticism, Messianic, Prophetic and holy book traditions, Mazdeism, Judaism, Judeo-Christianities, and different heterodox Christian communities living in the desert and distant from orthodoxies implemented by imperial powers, in one way or another nourished the surfacing of multiple cultural, political, and religious identities converging under the umbrella of Islam. The emergence and early expansion of Islam, aside from conventional narratives and stereotyped interpretations, was the result of an Arabization of the Abrahamic legacy through this symbiosis.
- Under the trending revisionist wave, Western scholars from the 19th century onward proposed several alternative interpretations to the traditional Muslim narrative challenging the factual validity of the Muslim sources, written almost two centuries after those events took place. From the middle of the 19th century forward, Islamic scholar literature offers different analyses, interpretations, speculations, and narratives that open a complex debate between Muslim and non-Muslim scholars. Most of the non-Muslim scholars challenge the traditional Islamic historiography from some of the different fields of Social Studies as secular disciplines, mainly, Medieval History, Legal History, Philology, Philosophy, Political Science, Comparative Religious Studies, Sociology, and Anthropology.
- We should keep in mind that the concepts of conquest and conversion always linked to political and religious ideologies carrying dominant interpretations used as propaganda of 'undisputed' truths; and, at the same time, revisionist scholar interpretations can hide new forms of neo-Orientalism when defending Western secularism as a 'superior' ideology, in a similar way that Western Christianism played in the colonial ideology.
- When comparing religious jurisprudence, like Jewish, Zoroastrian, Christian, and Muslim, with a secular one, it is essential to keep in mind that all of them are rooted in divine law. They are theocratic legal systems

because their ultimate submission is to the supreme ruling of God; so, legal reasoning is always theologically limited by the absolute divine rules, and the interpretation of the relationship between human and divine law is as intricate as multifaceted.

- It is essential to be aware of two epistemological risks: first, the dangers of a simplistic binary debate like traditionalists v. revisionists, religious v. secular, or even Sunnis v. Shiite reducing the analysis to an ideologically polarized and ineffective dispute; and second, the improper use of juridical neologisms applied to the Islamic legal system, mainly from codified European continental law and English common law as a result of the Orientalist, colonialist, and secularist mentalities that, instead clarification create confusion.
- Consequently, the development of the Muslim juridical system is closely related to the development of Islamic theology. In the Abrahamic faiths, law and theology are breathing from the same religious space, as we can also see in Judaism and Christianity. The notion of divine law interconnects law and theology with social struggles and political leadership in each community, conveying tensions between belief and reason, divine law and its legal interpretation, tradition or reform, and indeed, between religious authority and political power.
- In the last decades of the 7th century began the earlier Muslim legal reasoning in the former Byzantine and Sasanian territories under the Arab hegemony. They were societies permeated not only by Arab tribal customs but also by the previously established juridical systems, customs, and legal practices. Roman law, provincial law, the Sasanian Circle of Justice, Jewish, Christian, and Zoroastrian legal traditions were part of these communities in an overlapping process. The Islamic legal system was able to develop a full identity under the Traditionalist movement, a theological current that emerged in the 8th century and gained strength in the 9th and the 10th centuries, becoming the dominant theological movement in Islam from the 11th century onward; consequently, Muslim traditionalist jurists reject any foreign legal influence and defend its exclusive development from Muslim sources, mainly, the Qur'an and the *Sunna*.
- The conflict in Islam between traditionalism represented by the *Ahl al-hadith* movement, and rationalism defended by the *Ahl al-Ra'y* movement, did not find an unequivocal common ground. The aftermath of this dispute reformulated the caliph's power, changed the development of the Islamic legal system, and empowered the *ulema* as the religious authority.
- The distinction between *Usul al-fiqh* and *Usul al-qanun*, often blurred in practice, shows the complexities of the relationship among religious, legal, and political structures under Muslim ruling. In medieval times, the

loose edge between religious law and political governance presents some similarities between Christian and Muslim religious legal systems. Two remarkable examples are the *Episcopalis audientia* and the imperial nomocanons, correlated to Muslim legal practices, like *Mazalim* courts -as the caliphal institution of complaints and grievances to remedy injustices- and *Siyasa al-shar'iyya* -allowing Islamic rulers to legislate over religious and secular matters. *Al-Siyasa*, as proper political governance, includes legislative powers enacting administrative, fiscal, and criminal norms implemented by Muslim rulers in their territorial domains. *Siyasa al-shar'iyya* enshrined the Muslim ruler governance, following *Sharia* principles and *fiqh* like nomocanons absorbed Christian principles and included canons of Church councils and imperial legislation.

- The hegemony of the Traditionalist movement in the 10th century changed the course of Muslim history, as the Gregorian reformers in the 11th century transformed the path of Western Christianity. The *ulema* and the jurist-theologians *mujtahidun* retained their authority independent from caliphs and sultans from the 9th century. Comparatively, the Catholic episcopate and papacy maintained their religious authority from the 6th century onward, achieving papal supremacy from the 11th century to the Avignon papacy, thanks to the papal ideologists, mostly theologians and canon lawyers, who developed theological and legal arguments demanding primacy of the religious authority, as spiritual, over the imperial power, as secular.
- The paradigm of legal separation between Muslims and non-Muslims prevailed in the Muslim polities, as it did in the early Germanic kingdoms between Romans and Barbarians. Nevertheless, the outcome process was different, because the Arabization and Islamization of the locals took place at a large scale; the Barbarians, on the contrary, were romanized and progressively abandoned their Arian faith becoming Catholics as the local Romans, channeling the integration process by assimilating the Roman heritage.
- One of the challenges of the Muslim rulers was to elaborate regulations over non-Muslims, as it was for the Barbarians. The Islamic legal solution was more tolerant than the Visigoth policies, particularly on the Jews, based on the development of the notion of *dhimmi*, as a protected non-Muslim but not legally equal to Muslims. It was a unified model of accommodation for religious minorities with a sacred Monotheist text that did not distinguish between Jews and Christians. Those regulations were, in general, less oppressive than the Byzantine and Visigoth anti-Jewish legislation. Under the juridical space created by the *dhimma* system, legal pluralism expands. In the former territories of the Eastern Roman Empire and the Sassanian Empire, the Islamic rule allowed the development of

multiple institutions, formal and informal, and plural interpretations into a single Muslim order, adjusting the diversity and the dynamics of those cultural and religious identities. Religious minorities under the Muslim rule were able to have their jurisdictional structures, mainly in civil cases, generally regarding Family law. Criminal offenses were usually held by Muslim judges, as the Barbarian courts did it. In the same way, in cases of civil conflicts between Muslims and non-Muslims were resolved by a Muslim judge. The Islamic legal system allowed the interaction between the principle of personality and the principle of territoriality. It means that Muslim and non-Muslims could apply to the Sharia regarding contract law, property law, family law, and inheritance litigations, even if both parties were non-Muslim.

- Aside from the traditional Islamic version on the origins of the Islamic legal system, the last part of this research shows the evolution and *status quaestonis* according to the most remarkable critical historiography and academic literature, and the reciprocal influences with other legal systems explored by philologists, islamologists, and legal comparatists with Orientalists, post-Orientalists, and neo-Orientalists perspectives. These debates between the past and the present involve at least two distinctive and interdisciplinary academic dialogues of historical-philological-anthropological analysis and those requiring social-legal-historical exegesis.
- These influences that could receive the development of the Muslim legal system are from two roots: 1) religious, mostly from Jewish, Zoroastrian, and early Christian sources; 2) secular, mainly from Roman, provincial, administrative, and maritime laws and legal practices, even through an imperial codification project under the sponsorship of Harun al-Rashid, in a Justinian style but never published or formally enacted, and disputable existence. However, we must keep in mind that, in Late Antiquity, there was a blurred division between secular and religious, and it was an overlapping and intertwined dynamical process from a multifaceted heritage. A process by which the jurists -the early Muslim *fuqaha* in Late Antiquity and Medieval Christian canon lawyers later- started with a legal doctrine known and accepted, and moved back to the source texts to create a legitimating platform for legal support. Occasionally, built up from forgeries or borrowings from other legal systems attributing them a religious origin, like the Pseudo-Isidorian Decretals and some forged *hadiths*.
- Finally, we should pay attention to 1) the reciprocal influence between the Islamic and Byzantine cultural awakenings, or Classical Renaissances in the 9th and 10th centuries, not sufficiently studied at juridical level; 2) the reception that the matured Islamic legal system and

legal theory could have in the development of the Medieval European legal systems in the 11th and 12th centuries, specifically Common law and *Ius commune*, mainly through the Muslim Europe of Al-Andalus and the Muslim juridical legacy in Sicily under the Normans. This innovative research opens a new and rather unexplored space of comparative juridical relationships between Classical Islam and Medieval Christianity.