

# THE PROBLEM OF FOREIGN INFLUENCES ON EARLY ISLAMIC LAW

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## I. Introduction.

The origin of Islamic doctrine is the subject of one of the most serious debates among Islamic scholars. Wellhausen, Andrae, and Ahrens were of the opinion that Christianity "played the decisive role in the birth of Islam."<sup>1</sup> Richard Bell went even further by saying that popular influence, theology, and the transmission of Greek Philosophy were the important areas in which Christianity affected the development of Islamic teaching.<sup>2</sup> Torrey, on the other hand, contends that the doctrine that the basis of Islam was mainly Christianity is completely refuted by the evidence which the Qur'an furnishes and by the materials gathered from pre-Mohammedan Arabia<sup>3</sup>. Moreover, according to him, "....in the Koran itself there is no clear evidence that Mohammed had ever received instruction from a Christian teacher....."<sup>4</sup>

Islamic law, as the central core of Islamic doctrine, is also affected by such controversy. During the last few years there has been a serious discussion among Islamic scholars on the origin and the early development of Islamic law. In 1950, at the third International Congress of Comparative Law, Joseph Schacht addressed the problem in his paper entitled "Foreign Elements in Ancient Islamic Law,"<sup>5</sup> which investigated the influence of Roman law on

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<sup>1</sup>Charles Cutter Torrey, *The Jewish Foundation of Islam* (New York: Ktav Publishing House, Inc., 1967), VII - VIII.

<sup>2</sup>Richard Bell, *The Origin of Islam in Its Christian Environment* (London: Frank Cass and Company Limited, 1968), 190.

<sup>3</sup>Torrey, *Jewish Foundation*, XXVIII.

<sup>4</sup>*Ibid.*, 7. H.A.R. Gibb also presents the polemical viewpoint regarding the origin of Islamic teaching in his *Mohammedanism*, Second Edition (Oxford: Oxford University Press, 1962), 73 - 4. See also James Kritzeck, *Sons of Abraham : Jews, Christianity and Moslems* (Baltimore: Helicon Press, 1962), 32 - 4.

<sup>5</sup>Published in *Journal of Comparative Legislation and International Law XXXII* (1950) : 9 - 17.

Islamic law. Shortly afterwards, S. Vesey Fitzgerald published an article entitled "The Alleged Debt of Islamic to Roman Law."<sup>6</sup> Contrary to Schacht, Fitzgerald contended that Islamic law was not influenced by Roman law.

The present essay corroborates Schacht's conclusions, and I shall argue that the influence on Islamic law came not only from Roman law but also from other sources such as pre-Islamic Arab tradition and Judaic law.

## II. Islamic Law.

Law in any society plays a decisive role. The primary purpose of any law is to make social life possible. Law, according to some scholars, "is the legal norm approved by the people..... and derives its authority from the reason and will of man, and his moral nature."<sup>7</sup> Law reflects the values current in a society at any given time. The society has its starting point in the formulation of a legal code for its acts and activities. "Opinions about what constitute legal or illegal acts change, sometimes diametrically, as values change. When this happens the law is changed accordingly."<sup>8</sup>

The Muslim conception about law<sup>9</sup> is quite different. Islam "regards God as the sole source of law and absolutely denies the power of any human authority to legislate."<sup>10</sup> "The principle that God was the only Lawgiver and that His command was to have supreme control over all aspects of law was clearly established."<sup>11</sup> Islamic law is comprehensive in that it regulates every aspect of human activity and touches every sphere of daily life. "Not only

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<sup>6</sup>Published in *The Law Quarterly Review* (January 1951) : 81 - 102.

<sup>7</sup>D. De Santillana, "Law and Society," in *The Legacy of Islam*, eds. Sir Thomas Arnold and Alfred Guillaume, First Edition (Oxford: Clarendon Press, 1931), 288.

<sup>8</sup>M. Mustafa al-Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (Saudi Arabia : King Saud University Press, 1985), 5.

<sup>9</sup>There are many terms used for law in Islam, some of them being: Islamic law, Divine law, Sacred law, Religious law, *Shariah*.

<sup>10</sup>Fitzgerald, "The Alleged Debt," 82. See also Norman Anderson, *Law Reform in the Muslim World* (London: The Athlone Press, 1976), 38.

<sup>11</sup>N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1990), 20. The Following Qur'anic passages are relevant : 45 (18) : "And now have We set thee (O Muhammad) on a clear road of (Our) commandment; so follow it, and follow not the whims of those who know not." 6(155) : "And this is a blessed Scripture (Qur'an) which We have revealed. So follow it and ward off (evil), that ye may find mercy." 5 (47) : "Whoso judgeth not by that which Allah hath revealed; such are evil-livers." 5 (44) "Whoso judgeth not by that which Allah hath revealed : such are disbelievers." 4 (14) : "And whoso disobeyeth Allah and His messenger and transgresseth His limits, He will make him enter Fire, where such will dwell for ever; his will be a shameful doom."

contracts, criminal matters, marriage and divorce, etc., but also dress, food-stuffs, ritual, and even the forms of greeting and courtesy are decreed by the Islamic law."<sup>12</sup> Traditionally, some *fuqaha'* divide the subject-matter of Islamic law into two general categories: '*ibadah* and *muamalah*.'<sup>13</sup> Some other *fuqaha'* divide the subject-matter into *ibadah mahdah* (*ibadah*) and '*ibadah ghairu mahdah* (*mu amalah*). The central feature of Islamic law is the assessing of all human acts and relationships (*ibadah* and *mu amalah*) from the point of view of the following concepts: obligatory (*wajib* or *fard*), recommended (*nadab* or *sunnah*), indifferent (*mubah*), reprehensible (*makruh*), and forbidden (*haram*).<sup>14</sup>

Having considered the conception of Islamic law, it is understandable that Schacht should write "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself." In his view ".....it is impossible to understand Islam without understanding Islamic law."<sup>15</sup>

Some Muslim scholars go even further. They cling to the belief that Islamic law is totally divine and devoid of any historical development.<sup>16</sup> Law, according to them, "is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society."<sup>17</sup> "In this," Coulson writes, "the traditional picture of the growth of Islamic law completely lacks the dimension of historical depth."<sup>18</sup>

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<sup>12</sup>Charles J. Adams, "The Islamic Religious Tradition," in *Religion and Man : Judaism, Christianity, and Islam*, ed. W. Richard Comstock (London: Harper & Row, Publisher, 1972), 184.

<sup>13</sup>*Ibadah* is the relationship between *khalīq an-i makhluq*, while *mu amalah* is the relationship among *makhluq*.

<sup>14</sup>Adams, "Islamic," 184. See also Joseph Schacht, "Islamic Religious Law," in *The Legacy of Islam*, Second Edition, eds. Joseph Schacht and C.E. Bosworth (Oxford : Clarendon Press, 1974), 396. Santillana, "Law and Society," 289.

<sup>15</sup>Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 1. See also Joseph Schacht, "Theology and Law in Islam," in *Theology and Law in Islam*, ed. G.E. von Grunebaum (Wiesbaden : Otto Harrossowitz, 1971), 3 - 4. Layish also emphasizes this point in his "Notes on Joseph Schacht's Contribution to the Study of Islamic Law," *British Society for Middle Eastern Studies, Bulletin* 9 (1982) : 133.

<sup>16</sup>David S. Forte, "Islamic Law : The Impact of Joseph Schacht," *Loyola of Los Angeles International and Comparative Law Annual* 1 (1978) : 3.

<sup>17</sup>Coulson, *History*, 1 - 2. See also Philip K. Hitti, *Makers of Arab History* (London : Macmillan, 1968), 168.

<sup>18</sup>Coulson, *History*, 2.

Contrary to traditional belief "Schacht indicated that most of Islamic law, including its sources, resulted from a process of historical development."<sup>19</sup> His thesis, as elaborated in his famous books *The Origins of Muhammadan Jurisprudence* and *An Introduction to Islamic Law*, "was concerned with the historical development of Islamic law," and confirmed Goldziher's thesis of the nature of (legal) Traditions.<sup>20</sup> His "discovery" made a tremendous impression on some Islamic scholars. When he published *The Origins of Muhammadan Jurisprudence* in 1950, the book immediately met with immense approval.<sup>21</sup>

Some scholars have addressed various critiques to Schacht's thesis. Their critiques mostly concentrate on his two main theses: the origin of Islamic law, and the authenticity of (legal) Traditions.<sup>22</sup> Nevertheless, whatever their response, Schacht's thesis remains a great "discovery" in the field of Islamic law. Anyone who analyses Islamic law based on historical understanding and not on religious understanding would confirm Schacht's thesis and accept our general contention that the growth of Islamic law was (and is) closely linked to current social, political, and economic conditions. The Qur'an itself, according to the reports of *mufasssirun*, came down to Muhammad gradually over a period of 22 years, and most of its verses were revealed because of special circumstances (*asbāb al-nuzūl*).

### III. Foreign Influences on Islamic Law.

The Islamic civilization, like other civilizations, came directly and indi-

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<sup>19</sup>Forté, "Islamic Law," 8 - 9.

<sup>20</sup>Layish, "Notes on Joseph Schacht," 133 - 4.

<sup>21</sup>See the following remarks : Watt, *Journal of the Royal Asiatic Society* (1952), 91 : "a landmark.....study...likely to be the basis of all future work on the subject." J.N.D. Anderson, *Die Welt des Islams* 2 (1952), 136 : "a new landmark.....The Validity of his main contentions appear inescapable." Robson, *The Muslim World* 42 (1952), 62 : "...one can only admire the critical insight which has enable the author to come to his conclusion and support it so convincingly." Ritter, *Oriens* 4 (1951), 312 : "...a thorough methodological and highly original book....." Jefferey, *Middle East Journal* 5 (1951), 393 : "...meticulous in detail, sober in judgement, and clear in exposition. It becomes perfectly clear from his analysis that the origins of the juristic system of Islam are in practice of the Umayyad period...."

<sup>22</sup>Some scholars who challenge Schacht's thesis are : Azami in his *On Schacht's Origins of Muhammadan Jurisprudence* and *Studies in Early Hadith Literature*; Coulson in his *A History of Islamic Law* and "Correspondence," *Middle Eastern Studies* 3 (1967) : 195 - 203; Abbott in her *Studies in Arabic Literary Papyri* volume 2; Rahman in his *Islam, Islamic Methodology in History, and Some Islamic Issues in the Ayyub Khan Era*; Powers in his *Studies in Qur'an and Hadith : The Formation of Islamic Law of Inheritance*.

rectly into contact with its surrounding environment.<sup>23</sup> Islamic law therefore, being so important an aspect of Islamic civilization, could not have avoided contact with the laws of other civilizations.

In the previous section we concluded that historically, Islamic law was closely linked to social developments. We will try to demonstrate, in this section, the influence of foreign elements on Islamic law, and will concentrate more on pre-Islamic Arab tradition, Judaic law, and Roman law.

### A. Pre-Islamic Arab Tradition.

The advent of Islam in the seventh century of the Christian era marked a clear division in the political and religious history of Arabia. According to Muslim understanding, the pre-Islamic period is called *jahiliyah* (age of ignorance). From a religious standpoint, this term corresponds especially to the polytheistic beliefs and rituals that characterized religious life in Arabia.

To a large extent it seems true that the birth of Islam had almost nothing to do with pre-Islamic Arab tradition. "...Islam meant a complete and definite break with the preceding period....."<sup>24</sup> However, it is also clear and undeniable that many basic aspects, even practical ones, were derived from pre-Islamic Arab tradition. According to Izutsu:

"We would do a grave injustice, however, to the spirit of *Jāhiliyah* and even to the position of Islām itself if we supposed that the latter denied and rejected without discrimination all the moral ideals of pre-Islamic Arabia as essentially incompatible with its monotheistic faith. There is clearly recognizable a certain continuity between the Qur'ānic outlook and the old Arab world view, as much as there is a wide cleavage between them." "Some of the pre-Islamic values were totally rejected by the Qur'ān. But most of them were accepted, modified, and developed, in accordance with the demands of the new religion. The old views, thus radically transformed and entirely cut off from the traditional tribal mode of life, were reborn as new ethico-religious values and came to form an integral part of the Islamic system."<sup>25</sup>

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<sup>23</sup>Some general discussions how Islamic civilization came into contact with other civilizations can be found in G.E. von Grunebaum, *Medieval Islam : A Study in Cultural Orientation* (Chicago : The University of Chicago Press, 1947); De Lacy O'Leary *How Greek Science Passed to the Arabs* (London : Routledge & Kegan Paul LTD., 1964); Stephen F. Mason, *A History of Science*, New Revised Edition (New York: Macmillan Publishing Company, 1962).

<sup>24</sup>Toshihiko Izutsu, *Ethico-Religious Concepts in the Qur'ān* (Institute of Islamic Studies-McGill University Press, 1966), 251.

<sup>25</sup>*Ibid.*, 74, 252. Izutsu devoted himself to a lengthy discussion of the Islamization of the old Arab virtues such as generosity, courage, loyalty, veracity, and patience (74 - 104). See Frederick M. Denny, *Islam and the Muslim Community* (London: Harper & Row Publisher, 1987), 15 - 7; W. Montgomery Watt, *What is Islam ?* (Washington : Frederick A. Praeger Publisher, 1968), 28 - 31.

In the field of Islamic law, most Muslim jurists accepted the view that pre-Islamic Arab tradition forms a large part of both the source and the subject-matter of Islamic law.

The *sunnah* is a clear example of a concept which Islamic law derived from pre-Islamic Arab tradition. *Sunnah* is a term which in pre-Islamic Arabia meant "Custom of the community handed down by oral transmission."<sup>26</sup> It consists of the "habitual practice, customary procedure or action, norm, standard, or 'usage sanctioned by tradition'."<sup>27</sup> Islam, according to Gibb, "also developed its own *sunnah*, its proper system of social and legal usages, whether these were taken over from older custom or were set by the Prophet."<sup>28</sup>

In the field of Islamic law the *sunnah* of the Prophet has a decisive role. It was Shāfi'ī (d. 820) who first explicitly established the *sunnah* of the Prophet as the second fundamental source of Islamic law.<sup>29</sup> Shāfi'ī, Schacht contends, was the scholar more than any other responsible for the development of the theory of the four principle sources of Islamic law; Qur'ān, *sunnah* of the Prophet, *ijma'*, and *qiyās*.<sup>30</sup> Although there is a controversy regarding the authenticity of the *sunnah* of the Prophet, most (if not all) Muslim scholars have the view that the *sunnah* of the Prophet is the exemplar and model-behaviour for the Muslim community, and an indirect source of divine revelation for their way of life.

Other important aspects of pre-Islamic tradition surviving in Islamic law can be seen in the areas of family law, the important position of the *hakam*, and certain other features which are clearly derived from pre-Islamic Arab tradition.

Let us observe here some of the more important aspects of family law, such as marriage, divorce, inheritance, and *dīhar*. Polygamy, which is sanctioned by the Qur'an and the *sunnah* of the Prophet,<sup>31</sup> was a common practice

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<sup>26</sup>Gibb, *Mohammedanism*, 73 - 4.

<sup>27</sup>Mircea Eliade, ed. *The Encyclopedia of Religion* (London : Macmillan Publishing Company, 1987), s.v. "Sunnah," by Marilyn Robinson Waldman. See also M. TH. Houtsma and others, eds. *The Encyclopaedia of Islam*, Old Edition (Leyden : E.J. Brill, 1937), s.v. "Sunna," by A.J. Wensinck.

<sup>28</sup>Gibb, *Mohammedanism*, 73.

<sup>29</sup>Shāfi'ī's thesis is elaborated in his book *al-Risālah*.

<sup>30</sup>Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford : Clarendon Press, 1959), 1 - 2. See also Mircea Eliade, ed. *Encyclopedia*, s.v. "Muhammad," by W. Montgomery Watt.

<sup>31</sup>For the Qur'ān and the *sunnah* of the Prophet, see Kawthar Kāmil 'Alī, *Nizām Ta'addud al-Zawjāt fi al-Islām* (al-Qāhirah : Dar al-I'tisām, 1985), 29 - 53.

of the pre-Islamic Arabs.<sup>32</sup> Although there are different views concerning the limit on the number of wives which a Muslim husband can marry concurrently, some Muslim scholars are of the opinion that he may take as many wives as he wishes, and this tradition definitely derives from the pre-Islamic Arab custom.<sup>33</sup> The practice of divorce in Islam, as in pre-Islamic Arabia is likewise a simple matter. A Muslim husband "may divorce his wife at any time," even without a definite reason.<sup>34</sup> The law of inheritance is also generally derived from the pre-Islamic Arab tradition.<sup>35</sup> Landolt has said:

"Sunni laws of inheritance, which were elaborated in the second Islamic century by the jurist al-Shāfi'ī (757 - 820), generally follow Arab tradition. The primary heir is the *walī* as the nearest male agnate in descending or ascending order (*asābah*)."<sup>36</sup>

*Dihār* is another example of continuity in family law. "In *dihār*," Fyzee writes, "the husband swears that to him the wife is like 'the back of his mother'."<sup>37</sup> After the oath has been taken, "the wife has the right to go to the Court and obtain divorce or restitution of conjugal rights on expiation."<sup>38</sup> This kind of practice "is an archaic form of oath and dates from pre-Islamic Arabia."<sup>39</sup>

The practice of arbitration (*hakām*) in Islamic law, even as we know it today (e.g. in Indonesia), is clearly based on Arab custom. An arbitrator or *hakim*, a man whose main qualification is his wisdom, is asked to give advice or to resolve a dispute among his people.<sup>40</sup>

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<sup>32</sup>Fazlur Rahman, *Islam* (Chicago : University of Chicago Press, 1979), 29. See also 'Alī, *Nizām Ta'addud al-zawjāt*, 15.

<sup>33</sup>The limit on the number of wives permitted to a Muslim husband has been discussed by 'Alī in his *Nizām Ta'addud al-Zawjāt*, 105 - 14; also by Bello Daura in his "The Limit of Polygamy in Islam," *Journal of Islamic and Comparative law* 3 (1969) : 21 - 6.

<sup>34</sup>Alfred Guillaume, *Islam* (England : Penguin Books LTD., 1954), 71.

<sup>35</sup>For a general treatment of marriage, divorce, and inheritance in Islam, see Mahmoud Hoballah, "Marriage, Divorce, and Inheritance in Islamic Law," in *A Symposium on Muslim Law*, ed. J. Forrester Davison (Washington : The Washington Foreign Law Society, 1953), 24 - 31.

<sup>36</sup>Eliade, *Encyclopedia*, s.v. "*walāyah*" by Hermann Landolt.

<sup>37</sup>Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, Second Edition (Oxford : Oxford University Press, 1955), 137.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.*, 138.

<sup>40</sup>James Hawting, ed. *Encyclopaedia of Religion and Ethics* (New York: Charles Scribner's Sons, 1955), s.v. "Arabs (Ancient)," by TH. Noldeke.

There are many other subjects in Islamic law, such as *jināyah*, *hajj*, and sacrifice which can be pointed to as evidence for the continuation in Islam of the pre-Islamic Arab legal tradition. However, family law and the important position of the *hakām* are sufficient to demonstrate how great this influence has been.

## B. Judaic Law.

Public opinion, nowadays, is constantly faced by the fact that Judaism is in conflict with Islam. Many reasons have been put forth for this conflict, and Sawyer gives a good, although still debatable, explanation :

"Outside of comparative religion syllabuses and departments of Religious Studies, Islam and Judaism do not very often appear together. The reasons for this are not hard to find. Islam is the official religion of most of the Arab countries, while Judaism is the official religion of Israel. Jews, including a large proportion of Israelis (although not now the majority), are westernized, possessing close social and cultural links with Europe and United States. The overwhelming majority of Muslims, however, live in Africa, Asia and Middle East, and are distinct, socially and culturally, from the West. Furthermore, experts in Arabic and Islamic studies do not often possess expertise in Hebrew and Judaic Studies and vice versa, and to a casual observer the two religions, in spite of their common roots, would appear to have very few similarities."<sup>41</sup>

Our purpose here is not to concentrate on the conflicts, but rather to point out what they have in common. Jews and Muslims, as we know, are all children of the same father and reared in the bosom of Abraham. According to Peters :

Muslim and Jew come together in the figure and symbol of Abraham, a Jew before the Torah, a Muslim before the Qur'an, the father of both Isaac and Ismael, the former the tribal ancestor of the Sons of Israel, the latter of all the Arabs. This was the biblical geneology, and it was not disputed by Islam."<sup>42</sup>

It is therefore understandable that the two religions, Judaism and Islam, have similar teachings, and it is also not surprising that Judaism, a religion

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<sup>41</sup>J.F.A. Sawyer, "Islam and Judaism," in *Islam in the Modern World*, eds. Denis MacEoin and Ahmed al-Shahi (New York: St. Martin's Press, 1983), 27.

<sup>42</sup>F.E. Peters, *Children of Abraham : Judaism, Christianity, Islam* (Princeton : Princeton University Press, 1984), 197. See also Arthur Jefferey, "The Qur'an as Scripture III," in *The Muslim World* 40 (1950) : 185 - 206. In this article, after discussing the contents of the Qur'an, Jefferey comes to the conclusion "It is thus clear that as Muhammad claimed to be in the succession of the earlier Prophets as messenger called to summon men to the 'way of God', so his book, the Qur'an, is considered to be in the succession of the earlier Scriptures which men read to find what had been revealed from the heaven as to that 'way of God'."

that came earlier, influenced the later religion, Islam. In modern times the influence of Judaism on Islam has been a favorite topic of Western scholarship. It was Abraham Geiger, according to Bernard Lewis, who first devoted himself to this subject. His famous book *Was hat Mohammed aus dem Judenthume aufgenommen?*, published in 1833, pays attention "to certain biblical and rabbinical elements in early Islamic texts, with the obvious implication that these were Muslim borrowings from Jewish sources....."<sup>43</sup> This study, later, was followed by others, with some scholars even arguing that "Muhammad had had Jewish teachers or instructors who provided him with the rudiments of his religion."<sup>44</sup>

Law is an important area in which Judaism shares similar concepts with Islam. Judaism and Islam, according to Denny, "are orthoprax religions to the extent that each places fundamental emphasis on law and the regulation of community life....based on revelation and interpreted by respected specialist scholars."<sup>45</sup> "Like Judaism", Kritzeck writes, "Islam is a religion not only of a book, but also of a law minutely regulating day-to-day living of its believers (Hebrew *halakah*, Arabic *shari'ah*)."<sup>46</sup>

Like pre-Islamic Arab tradition, Judaic law, as is claimed by some Jewish scholars, also influenced Islamic law in both its source and subject-matter. "Like the Torah," Katsh said, "the Qur'an represents the written law," and as the first and foremost fundamental source.<sup>47</sup> "As Judaism has the Talmud, so Islam also has an oral law (*hadith*)"<sup>48</sup> as, it has been mentioned previously, the second fundamental source of Islamic law.

Joseph Schacht claims that the fourth source of Islamic law, *qiyas*; was derived from Jewish. He writes:

"Derived from Jewish law are the method of *kiyās*, together with its term which is a loan-word in Arabic, and other methods of legal reasoning .... Sometimes it can be doubt-ful whether a concept has entered Islamic law directly from Hellenistic or by way of Jewish law."<sup>49</sup>

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68. <sup>43</sup>Bernard Lewis, *The Jews of Islam* (Princeton : Princeton University Press, 1987),

<sup>44</sup>Ibid.

<sup>45</sup>Denny, *Islam*, 12.

<sup>46</sup>James Kritzeck, *Sons*, 43. Peters has discussed in general fashion the transformation of religious law since Judaism, Christianity, and Islam in his *Children of Abraham*, 73 - 96.

<sup>47</sup>Abraham I. Katsh, *Judaism in Islam, Third Edition* (New York: Sepher-Hermon Press, 1980), XI.

<sup>48</sup>Ibid.

<sup>49</sup>Joseph Shacht, *An Introduction*, 21.

Some other areas of Islamic law were, again according to certain Jewish scholars, derived from Judaic law. Bernard Lewis, James Kritzeck, Charles Cutter Torrey, Abraham I. Katsh, to name just a few, have contended that 'the five pillars' of Islam (*al-Arkān al-Islām*),<sup>50</sup> the law concerning food and drink, and the prohibition of wine-drinking are undeniable examples of the influence which Judaic law had on Islamic law.<sup>51</sup>

More important still is the fact that these Jewish scholars sometimes contradict each other. The practice of *salāh* is a case in point. Goldziher describes "the five daily prayers in Islam as of Persian influence."<sup>52</sup> Contrary to this belief Simon Duran, Torrey, and Katsh claim that the practice of the *salah* originated with Jewish practice.<sup>53</sup> They also disagree regarding the number of the *salāh*. Torrey emphasizes that the original instruction from Muhammad for the *salāh* stipulated three daily prayers. According to him, this corresponds to the Jewish practice.<sup>54</sup> Unlike Torrey, Katsh contends that since Muhammad's time, Muslims have practiced the five daily prayers, and that it can be traced from the five daily prayers of Jewish tradition.

Having considered the different views among Jewish scholars themselves, one may assume that the institution of five daily prayers in Islam was not influenced by Jewish but perhaps by other sources. This assumption may lead to the further assumption that the influence of Judaic law regarding other aspects of Islamic law may also be exaggerated.

### C. Roman Law.

The question of the influence of Roman law upon Islamic law has been much debated, with some scholars assuming a profound influence of Roman law, and others denying practically any influence. It was Ignaz Goldziher who first established that there were "certain resemblances between Roman and Islamic law and asserts that these resemblances must be due to direct borrowing."<sup>55</sup> Fitzgerald lists the following areas in which Islamic law, according to Goldziher's research, derived from Roman law:

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<sup>50</sup>It consists of *shahadah* (affirmation that there is no God but Allah), *salāh* (prayer), *zakāh* (almsgiving), *sawm* (fasting), and *hajj* (pilgrimage).

<sup>51</sup>For this discussion see: Kritzeck, *Sons*, 43 - 4. Lewis, *The Jews*, 72 - 3, 79 - 80, 85. Torrey, *The Jewish*, 133 - 42, 151 - 4. Katsh, *Judaism*, XII, XXIV - XXVI, 3 - 13, 128 - 30, 137 - 9, 143 - 4.

<sup>52</sup>Quoted by Katsh, *Judaism*, XXIV, 5.

<sup>53</sup>*Ibid*, 5 - 7.

<sup>54</sup>Torrey, *The Jewish*, 135 - 6.

<sup>55</sup>S.V. Fitzgerald, "The Alleged Debt," 93.

1. "The word *fiqh* is as we cannot fail to see a translation of *prudencia*, both meaning "reason ableness."
2. "The dualism of *leges scriptae* and *leges non-scriptae* is derived from Roman law."
3. "Just as Roman legal opinion gave great weight to the *opinio prudentum* in legal deductions so the Islamic *prudentes* assumed the prerogative of an authoritative subjective opinio; for *ra'i ra'y* , as it is called in Arabic, is a literal translation of Latin term."
4. "The principle known in Arabic as *maslaha* or *istisla* is the Roman standard of *utilitas publica*."<sup>56</sup>

In 1950 Joseph Schacht gave his support to Goldziher's thesis. In his article entitled "Foreign Elements in Ancient Islamic Law" he elaborates Goldziher's thesis in more detail, saying: "The parallels between Roman and Islamic law .... are not restricted to rules and institutions of positive law; they occur in the field of legal concepts and principles, and extend even to fundamental ideas of legal science."<sup>57</sup> After providing some important data in which Islamic law, according to him, derived from Roman law he came to the conclusion:

I trust I have shown that legal concepts and principles, including even fundamental ideas of legal science, entered Muhammadan law from outside, in particular Roman law, and have further shown how their adoption took place. Whether these influences amount to little or much is irrelevant; the important fact is that they did happen."<sup>58</sup>

Contrary to this belief, Fitzgerald stated that "There is not a single reference in any Islamic law book to any Roman authority."<sup>59</sup> Islamic law, according to him, "differs radically in character and intention from the Roman law."<sup>60</sup> Without "touching" on Schacht's opinion, Fitzgerald directly disputes Goldziher's theses. Each of Goldziher's theses (which have been already mentioned previously) is clearly rejected by Fitzgerald, who supports his argument by giving other data or other interpretations of the same data given by Goldziher.<sup>61</sup>

In line with Goldziher and Schacht, Patricia Crone published her *Roman, Provincial and Islamic Law* in 1987. In this book she argues that Ro-

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<sup>56</sup>Fitzgerald, "The Alleged Debt," 94 - 8.

<sup>57</sup>Schacht, "Foreign Elements," 11.

<sup>58</sup>*Ibid.*, 17.

<sup>59</sup>Fitzgerald, "The Alleged Debt," 86.

<sup>60</sup>*Ibid.*, 101.

<sup>61</sup>See Fitzgerald, "The Alleged Debt," 94 - 98.

man law clearly influenced Islamic law. She concentrates on the institution of the patronate (*walā'*) and attempts to prove that its crucial features derived from provincial and Roman law, rather than from pre-Islamic Arab society. In her own words:

".... it should be abundantly clear that the Arab conquerors soon came to be familiar with a cluster of provincial practices in which the predominant element was the *paramone* of the Hellenised Near East. The cluster, however, also included a tie which the Muslims called *walā'* and which undeniably resembles the Roman patronate.... The tie in question is said to come from Arabia, yet it does not resemble institutions known from Arabia. In both positive and negative terms, the evidence thus points to the conclusion that *walā'* has its origin in the Roman Near East."<sup>62</sup>

It is noteworthy that Wael B. Hallaq calls Crone's conclusion into question. In a lengthy review of Crone's book, Hallaq severely contends that "Crone's work...is confused, methodologically deficient, and definitely a step in the wrong direction."<sup>63</sup> This statement is elaborated further:

We shall not argue against Crone's conclusions, except to say that *none of them* follows from the evidence or the arguments presented in the book. It was precisely this speculative scholarship that Crone severely criticized when she dismissed the writings of Goldziher, Schacht and others on the grounds that they merely *affirm* rather than *demonstrate* what they set out to prove. Her own arguments are far-fetched, her use of evidence is tortuous, and she certainly approaches the subject with a predetermined mind."<sup>64</sup>

It is not our intention to adopt or reject one or the other of the new-points. In fact, it appears that scholars have generally arrived at quite opposite conclusions. We need further, deeper investigations into the relation between Roman law and Islamic law. Nevertheless, it is undeniable that after the death of the Prophet and the spread of Islam outside Arabia there were definite contacts between Islamic law and the laws of the conquered areas. The system of taxation, according to Peters, is an example of an institution which Islam derived from the conquered lands, particularly those formerly in the Christian Roman Empire.<sup>65</sup>

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<sup>62</sup>Patricia Crone, *Roman, Provincial and Islamic Law* (Cambridge : Cambridge University Press, 1987), 88.

<sup>63</sup>Wael B. Hallaq, "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law," *JAOS*, no. 1 (January-March 1990), 91.

<sup>64</sup>*Ibid.*

<sup>65</sup>Peters, *Children*, 92. For a lengthy discussion of the taxation during the first two centuries of Islam, see Daniel C. Dennett, *Conversion and the Poll Tax in Early Islam* (Cambridge: Harvard University Press, 1950).

#### IV. Concluding Remarks.

In the last section of this essay I would like to conclude with the following remarks.

It would seem that the phrase "*asābiyah* -minded" might describe the tendency of many communities all over the world. Any community, whether based on religion or nationhood, tends to claim that it is better than others, and regards the others as inferior. In the early period of Islam, for example, Arab Muslims regarded *mawali* as second class. Even in modern times, Christian societies (Western societies), according to Smith, have tended to look at Muslim societies as second class and inferior to them.<sup>66</sup> In this light it is understandable that some scholars should emphasize the profound influence of foreign elements on Islamic law, while others, mostly Muslim scholars, deny any influence.

What we would like to say is that, historically, people all over the world (Jewish, Christian, Muslim, and others), though differing in form, have had much in common and have been much involved with one another. If we agree on this point, it should be easy to understand that foreign elements have likely influenced Islamic law, and, of course, as Schacht, Khadduri, and Liebesny have pointed out, Islamic law has also influenced other laws.<sup>67</sup>

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<sup>66</sup>Wilfred Cantwell Smith, *Islam in Modern History* (New Jersey: Princeton University Press, 1977), 304 - 5.

<sup>67</sup>Schacht provides some examples of Islamic law that influence other law such as French, Austrian-German, Spain, Georgia, Jewish and Christian (Schacht, *The Legacy*, 401 - 2). Khadduri and Liebesny examine that "It...seems reasonable to suggest that the early English uses [Trusts] may have been derived from the Islamic system of *awqāf*" (Majid Khadduri and Herbert J. Liebesny, *Law in the Middle East*, Washington, D.C.: The Middle East Institute Press, 1955, 215). More than this, Marcel A Boisard has widely discussed this issue in his "On the Probable Influence of Islam on Western Public and International Law," *IJMES* 2 (1980) : 429 - 50.

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