

The Origins of Islamic Legal Theory

The Traditionalist and Western Perspectives

Kurt Rasim Güner

Abstract

Islamic law is both immensely important to those living in the modern Middle East and consistently misunderstood by those living outside of it. The way that individual Middle Eastern nations interpret and apply Islamic law directly impacts the lives of their citizens, but for years the origins of Islam (and Islamic law) closely mirrored the narrative presented in the Qur'an. While it is odd that the origins of Islamic law escaped scrutiny for years, the current state of scholarship is one of tension and excitement. Western scholars (primarily from Germany) have applied rigorous historical methodology to ancient sources and have challenged the traditional narrative. Traditionalist scholars (primarily from the Middle East) have noted that Western attempts to define the Middle East often mirror the pattern laid out by Edward Said's Orientalism, and counter with Arabic sources ignored by the West. The end result is a tense academic standoff, as Western scholars attempt to duck charges of Imperialism and repeatedly point to the intriguing questions brought up by their sources, while Traditionalist scholars give ground on some pieces of the Qur'anic narrative but not others. This paper breaks down the research and arguments of key scholars from each group. Wael Hallaq's work represents the most nuanced of the Traditionalist school, and his research is placed alongside the combined work of Joseph Schacht, Patricia Crone, and Benjamin Jokisch. It is important to note that these two schools should not be viewed as oppositional, despite the natural inclination to do so. This paper will show that they are, in effect, arguing with very specific goals in mind. The Traditionalist approach demands that Middle Eastern scholars be allowed to participate in the creation of their own historical narrative, and rightfully bristle at Western attempts to place Islam in a larger context, as this contextualization often places Islamic culture in a position subservient to the West. The Western approach attempts to bring new sources into the discussion of Islamic legal origins and, if it is done correctly, carefully separates this research from the *historia sacra* of Islamic tradition.

The Origins of Islamic Legal Theory

The traditionalist perspective of Islamic law generally follows the path laid out both by Qur'anic evidence and Islamic tradition, and can be briefly characterized as follows: In the first century AH,¹ prophetic *hadith*² began to emerge and gain importance as jurists used these “traditions of the prophet” to settle legal disputes. These *hadith* slowly supersede discretionary opinion (*ra'y*) and were a major factor in the formation of consensus (*ijma*). In the middle of the second century AH, jurists began to compile these prophetic traditions by tracing them back to the prophet through a chain of transmission (*isnad*) using pious and therefore trustworthy individuals as links to Muhammad. These jurists would eventually form schools of legal thought around particular scholars and those groups would interpret the *hadith* to the best of their ability. Theoretically, these jurists would not have to “create” anything; they were simply tasked with interpreting the divinely inspired Shari'a out of the Qur'an and Islamic tradition. Their job was to sift through incorrect *hadith*, though the core of legality still came (supposedly) from the Qur'an.

Western scholars like Joseph Schacht and Ignaz Goldziher, who attempted to use contemporary non-Arabic sources to corroborate the traditional view, challenged this perspective. When these sources did not match up with the Qur'anic origin story,³ new theories were proposed. Traditionalist Islamic origin scholars responded to these proposed hypotheses by arguing that the primary source research conducted by Western scholars either don't stand up to scrutiny or have been exaggerated by overzealous researchers. This paper will analyze the traditionalist and Western perspectives and attempt to show which group of scholars more convincingly presents their evidence and makes their argument.

¹ AH stands for “after *hijra*,” the year Muhammad and his followers migrated from Mecca to Medina in 622 CE. This is the “starting date” of the Islamic calendar (not unlike the Western world's “BC/AD”).

² Essentially, *hadith* are reports of Muhammad's teachings that can be traced back to him via reputable and pious sources. These “sayings” were compiled two centuries after Muhammad's death and form the core of much of Islamic law.

³ The “origin story” within the Qur'an makes up the core of the Traditionalist argument and traces the dynamic growth of Islam from Mecca and Medina (following the conversion of pagans to Islam), eventually culminating in a confrontation with the Byzantine Empire. Islamic law, in this narrative, was birthed in the Qur'an and eventually molded by Muslims (independently of other legal traditions) to become what it is today. Within this perspective, there is some debate over when and where the majority of these rules were codified and if further modifications are possible.

WAEEL HALLAQ: THE ORIGINS AND EVOLUTION OF ISLAMIC LAW

One of the most influential scholars within the traditionalist perspective is Wael Hallaq, whose carefully researched work has directly attacked claims made by Western scholars like Joseph Schacht and later Patricia Crone. In *The Origins and Evolution of Islamic Law*, Hallaq gives the reader a brief but complex summary of the history of Islamic law, looking specifically at the formative years of Islamic legal tradition. He attempts to shift the discussion away from the question of the authenticity of prophetic *hadith* and instead towards a culture of legal tradition that underwent a measurable evolution after the death of the prophet Muhammad in 632. Hallaq begins his work by confirming, largely through Islamic sources, the importance of Mecca as a nexus of trade and worship. He accepts the “paganism” part of the Qur’anic origin story, claiming that locals originally worshipped deities in part to gain earthly rewards, and these pagans eventually converted to monotheism.⁴ Mecca was strategically located between Yemen in the south and Syria/Iraq in the north. According to Hallaq, Mecca’s location in between major trade routes made it a thriving center of culture and trade while it used the existence of the Ka’ba to expand its (specifically, the famed tribe of Quraysh’s) political power. Hallaq notes that two specific Byzantine citizens lived in Mecca (named Anastasius and John) in an attempt to demonstrate the worldliness and influence of the city. If citizens of Byzantium, Egypt, and Persia lived in Mecca, then “Peninsular Arabs were not mere nomads subsisting on a primitive desert economy.”⁵ In general, Hallaq accepts the traditionalist view of prophetic *sura* and its place within the Qur’anic story of the origin of Islamic law.

Hallaq’s early evidence outlines a “dual” culture in Arabia, with nomads coexisting and trading with sedentary populations. In addition, this diverse society interacted with the global economy, bringing Arabs into contact with foreign goods and cultural artifacts. The duality of Arabian law also reflects this mixed culture. According to Hallaq: “Arabian society was in

⁴ Western scholars have challenged the idea that Arabs were pagan before they were introduced to monotheism and Islam, pointing out that it is a self-serving origin story. In short, the fact that Arabs were pagans gives Islam an origin *separate* from Christianity and Judaism, even if they share many of the same figures. A good starting point for the interested reader (though it gets dense at times) is *The Hidden Origins of Islam* edited by Karl Heinz-Ohlig and Gerd Puin.

⁵ Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, 2005). 15.

The Origins of Islamic Legal Theory

possession of two sets of laws, one serving sedentary, agriculturalist and commercial needs, the other supporting nomadic tribal conditions, and heavily dependent on customary laws.”⁶ However, certain elements of each legal code applied to society as a whole. Hallaq singles out blood-money or consummate revenge (in response to murder) as an important nomadic legal tradition that applied to both sedentary and nomadic segments of Arabian society. Hallaq also cites Piotrovsky’s “Late Ancient Yemen” as evidence of a Yemeni legal code dating back to the first century BC that could have influenced early Islamic legal tradition, though I was unable to track down and verify this source.

This legal tradition provides a backdrop to the evolution of Qur’anic law, something that Hallaq shows to be distinct from the law practiced by early Jews or Christians. After discussing a number of *surat* from the Qur’an, Hallaq notes, “God *could* have created one community, but he chose not to do so, creating instead three communities with three separate and different sets of law, so that each community could follow *its own* law.”⁷ The concept of a God-created (and driven) legal system is central to Hallaq’s argument, making the Qur’an itself an “admissible” piece of evidence. In the Qur’an, “the bulk of substantive legislation seems to have been revealed after the year 5/626, when a distinct body of law exclusive to the Umma... was first conceived. The traditional count of all the legal verses comes to about five hundred.”⁸ While this count may not seem significant, the average length of the verses with legal content is “twice or even thrice” that of the non-legal verses. The Qur’an, it follows, is very much a legal document, despite its lack of an overarching legal code as seen in modern societies.

An essential element of Hallaq’s argument is his discussion of *qadis* and *proto-qadis*. These judges played a crucial role in the development of early Islamic jurisprudence. Early Caliphs appointed *qadis* to garrison towns and cities around the fledgling religious Empire, and their purpose was to act as judges while the Empire expanded, both spreading and maintaining an Islamic religious ethic. Hallaq notes that Caliph Umar I needed a bonding agent outside of conquest and loot to maintain control over his new territory. *Qadis* were tasked with the religious aspects of governance and often based their decisions on the Qur’an itself through the use of analogy and on the actions of historical judges still held in high

⁶ Ibid., 18.

⁷ Ibid., 21.

⁸ Ibid.

estimation—the latter is referred to as precedent. Hallaq feels that precedence, and to a lesser extent, analogy, has been under-studied by Western scholars of Islamic origin. *Qadis* were also granted a level of autonomy in the form of *ra'y*, or discretionary opinion. Essentially, *ra'y* allowed *qadis* some flexibility when faced with new or complex legal issues as necessitated by the vague nature of legal instruction in the Qur'an. All of these decisions added up to a large number of precedent rulings that could be drawn from by *qadis* in their work. These processes were constantly changing, and they did not evolve under the guidance of one particular individual—Hallaq argues that Schacht gives al-Shafi'i⁹ far too much credit. Instead, they underwent constant growth as the early Caliphs gradually improved the store of legal knowledge in the region. The rise of the *Qadis* led to a similar rise in the importance of prophetic *sunna*, as the garrison society's emphasis on model behavior was traced back to the perfect example of model behavior in the Islamic world.

The importance of prophetic *sunna* was one of many important developments within Islamic law, but it was not the only one. Hallaq shows how the *sunna* concept gradually evolved over the years, moving from “example set by any esteemed person” to “example set by one of the companions or influential figures” and finally to “example set by the prophet.” Hallaq seems to feel that Western scholars believe that the existence of prophetic *sunna* was dreamt up by later Caliphs and completely fabricated. Instead, Hallaq argues that these *sunna* existed “from the very beginning”¹⁰ as a piece of a larger group of *sunan*. Later, years after the death of the Prophet (and the death of most of his Companions), *qadis* began to focus their attention on prophetic *sunna* and to hold it above others as the primary source of exemplary behavior. In regards to the fabrication of these prophetic *sunna*, Hallaq manipulates small parts of the story in order to come up with a more palatable sum total. As opposed to the simple, immediate, and politically motivated creation of *hadith*, Hallaq refers to a drawn out process that resulted in the fabrication of thousands of *hadith*. In addition, he notes that contemporary Muslims were fully aware of the problem, and winnowed down the resultant mass of *hadith* to a select few thousand. To Hallaq, the fact that contemporary Muslims were aware of the problem indicates that they dealt with it in a reasonable manner and, more importantly, that

⁹ A particularly influential *qadi* that Schacht believes is a key figure in the development of Islamic law.

¹⁰ Hallaq, *The Origins and Evolution of Islamic Law*: 104.

The Origins of Islamic Legal Theory

Western attempts to criticize the proliferation of prophetic *sunna* are, at best, redundant.

Comparatively, Hallaq argues that the ideas of consensus and precedence were stepping stones towards a complete legal system that was just as important as *hadith*. He is careful to stress the importance of precedence as an essential factor in Islamic legal growth, connecting the contemporary form of Islamic legal theory with its predecessors. He cautions the reader to be wary of, “the fallacy (dominating much of modern scholarship) that law began to be *Islamic* only when Prophetic authority, *as formally exemplified by hadith*, came into being.”¹¹ In his estimation, Islamic law went through a consistent evolution characterized by the absorption of legal traditions from neighboring empires (due to Mecca’s role as a trade nexus), the amalgamation of sedentary and nomadic legal codes, and a legal system built on precedence and the actions of *qadis* throughout the region. This legal system did not simply wait until the advent of prophetic *sunna* and the tireless work of al-Shafi’i forced it into focus. As such, Hallaq’s chronology runs counter to the works of Western historians that prioritize prophetic *sunna* as the major turning point in Islamic legal tradition by arguing that Islamic law was developed slowly out of pre-Islamic Arab traditions and the work of *qadis*.

Hallaq presents an incredibly well researched argument that comes with a complex theoretical framework. In his published works, both articles and books, Hallaq has built a compelling case impugning the Orientalist (in the Saidian sense) leanings of Western Islamic origin scholars. Unlike other notable scholars—specifically Muhammad Al-Azami—Hallaq maintains a relatively professional demeanor when dressing down his opposition. In “The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse” Hallaq argues that the influence of Imperialism has compromised much of Western scholarship on Islamic Origins. For example, he notes that:

¹¹ Ibid., 200.

In the early period, Islam came to displace Byzantium, with its Romano-Greek constitution, and conquered, among others, the dispersed populations of Jews in the Fertile Crescent. The debt of Islam to the Judeo-Hellenic and Roman cultures and heritages had, of course, to be accounted for, just as the Muslim debt to modern European law and codes had to be explained, justified and rationalized.¹²

This is a bold claim to make, but it is worth discussing: Hallaq is arguing that Western historians bend the evidence found in their sources in order to place Islam (and, by extension, other “non-Western” groups) in a subservient position. The conception of “borrowed” culture from “superior” Western civilizations is hard to disassociate from the orientalist framework of which these scholars were allegedly a part. While I believe that both Schacht and Crone are eminently capable researchers who are self-aware enough to avoid most of the pitfalls of orientalism, Hallaq’s attempt to question the pre-eminence of Western scholarship on a distinct “other” is fair. By subverting Arabic culture and attributing the growth of Islamic legal tradition to “copied” versions of Roman or Byzantine law, Western scholars once again prioritize a more “Western” region as the birthplace of significant cultural advancement. Hallaq himself admits that Islam has been influenced by other civilizations, but the scale seems to be the issue here: Hallaq is fighting to ensure that Islam is credited with being an advanced civilization like the Romans or Greeks, as opposed to a crude facsimile of European excellence. However, is it fair to discard all of the nuanced study done by Schacht and Crone based on the simple accusation that they are “Westerners?” I am not willing to make such a dramatic step. While I think Hallaq takes this step out of an understandable need to defend his status as a scholar with “oriental” origins and takes his criticism too far, I do believe that Schacht’s revered status as a monument in the field can act as a detriment for future research.

Hallaq and Schacht form easily-identifiable ends of the spectrum within the discourse on Islamic legal origins. Hallaq represents the traditional perspective by wholeheartedly accepting the importance of Mecca in Arabia (as a nexus of trade and culture) and as the origin of complex legal theory (similar but not identical to Schacht), downplaying the malleable nature of prophetic *sunna* and connecting Islamic legal tradition with Arabic culture and history. Schacht instead focuses on prophetic *sunna* as a crucial step towards the formulation of recognizable Islamic law and

¹² Wael B. Hallaq, "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Near Eastern Law* 2(2003): 4.

The Origins of Islamic Legal Theory

highlights the importance of al-Shafi'i as the driving force behind legal tradition. To Schacht, the propagation of *hadith* separated Muslims from the more secular concepts of legal tradition used by the Umayyads. In order to get closer to a semblance of truth, one must assess the strength of each scholar's argument.

Hallaq's contention that Mecca was a center for trade and interacted (on relatively equal footing) with neighboring empires is evidenced by Islamic sources and the existence of multiple Byzantines living in Mecca. I do not believe this evidence definitively proves that Mecca was a thriving metropolis, but it seriously damages the contention that Mecca was insignificant and unremarkable.¹³ Hallaq continues on his quest to change the interpretation of pre-Islamic Arab culture by pushing a "dual" culture, wherein sedentary and nomadic elements of society merged parts of their own individual legal traditions. This argument is important because it breaks away from the more popular idea of Arabia being relatively unpopulated and devoid of culture. The orientalism framework is useful here, as Hallaq questions the Western understanding of non-Western culture ("oral" traditions, etc.). Finally, when faced with the "problem" of prophetic *hadith*, Hallaq attacks the premise of the problem itself. He delves into this issue in great detail in his 1999 article "The Authenticity of Prophetic Ḥadīth: A Pseudo-Problem," but he mirrors the argument in *Origins and Evolution*. Hallaq places prophetic *hadith* within a larger legal context, arguing that Muhammad's *sunna* was but one of many and initially was not prioritized over other *sunna*, arguing that contemporary Muslims accepted and dealt with the problem in a logical way. The greater question that Hallaq seems to avoid answering is a simple one: Can one use the Qur'an, and Islamic tradition, as a source for historical research?

The Qur'an's evolution as a body of text is a subject too complicated to delve into here, but according to Islamic tradition Caliph Uthman compiled the Qur'an and gave it the shape seen today. While Western scholars endeavor to use other, more verifiable,¹⁴ sources to understand early Islam better, Hallaq argues that these scholars are simply reiterating a tired Imperialist attempt to define the Oriental in relation to themselves.

¹³ Some western scholars have suggested that Mecca was an ordinary town as opposed to a vibrant trading hub, implying both that the population of Mecca was smaller than in Muslim accounts and that much of the political back-and-forth that characterizes the city in Islamic tradition was a later fabrication.

¹⁴ In this case, "verifiable" means that the sources are corroborated by other outside evidence (for example, an Armenian or Greek historian might mention the same date as an event that took place in the Qur'an, thus confirming the traditional account).

The decision to prioritize, for example, contemporary Christian sources seem to prove Hallaq's point on Orientalism within the field, but these contemporary sources are essential for corroboration, a key part of Historical methodology. At the same time, Hallaq does little to answer the original question posed by academics that led to this move in the first place: how can one trust early Muslim sources? Hallaq answers that by simply marshaling his vast knowledge of Arabic sources to produce documents similar to the ones prized by Western scholars — In this, it appears he is successful. At the same time, his suggestion that the Qur'an was used as a legal "guide" as opposed to a strict code by early Muslims is understandable, but the vague nature of the *sura* discussing legal matters makes it difficult to make specific claims on the topic.

There are certainly legal elements within the Qur'an, but even Hallaq's incisive commentary has trouble discussing the attitudes that Muslims felt towards the Qur'an or, more importantly, what the Qur'an looked like before and after it was compiled. Hallaq tries to demonstrate that Arabs picked and chose pieces of the Qur'an's many legal *suras* to follow and incorporated them into the traditional "law" that they had practiced for centuries. The prohibition of wine, for example, was ignored for years after the Prophet's death, and Hallaq willingly admits this. How can we rely on the Qur'an as a source when certain elements were changed by *qadis* and local tradition? Whenever Hallaq uses specific *sura* as evidence for a Qur'anic legal tradition, I find myself wondering whether or not contemporary Muslims deemed this particular *sura* "important." When one mixes in the influence (and records) of the *qadis*, a different picture arises.

Qadis were allowed to use their discretion when ruling on cases that fell outside of the growing library of precedence in the region. These *qadis* were often assigned to garrison towns on the borders of the young empire, tasked with maintaining order while spreading a religious ethic among bands of Arab warriors and newly conquered citizens. Their decision to follow or not follow particular parts of the Qur'an would, if one follows Hallaq's chronology, make them the key factors in the evolution of Islamic law. Their decision to "absorb" local traditions into an Islamic legal code, along with the decision to focus on particular *sunna* and *sura*, would have had dramatic and long lasting effects on the future of Islamic legal tradition. How were these decisions made? How did this discretionary body of legal jurists gradually and carefully form Islamic legal code? Hallaq hints at possibilities and uses his vast store of evidence to cast doubt on crucial aspects of the Western/Schacht-driven chronology of Islamic law. The key difference between the two scholars

The Origins of Islamic Legal Theory

seems to be the timeline, as Hallaq details a slow and gradual evolution of law with the presence of prophetic *hadith* as early as 60 AH, and Schacht pushes a more hurried construction starting somewhere around 200 AH.

The question of Schacht's "orientalism" seems to have evolved in Hallaq's mind over time. While he claims to vehemently oppose Schacht and Western scholars in his 2003 article "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," by 2005, he has narrowed the difference between the two. In the end, it seems that Hallaq is most-incensed by the concept of Arab culture being necessarily subservient to the more advanced European cultures lauded by Western academics. Most of *Origins and Evolution* feels like an attempt to place Arab culture on an equal playing field. Rather than "copying" Byzantine or Roman law, Arabs "absorbed" it. Rather than fabricating *hadith* in a haphazard attempt to craft a religious ideology, Muslims were aware of the fabrications done by less pious individuals and worked to narrow the list down to a manageable and verifiable number. By changing the tone of the discussion and elevating the place of early Muslims, Hallaq is fighting for a dramatic shift in the way that Islamic legal scholarship discusses Arabs.

JOSEPH SCHACHT: THE ORIGINS OF MUHAMMADAN JURISPRUDENCE

In *The Origins of Muhammadan Jurisprudence*, Joseph Schacht attempts to radically restructure the traditional conception of Islamic legal traditions. He does this by bringing his vast knowledge of ancient sources to bear on the question of Islamic origins, reshaping the traditional Qur'anic narrative into something entirely new. Schacht builds *Jurisprudence* off the pioneering work of Ignaz Goldziher, focusing primarily on the growth of Islamic legal theory after the death of Muhammad. Schacht famously reorients the traditional chronology of Islamic legal tradition, focusing on the importance of Al-Shafi'i as a legal scholar and the propagation/fabrication of prophetic *hadith* centuries after the death of the Prophet.

As the Umayyad Empire expanded and incorporated new territories into its administrative apparatus, "provincial" areas of the empire were allowed to maintain much of their local customs while submitting to certain secular legal codes imposed by the Umayyads. At the same time, Schacht claims that pre-Islamic customs were at the core of Arabia's legal ethic. The Qur'an had a large impact on the lives of Umayyad citizens, and it was responsible for some legal regulations, but Schacht nevertheless moves the beginning of Islamic legal theory to the second century AH. At

this time, regional schools of legal thought began to present differing opinions on the interpretation of the Qur'an, each group creating a "living tradition" of sorts that summarized their findings. Schacht argues that contemporary sources depict a divided landscape within Islamic legal theory, with three major "geographical divisions:" Iraq, Hijaz, and Syria. Within those groups, Iraq can be subdivided into "Kufian" and "Basrian," Hijaz can be broken into "Mecca" and "Medina," and finally, while far less is known of the Syrian tradition, it clearly existed and was distinct enough to merit mention. Of those subdivisions, the Kufans in Iraq and the Medinans in the Hijaz comprise the majority of the ancient texts that Schacht analyzed, with the other groups being less clearly represented in the source material.¹⁵ Traditionally, the Medinan school, with a more "personal" memory of the Prophet, is considered the primary legal school of the time. However, Schacht argues that the Kufans played a more important role. Regardless, each of these groups used discretionary opinion and analogy, key pillars in Islamic legal theory, to frame their decision-making process, forming a "living tradition" that would uniquely characterize each school.

These regional schools were at the forefront of contemporary Islamic legal thought. Of these groups, the Iraqi school (specifically the Kufian) was the first to begin to give prophetic *hadith* preeminence over those of the Companions. This led to a snowball effect of sorts: once the Prophet had been invoked, how else could other schools compete, if not with prophetic *hadith* of their own? The process of connecting *hadith* back to the Prophet, *isnad*, became commonplace as pious men were used as stepping stones on the apocryphal journey back to a supposed comment or action by Muhammad. Around 120 AH, reformers known as "Traditionists" (led by al-Shafi'i) began to rebel against *any* non-prophetic source material, arguing that only prophetic *sunna* could be accepted as legal code. Within 20 years, the Umayyad dynasty fell in part because of pressure from Traditionists who fought against the "secular" nature of the Umayyad's. Their overarching goal was to "Islamicize" the empire, enforcing Qur'anic norms and molding the empire around Islam. Schacht, when discussing the Islamicization process, claims:

The tendency to Islamicize took various forms: it made the ancient lawyers criticize Umayyad popular and administrative practice, it made them pay attention to the (formerly disregarded) details and implications of Koranic

¹⁵ Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, (ACLS Humanities E-Book, 2008). 8.

The Origins of Islamic Legal Theory

rules, it made them attribute the 'living tradition' of their schools of law to the Prophet and his Companions, it made them take account of the rising tide of traditions ascribed to the Prophet...¹⁶

This process was fully actualized by Al-Shafi'i, a jurist who insisted on the traditions of the Prophet as the deciding authority in the Islamic legal world. Al-Shafi'i was originally a member of the Medinese school who developed views that clashed with the rest of the group. "No compromise was possible between Shafi'i and the Medinese, nor indeed any other ancient school of law, on their essential point of difference in legal theory, concerning the overriding authority of traditions from the Prophet, as opposed to the 'living tradition' of the school."¹⁷ While the difference between Shafi'i's strict traditionalism and other schools of thought varied in scale, vicious polemics were exchanged back and forth as each group sought to prove definitively that their interpretation was superior. The idea of using prophetic traditions was not exclusive to Shafi'i, but, as Schacht points out, other schools of thought consistently filtered these traditions through their own practice, and the relative dearth of prophetic *sunna* before this period indicates that those traditions might have been fabricated:

His [Shafi'i's] predecessors and contemporaries... while certainly already adducing traditions from the Prophet, use them on the same level as they use traditions from the Companions and Successors, interpret them in the light of their own 'living tradition' and allow them to be superseded by it. Two generations before Shafi'i reference to traditions from Companions and Successors was the rule, traditions from the Prophet himself the exception, and it was left to Shafi'i to make the exception his principle. We shall have to conclude that... traditions from Companions and Successors are earlier than those from the Prophet.¹⁸

Shafi'i, then, is the decisive figure in the evolution of Islamic legal theory and practice. His aggressive reformulation of the Islamic legal hierarchy placed prophetic *sunna* immediately after the Qur'an in terms of importance, with *ijma* (consensus) a far less essential component.¹⁹

¹⁶ Ibid., 283.

¹⁷ Ibid., 9.

¹⁸ Ibid., 3.

¹⁹ Ibid., 135. Schacht also notes that Shafi'i "paid lip service" to the Qur'an as an overruling authority, but in practice mostly ignored it in favor of prophetic *sunna*.

Schacht's chronology breaks away from the traditional timeline in two key ways. First, he argues that prophetic *sunna* were necessary for the creation of Islamic law (in the way we understand it) and second, that these *sunna* were created/added to the record long after the death of Muhammad and reflected the opinions and beliefs of Muslims living in the second and third centuries AH. Within this timeline, the emergence of Al-Shafi'i in the second century AH is the decisive factor in the formulation of modern Islamic theory. His efforts led to the creation of much of Islamic legal practice regarding prophetic *sunna*, mostly in the way that he perfected aspects of the Traditionism argument and countered the idiosyncratic living traditions espoused by the individual legal schools.

The evidence used by Schacht is largely unassailable. His analysis of Shafi'i's writing displays his depth of knowledge on the subject, and his chronology is closely married to the sources he uses. His methodology is similarly professional, as he brings a positivistic approach to the understanding of the ancient sources available for study, searching for corroboration and carefully analyzing his findings. Schacht acknowledges that early Muslim jurists were aware of the problem of prophetic *hadith* and did their best to address it in the time, discarding massive volumes of fabricated work. However, the results of this effort are not enough for Schacht to accept without digging deeper into the source material. Schacht summarizes his approach thusly: "The best way of proving that a tradition did not exist at a certain time is to show that it is not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed."²⁰ Muslim jurists and scholars living in the centuries preceding Al-Shafi'i *must* have been aware of the majority of work on Islamic law, meaning that examples stemming from the Prophet himself that apply to a specific legal question would have logically merited some mention in their eventual decision. The fact that prophetic *sunna* is not used in this way at all, but *is* used as a solution to later legal questions is an extremely strong argument for the fabrication of *hadith*.

When discussing the existence of these traditions, Schacht is clear in his argument, showing that early Muslim sources do not mention *hadith* and instead focus entirely on the Qur'an:

²⁰ Ibid., 140.

The Origins of Islamic Legal Theory

*Dogmatic traditions which are, generally speaking, earlier than legal ones, hardly existed... in the later part of the first century A.H. There is no trace of traditions from the Prophet and the author [Hasan Basri] states explicitly: 'Every opinion which is not based on the Koran, is erroneous.'*²¹

This close reading of contemporary texts further strengthens Schacht's case. If, as Hallaq has so consistently claimed, these prophetic *sunna* existed "from the beginning," why would early Muslim scholars decline to use them in any meaningful way? What would cause them to use the *sunna* of the Companions but not of the Prophet? The charge of Orientalism melts away in the face of this close reading of the sources, and Schacht's outline of the evolution of Islamic law does not stray from the evidence. What little conjecture there is in *Jurisprudence* is carefully thought out and explained.

Overall, *The Origins of Muhammadan Jurisprudence* is rightfully an essential part of any modern understanding of Islamic law. Schacht makes his case carefully and with great erudition, bringing a well thought out methodology to the understanding of prophetic *hadith* and centering his analysis on the actions of Al-Shafi'i. That Shafi'i was an important figure cannot be denied in the face of this evidence, and the in-depth discussion of the actual *formation* of Islamic legal theory is something not seen in Hallaq's attempt at a counter-argument.

PATRICIA CRONE: ROMAN, PROVINCIAL, AND ISLAMIC LAW

Patricia Crone's *Roman, Provincial, and Islamic Law* takes a completely different approach to Islamic legal origins. The practice of *wala*, wherein Muslims adopt or "sponsor" a convert into Islam, forms the core of the book, as Crone dissects the origins of the practice and its meaning for contemporary Muslims. With Islam's ascension and its more solid form of theology and law constantly expanding in the Middle East, a system for incorporating the newly conquered converts to the religion was necessary. This system had to maintain Islamic dominance while still providing a structure of rules for the new converts. Crone argues that this structure did *not* originate from within Islam itself, but instead from "provincial" law funneled back into the Empire. Through the use of evidence originating from surrounding regions as well as Arabia, Crone can convincingly show that the origin of the *wala* system came from the

²¹ Ibid., 141.

Roman conception of patronage. Though she does not use the term directly, this process parallels the idea of “reception” that is more deeply investigated by Benjamin Jokisch later in this paper.

The concept of *wala* is relatively unique, in that most nearby cultures practiced slightly different versions of this process. Greeks might withhold citizenship from newcomers, classifying them as a different (lower) class of individual. Crone notes that faith based societies would often allow for a higher level of assimilation after the subject had converted. Jewish societies, for example, would adopt a newcomer into a specific tribe once they converted. What makes the Islamic experience more unique is the relationship that the *wala* system requires. As Crone says, “all non-Arab newcomers in early Islamic society thus paid for their membership of this society by acceptance of a private relationship of dependence.”²² Without this dependent relationship, freedmen could not be adopted into Islamic society.

Crone begins by deconstructing the origins of the *wala* system, showing that while no study directly discusses the topic,²³ there is a general assumption that it is Arabic in origin. She argues that:

*Pre-Islamic Arabia... supplied the general context for wala: the institution manifestly served a tribal society. But it did not supply the institution itself. The crucial features of wala derive from Roman and provincial law. The borrowed elements were reshaped to fit the new context, but not so much as to change them beyond recognition.*²⁴

Again, Crone does not use the term “reception,” but the process she describes generally matches the process studied by Jokisch.²⁵ This assumption that pre-Islamic Arabia generated the future concept of *wala* is forcefully rebutted through the use of specific evidence and a clear understanding of a large number of sources. The most convincing elements of her argument are: (1) pre-Islamic Arabian group identity did not allow for dependent relationships to be formed on an individual level, something that is the hallmark of the *wala* system and (2) the fact that pre-

²² Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge University Press, 2002). 40.

²³ *Ibid.* In one of her famous footnotes, Crone notes that Wansbrough briefly touches on the topic of the *mawla*, or patron, but is generally unconcerned with the system as a whole.

²⁴ *Ibid.*, 41.

²⁵ In this way, Crone is an important antecedent to Jokisch.

The Origins of Islamic Legal Theory

Islamic *wala* did not have an assimilative nature, while that is an essential part of the Islamic *wala* system.

These major differences indicate a mismatch that requires further research, something that Crone is able to do through her vast knowledge of literature on the topic. She can convincingly show that these factors eliminate the possibility that *wala* developed out of pre-Islamic Arabia. Comparatively, she provides ample evidence that this tradition *did* originate from the late Roman patronage system used in nearby regions. Here, she dismisses the possibility of a Greek origin while showing why the Roman origin fits with the evidence:

The Greeks and the Romans had adopted opposite solutions to the problem of accommodating freedmen in the society into which they had been manumitted. The Greeks excluded them from citizenship, relegating them to a collective state of dependence as resident aliens; but the Romans on the contrary accepted them as citizens and subjected them to individual ties of dependence. [Emphasis added].²⁶

The simple fact that pre-Islamic Arabia featured a group oriented society in which dependent relationships formed on the group level, between tribes, rather than the individual level, means that an alternate origin must be found. When one compares *wala* with the Roman patronate system, the matching dependent relationships indicate that the origin of this system likely came from Roman territory.

The assimilation of such a complex system reveals much about early Islam. First, it must have often interacted with nearby Empires and had a strong enough administration in place to implement sweeping change. This supplements both Schacht's argument (while Shafi'i's was part of Islamic culture; the Abbasids were able to take his legal arguments swiftly and turn them into a legal code) and Jokisch's (an understanding of a key piece of Roman legal tradition like the patronate system makes it easier to believe that the *Corpus Iuris Civilis* could be adopted and implemented). At the same time, it damages Hallaq's contention that Western scholars are preternaturally occupied with "European" (or Roman, or Byzantine, or "Western") culture at the expense of Arab traditions. In this case, the ability to incorporate a complex legal structure into a growing Empire and implement it smoothly demonstrates a high level of functionality on the part of early Muslims. Over the course of the book, Crone's mounting

²⁶ Crone, *Roman, Provincial and Islamic Law*: 77.

evidence results in the reader believing that her conclusion is inevitable. However, she waits until the very end to reveal the individual she believes is behind the reception of the patronate system.

The specific individual that Crone names is Mu'awiya, an interesting choice considering Mu'awiya's military exploits. It was Abd al-Malik who used religion to expand Islamic influence and solidify the empire, but Crone makes her (brief) case by noting that Mu'awiya "resided in Syria where, surrounded by a bureaucratic staff inherited from the Byzantines, he presumably acquired some familiarity with the law of the land."²⁷ This is the only evidence she gives on the subject though the claim is made with Crone's trademark force and vigor. A different author might have used more caution in attributing the *wala* system to Mu'awiya, but Crone's decisive nature comes through in the way she makes a bold proclamation despite relatively flimsy evidence.

The absorption of Byzantine governing techniques and structure indicates that early Muslims had a familiarity with nearby cultures and a fluid style of organization that clashes with the traditional perspective of Islamic legal tradition. The fact that the *wala* system was later considered to be a natural part of pre-Islamic Arabian culture and later evolved within Islamic culture without external influence calls into question many of the other "authentic" elements of Islamic origins. By deconstructing this particular element of early Islam, Crone shows that with careful analysis of early Arabic and non-Arabic sources, scholars can uncover the origins of Islamic law despite the relative dearth of primary source material.

BENJAMIN JOKISCH: ISLAMIC IMPERIAL LAW

Benjamin Jokisch's *Islamic Imperial Law* makes the case that Abbasid Caliph Harun al-Rashid is responsible for the codification and dissemination of Islamic law. Unlike Schacht, Jokisch is not interested in the proliferation of prophetic *hadith* or the Qur'anic origins of Islamic law. Instead, he brings a comparative historical analysis to the subject, placing early Islam within its historical context as a rival and neighbor to the Byzantine Empire. Umayyad interaction with the Byzantines led to a series of coordinated events that denote an oddly parallel development in their Muslim and Christian (respectively) religious structures. These events are less important to the argument of this paper, as they are far too numerous to discuss in detail. Suffice it to say, the large number of parallel

²⁷ Ibid., 91.

The Origins of Islamic Legal Theory

events and actions by the two empires supports Jokisch's overall claim that the Byzantine and early Muslim empires were intertwined to the point that their interactions *must* be understood in a larger context to truly depict their growth. Scholars that limit their study to an individual empire are missing the interactions with neighboring regions that all too often lead to dramatic changes in culture and government. The interactions between the two empires led to a constant exchange of culture and the assimilation of specific structures. This process is termed, "reception," and it closely parallels the process through which Muslims adopted the patronate/*wala* system, as described by Patricia Crone.

Jokisch begins his argument by immediately dismissing *hadith* analysis. He argues that "Islamic law as we know it today came into being just after the period which is particularly interesting for *hadith* analysis."²⁸ In essence, Jokisch is claiming that Schacht's careful dissection of Al-Shafi'i's work was simply a prelude to a more dramatic and far less theological legal system. The Islamicization process described by Schacht was an important precursor to later developments, but the core of Islamic legal tradition, according to Jokisch, was created by jurists ordered by Harun al-Rashid to transform Roman law into a suitable Islamic legal code.

While Schacht focuses primarily on Kufa and Medina in his analysis of prophetic *hadith*, and Crone looks at the cultural exchange taking place on the borders of empire, Jokisch instead discusses the importance of the foundation of Baghdad as a center for culture and learning. The collection of foreign materials in the libraries of Baghdad allowed Abu Yusuf and Shaybani, the two state jurists who later completed the codification project, to interact with foreign scholars and access the *Digestsumma* and the *Glosse* (Byzantine abridgements of the Roman legal code, in Greek). Jokisch is able to deduce the specific date of this act down to "soon after 786,"²⁹ giving him an even later chronology for origin of Islamic law than Schacht.

These copies of Roman legal code were prime candidates for reception in large part because Roman law is particularly easy to borrow. Jokisch points out that most modern legal systems derive, in some form, from Roman law or English common law. "Even the Anglo-American legal system borrowed from Roman law. More than any other legal system,

²⁸ Benjamin Jokisch, *Jokisch, Benjamin. Islamic Imperial Law: Harun-al-Rashid's Codification Project* (New York: Walter de Gruyter, 2007). 15.

²⁹ *Ibid.*, 98.

Roman law, because of its comprehensiveness and multifariousness, proved to be suitable for reception.”³⁰ Reception, then, is not a strictly Islamic phenomenon, and Roman law is extremely easy to apply to different cultures due to its comprehensive nature. In addition, the presence of Greek translators in Baghdad allowed Shaybani and Abu Yusuf to quickly copy over the *Digests* and begin the codification project.

In Jokisch’s chronology, Schacht’s work is an excellent preamble to the later codification process. The argument over prophetic *hadith* laid the groundwork for later Islamicization during the reception process. Muslim scholars were able to quickly “Islamify” Roman code by connecting elements of the code back to prophet and couching the edicts in religious terminology. Jokisch’s argument is strongest when he connects jurist Al-Shaybani’s different works with the *Corpus Iuris Civilis*. Al-Shaybani’s laws regarding the sale of defective goods and other mercantile laws follow the structure and pattern of Roman law so closely that a connection is impossible to ignore. In addition, he dissects the six major works by Al-Shaybani (which are essential parts of his claims), arguing that:

*As comparative analysis shows, the Mabsut, Jami, Saghir, Jami Kabir, Ziyadat, and the Siyar works [by Al-Shaybani] form a unity which in structure, function and content exactly corresponds to the Corpus Iuris Civilis and therefore may only be explained by a systematic reception. This reception... took place neither before nor after the end of the eighth century.*³¹

The parallels between Al-Shaybani’s work and Roman law, coupled with the close connection between the Byzantines and the Muslims in the region, makes Jokisch’s argument incredibly compelling to me. Jokisch shows that while early Islamic legal theory was able to lay the groundwork towards a future legal code, only the reception of Roman law can explain the striking parallels between Al-Shaybani’s work and the *Corpus Iuris Civilis*. The way that Jokisch can systematically break down the *Digest* and compare it to the codified version of Islamic law leaves little doubt in my mind that the two are intimately related. This tracing of genetic origins seems vulnerable to Hallaq’s claims of Orientalism, in that Jokisch is arguing against the Arabic origins of a key part of Islamic culture. However, Jokisch seems to have foreseen such an attack, and deftly turns it on its head.

³⁰ Ibid., 15.

³¹ Ibid., 98.

The Origins of Islamic Legal Theory

Early in his introduction, Jokisch first clarifies the concept of reception, noting that the ability to understand and implement these systems indicates that early Muslims were a very sophisticated culture. Muslims prove to be specialists in borrowing not only single elements but also complete systems in many fields such as law, theology and philosophy. What we find in many cases is not a superficial or mechanical imitation of non-Islamic concepts but “high-level receptions” that presuppose considerable familiarity with foreign systems and an impressive ability to transfer them by analogy into the Islamic context.³²

As one sees in Crone’s *Roman, Provincial, and Islamic Law*, being able to absorb and implement a complex cultural structure and mold it onto existing traditions requires a strong administrative organization. In addition, the close ties required for such reception show that Byzantine and early Muslim societies were connected to the point that cultural exchange was an inevitability. I believe that this section of the introduction was included to answer future claims of “Orientalist” subversion by overzealous critics. The following quote continues this line of thought:

*The fact that Muslims largely borrowed from other cultures and religions in no way questions the status of Islam as an advanced civilization. By contrast, the receptiveness of or curiosity about foreign cultures and the ability to take over parts of them is an essential prerequisite for reaching the rank of a highly developed culture.*³³

Here, Jokisch turns Hallaq’s earlier cries of Orientalism on their head. The ability to interact with and absorb parts of nearby cultures elevates Arabs to the “higher” culture that Hallaq is so concerned they are being shut out of by Western scholars. Instead of minimizing the accomplishments of early Muslim jurists and scholars, Jokisch is documenting exactly how complex their task was and how successfully they accomplished it.

Jokisch’s argument is exhaustively researched and extremely compelling. The connections that he makes between Al-Shaybani’s work and the *Digests* are so strong that they cannot be ignored, and his chronology fits in with Joseph Schacht’s neatly while his conception of a Roman origin for Islamic law builds on the specific case brought forth by Patricia Crone. It is difficult to imagine that Jokisch is incorrect in his general claim that

³² Ibid., 13.

³³ Ibid.

Islamic law was, at the very least, *heavily* influenced by a Greek translation of the Roman legal digest.

CONCLUSIONS

While Hallaq's chronology and timeline raise important questions for consideration, I do not believe his claims of Orientalist misinterpretation, or the slow and steady internal development of legal theory he proposes, are sufficiently evidenced to counter the arguments of Schacht, Crone, or Jokisch. The argument that Western scholars are inherently biased by their assumed Imperialist national origins is one that must be considered carefully, and Schacht in particular deserves a measure of scrutiny, as he was employed by the British government during WWII, making him a literal part of the process of Imperialism. However, volunteering to combat fascism is not a damning quality for a scholar, and Schacht's thoroughly researched origin story is very compelling, in part because of the way it fits a combined Schacht-Crone-Jokisch narrative.

While these three scholars would likely protest to being combined into one chronology due to their many disagreements over the minutiae of Islamic origins, I believe the core of each scholar's argument in the books discussed in this paper form a compelling narrative. Schacht demonstrates the malleability of prophetic *hadith* and the ease with which multiple schools of thought were able to manipulate their views in order to connect their tradition to the Prophet. Crone shows how the provincial areas of the Byzantine and Muslim empires interacted in a way that led to cultural exchange and the adoption of specific legal structures. These structures were assumed to be part of a pre-Islamic Arab culture by later scholars within the Traditionalist perspective, though Crone's careful analysis proves otherwise. Finally, Jokisch can bring the Roman/secular origins of Islamic law to light by connecting Al-Shaybani's work with Roman legal *Digests* and to a concerted effort at codification by Harun al-Rashid. These arguments build off each other until we have what to me is a clear narrative.

Jurists like Shafi'i urge other jurists to use only prophetic *hadith* in their decision-making process. As a result, jurists sifted through *hadith* to discern which were fabricated and which were not, developing a verification process that would prove to be easily malleable by later jurists. At the same time, many of the key administrative practices used by early Muslims are adopted from nearby Byzantines, clearly showing how intertwined the two empires were. This adopted practice is seamlessly integrated into a Qur'anic origin story, demonstrating just how easily

The Origins of Islamic Legal Theory

Muslim jurists were able to trace practices back to early Muslim or Arab ancestry. Finally, the fabrication process is put to use by Harun al-Rashid to codify Roman legal *digests* and couch them in religious terminology. The reason these secular legal practices from Rome/Byzantium are so easily incorporated into the administrative structure of the Abbasid Empire is simple: this practice has been done before. This narrative, while necessarily broad and general, demonstrates the importance of corroborative methodology in History, as each Western scholar's breadth of source material was essential to the strength of their arguments. While Hallaq remains an important scholar and his argument is well researched and has merit, his criticisms of Western scholarship seem like a knee-jerk reaction in the face of the well-evidenced arguments they have produced.

Kurt Güner is a PhD candidate at the University of Utah and is studying the Middle East with a focus on modern Turkey.

Bibliography

- Crone, Patricia. *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate*. Cambridge University Press, 2002.
- Hallaq, Wael B. *The Origins and Evolution of Islamic Law*. Cambridge University Press, 2005.
- . "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse." *UCLA Journal of Islamic and Near Eastern Law* 2 (2003): 1 – 281.
- Jokisch, Benjamin. *Jokisch, Benjamin. Islamic Imperial Law: Harun-Al-Rashid's Codification Project*. New York: Walter de Gruyter, 2007.
- Schacht, Joseph. *The Origins of Muhammadan Jurisprudence*. ACLS Humanities E-Book, 2008.