

THE SHARI'A: ROMAN LAW WEARING AN ISLAMIC VEIL?

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INTRODUCTION

Law, much like language, is an ever-evolving body closely linked to the culture and society. A tree is often used as a metaphor for the relation of languages: for example, Spanish, Italian, Romanian¹ and Sanskrit all share a common lineage, or branch. They are all Indo-European languages and all differ from the Semitic languages of the Middle East, a different branch. Due to political factors, however, many Arabic words have been assimilated into Indo-European languages. This integration was exterior, either imposed on or incorporated into the receiving culture. The onlooker can pinpoint why a "foreign" word, has made its way in another language. The word is truly foreign, it has no lineage or roots in its new language; it is borrowed and then used in its new home, assimilated to fit its host culture. Does this phenomenon apply to law? Do different legal traditions borrow from each other? Can legal concepts be taken from another tradition, and made to fit into a host legal system? This is the general topic of this paper; a plunge into historical comparative law.

Comparative law is the study of legal institutions, and constructions of different legal traditions, with the purpose of ascertaining similarities and differences. This inevitably leads the comparatists to examine origins as well. The nexus of our analysis will be Roman law. Roman law has been accepted as having greatly influenced, if not wholly shaped, the legal structures of many European countries, possibly because no unifying political force

¹ The language of the Magyar Gypsies.

emerged in the West after the fall of the Roman Empire.² Roman law, as an institution, was more resilient than the individual customary laws of the Germanic tribes that ruled Western Europe. Scholars have tried to locate the different times in which Roman law was "received" back into the different emerging legal traditions of the West. But what of its evolution in the East? Did Roman law have the same impact on the Arab-Islamic tribes that conquered the eastern Empire? Some orientalists have stated that "Islamic law is Roman law in Arab dress."³ Is the answer so simple? At the same time, some Islamic writers stated that "Any law other than the law of Islam is obsolete."⁴ According to believers, Islamic law is the word of God, therefore it cannot have any pagan origins.

It is argued that the answer lies between these two poles. Islamic Law is rooted in Arabic and Middle-Eastern legal traditions, but through its evolution, it has assimilated elements of Roman law. In other words, Islamic Law seems to be of a different tree than Roman law, but it has incorporated some of the fruits of Roman legal thought. As this is a legal analysis, not an historical one, the thesis will be explored, after a brief introduction to Islamic law, by comparing structural elements of Islamic and Roman law, as well as some substantive concepts. The structural elements, such as the role of the jurist in Roman and Islamic law, explain why Roman law influenced, rather than was received into, Islamic law. The focus of the substantive elements of the analysis will be family law as it is in this field that we can find the most developed themes of Islamic law.

A BRIEF INTRODUCTION TO ISLAMIC LAW

Islamic law is a complete legal system. It is not limited to "religious" aspects of life. Under Islam, all human behaviour is in some manner religious. Therefore, there is always a moral and immoral way of acting. There are five classifications of behavior:⁵

Wajib, actions obligatory on Believers; *Matlub*, desirable or recommended (but not obligatory) actions; *Mubah*, indifferent actions; *Makruh*, objectionable, but not forbidden, actions and *Haram*, prohibited actions. Islamic law deals with obligations, property, family law, criminal law, administrative law, etc. The religion of Islam and the government form one body.

² The Church is a force that linked the European factions but this force did not unite Europe politically except for specific issues in limited times (such as the Crusades).

³ S. Amos as cited in P. Crone, *Roman, Provincial and Islamic Law* (Cambridge, 1987), 2.

⁴ R. Mottahedeh, "Some Islamic views of the pre-Islamic past," *Harvard Middle Eastern and Islamic Review* 1 (1994): 17.

⁵ H.A.R. Gibb, *Mohammedanism, An Historical Survey* (London, 1950), 77.

There are three words that mean "law" in the Islamic tradition: *fiqh*, which can be loosely translated as jurisprudence; *qanun*, which encompasses positive law rules that are set, such as state-made law; and *shari'a*, the generic term for Islamic law.⁶ *Shari'a* denotes Islamic law as a whole. It originally meant "the place from which one descends to water", and has developed to mean "the law of water" and, with time, was extended to cover all issues which were considered vital to human existence, including what God has decreed for the people in terms of fasting, prayer, pilgrimage, marriage, contracts, succession and war.⁷ *Shari'a* is thus the all-encompassing notion of the Islamic tradition; it contains written sources, *qawanin* (plural of *qanun*), and interpretations of those sources. In principle, the *shari'a* recognizes only two written sources: the Qur'an, the divine Book revealed to the Prophet Muhammad in the early 7th century AD, and the *sunna*, the reported compilation of the conversations (*hadith*) and deeds of the Prophet collected after his death by his Companions. The *Qur'an* counts approximately five hundred verses that deal with law and thus acts as foundational "Code" of sorts. This basic foundation underlies many legal texts written by jurists. This is *fiqh*, which also means "knowledge", "understanding" and "comprehension". It refers to the legal rulings of the Muslim scholars, based on their knowledge of the *shari'a*, and as such is the third source of rulings. The science of *fiqh* started in the late 7th century AD, when the Islamic state expanded and faced several issues that were not explicitly covered in the *Qur'an* and *Sunnah*. These writings are interpretive and, although not strictly authoritative, are fundamental to the development of the law.

THE PIVOTAL ROLE OF THE JURIST

Roman law and Islamic law have a fundamental common ground, in the role of the jurist. In both traditions there is limited legislation, no judge to make law, and a reverence for customary and historical analysis.⁸

The jurist in Islam is both a legal and religious expert. *Fuqaha* were the class of Muslim scholars who dealt in theoretical Islamic law, or *fiqh* while a *mufti* gives legal responses (*fatwa*) to people's questions. It is the *mufti*, or jurisconsult, that attracts attention.

The Jurist in Islamic and Roman Law

⁷ (Author Unknown), *Fixed and Variable Aspects of Islamic Legislation* (Tehran, 2001).

⁸ C. Mallat, "From Islamic to Middle Eastern Law, a Restatement of the Field," *Am. J. Comp. L.* 51 (2003): 719.

In order to be qualified to interpret the sources of law, a jurist had to master many branches of knowledge. Deep knowledge of the *Qur'an* and the *hadith* are essential, as well as an understanding of the science of interpreting these sources. Much like the Roman Jurist, this learning would be done at the hands of another learned man, by following in his footsteps and by attending meetings at assemblies.⁹ Knowing the history of the law and the schools of law, their differences and legal precedents ("decisions" of other jurists in the past) is also part of the curriculum. Other disciplines such as logic, history, rhetoric and general knowledge as well as specialized areas like commerce or international relations might be important in deciding specific cases. Being proficient in commercial matters was expected. Indeed, most jurists were also merchants and tradesmen. Muslim jurists were scholars with specialized professional training, but their authority was very limited. There is no clergy or priesthood in Islam, and no central authority hands out final judgments. The source of a Muslim jurist's authority comes only from their recognized knowledge, not from the government nor from a central religious authority.¹⁰ Judges (*Qadi*) are appointed and have the backing and support of the states. But judges' rulings, however, are not the foundation of Islamic law, but only its application to specific cases. Often, one could go directly to a *mufti* to resolve an issue and avoid the appearance in front of a judge.

The Roman Jurists gave *interpretatio*, an "elucidation of existing rules"¹¹ through *responsa prudentium*. This interpretation is not strictly authoritative but one can see the potential effect of this development, given that judges, advocates, governors and praetors were not necessarily skilled in the law.¹² These jurists would base their opinions on their knowledge of the legal texts, as well as on the opinions of other interpretations and on their general deductive reasoning, logic and studies. The jurists created a loose structure of legal construction that lasted until the post-classical era, when juristic writing withered and rules were being made by the unanimity of juristic thought rather than merit.¹³ At the height of his "power", the Roman jurist was the active element of law creation.

Both Islamic law and Roman law had the common elements needed to be typified as jurist-based legal systems. They allowed affluent learned people to become legally authoritative. These men became authoritative if they could, by a discussion, internal to the community, agree or supplant the arguments of the other. The common pattern for jurist-made

⁹ The word for assembly, in Arabic, is *Jami'*. This word also means University and Mosque.

¹⁰ This lasted until the custom started, after AD 1200, to assign an official state *Mufti* with legal authority.

¹¹ A. Borkowsky, *Textbook on Roman Law, 2nd ed.* (New York, 2002), 34.

¹² *Ibid.*, 36.

law is as follows: (1) law is not created primarily by legislation or by judges, (2) in their capacity as jurists, these individuals are largely independent of government, (3) their prestige, fundamental for their role, is independent of any job that they hold, indeed being a jurist was not a profession: they took no money for their services, (4) the materials on which they work are usually older, regarded as authoritative, but are insufficient and require a great deal of interpretation.¹⁴ The difference between these two traditions is that Roman law is secular while Islamic law is religious; religious law is a search for fundamental truth. The characterization of Roman law as completely secular, however, might be underestimating the effect that the College of Pontiffs had on the development of juristic reason in early Roman law. The codification of the Twelve Tables was the end result of a conflict between the Patricians and the Plebeians; nevertheless, the Twelve Tables were rather limited in scope. Furthermore, the College of Pontiffs was the sole body permitted to interpret these laws. This gave a religious hue to legal interpretation. Rather than discuss the religiosity of Roman law, it is more important to stress the secularism of Islamic law. The *shari'a* is "of this world and the other."¹⁵ In other words, it is both religious as well as civil. In modern times it has even extended to cover web-surfing and cellular phone usage.¹⁶

Juristic Reason as a Nexus of Roman Influence on the *Shari'a*

The role of the jurist is common to both legal regimes and might help explain why Muslim jurists, writing four hundred years after Roman jurists, would easily assimilate Roman legal doctrines. It would have been blasphemous and politically dangerous, however, to try to link Islamic law to Roman roots. Therefore, the Roman legal principles that permeated into the *shari'a* could not be imposed from "above". There could be no blanket "reception" of Roman law, and indeed, the political power structure would have been hostile to such an occurrence. The Roman legal principles had to be incorporated from "below". The jurist became the link between the customary interactions of the population and the written *qawanin*. By analogy and reasoning, the *mufti* rationalized behaviours to fit general principles of law. Unlike the judge, who deals with discrete matters, the jurist must account for dialectic reasoning when rendering opinions. This adds an analytical thread to broad ideas and notions as well as "on the ground" policy concerns. Jurist-made law is thus

¹³ Ibid., 52

¹⁴ Watson, 3-4.

¹⁵ "al-din ou al-dounya"

¹⁶ "Fatwa Online" *Islamonline* (05 December 2004), online: <<http://www.islam.tc/ask-imam/index.php>>

a way to systemize popular behavioural interaction into broad notions of justice. The Volkgeist is thus "sublimated" from society and "synthesized" back to the people.¹⁷

In addition to the role of the jurist, other legal structures that derive from that role are parallel in Islamic and Roman Law. Goldziher, in *Muhammeddanische Studien* and *Jogtudomány*, equates *fiqh* with *jurisprudentia*, the *fatwa* to *responsa prudentium* and *ra'y* (opinion) to *opinio prudentium*.¹⁹ Goldziher does more than equate, he hypothesises that Islamic legal structures are somehow descendants of Roman legal structures. But the Muslim conquest reached Roman law in a late stage when the *prudentes* of Rome had already long disappeared.²⁰ Goldziher does not push the argument that Islamic law is, through its origins, linked to Roman law. He states that one is a fruit of the other, rather than another branch of the same tree. It is possible that both legal systems had a common origin in earlier times,²¹ which might explain their common structures.²²

It is enough to note that Islamic legal structures are similar to the Roman ones and that this similarity, whether due to relation or coincidence, allows easier permeation of substantive Roman legal notions into Islamic law. It is impossible to state, at this point, that Islamic law is of the same genetic line as Roman law, but some of the substantive concepts that are parallel in both traditions can be explored.

THE AGNATIC LINE AND THE 'ASABA

The Syro-Roman Code and the *Shari'a*

Legal studies of late antiquity were greatly advanced when Karl George Bruns and Eduard Sachau published their translation of the Syro-Roman law book in 1880, in Germany. The Syro-Roman law book of the fifth century AD was an amalgamation of imperial Roman law, roman legal literature and Provincial Roman law. It points out legal patterns that enlighten several features of Islamic family law. These similarities were generally ignored in the internal Islamic scholarly tradition because of the supremacy of reli-

¹⁷ See generally A. Daher, "La construction de l'islamité et l'intégration des musulmans au Québec dans le discours de leurs leaders" (Ph.D diss., U. du Québec à Montréal, 1999) and P. Berger, *La religion dans la conscience humaine*, (Paris, 1971).

¹⁸ It is to be noted that the Romans referred to the opinion of the jurists but there was no properly set institution in Roman law that is equivalent to *ra'y*.

¹⁹ Crone, 103-104.

²⁰ *Ibid.*, 103

²¹ Possibly before 1st millennium BC since there seems to be an Indo-European migration from Asia Minor to the Italian peninsula at that time.

gious law.²³ The Muslims conquered the area where the Syro-Roman law book held jurisdiction at a critical moment of their own legal development. It is now recognized that many elements of the Roman law influenced the development of the *shari'a* because of the conquest of Syria.²⁴ The Syro-Roman Code itself is recognized as a source of Roman influence on Islamic law.²⁵ One such element is the common structure of intestate succession in Roman and Islamic law. It is important to mention that, although the Syro-Roman Code comes from a mixture of legal sources, the intestate succession scheme described in the code is based on the principle of the agnatic line²⁶ which is a "truly" Roman principle.²⁷

The similarities between the rules, as written in the Syro-Roman Code, and as interpreted in the *shari'a*, are striking. Chibli Mallat, a renowned Islamic legal scholar notes that:

“... the 130 articles in the Arabic version of the Syro-Roman Code sound so familiar to the modern Arab lawyer that the Code appears as some "vulgate" for the uninitiated [...] The following passage, taken from the very first article of the Syro-Roman Code, can equally serve as a good summary of the scheme of succession in Muslim Sunni law: "If a person dies without a will... and is not survived by his father or his mother or by a child or a brother, then his estate goes to his paternal uncles or the sons of his uncles.”²⁸

One of the most surprising realisations is that the word *sunnah* is used in the Syro-Roman Code to mean law,²⁹ thus predating the use of that word in Islam by two hundred years. Disregarding certain etymological influences of the Syro-Roman Code, this text still allows us to establish the influence of Roman Law on the substantive successions law of the *shari'a*.

In Roman law, the agnatic family is, as stated by Ulpian:

“...the one that comprises all paternal agnates; because, even after the

²² It would be helpful to look at the genetic history of Jewish law as it is even closer to Islamic law than Roman law.

²³ Mallat, 708.

²⁴ See e.g. Crone, 103.

²⁵ Gibb, 72-84.

²⁶ Mallat, 710.

²⁷ Borkowsky, 212-215.

death of the paterfamilias, when each one of them forms a new family, they were under his potestas and continue to be considered of the same family, in other words from the same house and the same root."³⁰

Therefore, "*agnati* are those who can trace relationship to each other by civil descents through males from a common ancestor."³¹ The *proximus agnatus* is the nearest agnate. He is the member of the agnatic line that would get the succession upon the death of a relative who did not leave a will and had no heirs who were *sui heredes*.³²

In Islamic law, some of the shares in the succession are prescribed to a defined number of heirs (daughter, son, wife, father, etc.). Once these prescribed Qur'anic shares are distributed, the nearest agnatic male kin receives the remainder of the succession to the exclusion of closer female relatives of the deceased.³³ What is left after the division of the prescribed shares goes to the nearest agnate. If the man died without direct heirs, this relative would receive everything. The word that describes this male "residuary line" is '*asaba*'.³⁴ It is essential at this point to give an example of how this notion is used. If a Muslim dies, leaving his widow, a son and a daughter, the widow would receive 1/8th of the succession as prescribed. This leaves 7/8th for the children. The son would receive double his sister's share, therefore he would get 2/3(7/8) while the daughter would get 1/3(7/8). If a Muslim dies with no sons, leaving only a widow and a daughter, the widow would still receive 1/8th of the succession, but the children would not receive 7/8. The nearest agnate would take the position of the lone son and thus receive 2/3(7/8), leaving the daughter with what she would have received had she had a brother.³⁵ Thus, the paternal nephew often has a larger share than the daughter.³⁶ The word '*asaba*' itself appears in the Syro-Roman Code at article 19.³⁷ The *Qur'an* has no mention of this word although it becomes a critical feature of succession law in Islam.

The Diverging Interpretation of Sunni and Shi'a Law

This Roman rule was assimilated into the Sunni sect of Islam that formed over ninety percent of Muslims. On the other hand, the Shi'as, who form less than ten percent of

²⁸ Mallat, 709-710.

²⁹ *Ibid.*, 709.

³⁰ Cited in B. Schmidlin & C.A. Cannata, *Droit Privé Romain*, (Lausanne, 1984), 49.

³¹ W.W. Buckland, *Manual of Roman Private Law*, (Cambridge, 1953), 64.

³² *Ibid.*, 227.

Muslims and whose demographic strength is concentrated in the eastern fringe of the Arab world, do not recognize the *'asaba*. In the absence of a male heir, the daughter receives under Shi'a law the whole succession. If we allude to the example used above, the daughter would thus receive the full 7/8 of the succession to the exclusion of paternal uncles or nephews. This rule derives without discontinuation from the Persian Zoroastrian (Sasanian) legal tradition that was prevalent in the Eastern fringe of Iraq.³⁸ This minority of Muslims, who occupy a territory that was not under Roman rule, apply an indigenous Sasanian rule that is exactly opposite of that of the Sunni sect, whose centre was in Syria on the Mediterranean during its formative legal years. By contrasting Islamic law's development outside the former borders of the Roman empire, one could contend that the Islamic law that developed in the Roman empire was influenced by Roman rules.

DONATIO PROPTER NUPTIAS AND MAHR

The Concept in Roman and Islamic Law

Western Roman law had recognized the institution of the dowry for much longer than the dower. The dowry is money or property brought by a woman to her husband at marriage. It is seen as a gift, an endowment. Whereas the dowry is given to the bridegroom, gifts from him to the bride were not subject to the same rules and were generally illegal during the marriage.³⁹

The dower is defined in the modern Webster as "the rights of a widow in the property of her husband at his death." In Islam and in the Roman Empire, the dower is the groom's addition to his wife's estate. In late Roman Law, this concept was called *Donatio Ante Nuptias*. This was, as stated, a later development of the Roman Law and has a distinctly Eastern influence. "Roman Law acquired a Byzantine hue in the late Empire [...] The custom whereby the bridegroom made a substantial gift to his bride on marriage was recognized by late imperial legislation."⁴⁰ It is a counterpart to the dowry and serves two purposes: (i) a penalty for unjustified divorce and (ii) extra provision for the widow.⁴¹ Justinian enlarged this institution, allowed such contributions during the marriage and renamed it *Donatio Propter Nuptias* (*propter*: "on account" of rather than *ante*: "before").⁴²

³³ Mallat, 709-710

³⁴ *Ibid.*, 710.

³⁵ See generally H. Taqiedin, *The Will and the Way of Succession in Druze Heritage* (Beirut, 1984).

³⁶ M. Motaharri, *Les Droits de la Femme en Islam*, (Paris, 1973), 164.

³⁷ Mallat, 710.

³⁸ *Ibid.*, 713.

The two aims of this concept would immediately resonate with any Muslim jurist. Indeed, in Islam they are the exact words used to describe the Islamic *mahr*. The *mahr* is an obligatory contribution that a bridegroom must make to his bride. It is recognized as a gift, not a compensatory institution that aims to put a price on the wife. Its aims are dual. As in the Roman *donatio*, *mahr* serves both to discourage divorce and to provide for the wife at the end of the marriage.

Mahr in the Jahiliya and the Qur'an

Mahr for these purposes did not exist in pre-Islamic Arabia.⁴³ It was a practice that historically symbolized ownership. The money was paid to the bride's family, not directly to the bride, as a compensation for taking her out of her native tribe. In even earlier times, the bridegroom would work for the bride's father for an amount of time that was deemed necessary to pay his debt. This custom is present in the Bible when Jacob, who had no dower to give for his wife, gave his services instead.⁴⁴

Even within the strict interpretation of the *Qur'an*, *mahr* also takes on different purposes. *Mahr* is a wife's right, which becomes binding upon the husband once the marriage is contracted. "And give women on marriage their dower as a free gift."⁴⁵ *Mahr* belongs to the wife and it is to be given to her only. It is not the property of her parents or her guardian. No one can relieve the husband from the *mahr* obligation except the wife herself. If a husband dies without paying *mahr* to his wife, the outstanding amount becomes a debt on his estate and therefore, must be paid before the distribution of his inheritance among his heirs. The rule is similar if there is divorce, as it becomes immediately due. The *Qur'an*, and several *muftis*, have stressed that the *mahr* has nothing to do with divorce. But, in classical Islamic legal circles, as well as modern ones,⁴⁶ the institution of *mahr* has taken on the roles that were described when talking of *donatio propter nuptias*. The rule that the *mahr* needs to be fully paid by the time of divorce becomes a de facto limitation on divorce.

It cannot be said for certain that the *mahr* institution derives from Eastern Roman Law because there existed an Arabian equivalent, but the juristic justification that was given to

⁴⁰ This was a limitation on the *liberum matrimonium* rule in Roman civil law. See Buckland, 66.

⁴¹ Borkowsky, 53.

⁴² P. Corbett, *The Roman Law of Marriage*, (Oxford: Clarendon Press 1930), 206.

mahr is taken from Roman legal thought. This tradition was so strong in the Eastern Mediterranean that it forced its way into Roman law and was crystallized in Book V of the Code of Justinian.⁴⁷ At the time of the Islamic conquest, the population in what is now Syria, Palestine and Southern Turkey was over ninety percent Catholic and had been living under Roman and Byzantine rule for the past five hundred years. The Muslim Umayyads transferred their capital to Syria and started its "Arabisation". This happened at an embryonic stage of Islamic jurisprudence, which allowed many local legal influences to enter Islamic legal thought.⁴⁸

THE ROMAN PATRONATE AND *WALA'*

The Islamic *Wala'*

We have looked at two pillars of Islamic family law that seem to be descendants of Roman legal principles. But neither the *mahr* nor the *'asaba* have received the amount of attention that the concept of *wala'* has garnered after Patricia Crone and Martin Hinds published *Roman, Provincial and Islamic Law* in 1987.⁴⁹

Wala' describes both "dependence on" and "affinity for" another. It is the patron-client relationship that develops when an "outsider" has to be integrated in a host group.

All societies must have a policy regarding the admission of outsiders to their ranks [...] in societies constituted by common faith, adoption of this faith will normally result in the acquisition of membership [...] Newcomers in a certain society necessarily receive their rights either indirectly via an individual or group or else directly from the community itself.⁵⁰

In Islam, the non-converted subjects of the state were called *dhimmis*, and, in principle, their rights were never circumscribed. The manumitted convert also benefited from full rights upon manumission, but that act also created a bond between the freedman and the manumitter. That relationship, which was mostly asymmetrical, is *wala'*.⁵¹

⁴³ U. Mitter, "The Role of Non-Arabs in the Origins of Islamic Law," *Sharqiyyat* 9 (1997): 110.

⁴⁴ Genesis 29:18

⁴⁵ Holy *Qur'an Al-Nisa'* 4:4

⁴⁶ See e.g. *Kaddoura v. Hammoud*, [1998] O.J. No. 5054 (Prov. Ct.) or *N.M.M. v. N.S.M.*, [2004] B.C.J. No. 642 (Prov. Ct.)

⁴⁷ Buckland, 66.

The legal ramifications are limited, but one of the main consequences is that the manumitter inherits as an agnate of the freedman. There are other consequences as well, such as the manumitter becoming the marriage guardian to his freedwoman.⁵² The freedman, on the other hand, does not inherit from the manumitter.⁵³

Roman Patronage

In Roman Law the rules are also clear. The law of the Twelve Tables gave the estate of a freedman to his former master provided he died intestate, and without *sui heredes*. The former master, by the act of manumission became his patron. The freedman did not acquire rights in his master's gens by his manumission, although he was allowed to adopt the gentile name of his patron. This is recounted in the Institutes of Justinian in Book III Title VII:

“Let us now turn to the property of freedmen. These were originally allowed to pass over their patrons in their wills with impunity: for by the statute of the Twelve Tables the inheritance of a freedman devolved on his patron only when he died intestate without leaving a family heir. If he died intestate, but left a family heir, the patron was not entitled to any portion of this property, and this, if the family heir was a natural child, seemed to be no grievance; but if he was an adoptive child, it was clearly unfair that the patron should be debarred from all right to the succession.”⁵⁴

Pre-Islamic *Wala'*

The parallels in the rules, do not, in themselves, show a direct link between *wala'* and the Roman patronate. Indeed, there was an institution in pre-Islamic Arabia that involved the accession of outsiders into the host society. It was *hilf'* (alliance, partnership, and attachment) and *jar'*⁵⁵ (protégé). These institutions describe the acceptance into the tribe of an outsider who then becomes subject to a relationship of patronage, not with any one individual, but with the tribe as a whole.⁵⁶ The relationship, in pre-Islamic Arabia, did not assimilate the outsider into his host tribe, and did not detach him from his native one.⁵⁷ Thus the

⁴⁸ Crone, 32.

⁴⁹ Crone, 3.

⁵⁰ Ibid., 35

⁵¹ Ibid., 36

⁵² Ibid., 36-37

two main characteristics of the pre-Islamic patronate are that it is formed between an individual and a tribe, and it is not assimilative. Therefore, Patricia Crone hypothesises that, due to the structural differences between the Arabian and Islamic patronate, and the structural similarities between the Roman and Islamic patronates, that the *shari'a* was influenced on this issue from its contact with Roman Law.

This is a plausible argument, which reinforces the main thesis of this paper, but the causal link is tenuous. Whether Islam is seen as exterior to this world, or a fruit of human thought, it cannot be denied that that philosophy had a great impact on the region. Focusing on some of the aims of Islam can reveal why, without Roman influence, it would transform Arabian *jar* and *hilm* into the Islamic *wala'*.

Islam as an Autonomous Source of Law Reform

Hilm and *jar* are relationships of patronage that did not have, as a goal, the accession of the outsider to the tribe. It was a way of allowing the outsider to stay with the tribe, rather than become part of it. The importance of blood relations in the *jahiliya*⁵⁸ cannot be overstated. It is impossible to accede to the tribe of another as tribal identity is linked to lineage. This is not so in Islam. Fundamental to any religious dogma is the possibility, highly encouraged of course, of conversion. Without conversion to the belief, no expansion is possible. Islam, as an institution, rejects any divisive communitarian institution such as *hilm* or *jar*. One of the fundamental aims of Islam was to create a global community of members, the *umma*, in an effort to eliminate tribal sectarianism.⁵⁹ This means that any patron-client relationship under Islamic law would necessarily have to be assimilative and would need to detach the outsider from his prior identity. Furthermore, rejecting the idea of tribal identity, the patron-client relationship created cannot be between an individual and a tribe. It has to be between the *umma* and the individual. Thus, the only "real" patronage created has to be one of individual relationships as opposed to tribal ones. Islamic Law and Roman Law have similar rules on client-patron relationships, but it cannot be said for certain that there is an influential link between Roman law and Islamic law as regards patronage. Perhaps this is simply another case of Islamic juristic reasoning that builds on Roman texts on the subject.

⁵⁵ Except for small pockets of the Imami and Ismaili schools which allowed the freedman to inherit if the manumitter died with no heirs. All other schools rejected this position. See Crone, 37.

⁵⁵ "The Institutes of Justinian" *Lincolinn*: online <<http://members.aol.com/hsuertieg/institutes/book3.htm>>

⁵⁶ Interesting to note that in modern times this means "neighbour", or, in other words, he who is not of this household but resides near us.

⁵⁷ W. M. Watt, *La Pensée Politique de l'Islam* (Vendôme, 1995), 7 and 63.

CONCLUSION

A point that was raised in this paper but not thoroughly explored is the possible genetic relation between Islamic and Roman Law. Do these systems come from the same legal tree? Are they of the same origin or family of law? They both treat obligations rather similarly, they both reorganize private property and they both have patriarchal family regimes that emphasize blood ties. This question is left unanswered because it is beyond the scope of this paper where the focus was on substantive legal influence and the structures that permit it.

By comparing substantive legal institutions of Roman and Islamic Law, it is possible to perceive a Roman influence on the *shari'a*. The influence is on the *shari'a* itself, and not on its foundational legal texts. The *Qur'an*, for example seems relatively free of direct Roman influence. But the rules that have evolved from it are heavily affected due to the structure of Islamic law. *Shari'a* and *shara'a* are words that mean many things, river, road, street, guide, but one other meaning is beginning, start, a new course. In the very meaning of the word, we can find an acceptance of interpretation being something new rather than recycled. The *Shari'a* is thus the "path to follow", but the path can evolve, it can seek out new terrain.

It is the unique structure of jurist-dominated legal systems that allows them to be so malleable to outside influence. In addition, Islam is individualist and decentralized. This decentralization does not allow for a predominant figure to emerge or a unique set of ideas to dominate. It is because of the looseness of this structure and the liberalism of the institutions that external influence is particularly strong on Islamic law. In essence, any rule that makes sense will find at least some followers. Therefore, a strong legal regime such as Roman law becomes particularly influential. Roman and Provincial law have indeed left a lasting footprint in Islamic law.

However, there is a flaw in the way we deal with comparative law. In this field, there is often talk of debts and borrowings when discussing legal history. If one looks at the writings of the late 19th century orientalists it would seem that barbaric, horse riding Bedouin tribes, after conquering the Eastern Mediterranean, were awed by the perfection of Roman

⁵⁸ In pre-Islamic Arabia, the "*Jahiliya*" came from the word for ignorance.

⁵⁹ Watt, 67-70.

law and thus proceeded to copy down the rules of the civilized Romans and purged from themselves the backwards tenets of their customary law. This is a skewed picture. Although it is true that there is a Roman influence on the *shari'a*, Islam itself, whether seen as a religion, a philosophy, or a socio-political movement, oversaw major law reform. Furthermore, the Roman influence that did occur was a slow integration of Roman ideas through the mechanisms of Islamic law. It follows a pattern of law evolution. If we look at the Middle East, its law has a certain linear pattern that goes from the Code of Hammurabi, through Assyrian Law, Rabbinic Law, Greek Law, Roman Law, Byzantine Law and finally to Islamic law.⁶⁰ Although the name of the legal regime that is in effect changes, the people living under it do not. It is these people that bring a rule from one tradition to another. When the Arab-Muslim empire became a real power, most of its inhabitants had still been born Byzantine. These people simply continued to live their lives as they always had and left it to the jurists to go through the mental acrobatics of reconciling their actions with "the law".

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⁶⁰See generally Mallat.

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