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Islamic Law in Oriental Studies⁽¹⁾

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Introduction

I am grateful to the president and the other members of the organizing committee of this conference for their kind invitation, and giving me the opportunity to visit this Muslim country, recognize her beloved people, and especially read my paper here before this respectful audience. It also gives me great pleasure to introduce here the best regards of Turkish people to the brother Jordanian people.

While the world is becoming a global village, and the outputs of orientalism are used somehow as a feedback for many international political and cultural projects imposed onto the "Orient" in general and the Muslim world in particular, Orientalism poses a vital issue for both Muslim world and the other peoples of the Orient. Therefore, it is necessary for them to construe the orientalist convictions and thoughts. In other words, "Orient" has to excavate this scholarship in order to penetrate the background of that literature.

The problem of recognizing and understanding the "other" appears throughout history. Although the Orient in its entirety takes place in the scope of Orientalism, Muslim territories in its long history always occupied the centre of the interest. Relations in the past between the members of the two civilizations such as the experiences of Crusades, al-Andalus, Saldjukids and Ottomans may be counted as the factors for a special interest in this world. In the middle ages, the Islamic world was the centre of global power up to the modern times, thus conceived a challenging force for a long time. This was the main factor for the fact that the geography of Islam and structure of Muslim societies and their cultures had a prevailing place in the related literature.

There is an ever-expanding literature in western languages on İslam and its

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various manifestations. In fact, the literature of the field has developed so that even an exclusive conference on the present state of any Islamic discipline in oriental studies is held, the subject could not have been examined thoroughly. Evaluating any portion of this literature produced in any single language exceeds the capacity of any person. Hence, any attempt of examining the oriental scholarship as to any Islamic discipline in a paper size is necessarily to be of a synopsis nature. Drawing such a sketch of the related scholarship is not impossible. Neither is it out of significance. In the first place, such a study will give a general idea about the subject matter, and it may function as a guide for the young students of Islamic studies. At least, it might provide the opportunity to penetrate this scholarship. If it bears any contribution to the field, in the long term, it will be a source of pleasure for the author.

Here I will not focus my paper on any specific problem, nor try to study it profoundly. If I were to introduce a paper in a specific conference, the title and the content of my paper would have been certainly different. Therefore, it would not be convenient to read a sophisticated paper full of technicalities of the field here in a conference which examine many aspects of the Islamic Orientalism altogether. I believe that there will be held many exclusive conferences among the specialists in different disciplines in near future. There is an increasing interest in holding such gatherings, and this trend is regarded to be seminal for coming events.

In this occasion, I would like to congratulate the organizing committee for choosing such an important topic for this conference. I hope this event will also promote mutual respect and understanding among the members of different cultures.

In my paper, I intend to examine mainly the conception of Islamic law in the West in broad lines, and deal with the nature and development of this conception. Meanwhile I'll try to catch general trends in related scholarship. In the first part of my paper, I will give a brief definition of orientalism. The second part examines the development of oriental studies relating Islamic law through

the works of distinguished scholars of the field. This part constructs the nucleus of my paper.

I use here "Islamic law" in the sense of al-fiqh. The choice of "Islamic law" phrase in the title is due to such a prevailing usage. In fact, al-fiqh has a compass broader than that of "Islamic law". On the other hand, I use "oriental studies" for the studies that are carried out in the West and by non-Muslim scholars.

I. Orientalism

Orientalism is Oriental scholarship, knowledge of Oriental languages. Oriental means belonging to, occurring in, or characteristic of, the countries east of the Mediterranean, esp. those of eastern Asia; of or pertaining to the Orient, its affairs, or civilization. Orient means the part of the earth east of a given point; spec. the countries east of the Mediterranean, esp. those of eastern Asia (New Shorter Oxford English Dictionary). Although the Orient signifies a geographical direction tantamount to the sense of east, Orientalism is a kind of attitude developed by European peoples towards those who inhabit in the Eastern part of the world, and all what those peoples produced.

As known, once Nasruddin Khodja has been asked of the centre of the world, he pointed to one of the back legs of his donkey as the centre. Surprising to the confidence of Khodja, the questioner asks how he knew that point was the centre. Khodja follows to answer as confidently as before, if he did not believe him, he could measure. In the same vein, while living on a globe, it is not so easy to answer such a question. There is east and west of any point of the world, for no coordinate of the world is devoid of rising and setting of the sun. Every point can be signed as orient or west. It depends on what point is taken as the center. However, such a geographical division has turned out to be a distinction of culture, civilization, and power. This metaphorical sense has become conventional, and the distinction drawn between them is deepened to an ontological level. Therefore, Orientalism can be defined as an intellectual attitude that reflects the approach in which the euro-centric social theory situates the Orient as the ontological "other".⁽³⁾ Hence, all good qualities are been attributed to

the west; the negative ones are ascribed to the Orient. The Orient was dormant; the West was dynamic, etc. Consequently, each member of both segments takes share in this division.

Whenever the concept of orientalism is been mentioned, it reminds of Edward W. Said, the author of excellent book "Orientalism", that brought about a revolution in the Western intellectual tradition of oriental studies. Usage of the term 'orientalist' in post-Saidian period has become increasingly pejorative. While previously one could call willingly himself as orientalist, in this new era nobody is pleased to be called as such.

Said identifies Orientalism as a style of thought based upon an ontological and epistemological distinction made between "the Orient" and "the Occident".⁽⁴⁾ He argues that such a distinction is accepted by a very large mass of writers as the starting point for elaborate theories, epics, novels, social descriptions, and political accounts concerning the Orient, its people, customs, mind, destiny, and so on.⁽⁵⁾ He diagnoses it as a Western style for dominating, restructuring, and having authority over the Orient.⁽⁶⁾ Meanwhile he sees Orientalism mainly a British and French cultural enterprise.⁽⁷⁾ He maintains that Orientalism derived from a particular closeness experienced between Britain and France and the Orient. France and Britain dominated the Orient and Orientalism from the beginning of the nineteenth century until the end of World War II. Since World War II, America has dominated the Orient and approaches it as France and Britain once did. In the final analysis, the large body of texts that he identifies as Orientalist comes out of that closeness. This literature always demonstrates the comparatively greater strength of the Occident (British, French, or American).⁽⁸⁾

Until recently when the West is been mentioned, it has been understood of Europe. This monopoly has been shaken by the United States since the latter part of the twentieth century. Since then, rising as a leading global power on the horizon, United States have occupied the dominant status in the representativeness of the West. The globalization process has a promoting factor in

this effect. However, there is a latent and deep competition between two big forces. In these circumstances, the Muslim world constitutes the ground of, or takes place in the converging point of competing interests of these global powers.

B. The phases of orientalism

Oriental studies, as Rudi Paret points out, is a discipline that has its origins in a world to which the orientalists do not belong.⁽⁹⁾ They are talking on a foreign world of civilizations and cultures. They try to penetrate this world. They use all the opportunity that gives them the means of access. First, they have to pass the linguistic obstacles. Since Orient is a huge realm of languages, each specialist has to choose convenient language of his area. Therefore, oriental studies have primarily a linguistic basis.

Many works that produced by Muslim thinkers have been translated into European languages throughout history. Without gaining mastery in related languages, one cannot penetrate that foreign world. Owing to the competence over foreign languages, the other's literature within which the cultural world of the other found expression can be transmitted. But the content of any culture can not be exhausted. What has been done is the translation of some pieces of most important literature. By the passage of the time, a considerable increase occurs in the amount of the translated literature. The fact that the philological attempts preceded the later stages of orientalism lies at this point.

Orientalism is a phenomenon whose genesis goes back for centuries. Its history may be drawn back to the early times of Islam, for it has been regarded by the Christian Europe as one of the greatest source of anxiety since the time it first appeared.⁽¹⁰⁾ The Muslims were a treat to Western Christendom long before they became a problem.⁽¹¹⁾ During the first thousand of the confrontation, the attitude of the Christian side towards Islam was generally a state of ignorance.⁽¹²⁾ Whatever European Christians thought of Islam, they could not deny that it was an important factor in human history, and one which needed to be ex-

plained. Awareness of the world of Islam increased in early modern times, between the sixteenth and eighteenth centuries, and in some ways its nature changed. The military challenge from Ottoman State had ceased to exist by the eighteenth century, as the balance of military strength shifted. Improvements in navigation made possible the exploration of the world by the European ships and an expansion of European trade in the Mediterranean and the Indian Ocean, and there were the beginnings of European settlement.⁽¹³⁾ As relations grew closer, intellectual awareness also expanded.⁽¹⁴⁾

Meanwhile the evolution of orientalism can be studied in three phases: classic, modern and post-modern orientalism. The basic characteristics of classic phase of orientalism can be summed up as follow: Most of the related literature lacks a scholarly basis; it has a missionary character; and examples of defamation are abundant. Modern phase of orientalism is generally accepted to start with military campaign of Napoleon to Egypt. The basic feature of this phase is to follow a scientific way. However, the basic tenet of orientalism, that is establishing the dominance over the Orient, is latent and embedded. This time it is thought to achieve the goal by the means of scientific activities. Indeed the orientalism of this period has produced a huge literature. The most important subjects and institutions of Islam have been seriously discussed in this period. It constructs the archive of recent phase of orientalism. That phase is called as new-orientalism or post-modern orientalism.⁽¹⁵⁾ In this phase, Islam became subject of many social sciences. Orientalist scholars of the last generation are trained in different fields of social sciences, and they examine Islam and its various dimensions in the terms of their disciplines.⁽¹⁶⁾ Orientalist scholars of this phase are identified by their culture, period and region of specialization, and by their specific disciplines.⁽¹⁷⁾

Indeed, Orientalism became a discipline among the secular faiths of nineteenth-century European thought. Islam was the essential Orient for the medieval and Renaissance periods. During the eighteenth century, a number of new elements interlocked the general scope of thought about the Orient.⁽¹⁸⁾ The first

element was European exploration of the rest of the world. The orient expanded. A more knowledgeable attitude towards the alien and exotic was supported by historians' efforts. Whereas Renaissance historians judged the Orient inflexibly as an enemy, with some attempt at dealing directly with Oriental source material, perhaps because such a technique helped a European to know himself better.⁽¹⁹⁾ But there was a tendency among some thinkers to exceed comparative study, by sympathetic identification. This is a third eighteenth-century element preparing the way for modern Orientalism. What today we call historicism is an eighteenth-century idea; Vico, Herder, and Hamann, among others, believed that all cultures were organically and internally coherent, bound together by a spirit, genius, Klima, or national idea which an outsider could penetrate only by an act of historical sympathy."⁽²⁰⁾ A fourth element preparing the way for modern Orientalist structures was the whole impulse to classify nature and man into types."⁽²¹⁾ "The four elements that have been described - expansion, historical confrontation, sympathy, and classification- are the currents in eighteenth century thought on whose presence the specific intellectual and institutional structures of modern Orientalism depend. Without them Orientalism, could have not occurred. Moreover, these elements had the effect of releasing the Orient generally, and Islam in particular, from the narrowly religious scrutiny by which it had hitherto been examined (and judged) by the Christian West. In other words, modern Orientalism derives from secularizing elements in eighteenth-century European culture."⁽²²⁾

The institution of oriental studies as a discipline was realized when people were ready to put aside all their prejudiced opinions. But it is not known precisely when this change took place. It can be claimed that the oriental studies had already acquired a scientific character by the nineteenth century.⁽²³⁾

By the beginning of the nineteenth century, Europeans who thought about Islam could take up two kinds of attitudes toward it. They could see Islam as the enemy and rival of Christianity, or else as one of the forms which human reason and feeling have taken in their attempt to know and define the nature of God

and the universe. Common to both these attitudes was acceptance of the fact that Muhammad and his followers had played an important part in the history of the world.⁽²⁴⁾

Silvestre de Sacy (1758-1838) is associated with the beginning of modern Orientalism. He is the first president of the Société asiatique (founded in 1822). His work virtually put before the profession an entire systematic body of texts, a pedagogic practice, a scholarly tradition, and an important link between Oriental scholarship and public policy. In Sacy's work, for the first time in Europe since the Council of Vienne, there was a self-conscious methodological principle at work as a coeval with scholarly discipline.⁽²⁵⁾

The difference between Sacy and Renan is the difference between inauguration and continuity. Sacy is the originator, whose work represents the field's emergence and its status as a nineteenth-century discipline with roots in revolutionary Romanticism. Renan derives from Orientalism's second generation: it was his task to solidify the official discourse of Orientalism, to systematize its insights, and to establish its intellectual and worldly institutions."⁽²⁶⁾

Ernest Renan, an Oriental philologist, also a man with a complex and interesting sense of the way philology and modern culture are involved in each other, takes places between the Friedrich August Wolf of 1777 and the Friedrich Nietzsche of 1875. In *L'Avenir de la science* (written in 1848 but not published till 1890) he wrote that "the founders of modern mind are philologists".⁽²⁷⁾

Oriental studies are an international affair. Thus, the scholars of any country have been always aware of the activities of their colleagues in other countries. In this effect, Congress of Orientalists, which continued to be held for two hundred years, is a noteworthy event. The first international Congress of Orientalists was held in Paris in 1873. The name of the congress changed after the Congress again in Paris in 1973. This organization served as a ground for exchange of experience and thoughts. This network has run well in the continental Europe and North America.

"Ever since the first orientalist congress in 1873, scholars in the field have

known each other's work and felt each other's presence very directly. Most of the late-nineteenth-century Orientalists were bound to each other politically as well. Hurgronje went directly from his studies of Islam to being an advisor to the Dutch government on handling its Muslim Indonesian colonies; Macdonald and Massignon were widely sought after as experts on Islamic matters by colonial administrators from North Africa to Pakistan; all five scholars shaped a coherent vision of Islam that had a wide influence on government circles throughout the Western world."⁽²⁸⁾

A. History of Islamic Studies in the West

In fact, the origins of Islamic studies can be dated to the twelfth century, when the Koran was first translated into Latin in 1143 by Abbot Petrus Venerabilis of Cluny, and it was followed by a Latin-Arabic glossary in the same century. All these efforts, as well as those of the following centuries had a missionary character. The attitude adopted by the Christian West towards Islam during the Middle Ages was characterized exclusively by apologetics and polemics.⁽²⁹⁾

The first systematic study of Islam and its history in Western Europe goes back to the late sixteenth century. In 1587, the regular teaching of Arabic began at the College de France in Paris.⁽³⁰⁾ Soon afterward, in 1613, a chair of Arabic was created at the University of Leiden in the Netherlands. In England, a chair was created at Cambridge in 1632 and one at Oxford in 1634.⁽³¹⁾

Islamic studies in various countries were been carried out in universities and academic centers. "There were two principal methods by which Orientalism delivered the Orient to the West in the early twentieth century. One was by means of the disseminative capacities of modern learning, its diffusive apparatus in the learned professions, the universities, the professional societies, explorational and geographical organizations, and the publishing industry. All these, as we have seen, built upon the prestigious authority of the pioneering scholars, travelers, and poets, whose cumulative vision had shaped a quintessential Orient; the

doctrinal -or doxological- manifestation of such an orient is what I have been calling here latent Orientalism."⁽³²⁾

It was Heinrich Leberecht Fleischer's (1801-1888) decisive work which brought together German Orientalists in 1845 to form the "Deutsche Morgenlandische Gesellschaft" (German Oriental Studies).⁽³³⁾

Gustav Flügel (1802-1870) was one of Silvestre de Sacy's (1758-1838) students. He published the Koran, a Koran concordance, the Catalogue of Books (Kitab al-Fihrist) by Ibn Nadim and a bibliographical lexicon by Hajji Khalifa.⁽³⁴⁾

Alloys Sprenger ^(a) (1813-9) and Alfred von Kremer (1828-89) observed and assessed Islam from the point of view of its cultural history. While the former traveled in India, the latter traveled in Turkey, Syria and Egypt. Therefore, they could form a picture of orient at first hand. The first example of Alfred von Kremer's preoccupation with problems of cultural history and sociological developments was his study on "Ibn Khaldun and his Cultural History of the Islamic Empires", which appeared in 1859.⁽³⁵⁾

Theodor Noldeke's (1836-1930) great concern was to grasp and analyze facts. He called himself a rationalist. Even he may be called a positivist. His most important work in the sphere of Islamic research is his "History of the Koran".⁽³⁶⁾

"Historicism had been one of the great intellectual achievements of the nineteenth century. The phenomenon had older roots, and it was not restricted to Germany."⁽³⁷⁾ The tradition of historicism entered Near Eastern studies, as it were, through the back door, through Old Testament studies. The Old Testament bridged the gap of understanding between Europe (or Germany) and the Orient.⁽³⁸⁾

Julius Wellhausen (1844-1918), as known an Old Testament specialist with his critique of the Pentateuch, applied his historical interest and scholastic energy to the early Islam and ancient Arabia. His characteristic method was a harmonious combination of source analysis and criticism with a first-rate historical

synthesis. His book "The Arab Empire and its Fall" (1902) is assessed a monumental achievement from both a scientific and artistic point of view. It is a portrayal of the political history of Islam up to the fall of the Omayyad dynasty.⁽³⁹⁾

Non-German orientalists such as Ignaz Goldziher (1850-1921) and Snouck Hurgronje (1857-1936) have had a lasting influence on the development of oriental studies in Germany. Goldziher, who was a Hungarian Jew, devoted himself to the whole range of Islamic studies after studying in Berlin and Leipzig, where he graduated under Fleischer. His critical investigations were mainly focused on the history of Islamic law and the origin and the development of Muslim traditions. In the second volume of his Mohammedan Studies he examines the development of traditions and questions the veneration of Muslim scholars of early times, and the authenticity of this literature. He ascribes a lesser level to it. He puts forward its secondary importance as a witness for the religious and sociological development of Islam in the first centuries.⁽⁴⁰⁾

Owing to the works of scholars such as Goldziher, Hurgronje, and Masignon, there has taken place a shift of scholarly emphasis in Islamic studies in Europe. The central tradition of those studies has continued: the exploration of the ways in which what was given to Muslims by or through Muhammad was articulated into systems of theology, law, and practice, an exploration carried on by the method elaborated by philologists, that of the careful study of written texts.⁽⁴¹⁾

Works of Ignaz Goldziher on traditions, of Christiaan Snouck Hurgronje on Islamic law had a lasting impact on later studies up to now. Encyclopedia of Islam, in its three editions, is a valuable enterprise in Islamic studies.

Carl Heinrich Becker (1876-1933), the first holder of the professorial chair of the History and Culture of the Orient, had been trained as a Semitist and Assyriologist, but had turned to Islamic research under the influence of the writings of Wellhausen, Goldziher and Hurgronje. The history of culture and religion was his main interest, at same time the study of the economic problems of the Orient was among his scholarly interests.⁽⁴²⁾

"Ignaz Goldziher's appreciation of Islam's tolerance towards other religions was undercut by his dislike of Mohammed's anthropomorphism and Islam's too-exterior theology and jurisprudence; Duncan Black Macdonald's interest in Islamic piety and orthodoxy was vitiated by his perception of what he considered Islam's heretical Christianity; Carl Becker's understanding of Islamic civilization made him see it as a sadly undeveloped one; C. Snouck Hurgronje's highly refined studies of Islamic mysticism led him to a harsh judgment of its crippling limitations; and Louis Massignon's extraordinary identification with Muslim theology, mystical passion, and poetic art kept him curiously unforgiving to Islam for what he regarded as its unregenerate revolt against the idea of incarnation. The manifest differences in their methods emerge as less important than their Orientalist consensus on Islam: latent inferiority."⁽⁴³⁾

C. General approaches to the literary products of Muslims

Although orientalist approaches towards literary products of Muslim in general and Islamic law in particular cannot be confined to a few lines, general trends can be discerned in the related scholarship. Among these trends, two major approaches can be mentioned here. The first approach can be characterized as skeptical and the second one as revisionist.

The adherents of the skeptical approach believe that the traditional societies do not have any scientific criteria. Therefore, the literary products of such societies are defective, thus unreliable. According to them, indeed, this literature represents the nostalgia and ideals of these societies. It does not tell their real history. Their history is a constructed one. Their mind is fictive, so their literature is an output of a fiction. This is the dominant attitude of classic orientalism towards Islam. It is evident that in the classical phase of orientalism, there have been interpretations exceeded the capital of the scholarship, though the related scholarship did not elevate at a desired level. [Orientalists such as John Wansbrough, Andrew Rippin, Gerald R. Hawting, Patricia Crone, Micheal Cook can be mentioned as the representatives of skeptical attitude.]

Meanwhile, the adherents of this approach are essentialist about Islam. They think that Islam there existed in the past, it still exists today and it will exist in the future, and any change cannot be expected within it. It is immutable, hence not familiar to the concepts of reality and change.

Edward Said, who can be regarded as anti-essentialist, brings a strong criticism to this attitude. According to him, no society can remain static. Otherwise, it renders a contradiction to the nature of the fact. He regards such a view as an "orientalist" approach that he condemns. He points out that the West has learnt the East through the tales of Arabian nights, thus created an image of the East. The West has read the East in the effect of this image for a long time.

Said is right in this criticism. Nevertheless, we must be aware here, and it should not lead us to an Occidentalism. If we evaluate all the literature produced in the west on Islam as defective, we would make another mistake. This approach would lead us to throw many precious studies to garbage can, and erase the ground of a dialogue between East and West. Said's criticism is one that came from left against the conservative circles in the western intellectual tradition. It is reasonable, when it is thought and evaluated in its own context. His opinions should be read against the circumstances of post-colonialism and post-structuralism.

Revisionist approach to Islamic literature: The adherents of revisionist approach call the former party to review and re-evaluate their thoughts and change them. Those who have a Middle Eastern origin or lived in the Middle East and were acquainted with its peoples have been bothered from the image of East created in the West. Unfortunately, the classic orientalist view that prevailed up to the first half of 19th century could be abandoned only by 1960s. The dialectic between the two approaches is operative in recent studies of Islamic law.

[Orientalists such as John Wansbrough, Andrew Rippin, Gerald R. Hawting, Patricia Crone, Micheal Cook can be mentioned as the representatives of skeptical attitude.] On the other side Makdisi, Hallaq, Baber Johansen, Bernard Weiss can be counted among the supporters of the revisionist approach.

II. Islamic law in related scholarship:

A. The importance of Islamic law in oriental studies

Since Islamic jurisprudence functioned as a decoder for the structure of Islamic society and its culture, it caught a privileged attention of many orientalists. This is evident in the statements of distinguished orientalists. For instance, Schacht, the most eminent scholar of Islamic law in the West, points out the importance of the sacred law of Islam for the orientalist tradition of Islamic studies with following words: "It is impossible to understand Islam without understanding Islamic law".⁽⁴⁴⁾ In another place, Schacht explains its value as such: "Islamic law provides us with a remarkable example of the possibilities of legal thought and of human thought in general, and with a key to understanding the essence of one of the great world religions."⁽⁴⁵⁾

A good example of the prewar rationale can be found in the following passage by Snouck Hurgronje, taken from his 1899 review of Eduard Sachau's *Muhammedanisches Recht*: The law, which in practice had to make ever greater concessions to the use and customs of the people and the arbitrariness of their rulers, nevertheless retained a considerable influence on the intellectual life of the Muslims. Therefore, it remains, and still is for us too, an important subject of study, not only for abstract reasons connected with the history of law, civilization and religion, but also for practical purposes. The more intimate the relations of Europe with the Muslim East become, the more Muslim countries fall under European suzerainty, the more important it is for us Europeans to become acquainted with the intellectual life, the religious law, the conceptual background of Islam.⁽⁴⁶⁾

B. History of oriental studies as to Islamic law

Many authors dealt with Islamic legal studies in the last quarter of nineteenth century and during the twentieth century. In this effect can be counted names such as Ignaz Goldziher, C. Snouck Hurgronje⁽⁴⁷⁾, T. W. Juynboll⁽⁴⁸⁾, Gotthelf Bergstr?sser, Joseph Schacht⁽⁴⁹⁾, Gibb⁽⁵⁰⁾ Emile Tyan⁽⁵¹⁾, H. Lam-

mens⁽⁵²⁾, Louis Milliot⁽⁵³⁾, G. Bousquet⁽⁵⁴⁾, Muhammad Hamidullah⁽⁵⁵⁾, Fyzee⁽⁵⁶⁾, Seymour Vesey-Fitzgerald⁽⁵⁷⁾, George Hourani⁽⁵⁸⁾, Norman Anderson, N. Coulson, M. Khadduri⁽⁵⁹⁾, Marie Bernard⁽⁶⁰⁾, R. Brounshvig⁽⁶¹⁾, Fazlurrahman⁽⁶²⁾, C. Chehata⁽⁶³⁾, Bernard Weiss⁽⁶⁴⁾, Baber Johansen⁽⁶⁵⁾, Aron Zysow⁽⁶⁶⁾, Norman Calder⁽⁶⁷⁾, Patricia Crone⁽⁶⁸⁾, Robert H. Eisenman⁽⁶⁹⁾, Joseph H. Escovitz⁽⁷⁰⁾, Hallaq⁽⁷¹⁾, Herald Motzki⁽⁷²⁾, Christopher Melchert⁽⁷³⁾, Jonathan E. Brockopp⁽⁷⁴⁾.

Perhaps the most important figures in the formation of a European scholarly image of Islam, in its development and nature as a religious and cultural system, were Ignaz Goldziher, a Hungarian Jew.⁽⁷⁵⁾ Through his studies, Goldziher became aware of modern German thought and scholarship. He read Hegel's philosophy, works of biblical criticism and Protestant theology, philosophy and the penumbra of ideas which surrounded it.⁽⁷⁶⁾

Goldziher's comprehensive view of the way in which Islam had developed as a religious system was given expression in a series of lectures, written in 1907 to be given in the United States but never in fact delivered, and later published: *Introduction to Islamic Theology and Law*. These lectures show his attempt to fit the phenomena of Islam into a framework derived from the German speculative thought of the nineteenth century. Its starting point is Schleiermacher's theory of religion: the basis of religions is the feeling of dependence, but in each of them, it takes a special form that determines its character and development. In Islam, the form, which it takes, is submission, which is the literal meaning of word "Islam" itself: man must submit his will to unbound omnipotence.⁽⁷⁷⁾

Goldziher is the first scholar in the orientalist tradition who drew a general map for Islamic studies. He engaged many disciplines, and produced valuable works in various topics. He studied the field in its entirety. This gave him the chance to examine Islamic studies conjointly. What the later orientalists did is to improve the paradigm that Goldziher had created for Islamic studies. His main views had an enduring influence on later studies. Later generations of

orientalists walked in his way, and they developed the master's theories. As to the second source of Islamic law, that is the traditions of the prophet, Goldziher was convinced that traditions were the output of the community. They are not reports of real sayings, acts, and approvals of the Prophet, conversely, they are products of later times. The community forged them, on call of need, in the second and the third century of Muslim era. This allegation was tantamount to destroying what Muslims had constructed hitherto.

Goldziher's colleague and friend Snouck Hurgronje (1857-1936) was a man with practical experience of the Orient. In preparation for his colonial service he spent six months of 1885 living incognito amongst Muslims in Mecca. Later he held senior positions in the Dutch-India colonial service, and there he had the opportunity, to get to know the customary laws pertaining amongst the Muslims there. His minor writings, dealing with great variety of themes were published in 1923-27 in six or rather seven volumes by A. J. Wensinck. He was intensively occupied with fiqh. He was acquainted with both the history of law and the statute law.⁽⁷⁸⁾

Oriental scholarship of the European continent discovered sunni fiqh, during the latter part of the nineteenth century through the practical context of colonialism. The first scholar to become a continental authority on fiqh is the Dutch orientalist Christiaan Snouk Hurgronje.⁽⁷⁹⁾

Rather similar ideas to that of Goldziher were carried in a different direction by another scholar of his generation, C. Snouck Hurgronje (1857-1936), in whom the tradition of the school of Leiden may be said to have reached its peak.⁽⁸⁰⁾ That Dutch Arabic studies became almost identified with Islamic studies is part of the heritage of Snouck Hurgronje, whose influence loomed large up to the 1960s.⁽⁸¹⁾

Christiaan Snouck Hurgronje (1857-1936) is regarded as the founder of Islamic legal studies in the West. He (1857-1936) studied Islam in Indonesia as an observer, and was an advisor to Van Heutsz and other government officials in the Netherlands Indies. In 1885, he traveled secretly to Mecca, and reported

that at that time, there were a significant number of Malays and Indonesians living there.⁽⁸²⁾ Starting about this time, the Dutch began to encourage Islamic worship and practice, as long as politics were not involved. The goal was to channel Islamic enthusiasm away from politics and nationalism.⁽⁸³⁾

Under the influence of Goldziher and Hurgronje, the course of progress run towards making Islamic studies an independent academic discipline in German speaking countries. Since Germany was one of the colonial powers until 1918, study of Islam and Islamic writings in Arabic acquired a stimulus. In these circumstances, there was founded the Seminar for Oriental Languages in Berlin in 1887, an institution for dissemination of specialized knowledge of modern Oriental and Far Eastern countries, their peoples and cultures. Eduard Sachau (1845-1930), the first director of the institute, after being Professor at Berlin University in 1876, took a research trip to Syria and Mesopotamia in 1879-80 and traveled in Iraq in 1880-97. Drawing on his experience of this research trip, he published the volume "Mohammedan Law According to the Schafii School" in 1897.⁽⁸⁴⁾

Thanks to the efforts of Goldziher and Hurgronje, Fiqh elevated to a specialized research field of Islamic studies. This gave rise to wider active publicity in the academic world.⁽⁸⁵⁾ The works that appeared in the first half of the 20th century such as "Handbook of Islamic Law According to the Doctrine of the Shafiitic School" (1910) by T. W. Juynboll, "Islamic Laws Pertaining to Aliens up to the State Treaties Between Islam and the Franks: A Study of Legal History of Fiqh" (1925), "On the Composition of Islamic Legal Works" (1935) by Willi Haffening constituted the following chain of this tradition.⁽⁸⁶⁾

Gottself Bergstrasser (1886-1933) made his contribution to the scholarship of the field with essays such as "The Beginnings and Character of Legal Thought in Islam" (1925) and "On the Method of Fiqh Research" (1931). On his unexpected early death, his lecture on the characteristics of Islamic law was published by Schacht under the title "G. Bertstrasser's Basic Characteristics of Islamic Law" (1935) in Text-books of the Berlin Seminar for Oriental Lan-

guages. Its starting sentence is very interesting. He says: "The Islamic law in its wider sense, comprehending the regulation of the cult, is the embodiment of the genuine spirit of Islam, the most decisive expression of Islamic thought and the very kernel of the whole of Islam".⁽⁸⁷⁾

The roots of Schacht's philological curiosity go back to Gotthelf Bergsträsser (1886-1933)⁽⁸⁸⁾, a philologist. It can be said that his taking the textual criticism as the starting point for his career is a result of his supervisor's philological interest. Schacht set out with literature of legal devices. His doctoral dissertation was an edition with partial translation and commentary of Hassāf's *Kitāb al-Hiyal wal-makhārij* (Hannover 1923). He passed his Habilitation (qualify as a teacher in a German university) in 1925. Meanwhile he published another *hiyal* book, that is *Das Kitāb al-Hiyal fil fiqh* (Buch der Rechtskniffe) des Abu Hätim Mahmud ibn al-Hasan al-Qazwini, mit Übersetzung und Anmerkungen, Hannover 1924. J. Schacht, "Die arabische *hiyal*-Literatur: Ein Beitrag zur Erforschung der islamischen Rechtspraxis", *Der Islam*, 15 (1926), pp. 211-323,335.

Joseph Schacht (1902-1969) stands, in the tradition of oriental studies of Islamic law, at an important point parallel to that of Muhammad b. Idris al-Shafii in the history of Islamic law. Having been conscious of this point, Schacht anchored al-Shafii in his *Origins of Muhammadan Jurisprudence* (1950). He tried to penetrate the scholarly atmosphere of the second century of Islam through al-Shafii's works, and his basic arguments in the discussions of that time on Islamic law. Sometimes you find him employ the al-Shafii's those arguments that directed against the practice of Madina and the Kufean scholars' exercise of personal opinion in cases where he believed there were sound traditions from the prophet. Sometimes you find him direct the counter-criticism that of other parties. Arguments or counter-arguments that were employed in individual cases by Shafii are sometimes misused by Schacht by generalizing them to the main structure of Muslim jurisprudence.

The most authoritative work in the circles of Islamic legal studies, *Origins*

of Muhammadan Jurisprudence is a historical study of the development of Islamic legal theory, starting from the systematic thought of al-Shafii (d. 204/820) and working back by inferences from it and other contemporary law books to the stages in the earliest Islamic jurisprudence.⁽⁸⁹⁾ Following in the footsteps of Goldziher, Schacht applies the method of Ignaz Goldziher's critical scrutiny of the Traditions in general to the early history of Islamic legal theory, which was largely based on a specialized use of Traditions.⁽⁹⁰⁾ Goldziher's enterprise in the field of Muslim traditions, indeed, led Schacht to argue that most of the legal traditions are put into circulation in the second and third centuries. In addition, he argues that almost all the legal traditions are reflected backward to the time of the Prophet. In fact, according to him, such traditions are produced to meet the social and political needs of the time. The contribution of G.H.A. Juynboll as to the chain system of tradition (isnads) is confined to taking the date of tradition to an earlier time. He discovers the phrase "common link", in the sense that means the source that the traditions stem from. In final analysis, he shares the basic assumptions of Goldziher's thesis.⁽⁹¹⁾

"The standard skeptical view, developed above all by Schacht in *The Origins of Muhammadan Jurisprudence* (1950), is that Islamic law in the eighth century had other bases, notably local custom, the speculation of local experts, and decrees from governors and caliphs. The priority of hadith from the Prophet as the basis of Islamic law was not rediscovered by Shafii; rather, along with prophetic hadith itself, it was invented by him and the traditionists, especially during his lifetime and in the next half-century after."⁽⁹²⁾

Schacht's *An Introduction to Islamic Law* (1964) is an account of the 1960s' western knowledge of the history and of the outlines of Islamic legal system. It consists of two sections: historical section, and systematic one. The book is enriched with a useful bibliography and a glossary. His account as to the origins and early development of Islamic law in the historical section of the book is a refined version of themes that constituted the nucleus of *The Origins of Muhammadan Jurisprudence* (1950). The content of his work *Esquisse d'une His-*

toire du Droit Musulman (Paris 1952) is also employed here. The systematic section contains the topics that have direct relevance to law in the technical sense of the word. He does not deal with the liturgical acts that constitute an essential element of his predecessor Hurgronje's depiction of the al-fiqh. Here, he concentrates on general concepts such as persons, property, obligations in general, obligations and contracts in particular, family, inheritance, penal law, and procedure. His account of these concepts is based on a Hanafite jurist Ibrahim al-Halabi's (956/1549) *Multaqa al-abhur*, for it contains the legal doctrine of a conclusive phase.

Calder questions the authorship of all compilations of transmitted material dated before 250/869.⁽⁹³⁾ Calder did achieve in substantive law what Schacht did in general theory of Islamic law (*usul al-fiqh*), Schacht anchored to the literature of the turning point of second century of Islamic era, especially, to al-Shafii's works; the arguments that are addressed by al-Shafii to Iraki and Hijazi schools of law are the point of departure for Shcacht. N. Calder advocates in his book entitled as *Studies in Early Muslim Jurisprudence*, the thesis that the most important sources of early Muslim jurisprudence were composed much later - some of them more than a century- than has been accepted until now.⁽⁹⁴⁾ Calder's dating of Malik's *Muwatta'* has already been the subject of critique and refutation in Y. Dutton's review of Calder's book, published in the *Journal of Islamic Studies* 5 (1994), 102, and his article "Amel v. ḥadith in Islamic law: the case of *sadl al-yadayn* (Holding One's hands by One's Sides) When Doing Prayer,": *Islamic Law and Society* 3 (1996): 13-14, esp. 28-33.

Calder challenges the accepted date of the *Muwatta'*, he argues that the *Muwatta'* was not written until a century later, around 270/883 in Spanish Cordoba. According to Calder, the compilation was composed over a period of two decades and finally edited by Ibn Waddâh (d. 287/900) who is regarded as a disciple of Yahya b. Yahya (d. 234/848). Neither Malik nor Yahya is responsible for the *Muwatta'* in its current form. Calder also claims that the *Muwatta'* is ascribed to Malik, but is not really his work. In short, Malik is not the author of

the Muwatta' in Yahya's recession.⁽⁹⁵⁾ His argument: If a tradition is not to be found in a compilation where it is necessarily expected to appear, then the tradition did not exist at the time this compilation was made.⁽⁹⁶⁾

C. The origins of Islamic law

The basic distinction between the Muslim attitude and the Western one as to Islam is the case of origin. Muslims believe that Islam is a true religion originated from revelation, a notion that is different from that of Christianity.⁽⁹⁷⁾ Since such a supernatural source for the Prophet Mohammed is not accepted by non-Muslims, worldly sources for Qur'an, and for its various manifestations are looked for. Some elements that pose resemblance to those of former religions such as Judaism and Christianity are taken as evidence of borrowings. Indeed, Muhammad (pbh) himself asserted that he was not the innovator of the prophecy, he declares himself the last chain of prophets. He pays full respect to former prophets. He believes that all of them are true prophets, and their message was as true as his message. However, as being the successor, his message repealed some parts of former messages. Qur'an, a book that has been preserved in its authentic form and transmitted as such through generations up to now, a privilege that no other religious scripture shares with it, is the last covenant between God and humankind.

The case of origins is been observed in various fields. Foreign elements, influence of foreign sources such as Roman law, Jewish law, Sasanid law, customary law of Jahiliya are all efforts that to look for an external origin for Islam.

Scholars, who are familiar to the Jewish religious literature, its various genres, and the adventure through which this literature had passed, try to draw some parallels between Islam and Judaism.

The case of borrowings from Jewish and Christian Scripture can be already seen in the lecture that was delivered in 1784 with the title "A Comparison of Islam and Christianity by their origins, evidence, and effects" by Joseph White,

the professor of Arabic at Oxford then.⁽⁹⁸⁾

The foundations for the epoch of modern historico-critical research on Mohammed and the beginnings of Islam were laid down with the works such as "What Mohammed Retain from Judaism" in 1833 by Abraham Geiger (1810-74), and "Mohammed the Prophet, His Life and Teaching" in 1843, and the "Historical-critical Introduction to the Koran" in 1844 by Gustav Weil (1808-89). These two authors were of Jewish origin and trained in the Talmud, then studied at German universities and gained knowledge of historical methods.⁽⁹⁹⁾ Geiger considered the possibility of borrowings from Jewish culture only in those cases where the relevant Jewish source-material could be proved to have originated before the time of Islam.⁽¹⁰⁰⁾

Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of Islamic Patronate*, Cambridge University Press, Cambridge 1987. It seems a thematic extension of her dissertation thesis "The Mawali in the Umayyad Period" London 1974. She defines the term "provincial law" as the non-Roman law practiced in the provinces of the Roman Empire, especially the provinces that formerly ruled by Greeks. It cannot be denied that Muslim rulers have employed some native inhabitants of new conquered lands in various levels of administration. In addition, the conquerors might have adopted some native customs. Amongst these customs there might have been some elements penetrated from formerly dominant legal institutions. However, this should not be exaggerated so much that these people had affected the structure of Muslim legal institutions. Simple resemblances must not lead to borrowings. When the case that jurists study is the same, the conclusions that they reach will be similar to each other. The slight differences result from their methodologies. Therefore, the sole resemblance between two systems of law cannot be taken as evidence of any borrowing. Before deciding in favor of borrowing, the methodology that any legal tradition employs is to be investigated. In the early times of the contact of western scholars with Islamic law, they were been puzzled by the resemblances between Islamic law and other legal and religious traditions that had

lived the conquered lands. This hasty verdict lost its efficiency through time. The more the related scholarship increased the faster this attitude lost its currency.

D. The starting point of Islamic law

According to Schacht, Muhammadan jurisprudence started in the beginning of the second century. The existence of some legal opinions that assigned to the end of the first century does not change this fact. What he counted as essential features of Islamic law such as the idea of living tradition of the ancient schools of law, a body of common doctrine expressing the earliest efforts to systematize, legal maxims that often reflect a slightly later stage, and an important nucleus of legal traditions can be dated from the beginning of the second century onwards. He says that Muhammadan legal science started in the later part of the Umayyad period, taking the legal practice of the time as its raw material and endorsing, modifying, or rejecting it.⁽¹⁰¹⁾

With the demise of the prophet, his companions took over the responsibility of judgment in their religious affairs. They tried to solve the different new-faced problems with the experience and qualification they had acquired during the lifetime of the prophet. They followed methodology of case-based reasoning. In the early times of Islam, practical knowledge of life was preferred. The reason that the jurisprudence precedes its general foundations should be sought here. The cumulative religious practice that embodied in the social life ran through generations. The material of religious practice underwent a condensed process of analysis in the second and third century of Islam. Due to the efforts of al-Shafii as to the traditions of the prophet, a concentrated Project of traditions was put into effect, studies in this direction gained an impetus, so that the third century of Islam might be called as that of the traditional studies. The traditional material constituted a huge literature of musnad, musannaf, sihah and sunan. The debates over the traditions culminate towards the end of the third century. Thus, the basic material that would be processed by religious scholars was established.

Since Arabic script did not develop to a desired extent in the first Muslim era, oral tradition was prevailing. Thus, the religious thought of this period found its expression in the literature of the following centuries. In addition, this thought was in an amalgamated state.

E. The nature of Islamic law

There has been an effort among orientalist to conceive and identify the nature of Islamic law. In fact, the nature of Islamic law has confused western scholars for a long time. Since Islamic law is a derivative of revelation, a notion that was of an immutable nature, its capability to the changing reality has been questioned.

There is an old dispute in oriental scholarship about whether Islamic law is a law in the technical sense or a deontology that has not a relevance to the reality. At the background of such a conception of Islamic law, there may lay an intensive experience of codification during the 19th century on European continent to a certain extent. Those who witnessed an extensive experience of codification that happened in 19th century on European continent must have set to finding a legal system having that of similar terms of their own. In the first stance, they were confused by the literature of Islamic law, and they had difficulty in identifying this "strange" literature. It had a legal character, and something more than that. It had an ethical dimension as well. They had recourse to Weber's classification of legal systems. The same traces of this difficulty can be observed in the definitions of Islamic law. They could not put this literature into terms familiar to them.

In fact, al-fiqh, as a whole, is a complex of modern disciplines. It is something more than law; it contains various elements from theology, philosophy, logic, linguistics, semantics, economics, politics, history, and social history. Such a structure is too difficult to penetrate. Therefore, it puzzled many researchers. The orientalist attempted to express it with the terms of any single discipline. This approach is not sufficient to gain competence in the field. There

are very few in the West who accomplished works deserving to mention. Here comes to mind the name of Bernard Weiss, the author of "The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi, Salt Lake City, University of Utah Press, 1992.

Bernard Weiss, began his scholarly adventure with his dissertation thesis "Language in Orthodox Muslim Thought: A Study of 'Wad' al-Luga' and Its Development", (Princeton University 1966) under the supervision of Farhat J. Zaidah. This study led him to concentrate on the scholarship of Sayf al-Din al-Amidi. The latter's prestigious work, *al-Ihkam fi Usul al-Ahkam*, took his time of more than twenty years. His labor found expression in his excellent book, "The Search for God's Word". This study is regarded an elaborative translation of a distinguished classical work of *usûl al-fiqh* in English.

When Schacht identifies the nature of Islamic law as "sacred", the impact of Max Weber shows itself. Weber divides law systems into two categories: sacred laws and rational laws. He counts Jewish law, Canonic law, Islamic law, and Hindu law under the category of sacred laws. Such laws are controlled, and enforced by religious elite. All the commentators of Weber share the view that the goal of explanation of rational Western civilization underlies his concern with the traditional oriental societies. Weber's invention of the category of "sacred law" is intended to indicate that religious legal rules stand in a medium position between theology and sociology. He casts for such systems of rules a transition phase in the way to the modern-secular law.⁽¹⁰²⁾ He ascribes a distinctive characteristic, derivative of revelation or inspiration, to such legal system. Being derivative of revelation is the attribute that differentiates them from "rational systems of law".⁽¹⁰³⁾ Weber maintains that only rational western systems of law attained the final stage of the legal evolution, while the traditional systems did not completed the evolutionary process. Weber's above-mentioned classification and placing Islamic law in the category "sacred" restricted Schacht's attempt to derive a legal system from Islamic law. In fact, Weber is indebted to Hurgronje in identifying Islamic law as sacred. We know that Hurgronje's scholarship of

Islamic law shaped Weber's related views. What Hurgronje said about the theological aspect of fiqh corresponds Weber's term "sacred" in the phrase "sacred law". Weber's emphasis on the sacred aspect of fiqh implies that such a law is cut off practice. Weber's contribution to the point is transforming this information into a sociological context. This revised and refined knowledge affected Schacht's approach to Islamic law.

Scholars such as Bernard Weiss, Aron Zysow and Wael b. Hallaq come at the beginning of those who have been interested in the legal theory of Islamic law, and made considerable contributions to the related scholarship. Weiss is well-known by his monument study titled "Search for God's Law". In his study titled "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory", (PhD., Harvard University 1984), Zysow has done what Bernard Weiss has accomplished with reference to al-Ihkâm of al-Amidi referring to the related classical literature of legal theory. Zysow's work consists of an introduction, five chapters, an epilogue and bibliography. In the first chapter, he treats the authentication of the prophetic traditions. Here, he examines the epistemological value of different kinds of traditions respectively. In the second chapter he discusses the methodology of interpretation that developed by theoreticians of the law. He deals with consensus in the third chapter, analogy in the fourth chapter and the case of ijtiḥad in the final chapter.

Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnî usûl al-fiqh*, Cambridge University Press, 1997. This book is a refined version of his previous articles regarding the concepts and problems of Islamic legal theory. Since 1980s he has published various articles on usûl al-fiqh. Beginning his career, Hallaq inquired the logic embedded in this literature. The *shifâ al-galîl* and other works of Gazâlî occupied his time for a while. Then he studied the problems of ijtiḥad, developments that occurred in medieval Islam, many allegations of Schacht. He challenged many views of Schacht. On the heritage of Schacht, a competition can be discerned between Hallaq and Christopher Melchert, the author of *The Formation of Sunni Schools of Law 9th-10th C.E. Studies in Islam-*

ic Law and Society, E.J. Brill, 1997 (Ph.D. diss., University of Pennsylvania, 1992).

The educational dimension of classical Islamic studies constitutes the subject of George Makdisi's interest. Studying certain scholars, their thought, and their milieu are the nucleus of his scholarship. He has a special admiration to Ibn 'Aqīl, and his works. Through him, he penetrates the aura of the medieval social context.⁽¹⁰⁴⁾ Makdisi's style and method of study can be seen intensively in Jackson's "Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi" (Leiden 1996). Sherman A. Jackson completed his dissertation under the supervisory of George Makdisi.

F. Capability of Islamic law to the changing reality

Due to the fact that the foundations of Islamic law are derived from and based on revelation, many people are led to construct some propositions generally based on pure speculations. That implies that Islamic law is of divine nature, hence immutable, so it does not let the notion of change. Now that the revelation expired with the demise of the prophet and life is continuously changing, a legal system defined as such must have been incapable of coming terms with ever-changing actual reality. In fact, al-fiqh, since its beginning, functioned to regulate correlation between Muslim subject and religious values that found their expression in the revealed texts. Al-Fiqh is, in a sense, a theory of Muslim social structure.

With the impact of Schacht, the view that Islamic law has turned to be rigid, and cut off from social reality since the tenth century onwards became prevalent in western scholarship. Many scholars such as Haim Gerber,⁽¹⁰⁵⁾ Wael b. Hallaq,⁽¹⁰⁶⁾ and Baber Johansen challenged this view.

Baber Johansen, one of the leading contemporary scholars of history of Islamic law, especially of Hanefi school, criticizes Schacht's description of Islamic law, and he himself identifies the nature of Islamic law as "a system of ethical and juristic norms".⁽¹⁰⁷⁾ Baber Johansen, in his book *Contingency in a Sacred*

Law, which is a collection of his previously published articles, provides proof for the flexibility and adaptability of Islamic law to changing circumstances despite the fact that it is rooted in revelation, a notion that of immutable character.

Whether there occurs any change in Islamic law or not. No profound changes occurred in Islamic law after the tenth century. What occurred in later times is of detail. Among the adherent of this view there can be mentioned the names such as Schacht, Coulson and Chehata. They have argued that Islamic law had lived fully development during its formative period, that comprises the eight and tenth centuries. Baber Johansen challenges this conventional insight through studying the development of Hanefite law in the Memluk and Ottoman periods, and argues that changes in legal doctrine there occurred even in public law.⁽¹⁰⁸⁾

The institution of fetwa has been examined from various points of view. Some scholars examined this genre of literature in order to examine its role in the development of the substantive law.

Conclusion

Edward Said's criticisms of Orientalism demonstrate how the relationship between the scholar and the subject shapes the scholarship. Said defines Orientalism as a body of theory about the "Orient" and about Islam based on power differentials between the European scholars and their subjects (Said 1978:31-34).

There is not any convention on the very concept of orientalism and its content. The concept is been conceived of in a large spectrum. The meaning of the concept is not clear enough to let a reasonable communication between the related parties. This ambiguity leads to a kind of hostility as well. Somebody uses it implying an ordinary meaning. Some others imply an ordinary academic endeavor whenever everything is going well. Moreover, in such times, each side shows a kind of sensibility, and pays attention to one's wording, thus choose adequate expressions. However, whenever a controversy is broken out, the mood

of peace expires. This state of affairs demonstrates that all those former efforts were not sincere, and all that were exhibited were not but a game of deceiving. Therefore, there arises a lack of confidence. This causes the anxiety, especially when behaviors of the one side or both sides are devoid of integrity. Consequently, this mood erases the ground of dialogue between the parties.

Here I have to express that Islam is certainly not restricted to the inquiry of Muslims. Non-Muslims have the right to study Islam, as well as any other topic. Whoever studies Islam does not have to convert into Islam, though every Muslim desires that result.

Throughout its history, orientalists were those who talked about Orient to their native audience. Their main task was to inform their audience about an alien world. They met the needs of their societies at this effect. The real problems of that foreign world did not concern them much. It can be said that Orientalism, in a sense, introduces an artificial agenda for Muslim mind to a certain extent. It does not contain the real problems of this segment of world. All that they concern with Muslim world should make its own agenda, and deal with its priorities. Muslims' considering their situation from an orientalist point of view amounts to designing one's life in accordance with others' desires.

Said is right in his criticism of Orientalism. Nevertheless, we must be aware here, and it should not lead us to an Occidentalism, for false does not constitute a precedent. If we evaluate all the literature produced in the west on Islam as defective, we would make another mistake. This approach would lead us to throw many precious studies to garbage can, and erase the ground of a dialogue between East and West. Said's criticism is one that came from left against the conservative circles in the Western intellectual tradition. It is reasonable, when it is thought and evaluated in its own context. His opinions should be read against the circumstances of post-colonialism and post-structuralism.

Neither West nor East is monolithic. Therefore, any generalization does not correspond to the reality, nor can be such an attitude defended. Individual attitudes should be subject to our judgments. On the other hand, Muslims should

not let any misunderstanding. Orientalists are not homogeneous, so it is possible to collect highly insightful recessions of the writings of Orientalists, and draw a positive picture, whereas the opposite is possible as well.

As the maxim that "the map is not the territory" inspires, the theory is always poor against the reality. Theory simplifies the reality to understand, but it never exhausts it. It is not possible to say the last word, unless the documents that were written in aljamiado in Spain, the millions of Ottoman documents of different genres are introduced to the interest of scholars. Though oriental scholarship of Islamic law underwent a continuous change, it drew a picture alien to Muslims to a certain extent. Later revisions didn't change the main paradigm that established by the western founders such as Goldziher and Schacht. However, it should be mentioned here that there have been some studies which tried really to understand the spirit of this discipline.

A purely secularized mind cut off veins of compassion leads to a brutal struggle amongst the children of the same parent, Adam and Eve. Unfortunately, the idea of natural selection, as a dynamic of evolution theory, is applied to the social and international relations. Consequently, the weak is subject to elimination by the powerful. This is the main source of anxiety. Key of handling this problem is sincerity. Corroborative evidence from the behaviors demonstrates either the existence or the lack of integrity. If one's integrity undergoes to serious suspicions, the allegation of sincerity collapses. Mutual respect and sincerity is the sole key for conflict resolution as to cultural problems.

Notes

- (1) This paper is partially drawn on the readings for my ongoing project that is supported by the Committee for Projects of Scientific Research at Marmara University. Project no: SOC-029/230501, starting date: 23.05.2001. In preparation of this paper I have been much helped by discussions taken place between me and my colleagues who have been to Western countries, especially that of Murtaza Bedir, Ibrahim Hatipoglu, Tahsin G6rg6n.
- (2) Associate Professor of Islamic Law, Faculty of Divinity, Marmara University, Istanbul - Turkey
- (3) Recep Sent6rk, "Oryantalizm ve Sosyal Teori" (Orientalism and Social Theory), a paper read at the Symposium that held under the title "Oryantalizmi Yeniden Okumak: Batıda İslam alımları?", 11-12 May 2002, Sakarya, Turkey, p. 1.
- (4) Edward W. Said, Orientalism, p. 2.
- (5) Said, ibid. p. 2-3.
- (6) Said, ibid. p. 3.
- (7) Said, ibid. p. 4.
- (8) Said, ibid. p. 4.
- (9) Rudi Paret, The Study of Arabic and Islam at German Universities: German Orientalists Since Theodor N6ldeke, Weisbaden 1968, p. 1.
- (10) Albert Hourani, "Islam in European Thought", p. 225.
- (11) Maxime Rodinson, "The Western Image and Western Studies of Islam", The Legacy of Islam, ed. by Joseph Schacht with C. E. Bosworth, second edition, Oxford 1974, p. 9.
- (12) Albert Hourani, ibid. p. 227.
- (13) A. Hourani, ibid. p. 229.
- (14) A. Hourani, ibid. p. 230.
- (15) Mustafa Aydın, "Oryantalizmde yeni d6nem", Zaman (17.07.2002).
- (16) Albert Hourani, "Islam in European Thought", p. 277.
- (17) J.D.J. Waardenburg, "Mustashrik6n", The Encyclopaedia of Islam, CD-ROM Edition v. 1.0 (c) 1999 Koninklijke, Brill NV, Leiden, vol. vii, p. 736.
- (18) Said, ibid., p. 116.

- (19) Said, *ibid.*, p. 117.
- (20) Said, *ibid.*, p. 118.
- (21) Said, *ibid.*, p. 119.
- (22) Said, *ibid.*, p. 120.
- (23) Rudi Paret, *ibid.* p. 7.
- (24) A. Hourani, *ibid.* p. 236.
- (25) Said, *ibid.*, p. 124.
- (26) Said, *ibid.*, p. 130.
- (27) Said, *ibid.*, p. 132.
- (28) Edward Said, *Orientalism*, p. 210.
- (29) Rudi Paret, *ibid.* p. 2.
- (30) A. Hourani, *ibid.* p. 231.
- (31) A. Hourani, *ibid.* p. 232.
- (32) Said, *Orientalism*, p. 221.
- (33) Rudi Paret, *ibid.* p. 8.
- (34) Rudi Paret, *ibid.* p. 7-8.
- (35) Rudi Paret, *ibid.* p. 12.
- (36) Rudi Paret, *ibid.* p. 13.
- (37) Joseph van Ess, "From Wellhausen to Becker: The Emergence of Kulturgeschichte in Islamic Studies", in *Islamic Studies: A Tradition and Its Problems*, Seventh Giorgio Levi Della Vida Biennial Conference, ed. Malcolm H. Kerr, California 1980, p. 34.
- (38) Joseph van Ess, *ibid.* p. 40.
- (39) Rudi Paret, *ibid.* p. 14.
- (40) Rudi Paret, *ibid.* p. 16.
- (41) A. Hourani, *ibid.* p. 275-6.
- (42) Rudi Paret, *ibid.* p. 18.
- (43) Edward Said, *Orientalism*, p. 209.
- (44) Schacht, *An Introduction to Islamic Law*, Oxford 1975, p. 1.
- (45) Schacht, *ibid.* p. v.
- (46) Edward Said, *Orientalism*, p. 255-6; *Selected Works of Snouck Hurgronje*, p. 276.

- (47) *Verspreide Geschriften*, Bonn & Leibzig 1923.
- (48) He studied on legal doctrines of Shafiite school.
- (49) G. Bergstrasser's *Grundzüge des islamischen Rechts*, Berlin&Leibzig 1935; "Foreign Elements in Ancient Islamic Law", *Journal of Comparative Legislation*, 1950, p. 3-4, Proceedings of the Third International Congress of Comparative Law. His most authoritative works are *Origins of Muhammadan Jurisprudence* (1950), and *An Introduction to Islamic Law* (1964).
- (50) He is active in 1940s.
- (51) *Histoire de L'Organisation Judiciaire en Pays D'Islam*, I, Paris 1938, II, 1943.
- (52) *Islam: Beliefs and Institutions*, London 1968. His publication first appeared in 1929.
- (53) *Introduction a l'Etude du Droit Musulman*, Loire 1953.
- (54) His publication activities took place in the years 1947-1963. He wrote in general topics as well as on Malikite jurisprudence.
- (55) Hamidullah (d. 2002)'s literary products started in 1940s.
- (56) He is active in 1950s.
- (57) "The Alleged Debt of Islamic to Roman Law", *the Law Quarterly Review*, 67 (1951), 81-102. As it is obvious from the title, the article discusses the case of borrowings.
- (58) He is active in 1960s.
- (59) N. Anderson, N. Coulson, M. Khadduri are active in 50s-70s. Anderson and Coulson are interested in similar topics. Coulson employs the picture of early development of Islamic jurisprudence that Schacht had drawn. For the later development of Islamic law, Coulson and Anderson both complete Schacht's account. They especially wrote the codification activities in the modern Muslim countries. They inquired elements that were been taken from religious law of Islam.
- (60) He is active in 1970s.
- (61) He is active in 1970s.
- (62) He is active after 60s.
- (63) Chehata is active in 1970s. *Etudes de Droit Musulman*, Paris 1971. *Essai d'une Theorie Generale de L'obligation en Droit Musulman*, Paris 1969. The content of this study is similar to that of Subhi al-Mahmasani's *al-Nazariyya al-Amma lil Mujabat wal 'Uqud*, Beirut 1948.

- (64) He concentrated on the works of al-Amidi.
- (65) He is an expert on Hanefite law and Ottoman law.
- (66) He is interested in legal theory of Muslim jurisprudence.
- (67) He is active in 1980s and 1990s.
- (68) She is interested in the case of borrowings as to legal institutions.
- (69) *Islamic Law in Palestine and Israel: A History of the Survival of Tanzimat and Shari'a in the British Mandate and Jewish State*, Leiden 1978.
- (70) *The Office of Qadi al-Qudat in Cairo under Bahri Mamluks*, Berlin 1984.
- (71) He is active in 1980s and 1990s.
- (72) *Die Anfänge Der Islamischen Jurisprudenz (Ihre Entwicklung in Mekka Bis Zur Mitte Des 2./8. Jahrhunderts)*, Stuttgart 1991.
- (73) *The Formation of Sunni Schools of Law 9th-10th C.E. Studies in Islamic Law and Society*, E.J. Brill, 1997 (Ph.D. diss., University of Pennsylvania, 1992).
- (74) Brockopp's main interest is Maliki school of law. Some of his works: *Slavery in Islamic Law*, (Ph.D.diss. Yale University, 1995); "Early Islamic jurisprudence in Egypt: two scholars and their Mukhtasars", *Int. J. Middle East Stud.* 30 (1998), 167-182, "Rereading the history of early Mālikī jurisprudence", *JOAS*, 118 (1998).
- (75) A. Hourani, *ibid.* p. 259.
- (67) A. Hourani, *ibid.* p. 260.
- (77) A. Hourani, *ibid.* p. 263.
- (78) Rudi Paret, *ibid.* p. 16.
- (79) Baber Johansen, *Contingency in a Sacred Law, Legal and Ethical Norms in the Muslim Fiqh*, Leiden 1999, p. 42-43.
- (80) A. Hourani, *ibid.* p. 265.
- (81) J. Brugman and F. Schröder, *Arabic Studies in the Netherlands*, Leiden 1979, p. 47.
- (82) <http://www.gimonca.com/sejarah/sejarah05.html>
- (83) <http://www.gimonca.com/sejarah/sejarah05.html>
- (84) Rudi Paret, *ibid.* p. 17.
- (85) Rudi Paret, *ibid.* p. 29.
- (86) Rudi Paret, *ibid.* p. 29-30.

- (87) Rudi Paret, *ibid.* p. 30.
- (88) Bergstr?sser, went to university of Leibzig in 1904. There he became a professor of Islamic history and languages. He completed his dissertation thesis titled "The Employment of Prepositions of Negation in Quran" in 1911. He became the professor of Semitic languages and Islamic sciences in 1912 after completion his work of "Hunayn b. Ishaq and his students and their translation of books from Greek into Arabic". Meanwhile he was attracted by the literature of Islamic jurisprudence.
- (89) George F. Hourani, "Joseph Schacht, 1902-69", *Journal of American Oriental Society*, 90 (1970), 163-167, p. 165.
- (90) George F. Hourani, *ibid.* p. 165.
- (91) G.H.A. Juynboll, *Muslim tradition - Studies in chronology, provenance and authorship of early hadith*, New York: Cambridge University Press, 1983.
- (92) Christopher Melchert, *The Origins of Islamic Law: The Qur an, the Muwatta and Madinan Amal*, (Book Review) *Journal of the American Oriental Society*; New Haven; 121; 4 (2001), pp. 713-715.
- (93) Harald Motzki, "The Prophet and The Cat: On Dating Malik's Muwatta' and Legal Traditions", *JSAI*, 22 (1998), p. 30.
- (94) Norman Calder, *Studies in Early Muslim Jurisprudence*, Oxford 1993.
- (95) Motzki, *ibid.* p. 19.
- (96) Motzki, *ibid.* p. 24.
- (97) Islamic notion of revelation is different from the one that is in circulation in Christian circles. Islam regards Mohammad as Prophet; he receives revelations from God via the angel Gabriel. Therefore, revealed speech is considered as the word of God, not of the Prophet. The Prophet is only a mediator in this divine communication.
- (98) A. Hourani, *ibid.* p. 231.
- (99) Rudi Paret, *ibid.* p. 9.
- (100) Rudi Paret, *ibid.* p. 9.
- (101) Schacht, *Origins of Muhammadan Jurisprudence*, p. 190.
- (102) Murteza Bedir, "Oryantalistlerin ?slam Hukukunun Mahiyetine Dair Tart??malar?", a paper read at the Symposium that held under the title "Oryantalizmi Yeniden Okumak: Bat?da

- "Islam Calıfımlar?", 11-12 May 2002, Sakarya, Turkey, p. 3.
- (103) See for the legal systems that are placed under the category of "sacred law" *An Introduction to Legal Systems*, edited by J. Duncan, M. Derrett, D.C.L. (Oxon) of Gray's Inn, Barrister-at-Law, London, 1968). The book examines "Jewish law", "Canon law", "Islamic law", and "Hindu law".
- (104) See George Makdisi, *Ibn 'Aqil: Religion and Culture in Classical Islam*, Edinburgh University Press, Edinburgh 1997; *Kitab al-Funun of Ibn 'Aqil*, 2 parts, edited by G. Makdisi, vols. 44 and 45, Beirut 1970-1.
- (105) See his book *Islamic Law and Culture, 1600-1840*, Leiden, Boston, Kluwer 1999.
- (106) See his articles such as Hallaq, 'Was the Gate of Ijtihad Closed?', *International Journal of Middle East Studies*, New York, 16 (1984), 3-41; 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad', *Studia Islamica*, Paris, 63 (1986), 129-141; 'Murder in Cordoba: Ijtihad, Ifta' and Evolution of Substantive Law in Medieval Islam', *Acta Orientalia*, Denmark, 55 (1994), 55-83; 'From Fatwas to Furu': Growth and Change in Islamic Substantive Law', *Islamic Law and Society*, I/1 (1994).
- (107) Baber Johansen, *Contingency in a Sacred Law, Legal and Ethical Norms in the Muslim Fiqh*, Leiden 1999, p. 1.
- (108) See Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of Mamluk and Ottoman Periods*, Croom Helm 1988, p. 1.