Western Scholarship on ‘Origins’ of Islamic Law: An Analytical and Critical Study

By
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ABSTRACT

Thesis Title: Western Scholarship on ‘Origins’ of Islamic Law: An Analytical And Critical Study

Orientalism is an ancient tradition of Western scholarship which portrays Islam, Muslim societies and Arabs in negative manner. Orientalist tradition was extended to Islamic legal scholarship during colonial era. Ground breaking publication of a Hungarian orientalist Ignac Goldziher (d.1921) ‘Introduction to Islamic Theology and Law’ (1910) became the basis of all future writings on this subject. Joseph Schacht (d.1969) a German orientalist carried his work in Goldziher’s footsteps and published ‘Origins of Mohammadan Jurisprudence’ (1950) and ‘An Introduction to Islamic law’ (1964) which laid the foundations of Islamic legal orientalism in academic writings of the Western world. With the advent of orientalist tradition in USA during the Cold War era, leading American universities established Oriental Studies, Near Eastern Languages and Cultures and Middle Eastern Studies departments which worked closely with U.S. State department and Foreign Affairs department to facilitate the government to establish political hegemony over the Middle East and the Muslim world. Two major assumptions put forward in the academic debate by the West on ‘Origins’ of Islamic law were inauthenticity of hadith literature and influence of pre-Islamic non-Arab laws on the development of Islamic law. This dissertation carries out critical analysis of writings of Western scholars during cold war era through post 9/11 era to date, on these two issues. The objective of this research is to study the shift in paradigms, trends, approaches and methodology adopted by Western scholars of 21st century in their writings on Origins of Islamic law and to see how this scholarship is related to European and American political hegemony over the Muslim world. Writings of Harald Motzki, Jonathan Brown, Wael Hallaq and Patricia Crone and a few more are selected to analyze 21st century Western scholarship. Responses, rebuttals and critiques on the assumptions put forward by Western scholars of 20th century are also part of this dissertation. A shift in trend and methodology is observed in 21st century Western scholarship on Islamic law but the essential paradigms for the study remain the same thus putting forth similar results. It is also observed that Western scholarship on Islam is strongly connected with its political hegemony over the Muslim world. Methodologically Western scholarship has shifted from 20th century philological zeitgeist to 21st century social science research but it remains within the orientalist problematique. Thus Islamic law is portrayed as an essentially defective legal system and hadith literature the second primary source of Islamic law remains inauthentic in Western scholarship. However there are scholars who are aware of the fact that they are not to become hostage to biased paradigms and inadvertent commitments to political agendas in order to promote academic honesty.
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CHAPTER: 1

INTRODUCTION

Western scholarship on Islam and Islamic law is heavily dominated by writings of non-Muslim orientalists, but this does not imply that the study of “Western Scholarship” for the purpose of this thesis entails the study of writings of orientalists only. In this dissertation “Western Scholarship” includes the scholarly contributions of orientalists as well as non-Muslim and Muslim Western scholars who do not share the orientalist perspective. It should be clear that orientalism is not Western because it predominates countries in the West but because it shares common epistemological assumptions. ‘Abdullah Laroui (1997) states “Nationality, religion and mother tongue do not count as much as the perspective chosen by the writer.” Thus “Western Scholarship” will include writings of all those scholars who studied, taught and published at Western universities. This study does not classify or discriminate the scholarship on the basis of nationality, religion, mother tongue or epistemological orientation of the scholars.

The second important term in the thesis title is “Origins of Islamic Law”. The word “Origins” specifies the term “Islamic law”. Islamic law is a broad term which involves the study of Qur’anic sciences, Hadith sciences, Islamic history, Islamic legal history, development of Islamic fiqh and legal theories of various schools of fiqh, judicial system of Islam, Islamic criminal and civil laws, Islamic modes of financing and laws regulating
them, Islamic international and constitutional laws, Islamic jurisprudence, philology, hermeneutics, and classical and contemporary Muslim societies and their legal practices. Study of all these aspects of Islamic law is not the focus of this research as it would not do justice with the subject owing to its vastness. This study delves only on those matters which relate to “Origins” of Islamic law. To be more precise this study will only discuss those issues which have been raised in Western scholarship concerning the “Origins” of Islamic law.

Having said this, the next problem is defining the timeline. Origin of Islamic law corresponds with the advent of Islam and migration of Prophet Muḥammad (PBUH) in 610 A.D. from Makkah to Medina where he established the first city state for handful of Muslims adherents. This is the first/ seventh century according to Islamic (A.H.)/Gregorian (A.D.) calendars respectively. Recent researches have shown that Islamic law had fully developed by the fourth/ tenth century (Hallaq, 2004). If we take fourth/tenth century as the starting point for the purpose of present research, it would be too painstaking and arduous. Also a survey of fourth/tenth century Western history and scholarship shows that no significant contribution was made by the West on Islamic law during and after fourth/tenth century. The trend of that time was to study Islam as a religion and not as a legal science. This trend was heavily dominated by orientalist approach. Orientalist approach still dominates the Western scholarship, although the terrain of critique has changed from religion to cultures and laws in the contemporary era.

During European medieval era (5th to 15th century) a significant body of literature on Islam did appear during first/seventh through sixth/twelfth centuries which had a great impact on the thinking of people, but this scholarship was rudimentary and contained heavy bias. On the other hand European medieval era is marked by outstanding intellectual achievements of Muslim scholars and philosophers. Politically, culturally and intellectually this was the Golden period of Islam. Writings of John of Damascus in

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second/ eighth century reflect orientalist leanings found in Western scholarship during this period.

It is also observed that orientalist perspective had emerged in the writings of Western scholars during colonization but their focus was not yet Islamic law. Islamic studies was developed into a relatively consistent field of study by Modern orientalists of eighteenth and nineteenth centuries but systematic study of Islamic law as a field of knowledge was still not explored. Writings on Islam during this era contained heavy bias and were polemical (disputed, controversial). Rigorous studies of Arabic texts and languages of the orient was the dominant trend in nineteenth and twentieth centuries. As a result various classical texts were explored by British and European scholars who paved way for systematic studies on Islamic law in the twentieth century. Foundation of the study of “Islamic Law” in Western academia was laid by Joseph Schacht (1902-1969) with his two ground breaking publications in 1950 and 1964. Schacht built his edifice upon the findings and assumptions of his predecessors Gustav Weil (1808-1889), Ignac Goldziher (1850-1921), Snouck Hurgronje (1857-1936) and David Samuel Margoliouth (1858-1940). What was unique in Schacht’s research was that he put forward his theory in most comprehensive manner.

It would not be wrong to say that two leading European Orientalists whose writings shaped the contours of Western scholarship on theoretical and historical development of Islamic law are Ignac Goldziher (1850-1921) a Hungarian scholar, and Joseph Schacht (1902-1969) a German-British scholar. Ignac Goldziher is considered to be the founder of Modern Islamic studies in Europe. His book “Muhammedanische Studien” (1890) in German language raised controversial issues on Muslim Ḥadīth literature. Another book by Goldziher “An Introduction to Islamic Theology and Law” (1910) translated from German “Vorlesungen uber den Islam” was the first scholarly discussion on usūl al fīqḥ in Western language. Goldziher’s studies on Islamic law were resumed and considerably extended by German orientalist Joseph Schacht (1902-1969) in his two major works,
“The Origins of Muhammadan Jurisprudence” (Oxford, 1950) and “An Introduction to Islamic law” (Oxford, 1964). It was Schacht whose writings have had a tremendous influence on the future writings on Islamic law in the Western world. His work was heavily quoted and referred to in works on ‘origins’ and early development of Islamic law, till the turn of 21st century. Considering the importance and referential value of scholarship of Goldziher and Schacht on “origins” it would be appropriate to take their writings as the starting point for the purpose of this research. Thus the first scholarly writing by Ignac Goldziher “An Introduction to Islamic Theology and Law” translated from German and published in 1910 can be taken as the starting point of Western scholarship on origins of Islamic law.

Now a word on selection of a wide timeline, that is 1910-2010. It was suggested that this study should either be confined to the scholarship of one or two prominent Western scholars or should be focused on post 9/11 scholarship on Islamic law. Both suggestions were very logical but we cannot over look that fact that the research topic must come from the heart and mind of the researcher and only he/she is responsible for justifying the viability of the topic. The researcher worked for a while on both these suggestions but material selected and read could not satisfy the objectives and questions that this researcher had in mind. Every scholar writing after 1950 and every monograph written after 9/11 (2001) on origins of Islamic law referred to the writings of Joseph Schacht and Schacht relied heavily on Goldziher. Therefore it was established that the path for the study of origins of Islamic law in Western scholarship cannot be tread without having a thorough understanding of the issues raised in the writings of Goldziher and Schacht. Thus combined scholarship of these two orientalists became the primary source for this research topic.

As mentioned earlier Western scholarship on Islamic law is dominated by orientalist perspective, therefore a word on orientalism is in order. Roots of orientalist scholarship have been traced to the Umayyad period in the writings of John of Damascus.
Later, a translation of *Qur’an* into Latin by Robert of Ketton appeared in thirteenth century and then D’ Herbalot’s “*Bibliotheque Orientale*” published in seventeenth century (1697). These remained standard reference works on orientalist scholarship on Islam in Europe until the early nineteenth century. Within the European world and now in United States Islamic legal history, especially its origins have been studied as integral to the Orientalist project. Discussion undertaken by Schacht and Goldziher revolve around two controversial issues, firstly codification of *hadith* literature in the 3rd century A.H. and secondly influence of pre-Islamic non-Arab laws in shaping Islamic legal system. Their writings form the basis of “Islamic Legal Orientalism”.

Jamāl ud Din Afghāni, Muḥammad ’Abduh, Muḥammad Kḥurd Ali, Abdul Latif Tibawi, Anwer Abdul Malek and Edward Said are a few scholars who wrote in response to the growing trend of Orientalism. But the most comprehensive of all writings on orientalism is that of Edward Said written in 1978. Said does not deal with law in his seminal work “*Orientalism*” and makes only a passing reference to the work of Sir William Jones and Ignac Goldziher. John Strawson in his articles written in the last decade of the twentieth century argues for recognition of term “Legal Orientalism”, which he claims has stamped jurisprudence since European Enlightenment. Legal Orientalism has constructed Islamic law as backward and deficient and Western laws as progressive and superior. This construction he says is “connected to the power relationship between the West and the Islamic World.”

After establishing a relationship between the Western scholarship and orientalism and having recognized the term ‘legal orientalism’ the discussion moves to two types of legal orientalism, applied and academic. In the discussion on Applied Legal Orientalism case of British dominion over the subcontinent in nineteenth and twentieth centuries is the prime example. Though legal orientalism extends to Chinese law, Tsarist Central

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Asia, (Raskola, 2002)\textsuperscript{4} colonial Malaya (Hussain, 2007)\textsuperscript{5} and French colonization of Algeria, Tunisia and Morocco (Charrad, 2001)\textsuperscript{6}, but these do not fall under the scope of this dissertation. This research identifies the key issues in Islamic legal Orientalism (only those discussed in academic writings, not applied), therefore the research is further narrowed down to Western scholarship on the issues raised in academic literature written by the West on origins of Islamic Law. In these academic discussions the stamp of Legal Orientalism is strongly felt on dogmatic beliefs concerning \textit{Qur’ān} and \textit{Ḥadīth} (the primary sources of Islamic law) and assumptions regarding the inauthenticity of these primary sources by the Western scholarship.

These key issues fall under three headings \textit{Qur’ān}, \textit{Ḥadīth} and Foreign Influence on Islamic law, details are given below:

- **\textit{Qur’ān}:** In Western scholarship \textit{Qur’ān} is not taken as a revealed word of God. Its authorship is ascribed to Muḥammad (PBUH). It is alleged that provisions made in \textit{Qur’ān} are limited to the primitive conditions of Arabia. Guiding principles in \textit{Qur’ān} are insufficient and inadequate for dealing with new situations. As a source of law \textit{Qur’ānic} legislation was ignored for approximately a century by Muslim community.

- **\textit{Ḥadīth}:** Western scholarship asserts that traditions (\textit{ahadith}) attributed to Prophet Muḥammad (PBUH) are documents not of the time to which they claim to belong, but of the successive stages of development of doctrines during the first centuries of Islam. Traditions originated towards the middle of second century. Tendentious and spurious additions were made to the original mass of traditions in every succeeding generation. Traditions were fabricated and were used as devices to substantiate particular points of view and are a direct reflection of the aspirations of Islamic community. Traditions of the

\textsuperscript{4} Ibid.
Prophet were historically the last authoritative ingredients in the formulation of Islamic law, not the first. *Hadith literature* is as mass of contradictory views formulated at uncertain times by uncertain persons, therefore unreliable.

- **Foreign Influence:** *Qurʾān* and *Hadith* are not divine but material contained in them is borrowed from various sources: such as pre-Islamic practices, local customs, Umayyad practices, doctrines of law schools, borrowings from laws of fertile crescent. Jewish and Canon law also influenced the development of Islamic law. Regarding origins of Islamic law it is acclaimed by Western academia that Islamic law did not originate in Medina but in Iraq or Syria.

  These are the leading contentions of Western scholars on three issues mentioned above. These were first proposed by Goldziher and later elaborated by Joseph Schacht. These assumptions become the basis of all future studies on “Origins” of Islamic law.

  In this dissertation *hadith* and foreign influences has been dealt with in detail whereas Western scholarship on *Qurʾān* is dealt with cursorily as it would make this dissertation too extensive (a separate study is required to unfold Western criticism and discussion on *Qurʾān*) The focus of this study is discussion on *Hadīth* literature and influence of foreign laws on Islamic law only.

**Objectives of Research**

This research is undertaken to carry out a critical analysis of Western writings on origins of Islamic law. Whenever a scholarship is critically analyzed it is important to find out the motives, agendas and inspiration behind this effort and to know how this trend of writing originate. This is not a research conducted on a single monograph or a single scholar but this thesis encompasses the entire scholarship spread over a century (1910-2010). This makes it all the more important to find the objectives behind this century long effort and its origins. A cursory study of the Western scholars writing on
Islamic law reveals that this scholarship is armed to the teeth against Muslim *hadith* literature and strongly proposes lack of originality in Islamic law.

Thus the second major reason for carrying out this study is to find out how strong are the arguments of Western scholars to support their claims.

Thirdly this dissertation also aims at analyzing the writings of those Western scholars who do not share orientalist perspective while writing on Islamic law and what is the outcome of their researches.

Lastly it is desired that after this critical analysis effort is made to bring Muslim and Western Scholarship closer to each other in their approach towards the study of classical Islamic literature.

It must be remembered that research is meant for promotion of knowledge for the betterment and advancement of society and pure knowledge is beyond the boundaries of religion.

**Assumptions/Hypothesis**

Following are the hypotheses which will be tested analytically at the end of this research:

1. The orientalist perspective dominates the Western scholarship.
2. Western scholarship has been instrumental in essentializing the differences between Muslims and the West through their writings on origins of Islamic Law.
3. Western study of development of Islamic law during first three centuries will always remain controversial and in conflict with the Muslim’s understanding of Islam and Islamic law.
4. Western scholarship on origins of Islamic law has not been able to reach a consensus on the issue of inauthenticity of *Hadîth* literature
5. Western scholarship on Origins of Islamic law has not been able to reach a consensus on the issue of foreign influence on Islamic law.

6. Scholarship of twenty first century does not support the assumptions of twentieth century scholarship on these two major issues. Thus theories proposed by Goldziher and Schacht cannot serve as basis of future studies on Origins of Islamic law.

**Research Questions**

Following research questions will help in giving a direction to this research:

- Q1. Does Western scholarship on Islamic law remain within the Orientalist paradigm?

- Q2. What are the objectives and essential paradigms for the study of Islamic law which guide the West in their academic efforts to understand the first centuries of Islam?

- Q3. Are these paradigms for study of Islamic law shared by the entire Western scholarship?

- Q4. Is it appropriate to coin the term “Islamic legal Orientalism”?

- Q5. Has Western scholarship proved beyond reasonable doubt massive fabrication of hadith literature?

- Q6. Is Western scholarship successful in proving the influence of pre-Islamic non-Arab laws on Islamic law?

- Q7. Does Western scholarship of 20th century on Islam and Islamic law differ from the Western scholarship of 21st century with respect to its mannerism, approach, trend, methodology and objectives of study?
• Q8. Can Muslim and Western scholarship be reconciled at any point in their understanding and study of Islam in general and Islamic law in particular?

**Limitations**

This research is limited to the discussion on origins of Islamic law by Western scholars. The two major issues as stated previously are *hadith* fabrication and borrowings in Islamic law.

Criticism on *hadith* and *Sijera*, by non-Muslims can be traced back to the early days of Islam but *hadith* criticism in this research will be in the context of discussion on Islamic law. Since Schacht revived the assumptions of his pre-decessors in the context of Islamic law in which *hadith* literature was taken as a source of law, therefore our discussion on Ḥadīth will be confined to this perspective only.

Publications only by Western scholars on issues related to “Origins” of Islamic law are the focus of this research. This is further narrowed down by publications in English language only. Although the time line is too wide (1910-2010) but from 1910-1969 research revolves around the issues raised in only three ground breaking publications by Goldziher and Joseph Schacht “*Introduction to Islamic Theology and Law*” (1910), “*The Origins of Muḥammadan Jurisprudence*” (1950) and “*Introduction to Islamic Law*” (1964). Remaining discussion delves on the assumptions put forward in these three monographs and continuation of academic debate on these two issues in 21st century Western scholarship.

Brief account of research of all Western scholars of 20th and 21st century on these major issues is recorded in this dissertation. However this thesis delves around the scholarship of Goldziher and Joseph Schacht in 20th century.


On the question of foreign influence on the development of Islamic law writings of Patricia Crone, Harald Motzki, Ayman Daher, Joseph E. David and Judith Romney Wegner are consulted. Writings on this issue are not very extensive.

Views of Wael Hallaq are also analyzed but his works could not be dealt with in detail.

**Research Methodology**

This research primarily focuses on scholarly monographs, and academic articles published in reputed journals by the Western scholars. Although research and information is substantiated by the use of information on reliable websites and encyclopedias, these sources remain secondary. This is a qualitative research based upon an extensive study of
scholarly writings of the West. It also involves a historical survey of social and political attitudes instrumental in giving Islam a stereotype image and portrayal of this image through the writings of the Western scholars since the advent of Islam. This thesis initially discusses the roots of orientalist tradition in Western scholarship and Muslim responses to such biased writings.

This dissertation is divided into two sections. First section deals with orientalism; the major trend in Western scholarship. First section is further divided into two chapters namely “Islamic Orientalism” and “Islamic Legal Orientalism”. The second section focuses on the controversial issues raised by orientalists on the origins of Islamic law namely hadith and influence of foreign laws on Islamic law. This divides the second section into two chapters one focusing on Western criticism on Ḥadīth and the second deals with the alleged influence of foreign laws on Islamic law. This is the main body of the thesis. This research ends with a summary, analysis, conclusion and identification of areas for further research. The analysis provides the answers to the research questions proposed in the introductory chapter of this dissertation and a discussion on the assumptions stated in the beginning. Some important areas for further research are highlighted at the end.

Chicago Manual citation style is followed throughout the thesis and transliteration table of Islamic Studies journal of International Islamic Research Institute is adopted to remain close to the pronunciation of Arabic terms. Dates in this research will follow the Hijri/ Common Era format. The phrase ‘May the peace and blessings of God be upon him” which usually follows Prophet Mohammad’s name will be abbreviated as (PBUH). Word tradition is used as equivalent of hadith and should be understood in this sense only. ‘Origins’ the plural of origin is used as per Western perspective because Western scholarship assumes the influence of numerous laws on early development of Islamic law.
CHAPTER 2

LITERATURE REVIEW

This chapter aims to review the critical points discussed in Western scholarship on ‘Origins’ of Islamic Law. An effort will be made to present a comprehensive survey of publications on the topic of research. This chapter will provide a summary of the research findings reported in the literature. It will help develop familiarity with the topic of research and will also introduce to the reader prior studies on this topic.

This literature review is chronological as well as thematic. Within a particular theme, available literature is reviewed chronologically. The body of this thesis is divided into four chapters. The focus of the study is issues raised by Western scholars on “Origins” of Islamic law but the discussion begins with the historical perspective of Orientalist’s writings on Islam. Thus Orientalism being wider topic is gradually narrowed down first to “Islamic Legal Orientalism” and then to the two major issues “hadith fabrication” and “foreign influence on Islamic Law”. These two issues are discussed extensively in Orientalist’s writings on Islamic law.

As this study analyzes Western scholar’s writings on Islamic law therefore all publications consulted in this dissertation are the researches of Western scholars. It contains latest journal articles published in the journals of leading American, British and European universities and monographs by leading Western scholars on Islamic law. It also includes book reviews, responses, rebuttal and critiques on focal issues discussed in this thesis. The review of literature introduces to the reader some important literature
written on Islam since Umayyad era down to the present decade, which served as basis for Orientalist writings on Islam.

Thus beginning with an introduction to Islam as a religion and as law the research moves to the broadest theme, i.e. “Orientalism”. The chapter on orientalism addresses the development and trends of orientalist approach in three chronological phases:

- Orientalist Scholarship on Islam in pre-colonial era
- Orientalist Scholarship on Islam in colonial era
- Orientalist Scholarship on Islam in post-colonial era

Various trends in Orientalist’s writings on Islam are observed. These changing trends reflect political and social aspirations of the West.

**Orientalist Scholarship on Islam during Pre-Colonial Era**

**(7th to 15th century)**

For the purpose of this research pre-colonial era falls between the advent of Islam in the seventh century till the beginning of European colonization in the fifteenth century. Major Orientalist writing on Islam during this period which had a profound influence on the thinking of people is “The Fount of Knowledge” by John of Damascus. Robert of Ketton also undertook the first translation of Qurʾān during this era.

“The Fount of Knowledge” was written by John of Damascus in the eighth century during last Umayyad caliphs. John remained at the court of Caliph in Damascus since his birth till he retired to a monastery in Palestine. John raised numerous issues about Islam as a religion, Prophet Muḥammad and Qurʾān. The second part of Fount of Knowledge is entitled as “Heresies in Epitome: How They Began and Whence they Drew their Origin”. Most comprehensive argument that John builds is that there is no witness to Muhammad’s prophecy therefore he cannot be accepted as a Prophet. John does not differentiate between Qurʾān and Hadith and attributes numerous verses of Qurʾān to authorship of Muhammad (PBUH). He saw Islam as a Christian heresy and declared it a
pagan cult. He calls Muhammad (PBUH) an imposter, an irreligious and a licentious man. He alleges that a surah named “Camel of God” was removed from Qur’ān and mocks and criticizes various other surahs of Qur’ān. This book became the classical source for all future Christian writings on Islam. Besides John’s scholarship Robert of Ketton produced the first translation of Qur’ān in the twelfth century.

Orientalist Scholarship on Islam during Colonial Era (15th to 19th century)

During the colonial era D’Herbelot’s “Bibliotheque Orientale” remained the standard reference work on Orientalist scholarship in Europe until the early nineteenth century. It was published in 1697 A.D. Orientalism in Louis XVI’s France (2009) published by Oxford Scholarship Online carries a chapter on Barthélemy d’Herbelot, and his Bibliothéque Orientale. It discusses its sources and the way it organizes and presents information to the reader. It stresses the dependence of d’Herbelot on one source in particular, a bibliographic dictionary by the Ottoman scholar Hajji Khalifa (1609–1657). This source was central to d’Herbelot’s book, not only for the new information it contained, but also for its alphabetical order, a feature d’Herbelot’s work imitated.

The next important work is Gustav Weil’s (1808-1889) first work the translation of Thousand and One Nights (1866) from original to German. Many Orientalists attach immense importance to this work and relate it to Islamic religious literature. Weil’s second great work was “Mohammed, der Prophet” (Stuttgart, 1843), translated as “Life of Mohammed”. His three important essays all on different aspects of life of Prophet Muḥammad, first one is on Mohammad’s epilepsy (1842) the second “Supposed Lie of Mohammed” (1849); and the third a discussion of the question whether Mohammad could read and write (“Proceedings of the Congress of Orientalists at Florence”). Finally he wrote “Biblische Legenden der Muḥammadaner” (1845), in which Weil proves the influence of the rabbinic legends upon Islam. Aloys Sprenger (1813-1893) published “Life of Muhammed” (1851). Sir William Muir (1819-1905), wrote “Life of
Muḥammad” (1858) and “History of Islam” (1861) in which he suggested that Muḥammad had fallen under satanic inspiration. Ernest Renan (1823–1892) was a French expert of Middle East, ancient languages and civilizations. His outstanding work is “General History of Semitic Languages”. He consistently promoted Islam and Arabs as monolithic and argued that, “Semitic mind was incapable of philosophical and scientific thinking.” He was a contemporary of Jamāl ud Din Afghāni. Afghani wrote a rebuttal of Rennan’s thesis. Student of Jamāl ud Din Afghāni, Muḥammad ʿAbduh supported the cause of Afghani. Together they published a newspaper from Paris named ‘Urwah-tul-Wuthqā.

Works of nineteenth century clearly reflect that Muhammad’s biography was the focus of majority writings on Islam. Islam was given negative projection by proving fallibility of Prophet Muhammad. Prophet’s personality was criticized and his hadīth were mocked. All sorts of allegations were levied on Muhammad to distort the image of Islam as a religion. Focus of the Orientalists during this century was to gain mastery over Semitic languages in order to access the classical Islamic texts and to understand Muslim societies through their classical scholarly texts.

**Orientalist Scholarship on Origins of Islamic Law during Post-Colonial Era (20th century onwards)**

Brockelmann was a leading German orientalist of 19th century and a Professor at University of Berlin. He is the author of multi volume “Geschichte der Arabischen Literature” (History of Arabic Literature) published in 1902 which remains the fundamental reference volume for all Arabic literature. Ernest Renan (d.1892) was a French expert of Middle East, ancient languages and civilizations. His outstanding work is General History of Semitic Languages. He consistently promoted Islam and Arabs as monolithic and argued that, “Semitic mind was incapable of philosophical and scientific thinking.” Max Muller (d.1900), German born philologist studied in Britain. He was the founder of the academic field of Indian Studies and discipline of Comparative religions. Sir William Muir (d.1905), a Scottish Orientalist and colonial administrator, educated at
Glasgow and Edinburgh wrote “Life of Muhammad” (1858) and “History of Islam” (1861) in which he suggested that Muhammad had fallen under satanic inspiration.

The first instance of scholarly writing on Islamic law in Western language was taken up by Ignac Goldziher (d.1921). His book “An Introduction to Islamic Theology and Law” (1910) translated from German “Vorlesungen uber den Islam” was the first scholarly discussion on usūl al fīqh in Western language. Another contribution by Goldziher was “Muhammedanische Studien” (1890) in German language raised controversial issues on Muslim hadīth literature. Ignaz Goldziher is considered to be the founder of Modern Islamic Studies in Europe who made a strong impact on the minds of people with his writings. The issues rose by Goldziher on hadīth literature and origins of Islamic law became the basis of future orientalist’s writings. He claimed that hadīth literature is a product not of time it claims to be and is fictitious. He also suggested that Islamic law is heavily influenced by Roman law thereby putting forward the idea that it contains borrowed elements and lacks originality. These ideas were further elaborated by other orientalists in their writings and were instrumental in initiating huge controversial debate on the origins of Islamic law.

Theodore Noldeke (d.1930) German orientalist is well known for writing “History of Qur’ān” (1859). He was appointed Chair of Oriental Languages at Strassburg. German orientalist Joseph Horovitz (d.1931) was a Professor of Semitic Studies at the University of Frankfurt, and the first director of the Institute of Oriental Studies at the Hebrew University, Jerusalem. He was a scholar whose research on early Islamic historiography contributed much to the foundations for the field as we know it today. Regarding Hadīth literature Horovitz traced the Isnāds back to the last quarter of the first century which is an earlier date than the one argued by main stream orientalists. However Horovitz occupies common grounds with other orientalists in his assertion that Islam contains many elements from other religions and cultures.

Hurgronje (d.1936) was a Dutch scholar of Oriental cultures and languages and advisor on Native Affairs to the colonial government of the Netherlands East Indies (now Indonesia). He was fluent in Arabic and served as professor of Malay at Leiden University. He was also the official advisor to the Dutch government on colonial affairs.
He was the leading Dutch expert on Islam at that time. In 1885 he was even allowed to commence pilgrimage to Mecca. He did his doctorate from Leiden in 1880 and is the author of “The Festivities of Mecca”. Lammens (d.1937) a Belgium born orientalist who mastered Arabic, Latin and Greek and published series of studies in pre-Islamic Arabia. He wrote “Age of Muḥammad” and “Chronology of Ṣīrah”. Wensinck (d.1939) was a Dutch scholar, he studied Semitic languages at university of Leiden and Berlin, later he was appointed as a professor at university of Leiden, He wrote “Muḥammad and Jews of Medina” which was published in 1908, and “Concordance of Muslim Tradition”. David Samuel Margolith (d.1940) was a priest in the Church of England and a professor of Arabic at Oxford University. He had mastered all major Oriental languages Arabic, Turkish, Persian, Armenian and Syriac. Louis Massignon (d.1962) was a French scholar of Islam and Islamic history and an Arabist. He had a great influence on how Islam was seen in the West. During World War I, he was the translating officer for Bureau of French Intelligence. He wrote his doctoral thesis on al-Hallaj in 1922. Makdisi, Abd al-Rahman Badawi, great Egyptian scholar and Abd al Halim Mahmud, the great Sheikh of al- Azhar were his students. Guillaume (d.1965) was an Arabist and Islamic scholar. He studied Oriental languages at university of Oxford. He was later appointed as professor of Arabic and Head of Department of Near and Middle East, in school of Oriental and African studies at university of London. He was also placed as a visiting professor at Princeton University. He translated Ibn-e- e Ḥishq’s Ṣīerah, and wrote “Islam” and “Legacy of Islam”. University of Istanbul chose him as first foreign lecturer on Christian and Islamic theology.

Goldziher’s studies on Islamic law were resumed and considerably extended by a German Orientalist Joseph Schacht (d.1969) in his two major works, “The Origins of Muḥammadan Jurisprudence” (Oxford, 1950) and “An Introduction to Islamic law” (Oxford, 1964). These works together became the basis of Islamic Legal Orientalism in academic writings on Islamic law. Schacht added that Islamic law is representative of the legal practices of Umayyad period and the Ḥadīth literature as representation of the

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http://en.wikipedia.org/wiki/Aceh_War
aspirations of early Islamic community and not the words of Prophet Muḥammad. The idea of “back projection into the earlier period” was first given by Goldziher though he did not use this principle for aḥādīth. This idea was extended by Schacht for back projection of hadīth. Schacht advanced the studies on Islamic law considerably. What was unique in his writings was that in addition to following the historical methods of research he did not ignore the sociological dimensions of study. Schacht’s views promoted a fundamental rethinking of Origins of Islamic law.

Johann Fueck (d.1974) a German Orientalist, wrote “Arabia” (1950) a fundamental work on the history of Arabic studies, Füeck has produced “Studies on the History of Early Islam” and a number of works on the history of the Arabic language and of Arabic literature. Fueck does not share the common skeptical attitude towards Ḥadīth literature as proposed by other orientalists of his time and those preceding him. Instead he criticizes the skeptical approach of his pre-decessors. He believes that Ḥadīth literature contains many authentic traditions and argues that narrative chains of Ḥadīth can only be traced back to the second century (A.H.). Fueck is a notable exception among the leading orientalists because of his views on authenticity of Ḥadīth literature.

Montgomery Watt (d.2006) was a Scottish historian and a Professor in Arabic and Islamic Studies at University of Edinburgh. His major publications are “Biography of Muḥammad”, “Muḥammad at Mecca” (1953) and “Muḥammad at Medina” (1956).

Juynboll (d.2010) studied at Leiden, when Schacht was a professor there he worked on an International project initiated by the Leiden professor A. J. Wensick, the “Concordance De La Tradition Musulmane”, which had been initiated in the 1930s. Juynboll’s wrote his dissertation on “The Authenticity of the Tradition Literature” (1969). His other works on traditions include his monograph “Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadīth” (1983) and his collection of essays Studies on the Origins and Uses of Islamic Hadīth (1996). In 2007, Juynboll completed his life’s work with the Brill publication the “Encyclopedia of Canonical Hadīth”.
**Orientalist Tradition in American Scholarship (Cold War and Contemporary Era)**

The trend considerably changed when Orientalist scholarship was dominated by American scholars. Their focus was more on Muslim societies rather than Islamic texts. Unlike Europeans, Americans worked as social scientists rather than language experts.

Duncan Macdonald (1863-1943) was the first expert on Islam in American academia. Throughout his writings Macdonald seems to be essentializing the difference between an Oriental and Occidental mind. Macdonald was of the view that Muslim mind is unable to comprehend complexity. Sir Hamilton Gibb (1895-1971) followed in the footsteps of Macdonald and proceeded to explain why Muslim societies behaved in accordance with Macdonald’s dictum. He was of the view that Middle Eastern societies are devoid of reason and sense of law. In 1930’s Gibb and Harold Bowen published two volumes on the nature of Islamic society titled, “Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East”.

Gibb succeeded Margoliouth as professor of Arabic and came to Harvard from Oxford as visiting professor in 1950. He later became Director of Harvard Center of Middle Eastern Studies and later became a leader of the movement in American universities to set up centers of regional science, to study the culture and society of a region of the world. It is reflected from his writings that he believed in the dichotomy of East and the West and essentialized it by dividing humanity unto ‘Semitic Mind’ and ‘Western Mind’.

Schacht (1902-1969) a British-German professor of Arabic and Islam at Columbia University in New York was a leading Western scholar of Islamic Law. His ground breakings publications are “Origins of Muḥammadan Jurisprudence” (1950) and “Introduction to Islamic Law” (1962). He taught at Columbia University from 1959 till

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John Wansbrough (1928-2002) was an American historian who taught at University of London’s School of Oriental and African studies he completed his studies at Harvard. His leading Publication in English are “Qurʾānic Studies: Sources and Methods of Scriptural Interpretation” (1977) and ‘The Sectarian Milieu: Content and Composition Of Islamic Salvation History’ (1978).

Noel J Coulson (b.1928) served as a Professor of Oriental Laws in University of London and was appointed as member of editorial board Arab Law Quarterly. His remarkable contributions are “A History of Islamic Law” 1964, and four other works on Islamic law.

An account of works and contributions of leading American orientalists who are alive is given below:

Bernard Lewis was born in 1916 in London and is still alive. Professor Edward Said of Columbia University and author of Orientalism (1978) characterized Lewis work as a prime example of Orientalism. Bernard Lewis too acknowledges the academic weakness of orientalism. To him, orientalism has not emerged as a purely academic discipline and is devoid of scientific methods of investigation Bernard Lewis also exemplifies Said’s critique on the relationship of scholarship to power. His ties to U.S. State department were exposed in his book What Went Wrong? This explained 9/11 as the decline of Islamic civilization. This book was written before 9/11 but provided the bewildered American public an explanation of those attacks and to bush government a justification for their reaction and response. Some influential books by Bernard Lewis are “The Arabs in History” (1950), “The Middle East and the West” (1964), and “The Middle East” (1995). Three of his books which were published after 9/11 are “What Went Wrong?”, “The Crisis of Islam”, and “Islam: The Religion and the People”.

“Roman Provincial and Islamic Law” (1987) and “Hagarism” (1977) are her major writings on Islamic law by Patricia Crone (b.1945). She is an orientalist and historian on early Islamic history. Micheal Cook (alive) co-authored “Hagarism” with


Hallaq is a non-Muslim Arab scholar of Islamic law and Islamic intellectual history. He is a world-renowned scholar of Islam, with numerous contributions to the field of Islamic legal studies. His outstanding contributions are *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament* (2012), “*An Introduction to Islamic law* (2009), *Shari’a: Theory, Practice, Transformations*” (2009), and “*The Origins and Evolution of Islamic Law*” (2005).

**Muslim’s Response to Orientalist Writings**

Muhammad Khurd Ali (1876-1953) Syrian intellectual never wrote a book devoted entirely to Orientalism but his most extensive discussion of this subject is volume I of “*Al-Islam wa al hażarah al ‘Arabiyyah*” (*Islam and Arab Civilization*). The early chapters of this book deal with the negative comments made by a number of Orientalists. Palestinian historian Dr. Abdul Latif Tibawi (1910-1981) wrote a critique of Western Orientalism under the title “*English Speaking Orientalists: A Critique of their Approach to Islam and Arab Nationalis*” Professor Tibawi has authored numerous other books such as, “*British Interests in Palestine*” (1961), “*American Interests in Syria*”(1966) and “*Anglo-Arab Relations and the Question of Palestine,1914-1921*”

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Anwer Abdul Malek (1924-2012) was an Egyptian scholar who wrote “Orientalism in Crisis”. In this book he stated that:

“One sees how much from eighteenth to the twentieth century, the hegemonism of possessing minorities, unveiled by Marx and Engels, and the anthropocentrism dismantled by Freud are accompanied by Europocentric in the area of human and social sciences” and that Orientalists give the “Orient” a timeless essence that produce what he describes as a “typology”, such as that of “homo Arabicus”.

Edward Said (1935-2003)’s major inspiration behind his masterpiece Orientalism was Anwer Abdul Malek. Edward Said fundamentally changed the theory by his 1978 Publication “Orientalism”. Said contends that Orientalism is a politically constructed binary, a category of interpretation rooted in preconceived and historically constituted ideas about the “Orient” as an “Other”.

Most recent Moroccan scholar ‘Abdullah Laroui is well known for his critique on Orientalist scholarship. His first critique on Orientalism is “The Ideology of Contemporary Arabs”. ‘Abdullah Laroui’s “Histoire du Maghreb Un essai de syntheses” which appeared in 1970 presents a seminal critique of the Western historiography of the Maghreb, it was translated by Ralph Manheim in 1977 as “The History of Maghreb: An Interpretive Essay (Studies on the Middle East).

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11 This term was coined during the period of decolonialization in the late 20th century and it had its historical roots in European colonialism and imperialism. It means viewing the world from European perspective.

12 Anwar Abdel Malek, Orientalism in Crisis Diogenes, (Winter, 1963) 44:108

**Review of Literature on Islamic Legal Orientalism**

The discussion on orientalism is narrowed down to Islamic legal Orientalism in the next chapter. Legal orientalism appeared during colonial era and was manifested in the application and codification of local laws by the colonizers. This thesis discusses the case of British colonization of Indian sub-continent and shows how Anglo-Muḥammadan Jurisprudence and Muhammadan laws evolved as a result of the efforts of colonizing commanders in India. Translations of classical Islamic legal texts by Hamilton, Sir William Jones and Baillie speak of Orientalist’s efforts to manipulate Islamic legal texts to their benefit.

The Chapter on Islamic Legal Orientalism discusses the effects of legal orientalism from two angles, applied legal orientalism and literary legal orientalism. The importance of discussing orientalism before writing on Western scholarship on Islamic law is obvious because twentieth century critique of Islamic law remains within the orientalist problematique. In “Quest for Origins or Doctrine” (2003) Hallaq also draws a connection between colonialism and Western interest in Islamic law. Edward Said does not deal with law in his seminal work and makes only a passing reference to it. Mayer also agrees with the contention of Said and says that orientalism should not be extended to law.

Strrawson, Anderson, Morrison and Ibrahim Moosa throw light on Applied legal orientalism in their published works. John Strwson in his article “Encountring Islamic Law” written in 1993 discusses the encounter of British colonizers in India.

Micheal Anderson too discusses the same in his article published in 1996 titled “Islamic Law and the Colonial Encounter in British India”,


Teemu Raskola discusses Legal Orientalism in Chinese perspective and informs the readers that Chinese people are labeled as a nation lacking in sense of law.
With respect to applied legal orientalism Hamilton translated Hanafi code of law written by Makhmasani the “Hedaya”, William Jones translated “Sirajiya” and Baillie codified “The Digest of Mohammadan Law”.

David Powers writes that students of orientalism have devoted little attention to colonial’s views on Islamic Law in his article “Orientalism, Colonialism and Legal History: The Attack on Muslim Family Endowments in Algeria and India” published in 1989.

Works of Goldziher and Joseph Schacht have been discussed previously as well as will be discussed in the hadith chapter. Same sources carry orientalist legal perspective by both these scholars.

Writings of Goldziher and Schacht had a considerable influence in determining the field of Islamic legal orientalism. Their scholarships have been discussed in the previous pages. Taking their monographs and articles as the starting point of Islamic legal orientalism the discussion is advanced to the twenty first century scholarship of John Strawson who says that, “the 20th century critiques of Islamic law remain within the Orientalist problematique, where Islamic law has been represented as an essentially defective legal system.”

After a general discussion on Orientalist’s writings on Islam Muslim societies and Islamic law the discussion in narrowed down to Orientalist’s criticism on Ḥadīth as a source of Islamic law and foreign influences in the making of Islamic law. The starting point being the writings of Goldziher and Schacht the discussion leads to the 21st century scholarship on Ḥadīth literature by Western scholars.

**Review of Literature on Hadith as a Source of Islamic Law**

Goldziher after ascribing authorship of Qur’ān to Muḥammad (Peace Be Upon Him), comments on Ḥadīth in the following words;
“Hadīth that we know from the transmission of later generations now and then contains a nucleus of ancient material, material that may not stem directly from the mouth of the Prophet (Peace Be upon Him) but that does stem from the earliest generation of Muslim authorities”\(^{14}\)

Advancing the same idea he further reiterates that;

“As the spatial and temporal distance from the source grew, danger also grew that people would devise ostensibly correct hadīth with chains of transmission reaching back to the highest authority of Prophet (PBUH) and his companions. These hadīth were then employed to authenticate both theoretical doctrines and doctrines with a practical goal in view.”\(^{15}\)

Regarding Prophetic traditions Schacht, in his article, “Revaluation of Islamic Traditions” says,

“This assumption should be abandoned that there originally existed an authentic core of information going back to the time of Prophet (Peace Be Upon Him) due to the fact that tendentious and spurious additions were made to the original mass of hadīth literature in every succeeding generation.”\(^{16}\)

On authenticity of hadīth, Schacht goes beyond Goldziher, in his “Origins” he says

“Every legal tradition from the Prophet until contrary is proved must not be taken as authentic…. but as fictitious expression of a legal doctrine formulated at a later date.”\(^{17}\)

He further highlights Shāfi‘i’s role as a master architect outstanding legal specialist who holds Ḥadīth in very high esteem, thus gaining confidence of a Muslim reader, very


\(^{15}\) Ibid, p. 39.


\(^{17}\) Ibid, p. 149.
soon makes his cut off point by drawing from Shāfi‘i’s role he states in “Origins” that “……great numbers of traditions were put into circulation after Shāfi‘i’s time”\textsuperscript{18}

Meaning thereby that aḥādīth of the Prophet (Peace Be upon Him) are documents not of the time to which they claim to belong. Schacht observes that two generations before Shāfi‘i reference to traditions from companions and successors was the rule and traditions from Prophet himself an exception. Schacht says that Shāfi‘i used reference to traditions from Prophet Muhammad (PBUH) a rule in his legal theory. He further discards the two sources of Islamic law “The Consensus” and “Analogy” and then focuses his attention on hadīth, which is the focal point of discussion throughout his thesis.

Then Schacht proves his argument e- silentio to show non-existence of many traditions in the early period of Islam. Schacht has frequently used the argument e silentio to show the non-existence of many traditions in the early period of Islam. This argument can simply be stated in his own words as:

\textit{“The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed”}\textsuperscript{19}

Having said this, Schacht focuses on Umayyad popular practice and says that Islamic legal thought started from late Umayyad administrative and popular practice and this is still reflected in a number of traditions. Schacht further engages in an extensive discussion on hadīth and proves his point with various examples. Schacht and his thesis prevail till the end of 20\textsuperscript{th} century.

Prof. Zafar Ishaq Ansari says that fourteen years later in “Introduction” Schacht takes a position more extreme by saying,

\textit{“Hardly any of these traditions, as far as matters of religious law are concerned can be considered authentic.”}\textsuperscript{20}


\textsuperscript{19} Schacht, ibid., p.271.
Zafar Ishaq Ansari refutes Schacht’s argument e-silentio in his article “The Authenticity of Traditions: A Critique of Joseph Schacht’s Argument-e-Sientio” by carrying out a comparative study of a fair assortment of legal doctrines of second century jurists to show the inadequacy of Schacht’s assumptions.

Schacht is followed by another distinguished scholar Noel J. Coulson who approached Islamic law from a completely different angle. His book, “History of Islamic Law” was published in 1964. He talks of evolution of law as a historical phenomenon and rigidity and immutability of Islamic law. In the introduction to his book “History of Islamic law” he says that

“Muslim Jurisprudence in its traditional form provides an extreme example of legal science divorced from historical considerations. Law in classical Islamic theory is the revealed will of God, a divinely ordained system, preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society. There can thus be no notion of the law itself evolving as an historical phenomenon closely tied with the progress of the society.....In this sense the traditional picture of the growth of Islamic law completely lacks the dimension of historical depth.”

Also

“...the notion of historical process in law was wholly alien to classical Islamic jurisprudence” “...but two developments in the present century require a radical revision of this traditional attitude”

By these two developments, he refers to Schacht and Goldziher (supporting Shari’ah law as the outcome of complex historical process) in the first place and legal developments in the Muslim world in the second place (dispelling the notion of Shari’ah as rigid and immutable). He moves the discussion on Islamic law ahead by adding that inherent in Islamic law are two distinctive characteristics, immutability and uniformity.

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20 Schacht, ibid., p. 34.
22 Coulson, ibid. p. 4.
He also emphasizes that there is a distinction between modern Muslim legal philosophy and classical jurisprudence.

Nabia Abbott has devoted her life to studying Arabic literary Papyri and studying their authors and significance of their works. Her two volume work is rich and original and its literary contribution is immense both in historical field (Studies in Arabic Literary Papyri I, Historical Texts, 1957) as well as in Qur’ān and Ḥadīth Studies (Studies in Arabic literary Papyri II, Qur’ānic Commentary and Tradition 1967). In “Studies in Arabic Literary Papyri II” Professor Abbott observed that the phenomenal growth of the corpus of this literature is not due to growth in content but due to progressive increase in the parallel and multiple chains of transmission, i.e., Isnāds. She says,

“...the traditions of Muhammad as transmitted by his Companions and their Successors were, as a rule, scrupulously scrutinized at each step of the transmission, and that the so called phenomenal growth of traditions in the second and third centuries of Islam was not primarily growth of content, so far as the hadīth of Muhammad and the hadīth of the Companions are concerned, but represents largely the progressive increase in parallel and multiple chains of transmission.” 23

This remarkable finding of Nabia Abbott helps to refute Sachacht’s thesis on hadīth forgery from three dimensions. Firstly, it negates his projecting back hypothesis, secondly creation of supporting traditions and thirdly suppression of undesirable material.

Ze’ev Maghen (alive) discusses Shacht’s Ḥadīth criticism in his article “Dead Tradition: Joseph Schacht and the Origins of Popular Practice”, “Ze’ev says,

“... if prophetic exempla and scriptural dicta are only secondary contributors to the formation of Shari’ahh, what then is the ultimate source of living tradition and popular practice to which Schacht assigns the primary

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role." and "from where does Schacht and the scholars who have embraced his thesis think Islamic Jurisprudence and positive law came from, if not from Qur’ān and Ḥadīth?"

Contemporary writings of Juynboll, Jonathan Brown, Harald Motzki, Christopher Melchert, and Wael Hallaq have contributed immensely in advancing studies on Ḥadīth literature. A review of their scholarly contributions is briefly stated in the preceding pages.

Juynboll (d.2010) gained recognition for his fundamental studies on Ḥadīth, which was his lifelong interest. In 2007 Brill’s of Leiden published his great work, “Encyclopedia of Canonical Ḥadīth “in which he amply illustrated the development of Ḥadīth in early generation of Muslims. Sole inheritor of Juynboll’s manuscripts are the Juynboll Foundation, an organization encouraging classical Islamic studies. The first president of its board is Professor Leon Buskens holder of the chair of Law and Culture of Islamic Societies at Leiden University. Jonathan Brown in his review of Juynboll’s Encyclopedia of Canonical Ḥadīth states that Juynboll’s contribution to the Western study of Ḥadīth has been substantial. From his earliest work in 1969 to latest in 2007, Juynboll has elucidated a wide range of topics in Ḥadīth universe. To Jonathan Brown most problematic aspect of Juynboll’s work is his extreme skepticism towards Muslim Ḥadīth regarding his 2007 publication Brown says that the title “Encyclopedia of Canonical Ḥadīth “is misleading and the contents prevent the scholarship from genuinely advancing this still underdeveloped field. Juynboll’s operating assumption is that all reports attributed to Prophet (PBUH) are forged and he builds upon Schacht’s common link theory, argument e-silentio and back projection of ḥadīth. In recent years these operating assumptions and methods have come under severe criticism.

Motzki is one of the leading critics of Juynboll. Motzki argues that argument *e silentio* is invalid,” Common Link” transmitters were generally reliable rather than forgers and that Juynboll uses small number of sources to support his claims. Motzki wrote his most influential article “Whither Ḥadīth Studies” (1996) as a rebuttal to Juynboll’s claims that Ḥadīth supposedly transmitted by the successor Nafi Ibn-e- Umar (d. 118/ 736-7) are mostly forgeries by Malik and there was no historical relationship between Nafi” and Malik and other narrations transmitted via Isnād Ibn-e-e Umar and Nafi were not authentic. Juynboll uses argument *e silentio* to prove the fabrication of Ḥadīth which Mokzki rejects completely.


Brown greatly advances the study in these scholarly writings and establishes his point that Sahihayn too were subjected to productive criticism by Muslim Ḥadīth critics. He moves ahead to examine works devoted to criticize Ḥadīth narrations (ilal) from 3rd to 8th century A.H. He discusses his findings in the article, “Critical Rigour Vs Juridicial Pragmatism: How Legal, Theorists and Ḥadīth Scholars Approached the Backgrowth of Isnāds in the Genere of Ilal al Ḥadīth” and concludes that original non-prophetic versions of many Ḥadīth survived alongside their Prophetic counterparts well into the 5th century A.H.

Brown examined the books of Ḥadīth criticism (*kutub al ilal*) and established that certain Ḥadīth scholars of 3rd and 4th centuries believed that reports considered

27 Preface of the same monograph
Prophetic in the canonical Ḥadīth collections were actually statements made by Companions and other early Muslims. Based on Goldziher’s analysis of explosive growth of Prophetic traditions in early Abassid period and then Joseph Schacht’s study of legal Ḥadīth led the orientalists to conclude that Muslim scholars of 2nd and 3rd centuries gave more authority to the reports of the Prophet and attribute this transition to Al-Shāfi‘i (d. 204 A.H.).

Jonathan Brown in his article “How We Know Early Ḥadīth Critics Did Matan Criticism and Why Is It So Hard to Find” says that Western Scholarship has accepted that Muslim Ḥadīth scholars focused principally on Isnâds to determine the authenticity of traditions and ignored the key components of modern historical investigation: the contents of the reports themselves.

Even Wael Hallaq (alive) a strong critic of Schacht agrees that by 830 CE, “the full authority to determine law was transferred from the hands of the Muslims to those of God and his Messenger”28 In his 2005 Publication “Origins” Hallaq says that the argument that Islamic religious law arose only with the emergence of Prophetic Ḥadīth, amounts to overlooking the entire first Hijri century contribution to Islamic law and Islamic ethical values of this era. The argument that the entire Ḥadīth corpus that proliferated in the second hijri century was fabricated would overlook the prophetic sunan that existed from the very beginning.

“Yet, it is undeniable that much of the Ḥadīth is inauthentic, representing accretions on, and significant additions to, the Prophetic siera and sunan that the early Muslims knew. As we have seen, many of these additions were the work of the story-tellers and tradition-(al)ists, who put into circulation a multitude of fabricated, even legendary, hadīth. Indicative of the range of such forgeries is the fact that the later traditionists – who flourished during the third/ninth century – accepted as “sound” only some four or five thousand

Ahādīth out of a corpus exceeding half a million. This is one of the most crucial facts about the hadīth, a fact duly recognized by the Muslim tradition itself.29

Motzki notes Schacht’s mistrust of chains of transmission which preceded the individual texts and states that Schacht’s mistrust blocked him from undertaking a consistent source analysis aimed at reconstructing the history of transmission.

In his article “The Jurisprudence of Ibn-e- Shihab al-Zuhri: A Source-Critical Study.” (1991) This article, revised and translated from the original “Der Fiqh des -Zuhri: Die Quellenproblematik” (1991), attempts to correct some of Schacht’s conclusions about the reliability of early Islamic legal ahādīth in general, his assessment of the authenticity of legal material attributed to al-Zuhri in particular, and his method of dating traditions more broadly. Motzki uses the Musannaf of “Abd al-Razzaq al-San”ani (d.211/826) to prove that Schacht’s conclusions were tainted by the lack of early published sources (Schacht relied principally on Malik’s Mawṭṭā? and secondly hypothesis-driven analysis that judged the provenance of early legal material based on overly skeptical assumptions.

Nicolet Boekhoff-van der Voort in “The Raid of Hudhayl: Ibn-e- Shihab al Zuhri’s version of the Eent” and Sean W. Anthony’s “Crime and Punishment in Early Madina: The Origins of Maghazī Traditions” both the authors have used Motziki’s Isnād-cum-Matan analysis to find the correct dating of these traditions. Nicolet concludes that this tradition can possibly be dated to as early as the last quarter of the first century A.H and Sean Anthony after examining numerous reports and then applying Motzki’s Isnād cum matan analysis that cluster of reports attributed to Anas Ibn-e-Malik can, in fact, be traced to Basra in the last quarter of the first century A.H. Isnād-cum-matan analysis is most extensively developed by Harald Motzki which has brought Western scholarship on Hadith criticism closer to the Muslim scholarship on criticism of hadīth.

29 Hallaq, op. cit., p.104.
Herald Motzki in his book “The Origins of Islamic Jurisprudence” published in 2002, greatly advances the study on *hadīth* criticism, Motzki states that,

“…that Schacht’s premise that portions of Isnāds which extended into the first half of the second /eighth century and first/ seventh century are without exception arbitrary and artificially fabricated is untenable at least in this degree of generalization” 30

He further adds;

“Schacht’s mistrust of the chains of transmission (Isnāds) which preceded the individual text blocked him from undertaking a consistent source analysis aimed at reconstructing the history of transmission. Schacht relied mainly on the criterion of contents and attempted to place the texts chronologically by ordering them in the overall context of the problem.” 31

Motzki says that Schacht restored to Isnād when its statements could be reconciled with the chronology developed through contents, otherwise he rejected Isnāds as forged.

He further states in “The Origins of Islamic Jurisprudence” (2002) that an investigation of the Meccan strands of sources leads to the conclusion that roots of legal scholarship in Mecca can be traced back to the middle of 1st century and their further development to the middle of 2nd century A.H. can be ascertained with a stunning wealth of detail that exceeds our dreams. He introduces Mussanaf of ’Abdul Razzak as Sanani (d.211) as an important source of history of law.

Motzki’s research and approach is based on the articles edited in “Analyzing Muslim traditions: Studies in Legal, Exagetical and Maghazi Ḥadīth” published by Brill in 2010. This is the English translation from German, of some very important articles on hadīth literature.

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31 Ibid, p. xiii
Harald Motzki introduced a new and badly needed approach to our study of early Islamic intellectual history. Motzki challenged the reigning conclusions of Joseph Schacht and the late G. H. A. Juynboll by demonstrating convincingly that their study of early Ḥadīth and law used only a small and selective body of sources, and that it was based on sceptical assumptions which, taken together, often asked the reader to believe a set of coincidences far more unlikely than the possibility that a Ḥadīth might actually date from the genesis of the Islamic community. Motzki’s work and that of those who have followed in his footsteps have contributed greatly to advancing the study of early Islamic history and law.

Building on Harald Motzki and Susan Spectrosky, Christopher Melchert records that Schacht took Shāfi‘i too much at his word. In the first half of the 3rd century Ibn-e- Hanbal (d.241) and Abd al Razzaq al-San‘ani (d. 211) continued to rely on the legal opinions of the companions when Prophetic hadīth were absent. Nonetheless Melchert agrees that one of the defining developments of jurisprudence in the 3rd century was that hadīth reports from the Prophet eclipsed reports from the Companions and later authorities.32

We can show the evidence of existence of hadīth collections from first century of hijra. For example, The Sahifa of Hammam Ibn-e-Munabbih: This is perhaps one of the earliest known hadīth collections. Hammam Ibn-e-Munabbih was a student of Abū Hurrairah and well-known among the scholars of the Ḥadīth to be trustworthy. Sahifah of Hammam Ibn-e-Munabbah (d. 110/719) a Yemenite follower and a disciple of companion Abū Hurrayrah (d. 58/677) from whom Hammam wrote this Sahifah which comprises of 138 Ḥadīth and is believed to have been written around the mid-first AH/seventh century.

Musannaf of `Abd al-Razzaq, Musannaf of Ibn-e- Jurayj & Musannaf of Ma`marIbn-e- Rashid and Mussanaf of Ibn e Abi Shayba are some leading texts which have helped in reshaping orientalists views on Ḥadīth.

John Burton in his book “An Introduction to Hadith” adds a new dimension to Islamic law, he says, “Origins of Hadith literature-the whole of Fiqh traditions-are exegetical.” To Burton “Fiqh is not law it is exegesis aspiring to become law” he further adds that the argument of whole sale rejection of Hadith as mere invention misses out the point that many of the aḥādīth can be shown to spring from primitive exegesis and that,

“This although Hadith may not be strictly historical in the sense of preserving actual information about the Prophet (Peace Be upon Him). It does at least preserve some material on the thinking of Muslims if not precisely in the age of the Prophet (Peace Be upon Him) then very soon after in the age of Qur’ān.”

Daniel Brown comments on John Burton’s thesis and says that “Burton’s thesis is nevertheless important and compelling and offers useful corrective to the theories of Goldziher and Schacht.”

Most acclaimed critique on Schacht’s thesis came from M Mustafa al-Azmi. The title of this critique is “On Schacht’s Origins of Mohammadan Jurisprudence” (2004) In this critique he has presented an analysis of the classical orientalist’s works. His work examines the sources used by Schacht to develop his thesis on inauthenticity of hadith literature. He exposes the fundamental flaws in Schacht’s methodology that leads to conclusios unsupported by the text examined.

**Review of Literature on Influence of Foreign Laws on Islamic Law**

Twentieth century saw a rigorous debate on the issue of influence of foreign laws on Islamic law. Initiated first in the writings of Goldziher in following words;

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“Muhammad was receptive of all sorts of ideas brought his way by the superficial contacts of business dealings with Jews and Christians and that Islam demonstrates its ability to absorb and assimilate foreign elements so thoroughly that their foreign character can be detected only by the exact analysis of critical research”\(^{35}\)

Schacht carried his research in the footsteps of Goldziher and observes a number of parallels between Roman and Islamic law, which he calls “too numerous and too striking to be coincidences”\(^{36}\). At the same time Schacht rules out the possibility of consciously adopting principles of foreign laws by Muslim jurists. He expresses this in the following words:

“The early Muslim specialists in religious law should consciously have adopted any principal of foreign laws is out of question”\(^{37}\)

Fitzgerald (1950) criticizes the writings of earlier Western scholars and says that they have adopted unscientific methods of research to prove their opinions;

“... to string together a list of resemblances, sometimes real but generally superficial and too often imaginary; and then to assert that such resemblances are in themselves proof of borrowings by the later from the earlier system. This unscientific method of dealing with the problem has been bolstered with unhistorical history, question begging epithets and a priori assumptions”\(^{38}\).

He refutes Goldziher in 1950 in his article “The Alleged Debt of Islamic to Roman Law” by stating that Shari‘ah differs radically in character and intention from the Roman law. The former is a system concerned with the relation of the individual human soul to God whereas latter is always a lawyer’s law.

John Makdisi’s (alive) articles “Islamic Origins of Common Law” and “An Inquiry into Islamic Influences during the Formative Period of Common Law” published

\(^{35}\) Ibid, p.14


in 1990 explore the origins of common law and trace the influence of Islamic law on common law.

Goldziher regarded Roman law as one of the chief sources of Islamic Jurisprudence but Patricia Crone comments on Goldziher that:

“Although a Jew with an intimate knowledge of Jewish law, he could have made an effortless case for the theory that Jewish law contributed heavily to the Shari‘ah; yet time and again he opted for the view that “it was a bygone stage of Roman legal history.”39

Crone in “Roman, Provincial and Islamic Law” further adds that,

“... the tradition is in fact armed to the teeth against imputations of foreign influence, practically no borrowings are acknowledged, loan words are very rare, since both patriarchal practice and Canaanite malpractice are located in the Arab past, foreign systems are hardly ever mentioned, let alone discussed even by way of polemics. Also no sources survive from the formative first century we are thus entirely dependent on a late tradition hostile to our designs.”40

Hallaq in his review on Crone’s “Roman, Provincial and Islamic Law: The Origins of Islamic Patronate” says that

“Her premise that the Arabs possessed little when they arrived in the Fertile Crescent and they were forced to borrow virtually everything from the nations they conquered leads her to the most unreasonable conclusions.”41

Motzki on the possible influence of pre-Islamic non-Arabic systems of law on Islamic law says that,


40 Ibid, p.2.

41 Hallaq, op., cit., p.6.
“Starting from the assumption that Islamic jurisprudence developed only towards the end of Umayyad period, scholars have sought its pedigree in Islamic Iraq (Schacht) or Syria (Crone).”

Motzki’s conclusion limits the scope of such an influence temporally to the end of 1st century hijra including pre-Islamic times and spatially to the Arabian Peninsula. Motzki further adds that the influence of Near Eastern Provincial law which was strongly infused with Roman law and Jewish legal reforms is conceivable with in these spatial and temporal limits. Commenting on the possible influence of pre-Islamic non Arabic systems of law on Islamic jurisprudence, Motzki limits the scope of such influence temporally to the end of 1st/7th century A.D/CE including pre-Islamic times and spatially to the Arabian Peninsula (Hejaz and Makkah). To Motzki, influence of Near-Eastern Provincial law which was strongly infused with Roman law and especially by Jewish legal reforms is inconceivable with these spatial and temporal limits. Not only this he introduces Muṣannaf ‘Abdul Razzaq al San’ani as a new source for the history of Islamic Jurisprudence, this collection presents an early stage of development and is more voluminous than Mawāṭṭā’.

Harald Motzki has challenged Western scholarship’s assumptions regarding the role played by scholars of non-Arab decent in the formative period of Islamic law. Motzki concludes that these findings lend no support to the assumption that scholars of non-Arab origins brought the purported borrowings with them from their native legal system. Therefore, we can no longer take it for granted that scholars of non-Arab descent were the natural vehicles of borrowings from pre-Islamic non-Arab legal systems. But even if there were any, such cases must be demonstrated. Motzki claims that he does not know of any such case from the first two centuries A.H. on the basis of this research.

42 Hallaq, op. cit., p.xv.
Judith Romeny Wegner\textsuperscript{44} compares four roots of Islamic and Talmudic law, to assert striking resemblance in both laws which cannot be called co-incidence. Each of these roots has its linguistic and conceptual counterparts in Jewish law. Wegner undertook the comparative study of Islamic and Talmudic law inspired by the following statement of Joseph Schacht.

“\textit{no comprehensive study of pre- Islamic legal terminology has been undertaken so far}”\textsuperscript{45}

Wegner compares the four \textit{usūl ul fiqh} roots of Islamic Jurisprudence i.e. Qur’ān, Sunnahh, Ijmā‘ and Qiyās with four basic sources of Talmudic law which are Miqra, Mishnah, Ha-kol and Hegges and concludes that Islamic terminology corresponds with its Jewish counterparts in meaning and concept implying Jewish borrowings. She ends sarcastically stating that

\textit{“We may never know for sure if Shāfi‘i sat, literally or metaphorically at the feet of Talmudic sages- just as we may never know for sure if Caliph “Umar had a Jew lawyer at his elbow.”}

Ayman Daher’s (alive) article on the influence of Roman law on Shari‘ah was published in Mac Gill Journal of Classical Studies in 2005. He proposes that “Can Roman legal concepts be made to fit into Islamic legal system?” Considering two opposing views, Sheldon Amos stating that

\textit{“Islamic law is Roman law in Arab dress”}\textsuperscript{46}

and R.Mottahedeh’s statement that

\textit{“Any law other than the law of Islam is obsolete.”} \textsuperscript{47}

\textsuperscript{44} Visiting Scholar at Harvard Law School.

\textsuperscript{45} Schacht, \textit{An Introduction to Islamic law} (Oxford: Clarendon Press, 1964) p. 8


\textsuperscript{47} Roy Mottahedeh, ‘Some Islamic Views of the pre-Islamic Past’ \textit{Harvard Middle Eastern and Islamic Review} 1: 17 (1994).
Ayman argues 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. Ayman does not follow historical method of research as adopted by Joseph Schacht instead he carries out a legal analysis, under which he compares structural elements and substantive concepts of Islamic and Roman law.

The Jewish-Islamic comparative perspective has also played a major role in various areas of Islamic studies and consequently shaped the leading scholarly paradigms. Nevertheless only recently have scholars began to demonstrate sensitivity to the methodologies of these comparative studies.\textsuperscript{48} Joseph E. David rightly asserts that many of the comparative studies of Jewish-Islamic legal traditions are largely led by curiosity about influences and borrowings, and are not necessarily troubled by wider questions of comparability. In “Legal Comparability and Cultural Identity: The Case of Legal Reasoning in Jewish and Islamic Law” (2010) Joseph E. David elaborates how cultures, religions and praxis should be compared. He is of the view that the objective of comparison should not only be confronting similarities and underlying differences but should provide a better understanding of compared systems and contribute knowledge, which otherwise would not be achieved.

This literature review presents an overview of important and leading literature by Western scholars since the first decade of the 20\textsuperscript{th} century (1910) till the first decade of 21\textsuperscript{st} century (2010) on ‘Origins’ of Islamic law. It highlights various issues raised by the orientalists on Islamic law and their underlying assumptions. The review of literature clearly reflects the most dominant themes and also the points on which there is disagreement between the scholars. Changing trends in methodology and various aspects from which Islamic law is approached by the West in its researches is also evident from this review.

CHAPTER 3

ISLAM & ISLAMIC LAW

Islam as Religion

Religion is a very diverse term and has been defined, redefined and interpreted by numerous religious scholars, orientalists, anthropologists and historians. Put in simple words “Religion is a systematic collection of beliefs, practices and cultures and legal norms which unite the adherents of a religion”. Where personal belief and private practice is an inherent component of religion at the same time religion is eminently social. It is the amalgamation of the “private” and “public” which gives religion its complete form and understanding. Faith and beliefs are fundamental to one’s religious inclination but it does not preclude its societal aspects. No matter how much we boast of modernity and rationality it seems inherent in human nature that we cling on to a set of beliefs and practices for the sake of identity. A survey49 of the global religious adherents reveal that approximately 60% of the world’s population is religious and 40% not religious including the atheists. Thus, showing the importance and relevance of religion in one’s individual life in this age of modernity.

49 Survey was done in year 2012
If we trace the etymology of the word religion it means respect for something sacred or reverence for gods. Division of religion into revealed and non-revealed which was later given up for a widely acceptable alternative into Semitic and non-Semitic religions brings forth the idea that even if a set of beliefs is not ancient or divine people have the tendency to construct and create a set of beliefs and practices to identify themselves with it. The religion Islam is revealed as well as Semitic and is the third in chronological order among the three major revealed religions Judaism, Christianity and Islam. Although it is Muslim belief that Judaism and Christianity were revealed to the Prophets who were the founders of these religions but the concept of revelation is so powerful and immense in Islam that it almost reduces Judaism and Christianity to worldly religions. An even wider classification of religions into universal and ethnic religions also exists. By universal religion is meant a religion whose origin is ancient and is universally accepted as a religion and it seeks more converts whereas ethnic religions come from a particular culture and does not seek adherents. According to a European scholar Fitzgerald religion is not a universal feature of all cultures but this idea developed under the influence of Christianity. Fitzgerald remarks that in the age of Enlightenment religion lost its affiliation with nationality and instead of becoming a social attitude it was reduced to individual practices and personal emotions.

Whether the basis is universality, philosophy or ethnicity there emerge six major religions in the world:

1. Judaism,

2. Christianity

3. Islam

4. Hinduism

5. Chinese folk religion

6. Buddhism
The first three among these are also termed as Abrahamic religions because it is believed that the Prophets who brought these religions were the descendants of Prophet Abraham. The remaining three do not owe their decent to Abraham.

Judaism: Judaism originated in ancient Israel and its primary source is Torah which is believed to have been handed down to Prophet Moses. Hebrew bible and Talmud are also considered to be the central texts of Judaism. Today the followers of Judaism are mainly settled in Israel and United States of America.

Christianity: Christianity is chronologically the second Abrahamic religion based on the teachings of Prophet Jesus and as stated in the New Testament. Christian faith believes Jesus to be the Son of God and the Savior of humanity. Christians unlike Jews are not concentrated in specific parts of the globe but are scattered throughout the world. It is further divided into Catholic, Protestant and Eastern Christianity.

Islam: Islam is the third of Abrahamic religions and was revealed on Prophet Mohammad in the 7th century CE. Primary text for Islam is the Quran and Prophetic traditions recorded in the second and third centuries of Islam. The two major divisions of Islam are Sunni and Shi’i Islam. It is most widely practiced in Asia and Africa.

It is a modern trend to understand and study religions in historical, social and cultural perspectives. This trend was introduced by the Western world with an assumption that such an approach would conclude objective and unbiased understanding of Islam, Judaism and Christianity. The idea of belief and revelation thus does not hold any place of prominence in the contemporary studies if religions. The problem that Islam poses to the Western world is that its primary literature and historical facts strongly support the concept of revelation and prophecy and Muslim belief lends support to these conceptions.

Concept of revelation is central to the Abrahamic religions. Revelation in religion means disclosing of some truth or knowledge through communication with some deity. In Abrahamic religions this term is used to refer to the process by which God’s will is revealed to human beings. Muslims even to this day have firm belief in the process of
revelation and the revealed status of Quran the primary source of Islam. Even the words of Prophet Mohammad are considered to be revealed but a degree less than Quran and are termed as “Wahy Ghair Mutlu”. It was the age of Enlightenment about the middle of seventeenth century with the progress of materialism and belief in rationalism that the concept of revelation was to be seen in a skeptical manner. In the twentieth century some religious philosophers proposed that revelation held no content in itself. They held that revelation is a human response that records how we respond to God. It is Muslim belief that God revealed himself to Prophet Mohammad through angel Gabriel. The Quran is the final word of God and a revelation preserved in its original form for the humanity.

According to Islamic literature, historical narratives and biographies of Prophet Mohammad it is believed that Quran was revealed on Mohammad at the age of forty. The medium through which these revelations were communicated to Mohammad was Angel Gabriel over twenty three years of his life. This is the time span during which entire Quran as revealed on Prophet Mohammad. Once the companion of the Prophet Harith bin Hishaam (R.A) asked the prophet how does wahy descend on you? The prophet replied in following word,

“Sometimes I listen to the sound like tinkling of the bell: this sound is one of the most difficult forms of wahy that I have had to experience. When this process is over revelation is implanted into my memory and sometimes an angel appears in the form of a man.”50

Prophet’s wife Aisha was witness to many revelations she said,

“I have seen the coming of wahy during the period of severe cold and his forehead used to be full of perspiration (in spite of such cold weather).” 51

It is not only the modern Orientalists and scholars of the age of enlightenment who disregard revelation but the reaction of pagan Arabs towards wahy was not much different. They considered wahy as invented falsehood and fabricated. To

50 Sahih Bukhari, vol.1, p.2
51 Sahih Bukhari, vol 1, p.2, hadith no.2
them the Prophet was either insane or possessed by spirits. They used to say and is recorded in Quran in 43:31 that,

وَقَالُواْ أَلَمْ تَنَزِّلْ الْقُرْآنَ عَلَىٰ رَجُلٍ مِّنَ الْقَرْيمِ الْقَهِيْدِمِ

And they said, "Why was this Qur'an not sent down upon a great man from [one of] the two cities?"

The first revelation came down on the 15th of Ramadan in the 40th year of the birth of the Prophet Mohammad in cave Hira and is revealed in Arabic language. In the opinion of linguists the word Quran means to be read, proclaimed or recited. This is equally applicable to any surah or whole of Quran. The criticism of pagan Arabs was neutralized by the fact that the Quran was revealed in Arabic as the Prophet Mohammad was an Arab. If it was not so then the pagan Arabs could object about the nature of revelation its reference to the context, historical perspective and various details about surahs interpretation. So they were surprised to see that the language of Quran and the Prophet who was Ummi was not rough and unrefined but eloquent and had depth in its meaning and expression. In the contemporary era since the age of enlightenment we find more or less same tenor and attitude prevails among the orientalists as was displayed by the pagan Arabs.

Religious philosophers make a distinction between revelation and inspiration. Revelation process is believed to have stopped after the demise of Prophet Mohammad with his seal of prophecy whereas the pious still carry on with the process of inspiration which normally is received through dreams.

Qur’ān

As mentioned above Quran and Hadith are the two primary sources of religion Islam, they are the primary sources of Islamic law as well. Quran being the core religious text of Islam is believed to be a revelation from God. Word Quran is derived
from the Arabic word *Qara’a* which means ‘he recite’ or ‘he read’. It is reflected in a Quranic passage:

“It is for Us to collect it and recite it.”

It is believed that all verses of Quran are recited and preserved in Quran as immutable. The Western world has levied objections as to the process of preservation, collection and compilation of Quran.

Historical facts reveal that the whole of Quran was completed during the lifetime of Prophet as Prophet himself called it as a *Mushaf*. *Mushaf* are the sheets on which Quran was collected.

This is further reinforced by a report of Abu Said al Khudri in the following words;

“Give your eyes a share of pleasure from your ibadah (devotions). They the companions asked ‘O Messenger of Allah what is that share in the devotion? He (the Prophet) replied “looking at the Mushaf (Quran) and contemplation on its meaning and consideration on its miracles”

Quran has been compiled in three phases, this is termed as *Jam’ al Quran*. First phase was in the life time of the Prophet, in this phase scholars consider meaning of Jama as “*Jam’ fi al sadar*”(in the heart) and “*tibyian bil lisan*” (declared through tongue).

Second period of Jam’ al Quran is considered to be in the time of Abu Bakr the Prophet’s companion. This was after the life time of Prophet and companions who had preserved the Quran in their memory were martyred in the battle of Yamama. It was a threat that the Quran would be lost as it had not been complied in the form of written book yet. Umar convinced Abu Bakr to put the entire Quran in compiled form to save it but Abu Bakr was reluctant to do so.

52 Al-Quran, 75:17
Finally he was convinced by the logic put forth by Umar and the official process of compilation was initiated. Abu Bakr nominated Zaid bin Thabit to undertake this task. He collected parchments, wooden slates and stones on which portions of Quran were written. He herd the Huffaz and compared the various copies and made sure that no verse was admitted unless two copies of it were found or a single copy confirmed by two witnesses. This Mushaf was placed under the custody of Hafsa the daughter of Umar.

Third phase of compilation took place in the time of Usman. By this time the territories of Islam had expanded to whole of Sham and Iraq. It now includes Palestine, Jordon, Lebnon, Syria, Iraq and parts of Iran. Muslims were on their way to conquer more territories. The problem that now arose was the difference in the recitation due to different dilects in these regions. This when pointed out to Usman he constituted a committee consisting of following companions:

1. Zayd bin Thabit
2. Abdullah ibn al Zubayr
3. Sa’ad ibn al As
4. Abdul Rehman ibn al Harith

This committee was directed to rewrite the manuscripts in perfect shape after careful compilation copies were dispatched to every province of Islamic state. The original version Umm was used for the purpose of reference. All other versions were destroyed as they were no longer needed.

It is important to understand the difference between chronological and textual order of Quran. Since Quran was revealed in parts therefore the order of revelation is strikingly different from its textual compilation. After complete revelation the entire Quran was recited by Prophet Mohammad in the presence of Angel Jibra’il and the Companions which determined its textual order. For example chronologically the first
surah is surah al Alaq but textually surah Fatiha was placed first. It is Muslim belief that the textual order of Quran is exactly as it is preserved in Loh e Mahfooz. Surahs were also named by the Prophet himself.

The systematic order of Quran is rejected by Orientalists like Palmer, Bell, Wansbrough Noldeke and others. The claim that no order in Quran exists instead surah are merely scattered messages to become superfluous after the purpose of the verses had been met.

In the words of John Burton,

“The Prophet could not have had access to writing the revelations nor did he care for it during his mission.”53

Palmer says,

“Apart from its preposterous arrangements, the Quran is not so much a Book as a collection of manifestos, diatribes, addicts, discourses, sermons and such like pieces.”54

In reply to this criticism of the Orientalists it must be stated that Prophet Mohammad although himself an Ummi encouraged learning and writing and had scribes who used to record his revelations. Secondly Arabs were well known for their excellent memories and many had reduced the entire Quran to their memories and was thus preserved. Thus the Orientalist’s claim that Prophet did not take care of writing the Quranic revelation is incorrect.

Orientalists have thus differed from the Muslim scholars regarding the systematic, textual and chronological order of the Quran. Most notable among these are Noldeke, William Muir, Jeffory and Rodwell. But it is an undeniable fact that Quranic surahs in their present sequence were recorded in writing under the personal supervision

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of Prophet Mohammad. The internal textual order of the verses in each Surah was set by the Prophet himself and whole ummah till now is strictly adhering to the same.

About the thematic order of Quran, notwithstanding the criticism of Orientalists the unity of the Quran is astoundingly greater than any other religious or sacred scribe. This can only be accredited to the unity of Allah’s purpose and design. From human perspective following facts emerge:

1. The Prophet Mohammad was an Ummi

2. The Quran was revealed in different environments and different times

3. The Quran addressed the entire humanity irrespective of their grades and shades.

One wondered about the miraculous revelations of Quran that it was revealed by one Originator (Allah) and one recipient (the Messenger). The Quran invites the attention of all human beings as mentioned in the following verse to explore and carry out research about Quranic revelations to find no discrepancy in any aspect of spirit, message and purpose. Verse 4:82 best explains this concept.

\[
\text{افلا يتدبرون القرآن ان لوكان من عباد غير الله لوجدوا فيه أحوالاً}
\]

*Then do they not reflect upon the Qur'an? If it had been from [any] other than Allah, they would have found within it much contradiction.*

**The Approach of Orientalists towards the Study of Quran**

The study of Quran by the European scholars started with a different aim and a purpose for example Peter the Venerable (1092-1156), an international figure from French origin was an associate of many religious leaders of his day constituted a team of

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55 Al-Quran 4: 82.
scholars to come up with an intellectual encounter against Islam and Qur’anic teachings. He was in Toledo in the twelfth century and feared the spread of Islam and Muslim culture. Many Christian missionaries carried out various studies for interpreting Islam and Quran from Christian point of view to achieve following objectives:

1. Stop the spread of Islam in Eastern and Western Europe

2. Add appealing fillip in the teachings of Christianity

The first Latin translation of Quran was produced in 1140 A.D. by Robert of Ketton, in this translation Quran was portrayed as the work of an enemy. Many other publications appeared successively which condemned Islam and its adherents. The writings on Islam were polemical and pornographic literature was used to depict Muslim culture. The first Arabic text of Quran was published in 1530 in Italy and the first English translation of Quran by Alexander Ross appeared in 1649 A.D.

Numerous other Orientalists such as George Sale, Wollaston, Muir, Lammens, Champion, Robinson, Menzes, Goldziher, Schacht, Wansbrough, Rippin and many others criticized Quran. These Orientalists insisted that Quran was composed by Mohammad and divine revelation completely. In Sale’s words:

“That Mohammad was the author and chief contriver of Quran is beyond dispute although it be highly probable that he had no small assistance in his design from others.”

According to Norman Danial the Quran is the work of a few non-Muslims who plagiarized the New Testament and the Bible. It was also said that Quran was a piece of poetry. J.N. Anderson said that “Quran was the result of wishful thinking” and Montgomery Watt said that “Quran was a product of creative imagination”. An interesting turning point is observed in the writings of Orientalists when trade and commerce increased between the Christians and Muslims. Now the need of the hour was

not to have better relations with Muslim countries to have trade facilities they thus
decided not to offend the feelings of Muslims and instead present such arguments which
were acceptable to them. The new strategy that they adopted was to speak of the
influence of the European world on Arab countries Muslims and their culture. They also
realized that due to the rapidly increasing contacts between the Muslims and Christians
books written by the Western world on Islam will now be sold in Muslim countries.

Emphasis now turned from polemical writings to the idea of influence of
Jewish and Christian sources on Quran rather than claiming that Quran was the product
of Mohammad’s wishful thinking or a piece of poetry. Jews started to explore how Islam
resembled Judaism and what Mohammad had taken from Christianity. Similarly
Christian scholars sought that Christianity was the main source of Islam. They also went
on to say that the Origin of the word Quran was nor Arabic but was Syriac and that some
portion of Quran was eaten by a goat or that the last two surahs were not part of Quran
were all baseless allegations according to the Muslim belief but the Orientalists have
argued that they have taken up all these allegations from Islamic literature.

Watt urged the Muslims and the non-Muslims to study Quran on new lines
in the twentieth century. These new lines according to Watt will try to express the
thoughts and conclusions of Western scholars in neutral language or tone but the truth of
the matter is that they would not abandon their views about Islam and its two primary
sources Quran and Hadith.

**Sunnah (Prophetic Tradition)**

The second primary source of Islam and of Islamic law is the traditions of
Prophet Mohammad referred to as his Sunnah. Sunnah consists of sayings, deeds and
even the tacit approvals given by Prophet Muhammad. It is divided into three categories:

1. *Sunnah Qawliyah*

2. *Sunnah Fi’liyah*

3. *Sunnah Taqririyyah*
Sunnah Qawliyah also known as hadith are the statements and sayings of the Prophet, Sunnah Fi‘liyah is derived from the deeds of the Prophet and Sunnah Taqririyyah is taken from the Prophet’s silence or tacit approval for the the deeds and decisions taken in his presence and he remained silent on them. Prophet’s silence was taken as his tacit approval.

Hadith denotes sayings of Prophet Mohammad whereas Sunnah (uswa) means the practices, path or the way Prophet of Islam lived his life. The implied meanings of both these terms include deeds, actions, sayings of Prophet Mohammad. Quran and Sunnah in effect are both part and parcel and are based on revelations. The practical manifestations of Quranic instructions are clearly visible in the life of Prophet Mohammad. The exemplary conduct of the Prophet is referred to as the role model behavior (uswa e hasana).

Prophet Mohammad did not order the recording of traditions just like he did not instruct the writing down of Quran. In fact Prophet had warned against reducing his traditions to writing. Even Caliph Umar refused the compilation of sunnah due to the fact that people would adhere to sunnah and discard Quran. Therefore Prophet’s traditions were not compiled until the Abbasid period. It was in the Abbasid period that traditions were compiled and classified and a number of authoritative sunnah collections came into being.

Al- Mahmasani says that compiled traditions were of two types:

- The Masanid
- The Musannafat

The Masanid are those compilations which take into account the sources of authority for their narration. It means that in Masanid traditions are recorded in accordance with the names of the narrators who had quoted the traditions. An example of Masnad is that of Imam Ahmad ibn Hanbal. The Musannafat on the other hand are
compilations of traditions based on topics of jurisprudence. Prime example of Musannafat is Muwatta e Imam Malik.

In the third century after Hijra intense interest was displayed by Sunni Muslim scholars to codify the Prophetic traditions. As a result six famous canonical compilations of Sunnah were produced by the scholars. Out of these six two were Sahih books and the remaining four were Sunan books. Sahih Bukhari was compiled by Mohammad ibn Ismail al Bukhari (194-256 A.H.) and the second was compiled by Abu al Husayn Muslim al Nisaburi (206-261 A.H.). These two compilations are seen as the most authentic collection of Prophetic traditions. It is said that Imam Bukhari spent sixteen years travelling around in search of traditions and collected them from those narrators who either heard directly from the companions or were closest to the time of Prophet Mohammad. He codified almost all narrations available of a single tradition and it also contains approximately four thousand individual narrations. In all it contains about seven thousand traditions and is rated as the most authentic after Quran. Sahih Muslim ranks second to Sahih Bukhari, however the scholars of North Africa consider it above Sahih Bukhari. Extensive commentaries in numerous volumes have been written by Muslim scholars to both these Sahihs. The four Sunan books which were compiled by Ibn Majah (d.273 A.H.), Abu Dawood (d. 275 A.H.), Al Tirmidhi (d. 275 or 279 A.H.) and Nasai (d.302 or 303 A.H.).

For Shi’a school of thought the two most important compilations of Prophetic traditions are al Kafi by Mohammad ibn Yaqub al Kulini (d. 328 or 329 A.H.) and Tahdhib al-Ahkam by Jafar Muhammad al Tusi (d. 411 A.H.).

After these traditions were compiled the scholars studied them critically and scientifically and there emerged a science of hadith study known as mustalah al hadith. The scholars who studied the hadith critically were known as rijal al-jarah wa al ta’dil, these were the men who confirmed whether a hadith is to be accepted as valid or rejected as invalid. They established rules for defining the authenticity of traditions and categorized ahadith into sahih (authentic), hasan (good), gharib (strange), mutawatir (those of consecutive testimony), mashhur (well-known) khabar wahid (lone narration, or
one man narratives) etc. Controversy arose over lone narrations, one group reject it due to the analogy over the rejection of testimony of one person in the Islamic law of evidence. Others accepted it saying that whenever Prophet would announce a decision he would not invite all people of Medina to attend. However the majority of scholars agreed that Khabr wahid traditions will be acceptable provided they were related to trustworthy narrator and were validated by reason.

Acceptance of Mursal traditions (those traditions in which connection with the Prophet is not mentioned) was subject to controversy on following grounds”

- If the connection with Prophet was not mentioned but if it was narrated by a Companion, such a mursal tradition was accepted by all.

- If the connection with Prophet was not mentioned but if the tradition was narrated by a prominent Follower it was accepted by all except Imam Shafi’i. Shafi’i made its acceptance conditional upon some other evidence.

- If a tradition was narrated neither by the Companion nor by the Follower then it was subject to controversy.

The controversy over the acceptance or rejection of traditions was one of the major cause of difference of opinion among various schools of thought. Besides careful scrutiny and strict criteria for acceptance of traditions there was a danger that traditions were exposed to forgery. Makhmasani says that it became a widespread phenomenon in Muslim community during the Abbasid era that traditions were invented to support political factions and for various other reasons.⁵⁹ He further adds that the number of traditions increased considerably after the demise of Prophet especially in the era of the Followers. Many of these traditions were weak and were generally unacceptable. This justified the Prophet’s prediction that:

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⁵⁹ See ibn al Jawzi’s classification of hadith narrators in Suyuti La’ali, II, 467-474.
“There will be in later generations of my people persons who will narrate to you things which neither you nor your fathers have heard of. Beware therefore of them.”

It is well known that Companions like Umar bin al Khattab, al Zubayr, Abdullah ibn Masud and Sa’d bin abi Waqas refrained from quoting or writing traditions because they feared Allah and were apprehensive that they might not misquote or change the meaning of a tradition while recording it.

The hadith scholars did not disapprove of all traditions randomly but had set scientific criteria for critical examination of the text and the content of the hadith compilations.

Sunnah or Hadith is also taken as the second source of Islamic law because it interprets the Quran. It is obligatory upon Muslims to adhere by Prophetic traditions by virtue of the following verses of Quran: 59:7

And what Allah restored to His Messenger from the people of the towns - it is for Allah and for the Messenger and for [his] near relatives and orphans and the [stranded] traveler - so that it will not be a perpetual distribution among the rich from among you.

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60 Sahih Muslim I, 9; Nawawi Sharh I, 78.
And whatever the Messenger has given you - take; and what he has forbidden you - refrain from. And fear Allah; indeed, Allah is severe in penalty.\textsuperscript{61}

And verse 92 of surah al Ma’`idah

\textit{وَأَطِيعُوا اللَّهَ وَأَطِيعُوا الرسُولَ وَاتَّبَعُوا مَا تُحْمَلَتْ عَلَيْهِم مِّنْ أَمْرٍ}  
\textit{رُسُولاً آَلِبِنْعَمِ الْمُبْتَغِينِ} \textsuperscript{61}

And obey Allah and obey the Messenger and beware. And if you turn away - then know that upon Our Messenger is only [the responsibility for] clear notification.\textsuperscript{62}

Differences arose between various schools of thought on acceptance and preference to be given to traditions. The Sunni and Shia schools differed and among the Sunni schools controversies arose between the traditionists and the rationalists. Orientalists took up this controversy from Muslim literature and massive literature was produced by them casting doubt on the authenticity of all traditions. The details of their allegations will be discussed in the preceding chapter devoted exclusively to Western scholarship on Hadith.

\textit{Shar\'iah (Islamic Law)}

Islamic Law or Shariah occupies a prominent place in world’s leading legal systems. It is different from other legal systems in that the source of Shariah is Allah and implementation of Shariah is subject to the rules stated in Quran and Sunnah of the Prophet Mohammad. Justice in Islam is achieved through the purposes of Shariah known as \textit{Maqasid e Shariah}. These objectives of Shariah were put forward by Imam al Ghazali. He divided them into purposes achieved in this world and the purposes achieved in the hereafter. These maqasid or interests are considered primary and the edifice of Shariah is erected to preserve these interests for the wellbeing of subjects. These interests according to al Ghazali are five:

\textsuperscript{61} Al-Quran 59:7  
\textsuperscript{62} Al-Quran 5:92
Preservation of Religion
Preservation of Life
Preservation of Progeny
Preservation of Intellect
Preservation of Wealth

The concept of preservation of interests through shariah gives Islamic law a broader canvas and more flexibility in deciding the cases by giving rational justification of which interest is to be preserved and how rather than strictly adhering to taqlid.

Islamic law is based upon three primary sources namely

1. Quran
2. Sunnah
3. Ijma (consensus)

and its secondary sources are eight namely:

1. Qiyas (analogy)
2. Istihsan (juristic preference of a stronger principle)
3. Istishab al haal (presumption of continuity)
4. Maslahah mursalah (extended analogy)
5. Sad al dharia’h (blocking lawful means to an unlawful end)
6. Qawl al Sahaba (Opinion of Companions)
7. Shar’ min Qablana (Earlier Scriptures)
8. ‘Urf (Custom)
Two primary sources have been discussed in detail above, the third primary source *Ijma* means consensus or agreement of Muslim community on religious issues. It holds an important place in Islamic law. Various schools of thought in Islamic jurisprudence differ on the definition of *Ijma*. According to some it is the consensus of first generation of Muslims only and according to others it is the consensus of the first three generations of Muslims, according to yet another opinion it is the scholarly consensus of the jurists and scholars of the entire Muslim world. The hadith of Prophet Mohammad that, ‘*My Ummah will never agree upon an error*’\(^63\) supports the concept of *Ijma*. Muslims regard *Ijma* as the third fundamental source of Islamic law.

*Qiyaṣ* technically means assigning the order of an existing case found in the texts of Quran and *Sunnah* to a new case. For application of an existing rule to a new case it is important that both the cases should have common underlying attribute. *Istiḥsan* means giving up analogy for stronger evidence from primary sources of law. *Istiḥsan* is often criticized on the grounds that analogy is being given up for personal opinion of a jurist. In reality *Istiḥsan* is only comparison of two valid evidences for which the jurist exercises his own judgment which evidence is to be accepted as stronger. *Istiṣḥab al haal* means maintenance of status quo with respect to a rule. *Maslahah Mursalah* means preservation of the purposes of Islamic law in the settlement of legal issues. *Sad al dhari’ah* means permitting the unlawful means to a lawful end. Decision of cases on the basis of Opinion of Companions in the absence of evidence from the above mentioned sources is also a source of Islamic law. Admissibility of earlier scriptures and prevailing customs as sources of Islamic law is also accepted. These five secondary sources are also known as rational secondary sources. All these eight sources are applied by a jurist in deciding a case under Islamic law.

Concept of *Ijtihad* carries an important place in Islamic law. *Ijtihad* means to strive hard to discover law from the texts through all possible means of interpretation. There are three modes through which *ijtihad* is employed to settle the cases under Islamic law. In the first mode literal interpretation of the texts helps the jurist
reach a decision. In the second mode the jurist employs analogy to reach a decision and third mode involves interpretation based on purposes of law this is when law is neither written explicitly in the texts nor is it found through analogy.

**Fiqh & Uṣūl al Fiqh**

There are ten branches of Islamic sciences out of which *Ilm ul Tafseer* and *Ilm ul Hadith* are primary and the remaining eight are helping sciences. These are listed below:

1. *Ilm ul Tafseer* (knowledge of exegesis of Quran)
2. *Ilm ul Hadith* (knowledge of Prophetic Traditions)
3. *Ilm ul Fiqh* (knowledge of Islamic law)
4. *Ilm usul ul Fiqh* (knowledge of Islamic Jurisprudence)
5. *Ilm ul Aqaid* (knowledge of Beliefs and Creeds)
6. *Ilm ul Kalam* (knowledge of scholastic Theology)
7. *Ilm ul Irfan/ Tasawaf* (knowledge of Mysticism)
8. *Ilm ul Falsafa* (knowledge of Philosophy)
9. *Ilm ul Mantaq* (knowledge of Logic)
10. *Ilm ul Manazra* (knowledge of Dialecticology)

*Ilm ul Fiqh* is one of the oldest sciences and it encompasses the whole social life of a man. Learning and teaching started with this branch of knowledge and voluminous books were added to the libraries of Muslim world. It would not be wrong to say that three fourth of the books on Islam were written on *fiqh, and uṣūl ul fiqh*. *Fiqh* does not only talk about laws but a portion of compendiums of *fiqh* are purely on *Ibadāt*. The term *fiqh* is used in lexical sense to mean discernment. During the Prophetic era the
terms *Ilm* and *Fiqh* were used interchangeably. Later on the term *Ilm* was only used for the knowledge that comes through traditions of the Prophet that is *ahadith* and *athār*. The term *fiqh* was then used only for the knowledge of law. This separation of terminology coincides with the time when specialization in law and traditions came into existence towards the end of first century *hijra*. During this time the word *fiqh* also encompassed the term *Kalam* in it. These two terms were not separated until the time of al Mamun (d.218 A.H.). Till this time *fiqh* embraced both theological problems and legal issues. When *Kalam* was introduced as a subject by the *Mu’tazilah* during the time of al Mamun the term *fiqh* was restricted to the corpus of Islamic law alone. This is how the term *fiqh* underwent its semantic transformation from its lexical meaning to its technical meaning.

*Fiqh* has a meritorious history, compilation of *fiqh* started after the demise of Prophet Mohammad in the second decade of first *hijra*. First compilation of *fiqh* constituted of *fatāwās* of Companions of the Prophet. Most prominent among these are Anas ibn e Malik, Abdullah ibn e Umar, Abdullah ibn e Masūd and Prophet’s wife ‘A’isha. When Islam spread out of Mecca and Medina especially in the period of Umar and Usman, the Companions of Prophet spread out in different regions to spread the knowledge of Islam. Iraq was very near to Arabian Peninsula thus companions spread out in Iraq and Syria near the river of Eupharatus and Tigris. Muslims interacted with a new civilization in this region which was quite different from *Hijaz*. Here Muslims were faced with new issues which needed deliberation and required *Ijtihad*. They established a new center of knowledge in Iraq. Before this Medina was an unparalleled center of knowledge and learning. As a result following two schools of Islamic law appeared:

1. Madrasa ahl e hadīth al Fiqhiya
2. Madrasa al Iraqeen al Fiqhiya

When Umayyads took over there were two distinct schools of Islamic *fiqh* established in Medina and Iraq. Madrasa ahl e hadīth al Fiqhiya was known by this name because scholars of this institution collected hadith compiled them and based their judgements on them. They abstained from using *Ra’ay* and *Qiyās*. The
institution was based on the approach of Abdullah bin Umar and Zaid bin Thabit. This school was later attributed to Sa'id bin Musayyab. For solution of a legal problem they primarily relied on the text of Quran and Hadith. In the absence of any textual evidence they resolved to *Ijma*. In case of failure of *Ijma* they observed silence (*sakoot*) and would only resolve to *ijtihad* in case of dire need. The scholars belonging to this school possessed vast treasures on *hadith*, opinions of Companions and cases decided on the basis of *Ijma al sahaba*. *Hadith* was gathered and compiled by them and they were well versed in the knowledge of narrators and their chains. In Medina very few new issues would emerge as compared to Iraq therefore all issues would have an answer in the compiled *hadith* and *athār* literature available to them.

On the other hand Madrasa *Iraqeen al Fiqhiya* or Madrasa *ahle Ra'y* was named so because they employed the use of *Ra'y* or intellect for deciding new cases. Umar wanted to keep prominent and leading Companions in Medina but for the propagation of Islam he sent some scholars to the fertile crescent. He sent Ma'ad bin Jabal to Damascus and Abdullah bin Masud to Iraq. They advocated thoughts and teachings of Umar in their respective provinces which later became the basis of Hanafi school of thought. Their methodology was to understand the wisdom behind a rule and would consider the objectives of Sharia very keenly before reaching a decision.

They took advantage of the conflicts between *ahl e Hadith* in Medina and *ahl e Ray’* in Iraq. The conflict rose to this extent that Hijazis and Iraqis started blaming and accusing each other, refusing to accept each other’s authority. *Ahl e Hadith* in Hijaz superseded Iraqis and accused them of fabricating hadith. They would not accept any hadith on the authority of Iraqi narrators except if one of the narrators in the chain was Hijazi. They considered themselves superior in *hadith* narration by virtue of their association with Medina.

Situation in Iraq was quite different from that in Medina as Iraq was a center of conflicting cultures and new problems. As a result they were inclined to do *ijtihad* and use their opinion in deciding the cases. On the other hand Hijazi scholars would almost always rely on Prophetic traditions and employed minimal use of *ray’*. They believed
rationalism as a fitna against Islam and thus Iraq was considered as a place of fitna. The Khawarij, the Mutazalites and the Karamites they all emerged from Iraq, The war of Jamal and the war of Siffin both emerged from Iraq. Appointment of Hujaj bin Yousaf as governor of Iraq who killed many scholars and literary figures including Said bin Musayab.

Two prominent phases in the history of fiqh were the first and the second half of second century after hijra. In the first half of the second century the knowledge of fiqh spread in Iraq, Baghdad, Kufa and Hizaj. The second half of the second century was a turning point in the history of fiqh, numerous jurists compiled their legal opinions in the form of a book. In the beginning of the third century or during the Abbasid era compilations of fiqh were expedited it followed codification of hadith and tafseer writing. During the third century two schools of Islamic thought emerged;

- Ahl e sunnah wal Jama’

- Shi’ites

Besides these two groups there emerged other groups as a result of political revolutions, Greek philosophical influence and Sufi teachings.

**Emergence of Schools of Fiqh**

Schools of thought emerged after the first century hijri. These school of thought were basically an extension of two established schools of Iraq and Medina

**Ibadi School**

The oldest book on *fiqh* is known to be written by *Khawarij* to extract Islamic law. The author of this book is Jabir ibn Zayad al Azdi (d. 93 A.H. or 122 A.H.). He was not a *Kharij* himself but was a *Tabe’e*. This formed the basis of Ibadi school of thought which attached great importance to hadith. Today *Ibadi* school is predominant in Oman and there are several areas where it continues to be followed.64 *Ibadites* today live

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64 Adil Salahi, 2005, retrieved from muslimheritage.com on 6/6/2012
mainly in North Africa, in Mazb region in the district of Jabal Nafusa and in East Africa (Zanzabir). East African Ibadites are originally from Oman in Arabia. According to Ibn Hazm (d.456/1064) there were in his time Ibadis in Andalus also.65

**Hanafi School**

Hanafi School of thought emerged from Iraq, Imam Abu Hanifa was its founder who was culturally Arab but was of Persian blood. He was born in 80A.H. and died in 150 A.H. in Baghdad where he is buried to date. The chain of transmission of Imam Abu Hanifa goes to Abdullah ibn e Masud. Decisions of Abdullah ibn e Masud were the same as Umar Farooq, they were always in agreement with each other.

Abu Hanifa mastered the art of *Ijtihad*, one of the striking features of fiqh e Hanafi was that this school always preferred ray over *Khabr e Wahid*. Abu Hanifa had put strong conditions for the acceptance of *Khabr e Wahid*. He said that he preferred *Khabr e Wahid* over *Qiyas* and *Ray’* in the derivation of fiqh. In the presence of *hadith Qiyas* and *Ray’* have no value, but this is so only when this is proved beyond reasonable doubt that *this khabr e waihdi* is indeed the words of Prophet Mohammad. Even if *khabr e waihdi* was weak with respect to chain of narrations but was strong and compatible with respect to the text Abu Hanifa would accept it and prefer it over *Qiyas and Ray’*.

**Maliki School**

Malik ibn Anas (93A.H.- 179 A.H.) was the founder of Maliki school of thought. He was born in Medina but his family belonged to Yemen. He was among the taba tabiun and learned from Abdal Rehman bin Hurmuaz for thirteen years.. Imam Shafi’i remained Malik’s student for a period of nine years and acknowledged his wealth of knowledge. Chronologically Maliki school is the second amongst the four leading schools of Islamic fiqh. The time period of Imam Malik was the end of Umayyad caliphate and the beginning of Abbasid era. The rulers of Abbasid caliphate considered Malik a threat and promoted Hanafi school of thought.

65 For details see ‘Ibadiyya’ by T. Lewicki.
The chain of transmission of Maliki school of thought goes to Abdullah ibn Umar. The principles of Maliki fiqh are elaborated in Muwatta e Imam Malik and Mudawana. Maliki school relies heavily upon the practice of the people of Medina in the first, second and third generation as a source. This is because Maliki school considers the collective practice of Medinans as Mutawatir and in accordance with the Prophetic traditions. Other sunni school while maintaining respect for Medinan practice do not give it a status of Prophetic tradition in derivation of laws. This school like all other schools of thought consider Qur’ān as a primary source followed by Sunnah of the Prophet. They have recourse to Ijma when the texts are exhausted and nothing can be found in the practices of first three generations living in Medina. Finally they rely on qiyās and ray’. Malik’s methodology differed from Hanafi school in that Imam Malik employed Ijtihad in the form of qiyās and ray’ instead of Ijma when no sahaba was found in Ijma. Thus in reality Malik used Ijtihad more often than Abu Hanifa.

**Shafi School**

Abu Abdullah Mohammad ibn Idrees al-Shafi’i (150 A.H.-204 A.H.) was the founder of Shafi’i school of fiqh. Imam al Shafi is also considered to be the founder of Islamic jurisprudence. His family belonged to Yemen but he was born in Ghaza and spent his childhood in Mecca. He came to Medina and studied from Malik for thirteen years. Hassan al Shaybani was also his teacher in Baghdad. He was appointed as a judge of Najran in the time of Harun ar Rashid. He developed his school in Baghdad inspired by the teachings of Imam Malik and Imam Abu Hanifa and died in Fustat, Egypt at the age of 54.

Shafi school is based upon the methodology stated in Al Risala and Kitab al Umm which emphasizes proper derivation of laws through the application of legal principles as opposed to speculation. According to his methodology exercise of private judgment is almost entirely excluded. Derivation of laws is governed by the force of precedents adhering to Quran and traditions. Shafi is also very strict in admitting the validity of recourse to analogical deduction. Shafi is known as the defender of sunnah because of his efforts in emphasizing solitary hadith in systematic methodology.
Zahiri School

When Shafi’i’s theory could not satisfy ahl al-Hadith there emerged another school of law rejected analogy and attempted to restrict all interpretations to the apparent meaning of the textual evidences. Abu Dawud al Zahiri was the founder of this school and the school was named after him as Zahiri school of thought because while interpreting this school looked at the apparent (zahir) meaning of the textual evidences. The details of this school and its methodology is explained in Ibn Hazam’s works. The views of this school have been recorded in considerable detail by Goldziher.

An interesting approach adopted by this school in a situation when two conflicting texts cannot be reconciled to obtain a legal ruling the position taken by the Zahiri school is that there is no hukm in this case and the case remains undecided and the matter is suspended. This school became extinct due to its strict approach and for providing no relief to parties in cases of conflicting evidences. The jurist of Zahiri school is under no obligation to stretch the meaning if it cannot be discovered directly from the texts. This school was followed by Hanbali school of fiqh.

Hanbali School

Ahmad bin Mohammad ibn Hanbal (164 A.H.-241A.H.) is the founder of Hanbali school of Islamic jurisprudence. His family belonged to Iraq and he was born in Baghdad. He learned jurisprudence under the Hanafi scholar Abu Yousaf who was a renowned scholar and a companion and a student of Abu Hanifah. He also studied Islamic law under Shafi’i in Baghdad. Hanbali jurisprudence is considered very strict and conservative especially on issue of theology. Hanbli school of fiqh is followed in Saudi Arabia and Qatar and the new Salafi movement tend to follow Hanbali school. Ibn Hanbal did not lay down a systematic legal theory for his school but systematic methodology was laid down by his students after his death. Imam Hanbal was essentially a traditionist and was involved more in work on traditions rather than on fiqh. His views on law as well as on legal theory were collected later by his students and were
transformed into a theory. This theory is quite similar to the theory proposed by Imam Shafi.

Like all other sunni schools Hanbali school of law also upholds the two primary sources of law as Quran and Sunnah of the Prophet but it gives a status to hadith almost equal to that of Quran. The founder Imam Hanbal was essentially a traditionalist. His school gives preference to traditions over analogy, but putting conditions for traditions that are less stringent than Shafi’ī. Hanbali methodology also gave preference to traditions over analogy, this theory appears to be even more strict than Shāfi’ī yet in some cases Hanbalī law is found to be more liberal than Shāfi’ī law.

**Theories of Islamic Law**

The theories of law employed by these schools of fiqh can be broadly categorized as:

- Theory of general principles
- Theory of purposes of law
- Theory of strict interpretation

Theories of general principles were employed by Hanafī and Malikī schools of thought. This is because both schools of thought had much in common with regard to sources of law and principles of interpretation. They adopted general principles derived from the legal texts instead of literal interpretation of the text, so they endeavor to formulate general principles encompassing majority of cases. After deciding the broad principles they search for sub-principles (if available). For analytical consistency and their relevance with the case under scrutiny, they search for exceptions or provisos to these principles.

Theories of strict interpretation differ from the theories of general principles in exactly the same manner as judge made laws differ from those advocating literal interpretation of the statutes. This struggle seems to have existed in every legal system. The differing opinions of *ahl-e ray* and *ahl e hadīth* regarding Muslim law is virtually
interpretation of judge made law and that of literal interpretation of statutes. This practice of interpreting differently even prevails today. The judge in fact carries out the function of legislature rather than relying upon the constitution or the intention of the framers of law (normally known as realists). Sometimes jurists applying general principles seem to ignore authentic traditions to the extent of distortion of the law of Allah and the commands of the prophet as it used to happen in early Islamic law. Whereas *ahl e hadīth* movement relates to more of political opposition to the Hanafis as they were part of the ruling elites. Clear example of this is case of Abu Yousaf, a stout disciple of Abu Hanifa who was appointed as chief judge during the Abassid period. Strongest of the opposition to the Hanafis appeared during the period of Shafi’i when *ahl e hadith* wanted the complete domination of literal application of traditions irrespective of their authenticity or strength. Then al Shafi’i did not support this movement completely. In fact he provided a balancing act between the early jurists and extremist elements of *ahl e hadith*. In this context Shafi’i accepted qiyas (analogy) as a source of law and insisted that it is qiyas alone which is ijtihad and rejected istihsan (used by Hanafis). Shafi stated explicitly in his book al Risala and in al-Umm that qiyas is of two types *qiyas al ma’ana (meaning)* and *qiyas al shabah (similarity).*

Theory of purposes of law law was proposed by al-Ghazali. He emphasized on the use of wider form of analogy as compared to narrow qiyas practiced by his predecessors. Ghazali was even accused of inventing new principles of interpretation or source of Islamic law. The credit of his new theory also goes to his teacher al Juwayni the Imam al Haramayn as many of the details of his theory are recorded in his book al-Burhan.

A distinctive feature of his theory is that Ghazali evoved its principles not on the basis of what the judges out to do but on the basis of what jurists actually did for the discovery of law that is to say he built up his theory from earlier practices and decisions. This means that he did not evolve anything new but derived on the basis of earlier practices. What is interesting about Ghazali’s theory of general principles is that practices of Hanafis Malikis, Shafi’i’s all gather into a unified whole.
Analysis

This chapter discusses Islam as a religion amongst other Semitic and non-Semitic religions with special attention to revelation as its characteristic feature. The discussion follows giving the reader basic introduction of the two undisputable primary sources of Islam as a religion and as law. Quran as the first Muslim scholarship which greatly influenced its adherents is discussed as a revealed text. Orientalist’s approach towards the study of Quran is discussed briefly because it is not the primary focus of this dissertation.

After an introduction to the Sunnah of the Prophet and hadith codification emergence of two major trends among Muslim community as ahl e hadith and ahl e ray have been discussed. The development of four leading schools of sunni fiqh and ibadi and zahiri schools which are now extinct is briefly touched. The focus of discussion regarding schools of fiqh is not tracing their history or development but their theories of law and their methodology. This is done to relate the approach of these schools to the preceeding discussion on hadith in chapter ‘Western Scholarship on Hadith’.

It would in no way be an exaggeration to argue that law was the defining characteristic of Muslim societies and civilizations throughout the centuries, and in every corner of the Islamic world, ranging from Indonesia and Malaysia to Algeria and Morocco. This fact is acknowledged in the statement of Joseph Schacht forty years ago,

"Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself .... [T]he whole life of the Muslims, Arabic literature, and the Arabic and Islamic disciplines of learning are deeply imbued with the ideas of Islamic law; it is impossible to understand Islam without understanding Islamic law."

One may even add that law defined not only the Muslim way of life, but also the entire culture and psyche of Muslims throughout fourteen centuries. Islamic
law governed the Muslim's way of life in literally every detail, from political government economy, social life, etiquette of dining, sexual relations to worship and prayer. It determined how Muslims conducted themselves in society and in their families; how they designed and ordered their cities and towns; and, in short, how they viewed themselves and the world around them. There has never been a culture in human society so legally oriented as Islam. Where did this law that was "the warp and woof" of Muslims' lives in pre-modern times come from? It was derived by medieval jurists committed to reading the words of God in his holy text through a concisely formulated "hermeneutics."

These jurists were educated in institutions that were autonomous of the rulers' influence and they interpreted the holy texts independent of rulers' interests. Their authority as interpreters of God's law was such that they were able to force even rulers to submit to God's law. In the olden times, according to Hallaq, jurists were the gatekeepers of civil society, preserving its autonomy, defending it from the tyranny of the state as they spoke God's law to ruler's political power. Then, according to Hallaq, something awful and tragic happened in the nineteenth century. At the instigation of colonial powers, the nation state was established in the Islamic world and with it the abandonment of Islamic law and the adoption of the European legal transplant. The tragedy for the Islamic world was threefold: first, law was secularized: hermeneutics developed by the jurists, the revealed texts would remain empty of legal significance, for it was this hermeneutic that brought out their legal import. In other words, God did not reveal a law proper but only textual signs or textual indications that required the intervention of the human rational faculty in order to bring out into a human reality what was seen as a sacred law. Thus, if God revealed the basic building blocks of the law, it was the jurists who built the House of Shari'a. Politics was subsidiary to law and entirely subservient to it. This is a fact of paramount importance, dictating much of what happened between the rise of Muhammad and the early nineteenth century. The Caliph and Sultan saw themselves and were seen by all others as subject to the holy law of God. And sure enough, notwithstanding the occasional violation, both rulers and their agents took this divine superiority for granted and as a rule conducted themselves in accordance with its dictates. If there is one inalienable feature of the Muslim body politic and legal culture it
is the prevalence of the rule of law, with the political sovereign accepting without challenge the supreme authority of the divine law and hence that of the jurists and judges-custodians of the law and its interpreters as well as the civic leaders of the Muslim communities wherever they were present.

No ruler or political might could challenge the divine law and its spokesmen. The rich, the powerful, and the poor, from sultan to pauper, all stood as equals in the presence of the humble, informal Muslim court to receive judgment. There were no special rules for the mighty, and none could question their eternal submission to the law of God. The Law was deemed to stand above anything human. It is this recognition on the part of the state and its functionaries that has preserved the distinction between worldly power and the province of the law. And it is this recognition that rendered the law so remarkably independent throughout twelve centuries of Islamic history. The state's legal power was accordingly limited to the appointment and dismissal of judges, and no doubt the state used this prerogative to exercise as much influence as it could muster. But the state had also accepted the fact that, once the judge was appointed, it could do nothing but bow to the Law as applied by the court. Judicial independence and the rule of law no doubt represented two of the most striking features of traditional Islamic cultures.
CHAPTER 4

ORIENTALISM: AN ANCIENT TRADITION OF WESTERN SCHOLARSHIP

“Verily in the sight of Allah, the most honored amongst you is the one who is most God-fearing. There is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab or for the white over the black or for the black over the white except in God-consciousness.” 64

Islamic Orientalism

Western discourse on Islam and Arabs, saturated with pre-conceived biases and ideological distortions is termed as Islamic Orientalism. The scholarship which reflects this bias about the Muslim world in the East is termed as Islamic Orientalist Scholarship. It is an ancient tradition of Western scholarship in which Islam and Arabs are portrayed as inferior and corrupted as against the West. This scholarship aims at essentializing the difference between the East and the West to justify the imperial designs of the West. This orientalist tradition has its roots in the poetic literature of Arabian Peninsula after the dawn of Islam and it continued through the systematic

writings of John of Damascus in “Heresy of Ishmalites” during Umayyad era. In the Golden period of Islam this tradition continued in the form of Christian polemics on Islam and the same sustained through the crusades as massive destruction of Muslims intellectual wealth at the hands of Mongols. Later the orientalist tradition was applied by European colonialists to justify their cultural and political assault over the colonized subjects. During post-colonial era Orientalist scholarship was dominated by British and the Europeans. In the twentieth century the banner of this scholarship was transferred to Americans. U.S. State department and foreign affairs department worked closely with Middle Eastern Studies departments, Oriental Studies departments and departments of Near Eastern Languages and Cultures at various American universities to establish their political hegemony over the Middle East and the Muslim world during the cold war. A striking feature of Orientalist tradition is that throughout this period the essential paradigms for the study of Islam and the Orient remained the same. However European philological approach was appropriated with American social science research agenda to study the Islamic and Middle Eastern societies closely. Europe manipulated Islamic texts through the use of philology and Americans manipulated Islamic societies through social science researches. Islamic texts were relevant to European Christians and Jews because their deep rooted enmity for Islam was searching for a truncated version of Christianity and Judaism in Islam. On the other hand Muslim societies (specially the Middle-East) were relevant for the Americans to establish political and economic control as a Super Power and to exploit oil resources of the Middle East.

According to Orientalist scholarship whether European or American, West is projected as progressive and rational as compared to the East. An in depth study of ancient history reveals that the concept of the Orient as the “Other” and “Inferior” is not new but it prevailed during Greek and Roman civilization also. Greeks and Romans did not see themselves as the West or the Europeans rather they considered themselves as a race culturally superior to barbarous people surrounding them who did not speak Greek or Latin language. Orientalism thus is an ancient tradition of Western view of the East, or what we can call today as Europocentric.65 Theory of Orientalism has its own history and

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65 European view of the world.
the Western views about the East and the Arabs as degraded and debauched prevailed even before the dawn of Islam.

To begin with ancient Greece and Rome and to discuss medieval Western European understandings of Islam is not to suggest that there was any continuous or monolithic Western image of, or attitude toward, the East or Islam stretching from antiquity through the medieval era down to the modern period. But as we will see, at various points over that very long span of time, some European scholars, writers and others appropriated certain images and notions about the East and Islam from what they had come to perceive as Europe’s distinctive past, refashioned them in keeping with their own contemporary concerns, and propagated them as relevant for their own time. It is this process of selective borrowing and creative recycling, which goes on even today, that makes delving into early images and attitudes useful for understanding how Islam and the Middle East would come to be understood and portrayed even in the modern era.66

**Orientalist Tradition during Pre-Colonial Era (6th to 15th Century)**

Medieval period in Europe started with the fall of Western Roman Empire after 470 A.D. and Golden era of Muslims began with the birth of Muḥammad (Peace Be Upon Him) in 570 A.D. During their prime era and even after, Greeks and then Romans portrayed themselves as civilized societies in comparison with Arabs, whom they considered as barbaric, uncivilized and lawless people.

The fallaciousness in the thinking of Romans that they are superior to Arabs is evident from the incidence when in 628 A.D. Prophet Muḥammad (Peace Be Upon Him) sent an epistle to Heraclius (610-641 AD), the Emperor of Byzantine Empire, inviting him to embrace Islam. Heraclius gathered the distinguished Romans and shared with them the contents of this letter to take their advice. In response the Romans said,

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“Are we to be under the hands of the Arabs when we are people with a
greater kingdom, a larger population and a finer country?”

When Heraclius revealed to his people that he intends to pay *jizya* to Prophet
Muḥammad (Peace Be Upon Him), his people said:

“Are we to pay the low and insignificant “Arabs” a tax when we are more
numerous, with greater sovereignty and stronger country?”

This reply by the Romans is reflective of their sense of superiority over the Arab
race and their blatant refusal to accept Arab supremacy in any form.

While Europe was passing through the medieval period the Arabs and Muslims
witnessed the Golden era. Islam spread from the city state of Medina to the Byzantine
and Sassanid Empires. During this epoch the first influential scholarship that challenged
the Western views came in the form of *Al-Qur‘ān*. To Muslims it is a revealed word of
God but Western scholarship ascribes the authorship of Qur‘ān to Muḥammad (Peace Be
Upon Him). Whatever be the case, it was established that such a comprehensive and
influential scholarship did not exist before. Qur‘ān itself indicates instances when the
non-believers were posed with a challenge to create something similar to Qur‘ān in which
they failed. Scholars and poets of this era engaged themselves in producing literary works
but none could parallel *Al-Qur‘ān* which was and is even to this date a masterpiece in
Arabic language. It narrated history, styled cultures and prevalent customs, enunciated
laws, negated existing beliefs and irreligious practices, re-introduced monotheism and
supported original teachings of Christianity and Judaism. It gave to the humanity a new
set of beliefs not known to the people of that age and spoke about the unseen and the
metaphysical world. It preached equality of mankind and strongly detested regional,
cultural and gender discrimination. Islam after mobilizing its adherents through this
scholarship and the charismatic personality of Muḥammad (Peace Be Upon Him) as their
guide and leader made numerous military advancements into the two great empires of

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68 Ibid., p. 657.
that time in the West and the East. Under the caliphate of Umar and Uthman Muslim territories extended enormously and established their religious, political and cultural hegemony. First Persia, Syria, and Egypt, then Turkey, and North Africa fell to the Muslim armies; in the eighth and ninth centuries Spain, Sicily, and parts of France were conquered. By the thirteenth and fourteenth centuries Islam ruled as far east as India, Indonesia, and China.\footnote{Edward Said, \textit{Orientalism}. (London: Penguin Group, 2003) p. 59.} These extra-ordinary achievements of Muslims amazed the Europeans.

During the Umayyad Caliphate, or the Greek patristic period John of Damascus (d.748) a Christian-Syrian scholar and a priest who was a great friend of Umayyad Caliph Yazid produced a monumental literary work “\textit{Fount of Knowledge}” and a critique on Islam the “\textit{Heresy of Ishmaelites}”. John was considered as one of the great Fathers of Church and his writings hold a place of great honor in the Church. His declaration, that Islam was a pagan cult, the \textit{Ka”ba} in Makkah an idol, and Muḥammad (PBUH) an irreligious and licentious man, became the classical source of all Christian writings on Islam.\footnote{Ziauddin Sardar, \textit{Orientalism}. (Philadelphia: Open University Press, 1999) p.18.} “\textit{Heresy of Ishmaelites}” is the earliest explicit discussion of Islam by a Christian theologian.\footnote{A. Louth, \textit{St. John Damascene:Tradition and Originality in Byzantine Theology} (England: Oxford University Press, 2002) p. 77.}

\textit{Heresies of Ishmaelites} was named so because \textit{Ishmaelites} descended from Ishmael who was born to Abraham of Hagar or Agar. According to John a false prophet named Muḥammad (Peace Be Upon Him) appeared from among the \textit{Ishmaelites}, who in consultation with a Christian monk Bahira, invented his own heretical doctrine.

John’s polemic about Islam deals with all the usual points of controversy such as Muslim rejection of cross and crucifixion. Christians claim that Jesus was son of God, and Muḥammad (PBUH)’s polygamy. John’s main argument against Islam is that Muḥammad (PBUH)’s revelation was given in secret and his name is not mentioned in the bible nor did he make miracles like Jesus to prove his status. He also argues that if Qur’ān demands witnesses to prove a statement then how Muḥammad (PUB) can be
accepted as a prophet in the absence of witnesses. He further attacks the Muslim veneration of the Black Stone at Ka‘ba, claiming that this is more idolatrous than Christian veneration of cross. He systematically continues in his polemic mocking and criticizing various surahs of Qur‘ān.

The writings of John of Damascus became the basis of future Christian writings and critiques on Islam. During the early Middle Ages the tussle between Europeans and Arabs was based less on culture and more on religion which is reflected in the Christian critiques of Islam. Christian attitudes towards Muslim countries and Islam were very negative and full of prejudices. The continuity of this negative attitude was instrumental in mobilizing simple European peasants for crusades (1096-1291). The devastating crusades resulted in deep rooted hostility between Muslims and Christians and brought huge loss of lives and wealth. Religious threat and cultural dominance were the two hallmarks of crusades in the region. European Christians were threatened by the overwhelming influence and spread of Islam. Christian intellectuals and scholars set their own differences aside and got engaged in writing against Muslims and Islam. The efforts of the Church scholars were directed towards learning Arabic language and understanding the religious texts, they indulged in a priori research on Islam. The resultant literature took the shape of polemic trying to convince the Muslims that Christianity was the true religion and Muslim faith a heresy. As a result a rudimentary but significant body of literature was produced in Europe. This literature contained a heavy bias and had a deep impact on the thinking of the people about Islam.

Robertus Ketenensis (1110-1160) undertook the first translation of Qur‘ān in Latin in order to understand and repudiate Muslims. The Christians sentiments for Muslims remained strained during this period. These feelings are best reflected when in 1311 Catholic Church pleaded to the council of Vienna to ban Muslim worship. Such sentiments reveal that many primary documents of this era contained a heavy bias. During this time the intellectual life of Europe was marked by scholasticism. The philosophy of Thomas Aquinas (d.1274), Poetry of Dante (d.1321) and travels of Marco Polo (d.1324) are among outstanding European literary accomplishments of this era.
Late middle ages in Europe faced famine, plague and war. One third of Europe’s population was killed due to Black Death (1347-1350). Heresy, schisms and controversy ruled the churches during this period and Europe was in a state of chaos.

**Muslim’s Intellectual Achievements in Pre-Colonial Era**

Muslim intellectual and educational activity started from the house of the Prophet (PBUH) in Medina. Mosque in Medina which was the first center of Muslim learning was graced by leading intellectuals like Ali, ‘Abdullah Ibn-e- Abbas, ZyadIbn-e-Thabit, Imām Jafar Sadiq and many more. During the reign of Abū Bakr compilation of Qur’ān was taken up by the companions of Muḥammad (Peace Be Upon Him) on the recommendation of Umar. The urgent need of doing so was due to the fact that highly respected companions who had committed Qur’ān to their memory were martyred in the battle of Yamama. Many Muslims turned apostate and Musaiylamah declared himself to be the new prophet. Muslims in order to preserve this revelation in systematic manner agreed on the compilation of Qur’ān. The process of compilation, punctuation and scripting of Qur’ān was the first literary effort taken up by the first four Caliphs of Islam (632-661 AD).

The Medieval era of Europe was the Golden era of Muslims. Great Muslim conquests, expansion of the empire, spread of knowledge and learning, development of art and culture were the epitome of this age. During Umayyad rule (661-750 AD) intellectual activity flourished under OmarIbn-e-Abdul Aziz and KhalidIbn-e-Yazid. Medina, Kufa and Damascus were the centers of learning during Umayyad period. The founders of leading schools of fiqh wrote voluminous treatises and compendiums on Islamic law during the Abbasid and Umayyad. (detailed discussion on the jurists and their literary contributions will be done in Chapter 2.)

Abbasid caliphate promoted and provided most congenial atmosphere for literary and scientific contributions of Muslim scholars in the fields of mathematics, chemistry, lexicography, environmental determinism, philosophy, medicine, astronomy, art and calligraphy, humanities, sociology, anthropology, jurisprudence and poetry. To name a
few Jabbir Ibn-e- e Hayyan (d. 815), al Khwarizmi (d. 850), al Kindi (d. 873), al Tabri (d. 923), al Mawardi (d. 1058) and al Biruni (d. 1048) and many others are the significant scholars of this epoch of Islam.

Abbasids ruled from Baghdad from 750-1258 AD. Their rule briefly ended for three years but was regained in 1261 after which they ruled till 1519 AD in Egypt. They made restless efforts for the progress of learning and development of educational institutions of higher learning. Mamun ur Rashid founded House of Wisdom (*Dar ul Hikmah*) in 830 AD in Baghdad which promoted higher education. It housed up to date library and an observatory and served as translation center. Caliph Mamun also established a college in Khorasan housed with distinguished scholars from all over the world.

The Fatimid Shia Muslims established themselves in Egypt in 909 AD. Jawhar al-Siqilly, laid the foundation of Mosque of al-Azhar in 970 A.D., which was later raised to university level in 988 A.D. In 995 A.D. Al-Hakim, the Fatimid Caliph, founded Hall of Wisdom in Cairo having an observatory a medical college and an extensive library. Later, Fatimids handed over the rule to Abbasids in 1171 AD.

Muslims ruled in Persia under the Seljuk Empire from 1037-1194 AD with Neshapur Ray, Isfahan, Hamadan and Merv as its capitals. Nizam ul Mulk Toosi established a chain of institutions by the name Nizamiya institutions. He founded Nizamiya University in Neshapur in 1066 AD. Imām al Haramayn the teacher of Imām Ghazali was its principal. Al Ghazali was made the in charge of Nizamiya University of Baghdad. Nizamiya survived the Mongol invasion of Baghdad at the hands of Helagu in 1258.

Nizamiya university was built by a non- Abbasid, hence “Mustansariya University” was opened by an Abbasid Caliph Mustansir Billah where all four schools of Islamic fiqh were represented. Noor ud din Muḥammad Zangi established the first *Dar ul Ḥadith* (House of Traditions) and Sultan Salahuddin established institutions in Cairo, Jerusalem, Alexandria and Damascus.

72 Fatimid conqueror of Egypt.
Umayyad Dynasty reached Spain in 756 AD and ruled till 1158 AD with its capital at Cordova. In Spain Abdur Rehman III founded Cordova University which preceded Nizamiya of Baghdad.

Several libraries were maintained by Muslim scholars in important centers patronized by Umayyad and Abbasiid Caliphs. Ottoman Turks established a strong kingdom with their capital in Constantinople now Istanbul from 1299 AD till 1922 AD. Initially it was a small kingdom but by 16th century it expanded to the Byzantine Empire.

Mongols brought one of the greatest threats to the literary achievements of Muslims. Changiz Khan “burnt remorselessly treasures of Bukhara, Merv, Isfahan, Shiraz, Ghazni and Rayy accumulated through centuries by the Muslims. The greatest single blow to Islamic civilization was struck by Hulagu Khan the Mongol, who destroyed Baghdad in 1258 A.D., and reduced to ashes the greatest literary treasures found in the Islamic world.” Leading Muslim scholars of this era were Ibn-e- Bajjah (d.1138), Ibn-e- Rushd (d.1198), al Razi (d. 1209), Al-Tusi(d.1274) and Maulana Rumi(d.1273). Last khalifa of Abbasids was killed by Halagu grandson of Chengiz Khan and Baghdad was devastated. Two million Muslims were massacred in Baghdad. Major scientific institutions, laboratories, and infrastructure were destroyed in leading Muslim centers of civilization.74

The last wave of Muslims Intellectual devastation and culmination of Muslim rule in Spain was witnessed in the 15th century. Ibn-e- al Nafis (d. 1288), Ibn-e- Battuta (d.1377), Ibn-e- Khaldun (d. 1406) were the leading Muslim scholars of 13th and 14th centuries. End of fifteenth century saw all literary treasures of Muslims destroyed by Arch Bishop of Toledo. Christian crusaders brought destruction to the intellectual life in Spain, they burnt the great Muslim library of Tripoli (Syria) containing more than three million books. More than one million volumes of Muslim works on science, philosophy and culture were burnt in Public square Vivarrambla, the ancient seat of Muslim pomp

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73 http://www.netmuslims.com
74 Major contributions.", Business Recorder, May 15, 2010 Issue
and chivalry in Granada. This was followed by European colonization in Americas, Africa and Asia.

During this period, Muslim scholars also showed keen interest in religion and history of the Christians. A Persian Muslim scholar Rashid ud Din (d.1318) wrote on the history of Franks, ancient Rome, and Pagan traditions. Rashid ud Din also introduced Christian history to the Muslim world. Another Muslim scholar, a contemporary of Rashid ud din and an influential writer was Taqi ud Din Ibn-e- Taymiyyah (d.1329). In all the intellectual and scientific achievements and literary works of Muslims one hardly comes across any bias or criticism on European culture or civilization. Efforts of Muslim scholars were focused on advancement of knowledge and spread of Allahs sovereignty. Muslims were not against Jews or Christians but only demanded rectification of their dogmas and belief in oneness of Allah. Muslims instead of spreading cultural hegemony believed in interfaith and intercultural harmony and unified societal existence of people of all faiths and cultures under the canopy of Islam.

Colonial Era: The Emergence of Systematic Orientalist Tradition (15th to 19th Century)

The first European colonization wave took place from the early 15th century (Portuguese conquest of Ceuta in 1415) until the early 19th century (French invasion of Algeria in 1830). In this era Europeans colonized the Americas and created European colonies in India and Maritime Southeast Asia. The second major phase of European colonization also known as New Imperialism was primarily focused on Africa and Asia. During this period there was limited interaction between Muslim and European cultures even though there was plenty of trade between Europe and Middle East. During European Renaissance Muslims had to flee to Middle East and North Africa due to Spanish persecution which curtailed interaction between Muslims and the Europeans.

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\[http://medlibrary.org\], retrieved on June, 14, 2013
European interest in Arabic literature, Arabic science and Islamic philosophy was felt in the 16th century France and 17th century England. Over these years study of the Orient had been an enduring feature of Western learning. Western world used this knowledge of the Orient to their advantage and to gain control over them as Turner puts it, “to know is to subordinate” (Turner, 1994:21). West controlled the East by making them believe that they are backward and uncivilized, and it is only with the help, guidance and control of the West that they will be lead to the path of progress and welfare. D’Herbalot’s “Bibliotheque Orientale” was published in 1697 and it remained the standard reference work on Orientalist scholarship in Europe until the early nineteenth century. In Bibliotheque d’Herbalot calls: “Muḥammad author and founder of heresy which has taken on the name of religion, Muḥammadan.”

Western writers studied Far Eastern and Near Eastern societies based on certain assumptions and were successful in creating a unique stereotyped image of Arabs and Muslims. This is expressed in the following passsage:

“However, despite academic and referential value of these studies, they largely contributed to creating a unique stereotyped personality for the orient in general and Arabs in particular. The accuracy and authenticity of that unique personality have never been verified by other sources. Even Arabs themselves, the subject of those assumptions, never got the chance to counter balance the orientalist approach.”76

Thus the Western observers constructed the image of the Eastern culture and the same was translated to the Western readers.

“Hence, the deep-rooted collective image in Western mind about Arabs and their culture and history has been largely relying on the representation which the orientalists provided throughout the years.”77

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76 Dr Tahir Ramdane and Dr. Merah Saud, ‘Between Orientalists and Al-Jazeera: Image of Arabs in the West (Comparative Inquiry)’ International Journal of Humanities and Social Science, Vol.1 No. 4; April 2011. p. 64.

77 Ibid., p. 73.
This body of literature concerning Islam and Arab culture written by the West was short of objectivity and loaded with misrepresentations. Throughout Enlightenment and Modern ages Orientalists continued to stereotype Arabs. Prominent European philosophers such as Voltaire, Hume and Kant reflected racial discrimination against Arabs in their writings. Hume expressed this discrimination in these words:

“There never was any civilized nation of any other complexion than white, nor does even any individual eminent action or speculation, no ingenious manufacture among them (Arabs), no arts, no science.”  

Hume’s statement reflects that Orientalists studied the Eastern and Arab culture with pre-conceived notions and, biases which reflects their sense of superiority over a nation projected as uncivilized and regressive.

To understand how the key themes of nineteenth century orientalist scholarship entered the twentieth century we should refer to Albert Howe Lybyer’s ‘The Government of the Ottoman Empire in the time of Sulieman the Magnificent’. As discussed earlier Renan’s views, Lybyer too strongly believed in the dichotomy based on racial characteristics rather than religion. Lybyer gives the example of Ottoman state as being divided into the ‘ruling institution’ and the ‘Muslim institution’ similar to the division of church and the state. Lybyer equates Turkish ruling institution with the ‘Turkish –Aryan’ and Muslim institution with the ‘Semitic race’.

Post- Colonial Era: Modern Orientalism (20th to 21st Century)

The period of “Modern Orientalism”, began when Napoleon invaded Egypt in 1798 to 1801 in which scholars started taking keen interest in this field and it gradually developed into a relatively consistent field of study.

78 David Hume, ‘Essays, Moral, Political and Literary’
79 Phillip Rushworth, ‘Orientalism Revisited’, at file:///C:/Users/a/Documents/PhD,literature/Orientalism/2012- last revised February 2012.
Classical Arabic texts were translated into European languages which were then analyzed, criticized and exploited by the European scholars against the Arabs and Islam. This wealth of information and knowledge replicated by the West about the East is today termed as Orientalist scholarship. This scholarship flourished under European Imperialism and once again reinforced essential differences between the Muslim World and Europe. Two features of Oriental scholarship dominated this era, firstly threat of Islam and the Ottoman Empire and secondly the adoption of philological approach adopted by Europeans scholars in the course of their study of classical Islamic texts. Philology had two contradictory effects on the field; it catered distortion but affirmed that study of Islam had to be based on the original Arabic texts. It also paved way for incorporating ideological agendas of the West. The interpretive framework within which this body of knowledge was shaped had an imprint of hostile encounters between Muslims and the West.

There were three fundamental problems with the resultant academia. Firstly, European scholars engaged in limited and selective reading of the original Arabic texts available to them. Secondly their studies focused on essentializing the cultural differences rather than minimizing it. Lastly the interpretive framework which guided these readings contained bias against Arabs, Asians and Muslims. Turner (1994:37) rightly mentions that

“Knowledge of the Orient cannot be separated from the history of European expansion into the Middle East and Asia”

The harsh treatment of Arabs remained tainted by inaccurate myths and stereotypes, even when the scholarly orientalism emerged in the eighteenth century, a period which witnessed active colonial enterprise. Britain and France produced leading orientalists during colonialism, this tradition was then passed to the Germans and finally to Americans.

80 Dr Tahir Ramdane and Dr. Merah Saud, ‘Between Orientalists and Al-Jazeera: Image of Arabs in the West (Comparative Inquiry)’ International Journal of Humanities and Social Science, Vol.1 No. 4; April 2011. p.12.
British and European Orientalist Tradition

Orientalists from Europe, Great Britain, Holland, Russia and Western regions worked closely with colonizers and military commanders and conducted many social and linguistic inquiries in the East. Their mission was primarily to belittle and reduce the contribution of Islam and Arabs to the progress of human civilization. In generalized and politically motivated tones, leading Western thinkers, scholars, historians, philologists and legal experts dominated the field of Orientalism. Ernest Renan (d. 1892), Max Muller (d.1900), Sir William Muir (d.1905), Ignaz Goldziher (d.1921), Theodore Noldeke (d.1930), Hurgronje (d.1936), Lammens (d.1937), Wensinck (d.1939), David Samuel Margolith (d.1940), Louis Massignon (d.1962) Guillaume (d.1965), Joseph Schacht (d.1969), Fueck (d.1974), Montgomery Watt (d.2006), Juynboll (d.2010) are some leading European and British orientalists whose writings shaped the contours of study of Islam in the West. An outline of their understanding of Islam and their scholarly contributions has been detailed in literature review chapter.

Ignaz Goldziher (d.1921) was a Hungarian scholar of Islam, and a contemporary of Theodore Noldeke and Christiaan Snouck Hurgronje. He is considered to be the founder of modern Islamic Studies in Europe. His major Publications are “Vorlesungen über den Islam” (1910), later translated in numerous languages and in English as “Introduction to Islamic Theology and Law”. “The Zahiris” (1884) written in German language and later translated in other languages which was the first scholarly discussion on usūl u fiqāḥ in a Western language. The chapter he wrote on Islamic law in his Vorlesungen gained more popularity probably due to the general nature of the work and the issues rose in it about Islam. In “Muhammedanische Studien” he showed how Hadīth reflected the legal and doctrinal controversies of the two centuries after the death of Muhammad (PBUH) rather than the words of Mohammed (PUB) himself. He was a strong believer in the view that Islamic law owes its origins to Roman Law. Goldziher raised numerous issues on Islamic Law in his writings Published in early 20th century. As mentioned in literature review Goldziher’s studies on Islamic law were extended by a German orientalist Joseph Schacht (d.1969) in his two major works, “The Origins of Muḥammadan Jurisprudence” (Oxford, 1950) and “An Introduction to Islamic law”
These works together became the basis of Islamic Legal Orientalism in academic writings on Islamic law.

**Anglo-American Orientalist Tradition**

In 1865 Foundation of Hartford Theological Seminary was laid down at Connecticut, USA, by a leading missionary scholar **Samuel Zwemer** where majority of experts on Islam were missionaries. They were much more sympathetic and informed of their subject as compared to medieval Christian polemics. The objective of their study of Islam was to find in Islam a truncated version of Christianity. In early twentieth century American Orientalist scholarship focused on the ancient Near East and showed less interest in Arabic and Islam. To study the ancient Near East philological approach was adopted by the orientalists. In 1919 Henry Breasted, an American, established Oriental Institute at University of Chicago and in 1927 Princeton University started the Department of Islamic Near East headed by a Christian Arab **Philip Hitti** (1886-1979) who then started a program of “Arabic and Islamic Studies” at Princeton, he introduced the field of Arab culture studies to United States.

**Duncan Macdonald** (1863-1943) an American orientalist was the first expert on Islam in American academia. He is hailed as the father of the field of Islamic studies in America. He studied Semitic languages at Glasgow and Berlin before teaching at Hartford Theological Seminary in U.S. He studied Muslim Theology and believed that stories in “*One Thousand and One Nights*” reflected Muslim piety. Throughout his writings Macdonald seems to be essentializing the difference between an Oriental and

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81 Ahmad, Dallal. op. cit.

82 Term Near East was coined from the Western perspective of European writers. The earliest use of Near East is dated 1856. In 1958, the State Department explained that the terms “Near East” and “Middle East” were interchangeable, and defined the region as including only Egypt, Syria, Israel, Lebanon, Jordan, Iraq, Saudi Arabia, Kuwait, Bahrain, and Qatar. The first official use of the term “Middle East” by the United States government was in the 1957, which pertained to the Suez Crisis. Secretary of State John Foster Dulles defined the Middle East as “the area lying between and including Libya on the west and Pakistan on the east, Syria and Iraq on the North and the Arabian Peninsula to the south, plus the Sudan and Ethiopia.”
Occidental mind. Macdonald thinks that Muslim mind is unable to comprehend complexity. This idea has a long pedigree in oriental studies and is often explained in terms of prevalence of atomism in Muslim theology. Hamilton Gibb (1895-1971) the next most famous Orientalist in Anglo-American Orientalism took Macdonald’s axiom for granted and proceeded to explain why Muslim societies behaved in accordance with Macdonald’s dictum. He was of the view that Middle Eastern societies are devoid of reason and sense of law. Gibb was quite active in defining the agenda for the field of Islamic studies in U.S. In 1930 s Gibb and Harold Bowen were commissioned by London based Royal Institute for International affairs to study Western impact on Middle East, as a result of their research they published two volumes on the nature of Islamic society titled, “Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East”.\(^8\) These books provided blueprint for the development of Middle Eastern Studies in US.\(^9\)

To Gibb, Muslim mind is incapable of comprehending complexity and further attempted to explain the reasons for “lack of law” in Islam. He also talks about “obscurantism of Muslim theologians” and the atomism of Muslim imagination. He was a Scottish historian and learned Hebrew, Arabic and Aramaic. During WW-1 he joined British Royal Regiment of Artillery in France and was awarded war privilege Master of Arts in 1918. He succeeded Margoliouth as professor of Arabic and came to Harvard as visiting professor in 1950. He later became Director of Harvard Center of Middle Eastern studies- became a leader of the movement in American universities to set up centers of regional science, bringing together teachers, researchers and students in different disciplines to study the culture and society of a region of the world.

Joseph Schacht (1902-1969) a British-German professor of Arabic and Islam at Columbia University in New York was a leading Western scholar of Islamic Law. His groundbreaking Publications “Origins of Muhammadan Jurisprudence” (1950) and


\(^9\) Dallal, op. cit. p.12
“Introduction to Islamic Law” (1962) earned him great fame. It would not be wrong to say that Joseph Schacht stands at the nexus of European, British and American scholarship. Schacht was born in Germany and was the youngest Professor in University of Germany Albert Ludwigs Universität in Breisgau at the age of 25, he then moved to Britain during WW-II, taught at Oxford University in 1946 and was naturalized as British subject in 1947. He moved to Columbia University in 1959 and taught there till the end of his life.

Noel J Coulson (b. 1928) is considered to be a leading Anglo-American Orientalist whose special interest was Islamic law. He was a visiting professor on Islamic law in leading American universities such as Pennsylvania, UCLA, Harvard and Chicago. He was born in Britain and served as a Professor of Oriental Laws in University of London and was appointed as member of editorial board of Arab Law Quarterly. His remarkable contributions are “A History of Islamic Law” 1964, and four other works on Islamic law. Following national service as intelligence officer in Parachute Regiment on Cyprus and Suez, he returned to Oxford in 1952 as research student of Islamic law. He was appointed as a lecturer in Islamic law in SOAS and was a visiting professor on Islamic law.

John Wansbrough (1928-2002) was an American historian. He completed his studies at Harvard University and taught at University of London’s School of Oriental and African Studies. He caused a furor in the 1970s when his research on early Islamic manuscripts, including the analysis of the repeated use of monotheistic Judeo-Christian imagery found in the Qur’ān led him to posit that the rise of Islam was a mutation of what was originally a Judeo-Christian sect trying to spread in Arab lands, rather than by simple cultural diffusion. As time evolved the Judeo-Christian scriptures were adapted to an Arab perspective and mutated into what became the Qur’ān which was developed over centuries with contributions from various Arab tribal sources. Wansbrough’s research suggests that a great deal of the traditional history of Islam appeared to be a fabrication of later generations seeking to forge and justify a unique religious identity. Within this context, the character of Muhammad (Peace Be upon Him) could be seen as a manufactured myth created to provide the Arab tribes with their own Arab version of the
Judeo-Christian prophets. His leading Publication in English are “Qurʾānic Studies: Sources and Methods of Scriptural Interpretation” (1977) and “The Sectarian Milieu: Content and Composition of Islamic Salvation History” (1978).

Bernard Lewis was born in 1916 in London and still alive. He studied at University of Paris and SOAS London. He earned his name as British American historian, scholar in Oriental Studies, and Professor Emeritus of Near Eastern Studies at Princeton University. Bernard Lewis is recognized for his prodigious influence in policy circles but his influence in intellectual and academic field is minimal. His advice on Middle East is sought by policy makers of US administration. Professor Edward Said of Columbia University and author of Orientalism (1978) characterized Lewis work as a prime example of Orientalism. He questioned scientific neutrality of Lewis” work on the Arab World and contends that:

“Lewis” knowledge of the Middle East was so biased it could not be taken seriously and claimed “Bernard Lewis hasn”t set foot in the Middle East, in the Arab world, for at least 40 years. He knows something about Turkey, I”m told, but he knows nothing about the Arab world.”

Further in the “Clash of Ignorance” Edward Said considered that,

“Lewis treats Islam as a monolithic entity without the nuance of its plurality, internal dynamics, and historical complexities.”

As already stated above, Bernard Lewis too acknowledges the academic weakness of Orientalism. To him, Orientalism has not emerged as a purely academic discipline. It has been devoid of scientific methods of investigation. European orientalists have been unable to overcome the language disability and build cultural bridges between East and West. Bernard Lewis asserts that the backwardness of the Middle East is due to their religion and culture. This assumption of Lewis is opposed to the post-colonialists views

according to which the major problems of the region are political and economic under
development due to 19th century European colonization.

Bernard Lewis also exemplifies Said critique on the relationship of scholarship to power. In 2002, Lewis” ties to the US state department were further exposed in his book *What Went Wrong?* This explained 9/11 to an eager American audience as the decline of Islamic civilization. In it he warned “that the suicide bomber may become a metaphor for the whole region”, with no condemnation of people’s attempts to conflate a small terror network with a diverse and multi-faceted region, a poignant “Orientalist” construction.88 Some influential books by Bernard Lewis are *The Arabs in History* (1950), *The Middle East and the West* (1964), and *The Middle East* (1995). Three of his books which were Published after 9/11 are *What Went Wrong?*, “*The Crisis of Islam*” and “*Islam: The Religion and the People*”.

Ahmad Jawad in his honors thesis “*The Great Orientalist Bernard Lewis*”89 critically analyzes his two recent books “*What Went wrong*” and the “*Crisis of Islam*.” He contends that even with Lewis’s eloquent and scholar-like writing ability and his neat citations, there are severe flaws in his writing and his ability to convey historical facts in an objective manner. The aim of historical study is to be able to observe the actions and reactions that made the world as it is today, and from these observations gain a better understanding of other peoples, cultures, and belief systems in order to allow them to coexist in peace and harmony. Lewis’s writing does not offer this understanding, rather, it drives his Western Christian audience to see Arabs and Muslims as an ancient opponent, as an “other” that rivals the Christian world in an epic “clash of civilizations”, and in this way Lewis seeks to legitimize the policies and military campaigns of his benefactors, the influential men of power who seek what is arguably imperialistic control and hegemony in the Middle East.90

90 Ibid, p. 108.
Muhammad Samiei compares Lewis, Esposito and Kepel in his PhD dissertation (2009) in which he concludes that Lewis is a persistent follower of the old fashioned school of dualism.

“His dismissal of the diversity and dynamism of Islam, his reliance on historical evidence and his reluctance to look directly at modern Muslim societies, his exaggeration of the religious part of Muslim identity, his overestimation of radicalism and his discourse of rage, clash and fear, his positivist methodology with his self-assured objectivity: all of these elements are the heritage of his Orientalist predecessors.”91

Patricia Crone (b.1945) studied at University of London and earned her doctoral degree from SOAS. She is an Orientalist and historian on early Islamic history. Since 1997 she is working at the Institute of Advanced Studies at Princeton University. “Roman Provincial and Islamic Law” (1987) and “Hagarism” (1977) are her major writings on Islamic law.

Micheal Cook was educated at Cambridge. He studied English and European history and learned Turkish and Persian. From there he went on to the School of Oriental and African Studies (SOAS) in the University of London, embarked on research into Ottoman population history in the fifteenth and sixteenth centuries then spent a good many years teaching and researching in Islamic history at the School of Oriental and African Studies till 1986. After this he took up a position at Princeton. He co-authored “Hagarism” with Patricia Crone.

David S. Powers a native of Cleveland received his Ph.D. from Princeton in 1979 and began teaching at Cornell in the same year. His courses deal with Islamic civilization, Islamic history and law, and classical Arabic texts, and his research focuses on the history of Islamic law and its application in Muslim societies. Powers is the author of


Hallaq is a non-Muslim Arab scholar of Islamic law and Islamic intellectual history. He is currently the Avalon Foundation Professor in the Humanities at Columbia University at the Department of Middle Eastern, South Asian and African Studies. After a Ph.D. from the University of Washington, he joined The McGill University Institute of Islamic Studies in 1985, to become an assistant professor in Islamic law. In 1994, he earned full professorship, and in 2005 became a James McGill Professor in Islamic Law. A prolific author and lecturer, he is a world-renowned scholar of Islam, with numerous contributions to the field of Islamic legal studies. His outstanding contributions are “The Impossible State: Islam, Politics, and Modernity’s Moral Predicament” (2012), “An introduction to Islamic law” (2009), “Shari‘ah: theory, practice, transformations” (2009), and “The Origins and Evolution of Islamic Law” (2005).

Scholars mentioned above belonged to the field of academic orientalism. For the most part, university-based scholars who studied Islam in Europe and the United States came to be situated in departments or institutes of “Oriental studies” or “Near Eastern studies” or “Near Eastern languages and civilizations” or some variant thereof, though others might work in departments or institutes focusing on art, history or even anthropology.93

**Orientalism in American Scholarship**

By mid twentieth century that is after the World Wars and during Cold War era Americans had started influencing the world politics in all its spheres so the


Orientalist tradition is dominated by American scholarship in the 20th century. American academy accepted most of the European paradigms for the study of Islam. From the beginning of nineteenth century till the end of World War II America dominated the Orient and approaches it as France and Britain once did but it is the British Orientalist tradition that left the most lasting imprints on the American field of Islamic Studies.

After the Second World War American policy makers identified the need of experts in languages and cultures of Middle East and Islam for intelligence and Foreign Service. At this time United States was projecting its role as super power and increasing its global involvement. The increased interest of US in Middle Eastern Studies and Islam overlapped with the growth of Area Studies in US. In 1958 National Defense Education Act (NDEA) was passed by Congress. The law provided large scale government funding for higher education, especially for Area Studies and languages. Area Studies in turn gave largest incentive to Middle Eastern Studies and Islamic Studies in US. The objective of area studies initiative was to apply social science methodology to understand the cultures and regions of the world.

Before passing of the NDEA, Ford Foundation established the Foreign Area Fellowship program in 1951 and a Division of International Training and Research in 1952 with a mandate to establish university area studies centers. By the time it was terminated in 1966, the Division had awarded grants of $270 million to 34 universities. By comparison cumulative NDEA funding of area studies centers from 1959-1987 amounted to only $167 million of which 13.4 percent or about $22 million were allocated to Middle Eastern studies. Besides Middle East area studies centers Ford also funded the establishing of Center of Arabic studies in Cairo for language training.94

In 1951, the SSRC (Social Science Research Council) initiated social science research on Middle East and five leading universities of US including Columbia, Princeton and Michigan established centers of Middle Eastern Studies. When US

universities established Middle Eastern Studies and Area Studies departments Gibb suggested that methodologies of social sciences should be adopted instead of philology to develop a better understanding of cultures. US universities were unable to find experts on Middle East who were trained in philology as well as social science research. As a result different area studies programs were headed by European Orientalists all trained in philology and languages of the orient and not in the disciple of the social science.\textsuperscript{95} Gibb moved to Harvard University in 1955 where he directed the center for Middle Eastern Studies. In 1958 UCLA established a center headed by Austrian Orientalist Gustave Von Grunebaum (1909-1972). German scholar Frantz Rosenthal was hired by Yale in 1956 and another German Scholar Joseph Schacht (1902-1969) was hired by Columbia University. In 1960s gradually other universities started establishing centers of ME Studies.\textsuperscript{96}

Thus the newly established centers of Middle Eastern Studies failed to apply methods of social sciences. Gibb suggested that there is a need to have the orientalists and social scientists work together, but sadly though the traditional orientalist approach was carried forward by American orientalists which treated Islam as an ahistorical monolith.

By 1996 Area Studies was under attack from scholars in several fields who in general argued that area studies had been an invention of the Cold War, reflected US political interests and Eurocentric prejudices, and now that Cold War was over ,the area studies has lost its rationale and value. Numerous charges were levied at area studies scholars such as imposition of national agendas through scholarly writings. It was argued that the orientalists through their writings are denigrating other societies that have almost always been politically and economically subordinated. There must be some truth in


\textsuperscript{96} Dallal, op.cit. p.13
these charges as Micheal Foucault says that political power and position and the generation of knowledge are inevitably entwined.97

**Responses to Orientalist Scholarship**

Most striking response to orientalism in the Muslim and Arab world was seen after the writings of Ernest Renan appeared in nineteenth century. Before we proceed to discuss the response of Arab and Muslim world against orientalist writings we will first examine the views of Renan.

Earnest Renan (1823-1892) was considered as the most influential French philologist and religious scholar of the nineteenth century. His views and opinions on Islam were taken very seriously in the academic and political circles. He delivered a lecture in 1883 in Sorbonne titled “Islam and Science” which reflects how Orientalists understood Islam and Muslim societies at that time. Following is an extract from one of Renan’s essays which reflects his thoughts about Muslims.

“All those who have been in East or in Africa are struck by the way in which the mind of a true believer is fatally limited, by the specie of iron circle that surrounds his head, rendering it absolutely closed to knowledge, incapable of either learning anything, or of being open to any new idea. From his religious initiation at the age of ten or twelve years, who occasionally may be up to that time, of some intelligence, at a blow becomes a fanatic, full of stupid pride in the possession of what he believes to be the absolute truth, happy as with a privilege, with what makes his inferiority….. The Muslim has the most profound disdain for instruction, for science for everything that constitutes the European spirit. This bent of faith inculcated by Mohammedan faith is so strong that all differences of nationality and race disappear by the fact of conversion to Islam.”

Renan is completely forgetting that Islam and the Muslims were at their epitome in the Middle ages which was the golden period of Islam. They had excelled in all branches of knowledge. Renan overcomes this problem by stating that Islam came up from Arabs who were completely disinterested in science and philosophy. It was only during the period of Abbasids that the Muslims were influenced by Persian and Greek philosophers and flourished in science, philosophy and culture. Then the European race awakened from its slumber but soon Turkish race came to dominate the Muslim lands plunging the Muslims into intellectual decadence. The Hungarian scholar Ignac Goldziher criticized Renan’s remarks on moral cultural and intellectual superiority of the Semitic people. Goldziher suggested that Islamic civilization could be studied in historical context and by analyzing the classical textual sources. It was in Renan’s time that British had colonized India and there were Western scholars who supported Islam and Muslims in their writings. As opposed to Renan they argued that Islam was compatible with human reason and could be interpreted to suit the trends of modern times. Jamal ud din Afghani, Goldziher and Renan were all contemporaries and they all had profound influence in their circles. Al Afgani was an influential Muslim who travelled extensively across the Arab world as well as Europe. Goldziher was a Jew and a Hungarian scholar and an Arabist he had numerous scholarly writings on Islam and the Muslim history and Law to his account. Renan was a renowned French Scholar whose views on Muslims and Islam were taken very seriously. Renan criticized Afghani and said that he is the best proof of the great axiom that the worth of the religions is to be determined by the worth of races that profess them. Renan also exclaimed that he did not say that the Muslims will always remain in ignorance but insisted that regeneration of Muslims was only possible through the their emancipation from their own religion through education just like enlightened Europeans had left orthodox Christianity. Karl Marx (1818-83) was a great thinker and critic of nineteenth century. He too criticized the Asian societies and deepened the divide between the East and the West but he did not believe that Asians were racially inferior. He was of the view that the cultural characteristics of Asian societies and stagnation of their civilization was based on economy.
Max Weber (1864-1920) studied sociology through history and relied on the works of Modern Orientalists of late nineteenth century who were mainly Germans. He proclaimed that the Muslim societies were backward because they lacked those key institutions which had enabled the Western societies to prosper. He suggested that the sacred law of Islam was to be replaced by a rational formal law and political system of sultans should be replaced by European political systems.

These contrasts were based on sharp dichotomies between the East and the West – Western freedom and Oriental servitude, Western law and Oriental arbitrariness, Western Modernity and Oriental tradition and between private property ownership in the West and its absence in the Orient. Twentieth century scholars have denied these contrasts and say that these are based on faulty understanding of these societies and their histories.

Jamal ud din Afghanai (1839-1897) was a Muslim thinker of 19th century and an advocate of Pan-Islamism. He was the founder of Islamic Modernism and showed much interest in organizing Muslim response to Western pressure. He travelled extensively through India, Iran, Turkey, Egypt, Russia and France and had a firm grip over oriental studies and Western scholarship. He in mid nineteenth century had identified that after conquering India European Imperialism now threatens the Middle East. Earnest Renan (1823-1892) was A contemporary of Jamāl ud Din Afghāni. Afghani wrote a rebuttal of his thesis and argued that ‘Ulamā’ of later generations who adopted taqlid are responsible for blocking progress of Muslims. He also highlighted Muslim’s contributions to preserve and translate writings of ancient Greek philosophers.

Student of Jamāl ud Din Afghāni, Muḥammad ṬAbdul supported the cause of Afghani. Together they published a newspaper from Paris named ‘Urwa-tul-Wuthqā. Being a modernist, ṬAbdul asserted compatibility of modernity and Islam. He laid great stress on improving and reforming educational institutions of Muslims. He was an advocate of equality of man and woman and explained that men are leaders of family in Islam not because they are superior but because of the responsibilities and roles Islam assigns to them.
Another important name in line is that of Muḥammad Khurd Ali (1876-1953) Syrian intellectual and activist, he was the founding member of the Arab Academy of Damascus. He is a less well known critic of Orientalists and Orientalism and perhaps better known to the students of Middle Eastern History and civilization as author of *Khitat al Shām* a six volume history of Greater Syria. He Published newspapers and journals, edited and Published medieval Arab manuscripts, wrote biographies of the famous Muslims of the past and the present. He served twice as minister of education in Syria. He never wrote a book devoted entirely to Orientalism but his most extensive discussion of this subject is volume I of *al-islām wa al ḥādarah al ‘Arabiyya (Islam and Arab Civilization)*. The early chapters of this book deal with the negative comments made by a number of Orientalists. In this book he tries to present a more accurate picture of Islam and Arab civilization to counter the efforts of Western scholars.\(^{98}\) He had a firm knowledge of various fields of Islam and tried to acquire and grasp Western scholarship with an open mind.

After Muḥammad Kḥurd Ali, a Palestinian historian Dr. Abdul Latif Tibawi (1910-1981) wrote a critique of Western Orientalism under the title “*English Speaking Orientalists: A Critique of their Approach to Islam and Arab Nationalists*” Tibawi was a contemporary of Arberry and Gibb. In this critique Tibawi exposed deep rooted resentment and antagonism between Christians and Islamic World, not only this he revealed why the study of Asians was initiated. Tibawi explains that Christian missionaries and Classical orientalists had a common agenda to study and evaluate Islam and Muslim societies and to present them in derogatory manner.\(^{99}\) “*A Second Critique of English Speaking Orientalists*” was published in 1979. In this critique Tibawi displayed that contemporary orientalists in their desire to understand Islam in order to combat Muslims made it impossible for their indoctrinated students to have a positive view of

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Islam. He contends that it is actually the Western bias against Islamic Societies which bars them from true understanding of Muslims. Professor Tibawi has authored numerous other books such as, “British Interests in Palestine” (1961), “American Interests in Syria” (1966) and “Anglo-Arab Relations and the Question of Palestine, 1914-1921” (1978).

Anwer Abdul Malek (1924-2012) was an Egyptian scholar at University of Soborne Paris. Abdul Malek asserts that Orientalism went through serious crisis after World War II due to anti-colonial movements in Asia. The colonial powers provided the orientalists, texts and manuscripts from Asia to be manipulated in Western libraries. He believed that like colonizers, orientalists believed that Asians are to be ruled in the name of progress and civilization. He further asserts in his article “Orientalism in Crisis” that

“One sees how much from eighteenth to the twentieth century, the hegemonism of possessing minorities, unveiled by Marx and Engels, and the anthropocentrism dismantled by Freud are accompanied by Europocentric in the area of human and social sciences” and that Orientalists give the “Orient” a timeless essence that produce what he describes as a “typology”, such as that of “homo Arabicus”.

Edward Said (1935-2003)’s major inspiration behind his masterpiece Orientalism was Anwer Abdul Malek. Numerous scholars have contributed towards


103 This term was coined during the period of decolonialization in the late 20th century and it had its historical roots in European colonialism and imperialism. It means viewing the world from European perspective.


shaping the Orientalist scholarship but it is Edward Said who fundamentally changed the theory by his 1978 Publication Orientalism. Said contends that Orientalism is a politically constructed binary, a category of interpretation rooted in preconceived and historically constituted ideas about the “Orient” as an “Other”. He further asserts that Orientalism is a textual construction and a false representation of the Orient in which West locates himself in an upper level or a superior level and East is to remain in an inferior position.

Said gives three fold definitions of Orientalism, a general definition, an academic one and lastly he defines orientalism from historical point of view. In its general meaning Orientalism is, “a style of thought based upon ontological and epistemological distinction made between “the Orient” and (most of the time) “the Occident” . Academically it means “Anyone who teaches, writes about, or researches the Orient—and this applies whether the person is an anthropologist, sociologist, historian, or philologist—either in its specific or its general aspects, is an Orientalist, and what he or she does is Orientalism.”

Historically speaking Said defines it as, “Orientalism can be discussed and analyzed as the corporate institution for dealing with the Orient - dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style, for dominating, restructuring, and having authority over the Orient.”

In the afterward of Orientalism which Said wrote in 1995, he says that Orientalism is a study of ways in which power, scholarship and imagination of a two hundred years old tradition in Europe and America viewed the Middle-Eastern Arabs and Islam. European interest in Islam arose due to the fact that it saw in Islam a competitor to Christianity. It would not be wrong to say that knowledge about Islam and the Orient, used by colonial powers to justify their colonialism, was derived from orientalist scholarship. By stating so, Said established strong parallels between the colonialism and modern orientalist scholarship. In the contemporary or the post- modern world this relationship of scholarship and political hegemony continues between the area studies scholars and government departments of foreign affairs. The aim of this relationship primarily is economic exploitation and aggression in Muslim World. This makes sense, of the opposition demonstrated by non-Western scholars towards Orientalism because
they perceive it as a scholarship originating in an era of colonialism aimed at establishing power and control in the Orient.

Said also draws attention towards the role played by electronic and print media and US journalists in presenting stereotypes that lump together Islam, Arabs, Terrorism, Orient and violence. To Said Oriental studies is not so much a scholarly activity but an instrument of national policy towards the newly independent nations of post-colonial world. Parallels between European and American imperial designs on Near East and Far East and a scholarly tradition on the Orient are obvious. What need further to be investigated is to what extent European tradition was fed in to Near Eastern studies with contemporary appearance of refinement and social science techniques.

He discusses leading Orientalists Gibb and Lewis and their role in promoting this less scholarly tradition. According to Gibb and Lewis are two great orientalists who have specialized on Islam and Islamic societies and worked for the government to brief them and support their national policy agendas. Gibb is a dynastic figure within the academic framework within the British (and later American) Orientalism. A scholar whose work quite convincingly demonstrated the national tendencies of an academic tradition set inside universities, governments and research foundations.

Criticizing the great Orientalist Bernard Lewis, to whom the banner of orientalism was passed after Gibb, Said says his writings on Islam are filled with ahistorical and willful political assertions. Said characterizes Lewis work as political rather than intellectual. He says that Lewis on one hand reduces Islamic Orientalism to an innocent and enthusiastic department of scholarship” and on the other hand he argues that Orientalism is too complex, various and technical for a non-orientalist to criticize.

Gibb’s career from his appointment in London then Oxford and finally at Harvard, “bears the stamp of a mind operating with great ease inside established institutions.” Gibb’s approach was different from other Orientalists in that he was more in touch with Public policy aspect of Orientalism. Renan, Becker and Massignon emphasized on cultural discourse in Orientalist tradition. On the other hand Philip Hitti’s contribution from Princeton in 1920s and Princeton’s brand of Oriental studies focused on scholarly
engagement in this field. In spite of the differences in approach durability of orientalism must be acknowledged which remained unchanged as a system of ideas from Ernest Renan in late 1840s till present in United States.

Most recent Moroccan scholar ‘Abdullah Laroui is well known for his critique on Orientalist scholarship. He writes in Arabic and French and is considered one of Morocco’s leading intellectuals. He criticized orientalists for showing sympathy for Muslim tradition. He criticized leading orientalists such as Gibb and Smith and those who followed them. He wrote a critique on Orientalism. According to ‘Abdullah Laroui, Orientalism is not Western because it predominates countries of the West, but because it shares common epistemological assumptions.

The main divide in Laroui’s view is:

“…between those who take for granted certain values and ideals which are not so evident to the others. Many Easterners will share Western values and therefore will be counted among Western Orientalists, while many Westerners will be doubtful of their own heritage and will be excluded from the congregation. Nationality, religion, mother tongue, do not count as much as does the perspective chosen by the writer.”

Zachery Lockman’s book ‘Contending Visions of the Middle East’ discusses the history and politics of Orientalism with special focus on the age of Imperialism which was the time of increasing American involvement in the region and the repercussions of 9/11 terrorist attacks. Besides historical realities Lockman discusses how the world was divided between East and the West and how power relations have affected scholarly writings on Islam. This book gives special attention to the ideas, politics and debates that have shaped Middle East studies in United States in the past half century. It also includes debates initiated by Edward Said in his influential publication Orientalism (1978). This book is important as it discusses contemporary issues in the Muslim world from Western

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perspective such as Muslim extremism, terrorism and United States policy on the Middle East. It relates these issues to their broader historical and political contexts.

This book focuses on Orientalism, Oriental studies, Middle Eastern Studies, Islamic Studies as practiced in the West special focus to US from mid twentieth century. The author says that,

“ It does not attempt to identify or discuss all the scholars, writers, artists, travelers, texts, schools of thought or institutions involved in studying, commenting on or depicting Islam, the Middle East or the broader Orient over the past millennium and a half. Rather, it explores broad trends, some particularly influential interpretive paradigms and theoretical approaches, important debates and significant transitions, along with their political, social and cultural contexts, largely by focusing on a selection of representative individuals, illustrative texts, key institutions and important developments. “

This book is written from an American perspective and throws light on how Middle East and Islam have been understood and perceived by the United States. Zachery Lockman defines ‘politics of knowledge’ as “contexts, arguments, conflicts and processes which affect the production, dissemination and reception of knowledge in a particular field or discipline.”

One important aspect of this dissertation is to focus on the ‘politics of knowledge’ in the field of Western interests in the field of Islamic studies and Muslim societies in general and Islamic law in particular. This is important for several reasons:

- Firstly to help in understanding the orientalist perspective and judge the impact of their writings.
- Secondly scholars engaged in the study of Islamic or Middle eastern studies might benefit from a better understanding of controversial debates.
Thirdly it might also help the scholars of this field to effectively assess the policies advocated by government officials, politicians and think tanks as these policies are imbedded in understanding the Muslim World and the Middle East by the way it is elaborated by scholars.

Important issues in the context of American perception of the Middle Eastern or Islamic Studies are the Cold War, September 11 and US occupation of Iraq in 2003. It is natural that factors such as political, social, economic and historical contexts play an important role in understanding and in interpreting these issues. Thus it is highly important to pay attention towards the politics of knowledge in understanding the crucial contemporary debates. The dilemma is that the politics of knowledge in the field of Islamic studies has always been shadowed by prejudice, racism, stereotyping and biases. This trend has been observed in the writings of seemingly learned scholars in the West when they write about Islam and the Muslim world. One can easily trace instances of racism, bias and stereotyping in their writings. However Lockman adds that there are scholars of Islam and the Middle East who completely reject the notion of politics of knowledge and claim themselves to be politically neutral and objective in their scholarly writings.

Orientalism received very little scholarly attention until 1960’s when two British scholars published their scholarly work that laid the foundations of Orientalism- a term which denotes scholarly study of Islam and the Orient. In 1960 Norman Daniel published *Islam and the West: The Making of an Image* and two years later Richard W. Southern published *Western views of Islam in the Middle Ages*. These scholars saw Muslims in their ethnic background rather than in religious terms and called them Saracens (the tent-dwellers). Southern sums up the state of Western knowledge of Islam in the entire period from seventh to twelfth century as age of ignorance.

It would be worth while to delineate the views expressed by Zachery Lockman in his book ‘*Contending Visions of the Middle East*’ (2003). Lockman
discusses the history and politics of orientalism in this book. This book gives a broad survey of the development of Western knowledge about Islam and the Middle East. Zachery Lockman suggests that to begin with ancient Greece and Rome the Medieval Western European understanding of Islam does not suggest that there was some continuous Western image or attitude towards Islam stretching from antiquity through the Medieval era to the modern period. Over this long span of time it is seen that some European scholars misappropriated certain notions about Islam and refashioned them according to their own contemporary concerns.

East/ West polarity was developed by Greeks but it was not so sharp as we see it today. Roman scholars adopted this East/ West divide. Romans often used the terms Asia and Europe to represent the Eastern and Western parts of their empire. Western Image of the Muslims became more obvious in the eleventh century. The motivation of the Western Church scholars to understand Islam was largely drawn to the motto ‘know your enemy’. This approach was adopted by the Americans while confronting Soviets during the cold war era. The underlying schema was to know the enemy’s ideology to fight well. Christian scholars understood Islam as Christian heresy and emphasized that Islam could not be combated unless its errors are understood. For this reason learning of Arabic language received popularity and scholars were encouraged to translate Arabic texts especially classical Arabic literature. Christians and Jewish scholars began to publish Islamic and Arab history, biography of Mohammad and teachings of Islam. These Jews and Christians believed that these Saracens/ Muslims / Arabs believed in one God, got circumcised and do not attack Christ or Apostles but they deviated in only one faith that Jesus was not the son of God and that they venerate Mohammad. The outcome of learning Arabic language and reading classical and revealed literature by Christians and Jews was that these scholars and theologians started producing polemical literature on Islam designed to refute it as a true religion. One striking feature of these scholarly writings was that critique of Islam was thoroughly grounded in Christian theology.

107 According to the traditional view collapse of the Western Roman Empire marks the break between antiquity and beginning of medieval era. But Belgian scholar Henry Pirenne argued that Muslim conquests of the seventh century destroyed the unity of the Mediterranean and separated East from the West.
Besides achieving better understanding of Islam these European scholars realized that they can benefit greatly from these Muslim intellectual riches and subsequently improve their rather improvised culture. They found treasures in the form of libraries in Muslim mosques filled with rich literature in all disciplines. It was by this means that Western Europeans got access to works of Greek antiquity translated into Arabic language. These texts had a profound impact on European intellectual achievements. But the Europeans whether Christians or Jews had always perceived Muslims as ‘the other’ and considered themselves superior to them. By the end of thirteenth century the crusaders failed and Mongols destroyed and hopes of many Westerners also failed. The educated Christians in the west reached the conclusion that Muslims could not be destroyed but the use of force.

In the fifteenth century the Ottomans in Europe became very powerful and the image of the Muslims strength was felt throughout the region. These Ottoman kings took advantage of the conflicts that existed among Christian kings in Balkans and took control of much of their territories such as Bulgaria, Siberia and Greece. Ottomans success and advancement in Europe was halted in the fifteenth century when they got defeated by Tartar from Central Asia. This dynasty started to restore again after a recession of a decade. Sultan Mehmet conquered Byzantine Empire in 1453 and took hold of Constantinople. Constantinople was later named as Istanbul and was made the capital of Ottoman Empire. Sultan Selim conquered Persia, Syria, Egypt, Northern Iraq and Western Arabia. His son Suleiman conquered Hungary in 1529. Ottomans took control of most of Europe and Arab World what is now today the Middle East. In later fifteenth and sixteenth centuries the Ottomans or the Muslims were perceived as a great threat to the Europeans. Although the Ottoman state was a Muslim state Europe did not perceive it as an ideological or religious threat although coalition formed against Ottomans gathered in the name of Christianity. Ottomans were governed by political expediency rather than religion.

According to Zachery Lockman Orient meant:
'All of Asia from the lands along the Eastern shores of the Mediterranean (which Europeans also call Lavent) derived from the French term from where the sun rises, all the way to India and China. Much later in the nineteenth century, the specialized field of scholarly learning which studies the languages, religions, histories and cultures of the Orient would come to be called “Orientalism”. Islam was obviously central to this emerging field of knowledge since much of the region between Europe and China was predominantly Muslim, and Renaissance proto-Orientalists saw themselves as developing a fuller and more accurate understanding of that religion by studying a wide range of texts in the actual languages of the Orient rather than relying on the poor translations and flawed commentaries produced by medieval scholars for polemical and missionary purposes. 108

Political and commercial considerations also stimulated the development of Orientalism as a field of scholarly study. Biased attitude towards Islam existed in Orientalist scholarship for a very long time. European political thinkers saw their own societies as based on freedom, justice and law in contrast to Ottoman Sultanate as based on dictatorship, lawlessness and complete power in the hands of ruling Sultans. This image actually had little to do with the actual subtleties of Ottoman culture and Sultans. The consequences of such scholarship reached wider public in creating an image of the Orient as exotic and mysterious and not threatening. Sixteenth century saw Ottoman decline and Oriental dictatorship and autocracy. In seventeenth century Ottoman Empire had reached its maximum limits of expansion in Europe. But with the treaty of Karlowitz in 1699 they were compelled to surrender their territory in central Europe and lost its image of superiority and political strength. Europeans now perceived Ottoman Sultanate not as a powerful threat but as a weak enemy. In the eighteenth century Russia and Austria started invading Ottoman ruled territory and it became possible to disintegrate the empire. This changing image of the Ottomans had much to do with evolving new image

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108 Zachery Lockman’s Intending Visions of the Middle East, (2012) p. 44.
of the Europeans as more centralized, bureaucratic and more powerful than before. On the other hand Ottomans now became a prime example of Oriental despotism. Gradually the world divided into the West and the Rest or the West and the non-West.

Islam also had the history of being accepted as a major religion as opposed to Christianity. In the age of Modern West which had actually replaced the Christendom, Islam was considered as the most well-known opposite of the West. Writings of the Orientalist scholars and political thinkers had created an image of Islam as lacking in almost all those qualities which had made West as a great power and culturally superior.

From 1960s onwards Islam was critically seen as declining and imperfect civilization as against the West. It was also considered to be the polar opposite of the West. This perspective underpinned both popular and Orientalist scholarly writings. It will not be true to call Orientalist scholarship as always biased and critical of Islam anew approach in the Orientalist scholarship was also seen which understood Islam in a more objective manner. This scholarship criticized churches dogmatism and admired Islam as a rational and tolerant faith. This trend of writing was first seen in Europe and it was later adopted by British and American scholars. The suffering of Muslim societies from moral and social weaknesses was seen in the same manner as that which plagued Christian societies and it could be rectified in exactly the same manner. Besides the work of the Orientalist scholars most popular literature was also available in Europe which also aided in creating the image of the Orient as exotic and magnificent. The most remarkable literature and most popular in the West was the *Thousand and One Nights* which appeared in France and continued to be re-edited and retranslated owing to its popularity.

It is important to mention here that Lady Mary Wortley Montague wife of the British ambassador to the Ottoman Empire in 1717-1718 published her observations of the Ottoman lands and female members of the Ottoman elites. Her writings countered the image of the veiled Ottoman women as suppressed and instead portrayed them as having more liberty and rights than European and British Women. She proclaimed that ‘*I never
saw a country where women may enjoy so much liberty and free from all reproach as in Turkey”109

By the nineteenth century Orient was seen as comprising of two different units ‘Near East’ and ‘Far East’. Near East comprised of Southern Europe, the Levant (lands across the Eastern shores of Mediterranean) and parts of West Asia which are near to Europe. Far East comprises of India, China Japan and South East Asia. The Orient remained a powerful category in European popular and scholarly literature. In the nineteenth century the previous trend of scholars to study the languages, religions and cultures of the Orient now took the form of a developed scholarly discipline and was institutionalized with Oriental studies departments in major British, European and American universities. These departments were funded by governments and focused on the politically oriented intervention and study of the lands of the Orient. It opened a pathway for the West to enter the East with apparent purposes of cultural, ethnic or religious studies. This period was termed as ‘Oriental Renaissance”. School of living Oriental languages was established in Paris in 1795. Silver de Sacy who taught at this school helped lay the foundations of Modern Orientalism. Asiatic Society established in 1821 provided a platform for the scholars and others interested in the study of Asia and Near East and Islam. The Society funded scholarly meetings and publications. American Oriental Society established in 1840s facilitated in building networks to link scholars around the world. The first International Congress of Orientalists met in 1873 after which meetings were held regularly. Nineteenth century saw the process through which Europe exerted its influence on the world. The two spheres of influence which Europeans focused on were political and economic. France and Britain continued to exert influence in India and South East Asia just as Russia had expanded into Central Asia a century ago.

Zachery Lockman in Intending Visions of the Middle East explores the growth of Western impressions about the Orient and generation of Western image of the Orient and stereotyping of the orient was linked in complex ways with the simultaneous growth of the European, British and then American power over the Muslim lands.

Just like in 19th century the academic orientalism was linked to extension of European power in Muslim lands, similarly establishment of departments of Middle Eastern studies in American universities and huge fundings from government and private agencies and corporations to promote these studies was linked with the emergence of US as a global super power and its deepening involvement in the Middle East.

It can be easily seen that Europeans understanding of Islam and Muslim societies in Medieval era helped shape power relations between Europe and its neighboring Muslim world. In the same manner in the nineteenth century expansion of knowledge about the Orient and stereotyping of the Orient was linked with the European and British power over the Muslim world.

During the nineteenth century Orient was understood through the study of classical texts anthropology and by understanding the culture and history of a particular period. Orientalists also focused on the linguistics and studied the relationship of various Oriental and Occidental languages to one another. Learning of Oriental languages was a matter of pride for European scholars. Most famous European scholars were all well versed in Arabic language which enabled them to explore the classical texts. Not only classical texts were interpreted but Orientalism also made its way through European art and literature. Islamic concept of polygamy and harems of the Ottoman Empire were portrayed in paintings in the form of nude Muslim women, thereby establishing moral superiority of the West over the East. All this portrayal and imagery does not really mean that all every Orientalist was a conscious agent of imperialism or justified colonialism. But this definitely implies that the Orientalists in general were influenced by such depictions and such assumptions implied Western superiority and Eastern inferiority. This distinction was made very sharp in order to gain political strength and influence the minds of general public through literature. Educational institutions and the literature one reads and in today’s world whatever is projected through media such as television serials, talk shows and Films helps in setting a mindset of the public and pave a way for the forthcoming political agendas which otherwise might not be acceptable to the world at large. The prime example of consequences of such imagery is the US
intervention in Afghanistan by portraying Muslims as terrorists and backing up this image of Muslims with the conception of Jihad in Muslim religious literature. These scholars of the Occident gave little attention to how the controversial Islamic concepts of status of women, polygamy, jihad, hudood punishments and later the concept of democracy were interpreted by the Muslim scholars. They tried to understand these concepts in their own perspective and gave their own authoritative judgment on these issues. They could neither see wisdom behind these nor could understand the true perspective of Muslim scholars. The major reason of departing was attributed to Muslims being conservative and lacking in logic as well as morally incorrect. The campaign did not end here but the thrust of literature on Muslims and Middle Eastern culture by the West was so strong that even the Muslims (general public) were convinced by the how the West characterized the Muslims and Islamic concepts. There was one major reason of this dominance of Western literature or Western scholarship and that was the ‘Language’. European scholars studied the languages of the Orient and thus were able to explore their classical texts which they referred to in their scholarly writings. This made an impact on the educated Muslims and the same impact was transferred to those who were not so literate. This should have encouraged the Muslims to learn the languages of the Europeans and the British to understand them better but instead Muslims avoided learning of these languages even for the sake of gaining knowledge. English and French were made international languages and were a medium of communication internationally. Besides this, vast amount of literature was being produced in these languages especially the legal codes and statutes of the colonized states. Even then language remained a barrier. Prime example of this is the Muslims of Indo Pak sub-continent who were in turn deprived of important government positions and lagged behind the Hindus.

The division of the world into West and the East was initially based on religion and later on culture but gradually European and American thinkers began to argue that the cultural superiority of the West was not simply due to their superior values but due to the superior biological traits of the white race. This supposition was put forward by the scientists and the scholars and shaped Orientalist scholarship and the world was now divided into a biologically superior white race against biologically
inferior race to which belonged the inhabitants of Africa and Asia. Many scholars disagreed to this biological distinction and divide claiming superiority but Euro-American discourse of the world was influenced by racial ideology.

Colonialism had a strong link with Orientalism and Europe was threatened by the idea of Pan-Islamism on the pattern of pan-German or pan-American. They feared that pan-Islamism would be instrumental in mobilizing Muslims across the globe against colonialism. Zachery Lockman states in ‘Contending Visions of the Middle East’ that the nineteenth century Orientalists had “no direct involvement in policy making”. But scholars in 1970s and after that argued that Orientalism as an intellectual enterprise was linked to European colonialism. However we cannot deny that the individual Orientalists were ready to put their services for their country’s colonial ambitions. Silver de Sacy advised French government on Islam, Snouck Hurgronge aided Dutch government to formulate policies in Muslim Indonesia and Russian Orientalists helped Tsarist government to pacify and control Muslim subjects.

Edward Said argues that there is a difference between knowledge of other peoples aimed at self-affirmation and for the purpose of control and authority over others, and on the other hand knowledge which is the result of compassion and careful study with a will to understand each other for the purpose of co-existence.

“It is surely one of the intellectual catastrophes of history that an imperialist war confected by a small group of unelected US officials (they”ve been called chicken hawks, since none of them ever served in the military) was waged against a devastated Third World dictatorship on thoroughly ideological grounds having to do with world dominance, security control, and scarce resources, but disguised for its true intent, hastened and reasoned for by Orientalists who betrayed their calling as scholars.”

Analysis

An analysis of Orientalists writings on Islam and Islamic societies since pre-colonial to the present era confirm persistence of common paradigms in their thoughts which reflects in their writings. Whether it is John of Damascus writing in the Umayyad era or Gibb and Lewis writing in the contemporary era reflect their contempt for Islam and Muslim societies. Their writings are ahistorical and political rather than intellectual. Today we see numerous political and economic agendas such as the gulf oil and U.S. efforts to assert themselves as a super power in the world which drives their scholars to portray Muslims and the Arab World as different and inferior from the West to justify their dominance and have an authority over the East and the Middle East. This bias and lack of intellectual writings has barred Western societies from true understanding of Muslim societies. Most popular contemporary image of Muslims as terrorists in the name of Islam is the product of Western political interests coupled with intellectual efforts of leading orientalists such as Bernard Lewis and many others. But Orientalists alone cannot be blamed for this imagery. It is also a prime responsibility of the Muslims and Middle Eastern societies to understand the true spirit of Islam and portray themselves and Islam in a positive manner by their intellectual efforts. Media which translates the thinking and scholarships has been greatly instrumental in this image building process. This can only be made counterproductive by and intensive intellectual campaign by the Muslim World to show the true face of Islam and positive elements and progressive achievements of Muslim societies. The Muslims must understand where they stand today and steps are to be taken by them in order to strengthen themselves as a nation and how to rectify their image in the face of the world. Use of positive scholarship goes hand in hand with achieving political objectives and national interests. Muslims have a rich history of intellectual achievements and of ruling the world in medieval ages. Their history should be revived in a positive manner and the contribution of their religion in the expansion of Muslim lands into Roman and Persian empires is acknowledged.

If the dichotomy of East and the West can be used by the West to the detriment of the Muslims it can also be used the other way round, for the West also suffers from its shortcomings in history and politics. The need is to portray the image of
the East and the Arab world by the Muslims themselves rather than being a play thing in the hands of the Western world to be portrayed according to their wishes.
“It is not really faith that is in question here, but knowledge: it is not the attitude to God, but the attitude to law. The essential difference in the Oriental mind is not credulity as to unseen things but inability to construct a system as to seen things….. The difference in the Oriental is not essentially religiosity but lack of sense of law.”\textsuperscript{111} 

\textit{Duncan MacDonal}

\textbf{Introduction}

Islamic law remains one of the earliest and most highly developed areas of Orientalist scholarly production. We have discussed Orientalism at length in the previous chapter and the discussion now advances to Islamic law which is the main theme of this dissertation. Why it was important to discuss and analyze Orientalist scholarly tradition before we proceed to the discussion on Islamic law in Western scholarship is rightly identified by John Strawson. He says that,

“...the 20th century critiques of Islamic law remain within the Orientalist problematique, where Islamic law has been represented as an essentially defective legal system.”

The scholarship of prominent Western Orientalists such as Hegel, Marx and Weber affirm the superiority of Western laws and Western civilization.

Extensive scholarship on Islamic law by Western scholars began during European colonial expansion and Modern discipline of Islamic legal history was laid down in mid nineteenth century. Colonial administration decided constitutional destiny of its colonies and European Law regulated all important commercial transactions. Though remaining law was left to the colonies but it was used to secure colonial rule in their regions. Laws were used to reflect colonial preoccupations more accurately than indigenous norms. In “Quest for Origins or Doctrine” (2003) Hallaq too draws connection between European colonialism and increasing Western interest in study of origins and early development in Islamic law.

In Orientalism Said does not deal with law in particular but makes only a passing reference to the work of Sir William Jones (1746-1794) whose official work was to translate codify and implement the indigenous laws of the sub-continent. Said also refers to Ignac Goldziher but does not deal with his work at length. Hallaq in “Quest for Origins” proposes that he wishes to do for Islamic law what Edward Said has done for Islamic Studies.112 What concerns Hallaq is that “how the “Orientalist project” has appropriated Islamic law as a field of knowledge and specifically how this project has dealt with the question of law's origins”113 Mayer also refers to Said’s critique of Orientalism however, she opines that it should not be extended to law, “Said’s idea of Orientalism, is not a concept developed for application to the field of Law or for evaluating whether governments of nations are adhering to international legal norms.”114

Mayer appears more concerned with Said’s focus on literature, than with his methodology.

Islamic Legal Orientalism started exerting its influence in two ways in the eighteenth and nineteenth centuries.

- Firstly, through colonial administrators by application of laws in their colonies
- Secondly, through scholarly writings by Orientalists to influence the literary circles in particular and masses in general.

The British colonial administrators in order to establish their authority over the sub-continent instituted their law officers, translated and interpreted Islamic legal codes and applied Islamic law in consultation with the natives. This is effort is termed as “Applied Orientalism”, it deals with the impact of Orientalist attitudes on colonial governance and law, how the indigenous and religious laws were interpreted and applied, and, the appropriation of Islamic legal texts and use of Islamic law to establish their authority in consonance with the elites of their respective colonies. As mentioned in the preface, although applied legal orientalism extends to Chinese law\textsuperscript{115} Tsarist Central Asia,\textsuperscript{116} colonial Malaya\textsuperscript{117} and French colonization of Algeria, Tunisia and Morocco\textsuperscript{118} our discussion will be limited to applied Islamic legal orientalism in British India only. In the realm of applied legal orientalism in British India leading names are of Sir William Jones (1746-1794) judge of Supreme Court, Calcutta, Warren Hastings (1732-1818) the first Governor General of Bengal Lord Macaulay (1800-1859) who served on the Supreme Council of India from 1834-1838 and Sir Alfred Layall (1835-1911) Governor of North Western provinces of British India. Macaulay represents Orientalist sense of

superiority in these words “A single shelf of a good European Library was worth the whole literature of India and Arabia,”119

John Strawson120, Michael R. Anderson121 and Alexander Morrison122 lay emphasis on “Applied Orientalism”. Said and Strawson both claim that very little of this Orientalism has been merited serious scholarly attention. Ebrahim Moosa contends that Said surely misread legal practices as scholarly productions which in his view only had symbolic significance. He understated the interest of colonial officials in legal writings and translations. Ebrahim Moosa further indicates that there was significant overlap in the approach and methodologies of Islamic law between Muslim ‘Ulamā’s and Orientalists. The ‘Ulamās and modernized elites in colonized Muslim countries collaborated with the colonizers to enforce different modes of Islamic law. The legacies of both colonizers and colonized were intertwined.123 If “Legal Orientalism” ever had a far reaching and invidious effect on discursive and existential domains, then surely it was in terms of Islamic and customary laws.124 These colonial administrators had mastered oriental languages which they used for the purpose of translations.

Hamilton (1876-1961) translated Hedaya, Jones translated Sirajyah and Baillie codified “The Digest of Muhammadan Law” and translated Sara’i al Islam. All these Orientalists were colonial administrators and worked on the law codes and aimed at implementation of Muslim and Hindu laws in the subcontinent.

120 John Strawson ‘Encountering Islamic Law’ (2000)
124 Moosa, Ibid., p. 6-7.
The second type of Legal orientalism in Islamic legal perspective focused on the origins and historical development of Islamic law and involved the study of the first three centuries of Islamic history and Islamic legal development. Leading European and British orientalists whose writings shaped the contours of theoretical and historical development of Islamic law are Ignac Goldziher, Joseph Schacht and John Wansbrough. These scholars were historians and philologists and they used their skills to understand the culture of Muslim societies and explore the history of Islamic law. It was with the work of these orientalists that the tradition of Islamic legal Orientalism started. In the works of Ignaz Goldziher (1890), Joseph Schacht (1950) and John Wansborough (1970) “first the Hadith and then the Qur’ān have been (or so it is argued) separated from the lifetime of the Prophet.” These Orientalists focused on the historical development of Islamic law and its origins. Key issues in their discussion are the relationship of Islamic law with Qur’ān and Prophetic sunnah, dating the beginning and end of Islamic legal development emergence of hadith literature as a source of Islamic law, assumptions as to the fabrication and back projection of Prophetic hadith and the influence of Jewish, Roman and Persian laws as well as Umayyad practices in shaping Islamic law.

In both these approaches, applied as well as theoretical, Islamic law was misappropriated; it reflected Western cultural and political attitudes towards Islam. The essentialist elements of this scholarship were transmitted from the 19th century till today and the paradigm for the study of Islamic law remained uniform. Hallaq argues, that if legal Orientalism is a paradigmatic doctrine, then it follows, logically, that this doctrine has “little to do with the particulars of diverse positive scholarship” and as a field of knowledge this body of knowledge is “essentially imperialistic.” 125

The difference between these two groups of Orientalists was that the first group of Orientalists was the colonial administrators who were faced with the immediate task of ruling their colonized subjects. They operated from and resided in the societies of the colonized people, this land and its societies were alien to them. They had achieved political supremacy over the subcontinent and were now faced with the task of managing

125 Hallaq, op.cit., p.3.
them as rulers. Implementation of laws was an important aspect and the rulers were alien to the norms, customs, laws and religious affiliations of the heterogeneous communities living in the sub-continent. They used local, religious and customary laws for smooth governance and to achieve harmony in their administrative affairs. The second group of Orientalists focused on the study of Islamic legal history. They themselves were neither colonial administrator nor indirectly involved in ruling the colonized people, so application and implementation of laws was not their primary concern. They exploited classical texts of Islamic law to understand and reinterpret the theoretical aspects and history of Islamic legal development. They tried to establish their supremacy over the Orient by undermining the Islamic legal system and demonstrating it as inferior, borrowed, fabricated, deficient and lacking in law and reason.

What was common in the efforts of both genres of Orientalists was that they read, interpreted and translated the classical Arabic texts on Islamic law but to their own benefit and neglected the areas of International law, Constitutional law and Commercial laws of Islam. The colonizers invoked European International, Constitutional and Commercial laws for smooth governance and did not explore Islamic laws in these areas. On the other hand Orientalists studying the early history of Islamic legal development focused their attention on the two primary sources of Islamic law Qur’ān and Ḥadīth but their studies were shadowed by ancient orientalist paradigms. They eventually achieved the aim of projecting Islamic law as a deficient legal system incapable of being compared with the European legal system. The consequences of this biased and racial discriminatory position and non-scientific writings and researches which were short of objectivity has today generated heated debates on authenticity of Islamic legal sources and advocate non-democratic, non-humanitarian and non-pluralistic nature of Islamic law and Muslim societies. The West today boasts that they are the champions of democracy, human rights and pluralism and they have a right to rule the East to teach them these essential norms.
Applied Legal Orientalism

David Powers points out that, “Surprisingly, students of Orientalism have devoted little attention to the colonial views of Islamic law—that is, to the attitudes and assumptions that underlay their writings and interpretations or to the impact of those views on the development of Islamic legal studies as a discipline.”\textsuperscript{126} John Strawson argues that English narrative of Islamic law can be traced to the British Imperial engagement with India in 18\textsuperscript{th} century.\textsuperscript{127} Similar views are expressed by Anderson; according to him Anglo-Muḥammadan Jurisprudence in British India is a result of British colonial rule in the sub-continent.

The post-colonial states of British India are Pakistan, India and Bangladesh. Since the primary objective of colonizers was to establish their supremacy and control over the colonized states the local and religious laws were used to achieve this purpose. Colonial judges applied religious laws to attain certainty and uniformity therefore they were less concerned about the accuracy of application. They did not pay attention to the flexibility, genuine differences and discretion given to a Muslim judge in deciding cases; instead they imposed rule bound legal system. The mental bent of British lawyers also influenced the method of interpretation of Islamic laws which of course was fundamentally different from the Muslim jurists and lawyers. Colonial rulers had understood that it was inevitable to understand and study indigenous and religious laws of local population as the natives strictly adhered to them in personal matters and it would also help the colonizers to have a better control and smooth administration in these regions.

Regarding International, constitutional and trade laws their perception and adaptation was different and by design colonial rulers introduced their own laws in these areas. Britain being the largest imperial power established itself in Indian subcontinent through East India Company. East India Company had two broad goals, firstly to extract

\textsuperscript{126} David S. Powers, ‘Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India’ 

\textsuperscript{127} John Strawson, ‘Islamic Law and English Texts’ , Law and Critique, vol. VI/1,(1995),pp. 21-38
economic surplus in the form of revenue from agrarian economy and secondly to maintain effective political control. According to Hastings plan of 1772, colonial law courts applied indigenous legal norms in all suits related to personal laws. In 1783, Sir William Jones, a British Orientalist and a jurist was appointed as judge of Supreme court of Calcutta. Jones founded Asiatic Society of Bengal with a purpose to encourage Oriental studies and translations of relevant legal texts. Jones suggested Hastings that digest of Hindu and Muḥammadan law be compiled on the model of “Justinian inestimable Pandects”. Hastings ordered translation of Hedaya from Arabic to Persian by three Maulvis and then from Persian to English by Charles Hamilton in 1791. A number of translation errors were discovered in Hedaya but corrections were made only to the Persian version in 1807. The English version remained incorrect. Furthermore law of inheritance was not translated and added to the Persian and English versions. In 1792 Jones himself took up the task of translating the treatise on Muslim inheritance laws directly from Arabic, al-Sirajiyyah a treatise on inheritance was translated directly from Arabic by Jones personally. Although produced in haste and with imperfect language skills the unrevised 18th century translations remained authoritative. The orientalist efforts of translating and codifying Muslim laws continued and in 1823 the Royal Asiatic Society Published “A Digest of Muḥammadan Laws” which included the translated texts of Hedaya, Fatawa-e-Alamgiri and Ihna Ashariya, translated by Baiellie. Together these three translations formed textual basis of Anglo-Muḥammadan Law in British India. This significant volume of Anglo-Muḥammadan Law raises questions regarding relationship of law and colonial power and also of bias and validity of these law codes. This orientalist discourse of translation and codification of Islamic law entitled as Anglo-Muḥammadan Law served to secure the allegiance of indigenous elites of the subcontinent professing the religion Islam and it also facilitated the colonizers to smoothly collect the revenues. It also aided in extending the influence of colonial state.

Primary objective behind the Anglo- Muḥammadan Jurisprudence was to adapt indigenous arrangements to implement colonial rule and eventually to collect revenue from the colonies. They presented Islamic law as a set of inflexible set of rules applicable to all Muslims irrespective of their cultures, ethnic backgrounds and affiliations with
school of thought. Colonial judges relied on the native law officers or maulvis and Qādis who provided fatwas to guide the British judges. In 1864 court mualvis were dispensed with altogether. British judges now wanted to apply Islamic law directly themselves for which they relied heavily on limited number of English translations of Islamic law manuals, fatawa compilations and codification of customs by British orientalists and colonial law officers.

The resultant Anglo- Muḥammadan law was an inflexible, orthodox form of Islamic law not practiced in pre-colonial period. Anglo- Muḥammadan scholarship often distorted its subject matter and reflected mental habits of English lawyers which influenced their methods of interpretation. In their search for effective and inexpensive modalities of rule, the British came to rely upon the devices of translation, textbooks and codification to adapt indigenous arrangements to the dictates of colonial control. Given the constraints of language, financing and a limited tradition of scholarship, colonial administrators developed a form of law which was not representative of true Islamic law. Throughout the colonial period, Anglo- Muḥammadan law was taken seriously as a politically sensitive and technically complex subject for legal scholarship. When legal texts were thoroughly codified and applied, reliance was placed on them by colonial judges and the native law officers (‘Ulamā’ s) were suspected. The laws now were applied directly by British judges. Judges relied on unrevised and imperfect translations. Colonial law courts also established their own hierarchy of civil and criminal courts which followed British models of procedure and adjudication.

Though the purpose of the British government was achieved but the process suffered from certain deficiencies. The colonial rule preferred textual sources and the courts endorsed highly orthodox forms of Islamic law not known in pre-colonial period. They relied on limited number of translations from Arabic and Persian texts, a few commentaries and precedents. These translations were not revised thoroughly and many a times they did not convey the true meanings of the original texts. Judges relied on

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the resultant codes for administration of justice; they also suffered constraints of language.

The irony was that the Islamic texts were applied in ignorance of social circumstances. British rulers did not take native norms into consideration while applying these laws and primacy was given to texts over practice and Islamic law emerged as an essentialist static law. The application of laws also reflected British pre-occupations and their indifference towards and ignorance of native norms of the colonized subjects. Anderson rightly concludes that “colonial administrators may never have changed Islamic legal arrangements quite so profoundly as when they were trying to preserve them”.129

**Academic Legal Orientalism**

Majority of orientalists enlisted in the first Chapter were historians, philosophers, philologists and experts of Semitic or Oriental languages. They also had close ties with colonial administrators and policy makers or advised them on culture, religion and ethnicities of colonized subjects. Most of them like Voltaire, Kant and Hume had profound influence on Western thought. In the field of Islamic studies their writings focused mainly on life of Muḥammad (PBUH) and history of Islam. Gradually the trend was changed and the orientalists focused on Muslim societies and their laws. To understand Islamic law they studied the Origins of Islamic law which involved the study of the first three centuries of Islam. History of the first three centuries of Islam posed numerous problems to the West as the only literature available was written by Muslims. Not only this, primary repositories of Islamic history were Quran and Prophetic traditions. Quran and traditions were also the primary sources of Islamic law and Islamic legal history which is the focus of this dissertation.

Western scholars and orientalists delved deeply on the prophetic traditions to trace Islamic legal history in the first three centuries after hijra. Instead of taking the

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129 Ibid., p.15.
traditions as true words of Prophet Mohammad they took the traditions as pieces of historical evidences and statements which reflected the political and cultural aspirations of Muslims living in that period. Owing to their own belief these traditions were not the words of Prophet thus they had no reverence for huge treasure of knowledge which is so sacred to the Muslims. However Prophetic traditions as a historical and legal source for the study of Origins of Islamic law could not be denied by the orientalists.

Orientalists do not agree with the Muslim account of Origins of Islamic law. Instead they propose an alternative account of Origins of Islamic law as proposed by Goldziher and Schacht. Their proposition is that historical, theological and juristic ahadith do not reflect the lifetime of Prophet Mohammad (PBUH) but are a product of the disputes within the community in first and second centuries of Islam. Similarly Quran too is not the product of life time of Muhammad but a reflection of community worship in the first two centuries of Islam. Orientalists do not believe in the process of revelation and consider community as creative agent. They have also shifted the geographical locus of Muslims from Hijaz to Africa, Syria and Iraq.

Within the European world, Islamic legal history, specially its origins has been studied as integral to the orientalist project. The leading text, which has had so much influence on current thinking about Islamic law is Joseph Schacht’s “Introduction to Islamic Law” (1950). It largely draws upon the writings of German scholar Ignaz Goldziher. Goldziher in his “Introduction to Islamic Theology and Law” (1910) raised certain issues which were revived by Schacht in a detailed and systematic manner. Discussions by both these scholars revolve around the Origins of Islamic law, controversies related to the codification of hadith literature in the 3rd century AH and influence of foreign laws in shaping Islamic legal system. Their writings form the basis of Islamic legal orientalism. Entire corpus of hadith literature is labeled as fabricated. Islamic law is said to be representative of the legal practices of Umayyad period and the hadith literature as representation of the aspirations of early Islamic community and not the words of Prophet Muḥammad (PBUH). Both these scholars also allege the presence of foreign elements or influence of foreign laws on Islamic law thereby negating its divine nature and originality. These allegations levied at Islamic legal literature were not
easy for the Muslims to absorb as it shook the entire basis of their theological beliefs and centuries old literary efforts of Muslim scholars. But it is surprising to find that the strongest criticism and response to orientalist scholarship on Islamic law has come not from Muslim scholars but from the Western scholars writing on Islamic law. A detailed discussion on the issues of hadith fabrication and foreign influence on Islamic law will be discussed in third and fourth chapters of this dissertation.

Wansbrough wrote mainly on Qur’ān, since this dissertation does not deal with the Western scholarship on Qur’ān his writings will not be analyzed here. Major issues raised by Goldziher and Schacht are discussed below.

**Criticism on Origins of Islamic Law by Ignac Goldziher**

A systematic and increased interest in writings on Islamic law first began with the publication of “Vorlesungen über den Islam” in 1910, by the Hungarian orientalist Ignac Goldziher. His book was later translated in numerous languages and in English as “Introduction to Islamic Theology and Law”. Another contribution by Goldziher in the field of Islamic law is “The Zahiris” (1884) written in German language and later translated in other languages which was the first scholarly discussion on usūl ul fiqḥ in a Western language. His colleagues did not show much interest in usūl ul fiqḥ so his book on Zahiris was regarded with mere curiosity. The chapter he wrote on Islamic law in his Vorlesungen gained more popularity probably due to the general nature of the work and the issues rose in it about Islam. In “Muhammedanische Studien” Goldziher showed how Hadith reflected the legal and doctrinal controversies of the two centuries after the death of Muhammad (PBUH) rather than the words of Mohammed (Peace Be Upon Him) himself. He was a strong believer in the view that Islamic law owes its origins to Roman Law. Goldziher devotes the second chapter of “Introduction to Islamic Theology and Law” entirely to the development of Islamic law. He begins the discussion on Islam from the point of view of an Orientalist. He adopts the course of historical research to discover the development of Islamic legal thought in the first three centuries of Islam. He refers to a French tale “Sur la Blanche” in which a few educated gentlemen are discussing their
thoughts about history of religions. One of the characters of this story pronounces a
French maxim which means that the founder of a religion is rarely aware of the impact
his achievements will have on history. Goldziher adds that “Muḥammad is very much a
case in point.” While defending Islam against its own pedants he is in fact protesting as a
Jewish liberal against the narrow minded fundamentalist rabbis. He further adds that the
fall of the Umayyads and rise of Abbasids played an important part in the development of
fiqh.

The idea of “back projection into the earlier period” was first given by Goldziher.
He did not use this principle for ahādīth but instead used it to support the idea that
restrictions on public display of religious ceremonies and building and preservation of
worship places/ churches was not the norm of the early period of Islam but was adopted
by the Abbasid rulers such as Umar 11, Mutawakkil and other rulers of like disposition.
He proves his point through historical scrutiny of the facts.

While discussing the legal enforcements pertaining to civil law and economic
relations with non-Muslims Goldziher advocates that forbearance and moderation were
the hall marks of early Muslim society. He supports this point with two traditions from
the prophet, “If someone causes people to suffer in this world, God will cause him to
suffer on the day of judgment”\textsuperscript{130} and “On the day of judgment I myself will act as the
accuser of any man who oppresses a person under the protection of Islam and lays
excessive burdens on him.”\textsuperscript{131} In the notes below the margin Goldziher refers to certain
traditions which reflect fanaticism against other religions. Similarly he mentions more
sayings attributed to Prophet Muḥammad (PBUH) which were rejected as apocryphal
and khabr batil. Goldziher further adds that people like Hanbalites reject basic form of
social toleration even in their relations to Muslims of other views are naturally no less
harsh towards those who profess other faiths. By mentioning divergent traditions on the

\textsuperscript{130} Ignac Goldziher, \textit{Introduction to Islamic Theology and Law} (Andras & R. Hamori, Trans.).

\textsuperscript{131} Ibid., p. 35.

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same issue he tries to convince his readers/audience that every attitude of mind in Islam found expression in prophetic saying.

Another point that Goldziher raises is inefficacy and inability of Qur’ānic teachings and regulations to meet the needs and provide regulations for ever expanding Muslim empire. Therefore Muslims had to rely upon practices and laws of ancient civilizations.

Based on the study of Goldziher’s writings published in early 20th century his major criticism is summarized below:

1. Goldziher ascribes the authorship of Qur’ān to Muḥammad (Peace Be Upon Him) and claims that “The Islam of Muḥammad (Peace Be Upon Him) and of the Qur’ān is unfinished, awaiting its completion in the work of generations to come”\(^{132}\). This statement of Goldziher if taken literally is contradictory to Muslim belief because Holy Prophet (PBUH) proclaimed on the occasion of his last pilgrimage that “Today I have perfected/completed your religion for you.” Whereas Qur’ān is concerned it is the last and final revelation of Allah. According to Muslim belief transfer of knowledge and communication through revelation is the prerogative of Allah’s prophets only and with Muḥammad (PBUH) bearing the seal of prophecy determines the finality of prophethood and end of revelation. But on the other hand establishment of Muslim community, and Islamic institutions the development of fiqḥ and unfolding of Islamic thought which resulted from the work of the subsequent generations shows the pragmatic and progressive nature of Islam and early Muslim community.

2. Goldziher raises another very sensitive issue under the discussion of Islamic law and that is of foreign influences in Qur’ān and Ḥadīth. In Goldziher’s view Islam law was influenced by Roman law and numerous percepts of Jewish and Christian laws and cultural practices had paved their way into Islamic teachings. He says:

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\(^{132}\) Ibid., p.32.
“Islam as it appears in its mature aspect is the product of various influences that had affected its development as an ethical world view and as a system of law and dogma before it reached its definitive, orthodox form.”\textsuperscript{133}

He further adds;

“...the most important stages in its (Islam) history were characterized by the assimilation of foreign influences”\textsuperscript{134}

3. Goldziher believed in the fabrication and back projection of Ḥaḍīth which he expresses in the following words.

“...as spatial and temporal distance from the source grew; the danger also grew that people would devise ostensibly correct aḥādīth with chains of transmission reaching back to the highest authority of the Prophet and his companions and employ them to authenticate both theoretical doctrines and doctrines with a practical goal in view. It soon became evident that each point of view, each party, each proponent of a doctrine gave the form of hadīth to his theses.”

Since Goldziher’s focus was the evolution of religion so his interest was claimed by the growth of Ḥadīth He considered that Ḥadīth contained a nucleus of ancient material which stemmed from the earliest generation of Muslim authorities and is a direct reflection of the aspirations of Islamic community.

**Criticism on Origins of Islamic Law by Joseph Schacht**

Joseph Schacht was one of the last in the tradition of European Orientalism and probably the first in Anglo-American Islamic legal Orientalism. It would not be wrong to say that Joseph Schacht stands at the nexus of European, British and American scholarship. Schacht was born in Germany and was the youngest Professor in University of Germany Albert Ludwigs Universität in Breisgau at the age of 25, he then moved to

\textsuperscript{133} Ibid., p. 4
\textsuperscript{134} Ibid., p. 5.
 Britain during WW-II and was naturalized as British subject in 1947. He moved to Columbia University in 1959 and taught there till the end of his life. While writing on Islamic law he followed in the footsteps of Ignac Goldziher who is considered to be the founder of modern Islamic studies in Europe. Having studied Goldziher he was surprised why his writings and discoveries on Islamic law have been neglected. Goldziher’s studies on Islamic law were resumed and considerably extended by J. Schacht in his two major works, *The Origins of Muhamadan Jurisprudence* and *An Introduction to Islamic law*. Joseph Schacht, states in “Introduction to Islamic Law” 1964,

“Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself” 135

Schacht adopted the methodology of historical research while writing on Islamic law but did not ignore the sociological dimensions in which Islamic law originated, developed and flourished. He was trained in philology and had come from European background where philological techniques were applied to the study of classical Islamic texts to understand Muslim societies. However his approach was neither philological nor theological or juristic. He was aware of the modern trends of social sciences to understand societies and their cultures. His work may be considered as one of the most important works in application of social science techniques to Islam. His writings have had a tremendous influence on academic writings on Islamic law in the Western world and was heavily quoted and referred to in writings on origins and early development of Islamic law till the turn of 21st century.

In 1930s when Schacht was in Cairo he began to gather material for his major work on Islamic law building upon Goldziher and Snouck Hurgronji. (Studies on Qur’ān have been left out of this discussion as it would make the thesis painstaking and a separate discussion is required to analyze Western critique on Qur’ān.) *Hadīth* being the second primary source of Islamic law was taken up by Goldziher. He stated that tremendous growth in *Hadīth* literature and its codification in the third century of Islam accounted for its fabrication and back projection to support legal theories of the jurists,

especially Shafi‘i. He also suggested that Hadith literature was a reflection of Muslim community of that time. Schacht elaborated on fabrication and back projection of hadith literature in a systematic and detailed manner.

The second criticism raised on Islamic law by Schacht was the influence of foreign laws on Islamic law. In the 1950s, he published “Foreign Elements in Ancient Islamic Law,” and “Adultery as an Impediment to Marriage in Islamic Law and in Canon Law,” In these articles he showed how Roman and Canon law has influenced Islamic legal practice and that Islamic law contains Jewish borrowings.

To deal with both these issues Schacht carries out a detailed study and critical analysis of aḥādīth with legal contents specially those concerning family laws. He was able to prove that the entire hadīth corpus was not the product of the life time of Muḥammad (Peace Be upon Him) but in fact expressions of practices and opinions of Muslim community some two to three hundred years after the demise of Muḥammad (PBUH). On the issue of hadīth fabrication his writings include “A Revaluation of Islamic Traditions”, “The Origins of Muhammadan Jurisprudence” and “An Introduction to Islamic Law”.

Until his death in 1969 Schacht insisted that his conclusions only confirmed the original hypothesis of Ignaz Goldziher and the independent investigations of Schacht’s contemporary, Professor Brunschvig. Goldziher’s views, though, were substantially ignored, while Schacht, not Brunschvig, is considered the true author of this historic revision.

Schacht carried out a historical study of the development of Islamic legal theory in his “Origins of Muhammadan Jurisprudence”. His starting point was al-Shafi (d. 204 A.H.) and his legal theory. Shafi’s in his legal theory attaches too much importance to the

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traditions attributed to Prophet Muhammad (PBUH) as compared to other schools of thought. Schacht presumes that *hadīth* were fabricated during the time of Shafi’ to lend support to each and every legal ruling. To incorporate the newly fabricated *aḥādīth* into the *hadīth* corpus new chains of narration were devised which reached back to Prophet Muhammad (PBUH). This resulted in an enormous growth and back projection of fictitious *hadīth*.

The religious legal system of Islam is grounded in the belief that the basis of Islamic law are the legal rulings stated in *Qur’ān*, revealed on Prophet Muhammad (PBUH) as well as on the interpretations and explanations provided by the Prophet Mohammed on these legal rulings which are preserved in the form of *hadīth*. To Muslims *Hadīth* is also a form of revelation i.e *Wahy Ghair Matlu*, in which the content and meaning are revealed but the words spoken are that of Muhammad (PUB) contents of these *aḥādīth* are known as *Sunnah*. *Sunnah* includes the words, actions, tacit approvals and decisions of Prophet Muhammad (PBUH). This entire process spans over the time period starting from first revelation of *Qur’ān* till the end of Prophet’s life. In the absence of Prophet Muhammad (PBUH) his companions would make decisions on the basis of what they knew or heard from the Prophet. Thus the “fundamental revolution brought by the Prophet was the establishment of authority of revelation.”

This fount of knowledge was preserved since the very beginning and the authenticity of each *hadīth* was guaranteed by a chain of transmitters (the *Isnād*). These *aḥādīth* were preserved orally, in writing and in practice by the successive generations over a period of about two hundred years. Prophetic *Sunnah* and *Hadīth* forms the second primary source of Islamic law. The *Qur’ān* and *hadīth*, along with consensus of the scholars (*Ijmā‘*) and reasoning by analogy (*Qiyās*), provided the basis for Islamic law. From Western point of view the generally accepted assumption is that Prophet had only peripheral interest in legal matters. Ansari proved this assumption as invalid and showed that Muslim judicial organization had come into being in the Prophet’s own life time.

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138 Zafar Ishaq Ansari Early Development of Islamic Fiqh in Kufa with special reference to the work of Abu Yousaf and Shybani’ PhD dissertation, (Canada:McGill University, 1966)

139 Zafar Ishaq Ansari, Ibid., p. 23.
advocates the view that Prophet and his companions were faced with many more legal problems than is generally imagined. Lack of recognition of this fact distorts the entire approach to the investigation of development of Islamic law.\footnote{Ansari, Ibid., conclusion}

As stated above, Schacht took up the task of elaborating and interpreting Goldziher’s conclusions. In his pursuit Schacht proceeded to do what Goldziher had not attempted. He erected a completely new structure to explain the origins of Muslim jurisprudence. One major objection on Schacht’s thesis is the use of confusing terminology. He uses the word “traditions” for practices of Holy Prophet (PBUH), practices of companions, practice of successors and Islamic legal thought under Umayyads as popular practice.

Schacht says, to guarantee the authenticity of the doctrines of their respective schools of thought the scholars of local schools started ascribing their principles to earlier jurists of their schools and by a process of this gradual back projection, these doctrines came to be ascribed first to the companions of the Prophet and finally to Prophet Muḥammad (PBUH) and vast numbers of traditions came into circulation. Shafi’s legal theory was based on the principle that nothing overrides the authority of a tradition from the Prophet (PBUH). Shafi also gave a different meaning to consensus; he replaced the local consensus of scholars with the consensus of entire Muslim community thereby making the consensus of scholars of a school irrelevant. By doing so he restricted legal reasoning to analogy.

Schacht also concludes in “Revaluation of Islamic Traditions” that the concept of Medina as a true source of sunnah turns out to be fiction of early 3\textsuperscript{rd} century of Islam. Schacht regarded the entire hadīth corpus as a fiction and proposed a revaluation of Islamic traditions.

Schacht’s propositions and findings stirred the scholars of Muslim community but it is surprising to find that very few scholarly responses to Schacht’s writings came from the Muslim scholars. M.M. ‘Āzmi Published a detailed critique on Schacht from Riyadh. The title of his critique is “On Schacht’s Origins of Muḥammadan
Jurisprudence. ‘Āzmi’s critique is not very popular among Western scholars and is labeled as a polemic. Not only Muslims but many Orientalists showed hesitation in embracing Schacht’s ideas. H.A.R. Gibb and Montgomery Watt suggested that “Schacht may have taken the analysis too far”. Fuat Sezgin too did not agree with Schacht’s findings. The most developed challenge to Schacht came from N.J. Coulson, in his “History of Islamic Law” (1964).

Jeanette Wakin says, scholars in the Muslim world in general are unable to accept Schacht’s discoveries or face their implications. They would either ignore his findings or would bar Western scholars from Hadith criticism on grounds of disbelief and insufficient familiarity. On the whole, the only criticism voiced thus far has been eclectic and lacking in systematic or rigorous thought.141

If Schacht’s views are correct, then a fundamental rethinking of Islamic law is in order. And if Islamic Law is to be rethought, then Muslim society itself may be in for a watershed change. Islamic law is not merely one aspect of Muslim civilization. Rather, it is the acknowledged crown of Islamic society, the queen of Islamic sciences. It is “the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself.” “What theology is for the Christian, law is for the Muslim” Despite the internal variations in interpretation, Islamic law has been the factor which has made that religion into a world-wide social force. In its classic formulation, it continues to encompass nearly all aspects of Muslim life.”142

Joseph Schacht’s views on Origins of Islamic law are summarized below:

1. Joseph Schacht indicated that most of Islamic law, including its sources, resulted from a process of historical development. Whereas classical Islamic jurisprudence claims that legal problems were solved by recourse to the Qur’ān, the Sunnah, ra’y (later rejected), Qiyās, and Ijmā’ in that order,

2. Schacht asserts that the content of Islamic law followed a different sequence. In capsule form, Schacht holds that first, during the period of the Caliphate and in the early Umayyad Empire; pre-Islamic custom formed the bulk of the legal rules in Arabia. This was the traditional “sunnah” that the Arabs had lived under for centuries. At the same time, local custom and the administrative rules of the Umayyads were the law in the newly conquered provinces, creating a second, parallel sunnah. The law in Arabia and the provinces was structured and developed by the newly forming schools of law, first through ra’y, but mostly by consensus. The doctrines arising from the schools formed a third sunnah, called the living tradition of the schools. Soon thereafter, the schools began restructuring much of the law by reference to the Qur’ān. Finally, beginning around 100 A.H. the Traditions of the Prophet began to be fabricated. Eventually, the traditions formed a new and final sunnah, which replaced the pre-Islamic sunnah of Arabia, the mixed custom-administrative law sunnah of the distant provinces, and the living traditions of the schools. The unification of Islamic legal thought occurred under Shāfi‘i, who raised the Traditions of the Prophet to a position of pre-eminence, second only to the Qur’ān.

Thus sunnah followed this sequence: pre-Islamic customs---Umayyad administrative practices---doctrines of legal schools--- traditions from the Prophet (PBUH). Traditions of the Prophet were historically the last authoritative ingredients in the formulation of Islamic law, not the first. Schacht’s unsettling conclusion is that the Traditions of the Prophet were a late invention and that few, if any, are authentic. In fact, Schacht terms the development of the aḥādīth as an “innovation, signifying a purely human rule unconnected to the divine source of law.

3. Expanding on his position, Schacht asserts that the “sunnah” which existed after Mohammad was the same “sunnah” of pre-Mohammed Arabia, with only a few modifications dictated by the Qur’ān. Mohammed (PBUH) himself was not interested in changing much of the traditional sunnah.

4. Law fell outside the sphere of religion and Prophet did not aim to create new system of jurisprudence. He was primarily concerned with reforming religious practices. As the leader of Medina, Mohammed conducted himself in the manner of the old arbitrators, or
hakams, of Arabia: judging cases on an *ad hoc* basis. In Muḥammad’s case, Schacht concedes, the role of the hakam was modified. The traditional hakams did not formulate black letter law as such, but rather decided questions according to their understanding of custom. The decisions of the Prophet, on the other hand, were to have precedential value.” But Mohammed limited his law-giving function primarily to the question of religious duties: “he wielded his almost absolute power not within but without the existing legal system; his authority was not legal but, for the believers religious and, for the lukewarm, political.” Since Mohammad’s primary mission was religious, he “had little reason to change the existing customary *law*. It must be presumed that decisions based on the traditional law continued to be made by the ordinary hakams.143

5. Schacht uses a number of criteria to prove that most traditions were created after 100 A.H. as devices to substantiate particular points of view. First, all authentic early writings of Islamic law are virtually devoid of any mention of traditions. Some early writers even held that “every opinion not based on the Koran, is erroneous.” Second, the early doctrines of the schools of law were almost always traced (usually apocryphally) to an earlier jurist or to the Companions, virtually never to the Prophet.”144 Joseph Schacht’s discoveries have engendered one of the most vigorous debates about Islamic law in centuries. In general, Muslim scholars are somewhat in disarray and uncertain of how to handle Schacht’s conclusions. Western scholars, on the other hand, have been more amenable to absorbing Schacht’s view into their own studies in the field. But both groups contain critics as well as supporters. In fact, it is in the Western group of orientalists where the stiffest challenge to Schacht is raised. This will be discussed in the next chapter.

143 Ibid., p.10.

Response of Wael Hallaq

Wael B. Hallaq has written extensively on the origins and historical development of Islamic law. Few of his recent Publications are:


In Origins Hallaq defines the formative period of Islamic Law and explores what distinguishes the formative era from other historical periods. Quoting Joseph Schacht, he says that until recently it was thought that the formative era of Islamic law ended around the middle of 3rd century. But recent researches have shown that Schacht’s findings were incorrect. Hallaq proposes that the point at which Islamic law came to contain all its major components must be dated to around mid-fourth century. He defines formative period as the historical period in which a legal system acquires four essential attributes. These attributes are:

• Evolution of judiciary and court system
• Elaboration of a positive legal doctrine
• Emergence of science of legal methodology and
• Emergence of doctrinal legal schools

Hallaq says that by the middle of third century only first and second attributes had developed and by the middle of fourth century the remaining two attributes also developed to give Islamic law its final shape. By the end of the first century hijra and the beginning of the second there emerged legal specialists. A group of men who elaborated a legal doctrine that became the juristic foundation of legal practice. With the rise of these legal specialists there occurred a concomitant development in the construction of Prophetic authority, represented by emergence of Hadîth. At the next stage of judicial development, Muslim courts acquired its final shape. Parallel to this development in judiciary some jurisprudential changes occurred. The dynamics of legal authority shifted
from Sunniac practice to acceptance of Prophetic hadith accompanied by the use of Ijtihad and Ray. By the middle of second century all essential features of Judiciary and positive legal doctrine had acquired developed form but legal theory remained in embryo. This legal theory emerged out of the great rationalist – traditionalist synthesis. This in turn gave rise to doctrinal legal schools which was the last feature of Islamic law to develop.\textsuperscript{145}

Hallaq also asserts that Orientalist scholarship on Origins of Islamic law was a direct product of “hegemonic discursive tradition”\textsuperscript{146}. Meaning to say that, this discursive tradition developed during colonial expansion when the West established its political control over the Muslim World and dominated the region culturally and economically. The malevolent effects of this scholarly tradition continued through the present era.\textsuperscript{147}

The aggregate effect of this hegemonic discursive tradition on Islamic law is to give a verdict on Islamic law as a cultural expression heavily indebted to the West. It reflects the cultural and political attitudes of the West towards Islam. Hallaq contends that it is believed by the orientalists that scholarship produced by them is superior to that of an Oriental, no matter how well documented, well- reasoned and sound the latter may be.\textsuperscript{148}

This orientalist scholarly tradition has separated the study of Islamic law from the study of Islam and the study of hadith has been separated from the study of life time of Prophet Muḥammad (PBUH). Whereas in view of Muslim scholars “Islamic law was never considered outside the jurisdiction of religion.”\textsuperscript{149}

Commenting on the views of Hallaq David Powers says that “Hallaq in an attempt to debunk legal orientalist doctrine has fallen into trap of creating a counter doctrine “Anti-Orientalism”.\textsuperscript{150}

\begin{flushright}
\textsuperscript{146} Ibid., p. 30.
\textsuperscript{147} Ibid., p. 30.
\textsuperscript{148} Ibid., p. 21.
\textsuperscript{149} Ansari, op. cit., conclusion
\end{flushright}
Regarding the beginning or the starting point of Islamic law Hallaq says that issues related to the beginning of Islamic law have stemmed more from unproven assumptions than from any real historical evidence. Ansari dates the evolution of Islamic legal science in the last decades of the first century. He gives the example of Ibrahim Nakhai. Nakhai’s legal doctrine testifies the authority of practices and percepts of the Prophet (PBUH) and importance of practices and percepts of the Companions.

Hallaq states the five tenets of Islamic legal orientalism:

1. Islamic law began to develop a century after Prophet (PBUH).
2. Hadith are spurious until contrary is proved.
3. Textual and practical sources of Shari’ah are found in Fertile Crescent not in Arabia
4. Shāfi’i was the first Muslim jurist to establish a personal school of law
5. Soon after Shafi’i died gates of Ijtihad were closed.

David Powers compare Hallaq’s conclusions with that of Schacht and concludes that the conclusions of both scholars on the legal development during first two centuries of Islam are not much different. These differences are minor. On legal borrowings Schacht says Muḥammad borrowed legal institutions from Near Eastern Law. According to Hallaq pre-Islamic Arabs absorbed Iraqi and other Near Eastern legal institutions. Schacht traces the origins of Islamic law to Iraq whereas Hallaq traces the origins to Hejaz. According to Schacht first Muslims ignored the Qur’anic legislations for a century and according to Hallaq Qur’ān served as a legal guide for Muslims from the very beginning although certain Qur’ānic laws were ignored until the last decade of first century. Both scholars agree that first judges and jurists relied heavily on ra’y.

According to Schacht Prophetic hadith began to emerge at the beginning of second century AH. And according to hallaq Prophetic traditions began to emerge between 60-70 AH. Regarding hadith fabrication and back projection Schacht holds that a large number of Prophetic hadith were forged and jurists in Iraq and elsewhere projected their living tradition backwards first to their local figures then to Companions and finally to Prophet (Peace Be upon Him), to which Hallaq also agrees. Schacht assumes that Umayyad administrative practices were transformed into Islamic law whereas Hallaq accepts that
Qādis issued decisions on the basis of established practices including Umayyad Caliphal law.\textsuperscript{151}

**New Trends in Islamic Legal Orientalism**

New trends in Orientalist scholarship on Islamic law are outlined by John Strawson in his papers “Encountering Islamic Law” (1993), “Islamic Law and English Texts” (1995), “Law and Orientalism” (1996) and “Orientalism and Legal Education in Middle East” (2001). In his writings John Strawson argues for recognition of “Legal Orientalism” which has stamped jurisprudence since European Enlightenment. Western scholars have purposefully omitted references to Islamic International and Constitutional laws which illustrates their bias and wishes to belittle and undermine the supremacy of Islamic law. “The consequences of these representations are two-fold; first that Islamic law is constructed as backward; and second that Western legal systems are represented as superior. These constructions are connected to the power relationship between the West and the Islamic world.”\textsuperscript{152}

For Elizabeth Mayer, Islamic law confronts the international legal order. It is not part of it; it is the “other”. By setting up her modernist model, Mayer effectively de-legitimizes Islamic law and therefore, despite her awareness of the issues, sustains a methodology very much in the tradition of the scholars in the 1960”s, who were themselves products of an Orientalist lineage stemming from the eighteenth century. Mayer argues that Middle Eastern regimes are not based on democracy and assumes that European law is fully developed system speaks of Western superiority. European Law is perceived as superior to other laws especially Islamic law by Orientalist administrators and scholars alike. In the nineteenth century they argued for superiority of European culture, in twentieth century Europeans claim to promote human rights, democracy and

\textsuperscript{151} Ibid., p.19.

pluralism, projecting that Islam and Muslim regimes are against these notions. Islamic law is presented as incomplete and inadequate especially when compared to “modern” European and, by extension, International law. The de-legitimizing effect on Islamic law has its mirror image in the representation of European law as a complete, established and definite legal system, legitimate in all respects. This is what Said means by European culture gaining “strength and identity by setting itself off against the Orient”. The assumption that European law is a fully developed system is rather difficult to accept within the European world let alone the ex-colonial territories.

There are three major themes which emerge after studying the history of Orientalism. Firstly religious bias seeded by Christian churches in the medieval era. Secondly, cultural hegemony propagated by European colonizers to justify their rule over the colonized states. Thirdly, American political agenda promoted during cold war and after to establish itself as super power and make use of oil reserves in the Middle East and benefit from the strategic location of Afghanistan and Pakistan with respect to Soviet Union and China. Thus “religion” in the medieval era, “culture” during colonial era and “politics” after the cold war era have been thoroughly used to define power relationships in the history of civilizations.

During the medieval era when religion was the basis of supremacy and Christianity and Islam stood face to face, Christian scholars focused their attention towards the primary textual sources of Islam. Scholarship of this era was fundamentally based upon the criticism of religious texts of Islam, the Qur’ān and Ḥadīth literature. By ascribing the authorship of Qur’ān to Muḥammad (PBUH) and denying the status of Muḥammad (PBUH) as a Prophet, shook the very foundation of the religion Islam. It helped the Christians to prove that Christianity is the true religion and Islam a fiction and enemy to Christianity. Qur’ān and Prophetic sunnah being the primary sources of Islamic law their underestimation also resulted in undermining of Islamic law.

During the colonial era the focus was on cultural hegemony. The stance of orientalist scholarship that Islamic law has been influenced by the Roman, Canon and Jewish laws was the result of establishing cultural supremacy. Claims that Romans, Christians and Jews had well established and comprehensive legal systems meant that
they were civilized societies as compared to the barbarian Arab Muslims. The Arab world was targeted and their stereotyped representations were spread on print and electronic media. One does not find references to International laws and Constitutional laws of Islam in Orientalist scholarship although the text of *Mithaq e Madinah* and Shiābānī”s *Siyar al Kabīr* and *Siyar al Saghīr* are comprehensive scholarships on International laws and guideline for constitutional basis of Islamic community. In the re-editing of *al-hidāyah* in the 19th century references to International law and law of *Siyar* were omitted which illustrates colonial aspirations in constructing the character of legal systems of colonies it occupied. By neglecting and not addressing these very vital aspects of Islamic legal system, Islamic law is projected as a deficient legal system in need of borrowings from foreign laws and incapable of a genuine comparative discourse with fully developed Western legal systems. Colonial phraseology of article 38 of the Statute of the International Court of Justice states that the “law of civilized nations” is a source of International law. It could have stated “major legal systems of the world” instead of “civilized nations” thereby including Islamic law which has equal claim as any other legal system to be included.

In the third theme that is, American political aspirations in the contemporary age of becoming the super power and ruling the world once again Islamic law was used as an instrument by highlighting the notion of democracy, human rights and pluralism. At the turn of twenty first century the terrain of the critique changed from religion to law. Contemporary claims about human rights, democracy and pluralism replaced religious claims put forward by Christian churches and cultural hegemony advocated during colonialism and imperialism. It is portrayed that Islamic law does not stand for democratic constitutions that it is devoid of fundamental human rights and does not offer laws that cater for co-existence of pluralistic societies. This image of Islamic law is created and propagated with the help of Western scholarship. Islamic law being devoid of all the above mentioned themes is once again portrayed as backward and deficient and
essentially defective. The problem with this critique is that it replicates the power relationship between Europe (and the United States) and the Islamic world.153

“The European systems of law have been used to imprison many who fought for these principles in the colonial world. The European age of the Enlightenment produced the American constitution that permitted slavery, and confined the vote to white male property-holders of the Christian religion. The Western Human Rights movement even today is largely a male rights movement. European societies (and here I include the United States) moved extremely slowly to extend the formal vote to women. Indeed France, the home of the Enlightenment, did not grant women the right to vote until after the Second World War.” 154

It should not be forgotten that during twentieth century European regimes such as German Nazism, Russian Stalinism, Iberian Fascism, were opposed to the conception of human rights, democracy or pluralism.

Issues raised by the West against Islamic law and society in the contemporary era are:

- Democracy
- Human Rights
- Pluralism

Democracy

Muslim scholars like Professor Khalid Abu al Fadl have written extensively on Human rights and concept of democracy in Islam. In view of Khalid Abū al Faḍl democracy’s moral power lies in the notion that citizens of a state are sovereign, these citizens represent their sovereignty by exercising their right of electing representatives. In democracy people are the source of law and people are the sovereign. Thus democracy

154 Ibid.,
poses a formidable challenge for Islam. Islam does not accept human authority for God’s sovereignty. In Islam Allah is the ultimate sovereign and source of legitimate law. The question posed to Muslim societies in the contemporary world is how can human authority be reconciled with God’s sovereignty? Professor Fadl answers this question by explaining “that democracy and Islam are defined by their underlying moral values and attitudinal commitments of their adherents”. By focusing on the fundamental moral values thus Professor Fadl indicates that Muslim political system can be developed into a democratic system.

Thus according to Khaled abu al Fadl democracy and Islam are compatible. Qur’ān itself does not specify any form of government but identifies certain social and political values that are central to Muslim polity. Fadl says that Muslims should promote that form of government which promote pursuit of justice (49:13, 11:119), establishment of non-autocratic and consultative method of governance and institutionalizing mercy and compassion in social interaction (6:12, 6:54, 21:107, 27:77). Abou al Fadl contends that “democracy is an ethical good and pursuit of this good does not require abandoning Islam.”

**Human Rights**

Human rights are those fundamental rights to which a person is entitled by virtue of the fact that he is a human being. Human rights are universal as well as egalitarian and are a cornerstone of public policies around the globe. The human rights movement developed as an aftermath of WW-II and the Holocaust (mass killing of Jews during the World War II). As a result of these catastrophies United Nations General Assembly in 1948 adopted Universal Declaration of Human Rights. Article -1 of this declaration states:

“All human beings are born free and equal in dignity and rights’.

This phrase carries the same concept as is expressed in verse 13 of surah 49 (al-hujrāt), its translation and text is reproduced below:
"O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted."\textsuperscript{155}

Similarly all articles of Universal Declaration of Human Rights can be conveniently related to verses in Qur’ān as fundamental teachings of Islam. It is surprising to see that with such explicit teachings of Islam why today the Muslim world is being labeled as the oppressors of human rights and this concept is being extended to Islamic law. With regard to women’s rights Islamic penal code is criticized for giving undue punishments to women and for discrimination in case of evidence. Women rights are also linked with human rights in the contemporary era. Women of Muslim countries and Muslim societies are being projected as oppressed women whose rights are not granted to them.

**Pluralism**

Pluralism is the acknowledgment of diversity. This term is used in various meanings. Here we are concerned with political and legal pluralism. Modern democratic governments consider pluralism to be in the interests of its citizens. Pluralism is also considered to be a theoretical standpoint on state and power, which suggests how power is distributed in societies. Political pluralism also leads to cultural pluralism which represents a democratic nation which sustained and was sustained by many cultural traditions. Pluralism is connected with a hope that this process will lead to realization of common good that is best for all members of a society. To achieve this purpose all groups of a society have to agree to a minimal consensus regarding shared values which bind different groups to society which is aimed at conflict resolution. Most important values of

\textsuperscript{155} Al- Qur’ān 49:13
A pluralistic society is the manifestation of mutual respect and tolerance. The objective behind a pluralistic society is to allow different groups to co-exist without any one being forced to assimilate to anyone else’s position. It also aims those conflicts between different groups to be resolved by dialogue which leads to compromise and to mutual understanding which is essential for co-existence of diverse communities.

The concept of legal pluralism arose when colonial governments established themselves and the need arose to develop a legal system in which the laws of the colonizers may co-exist with the traditional laws/ legal systems of the colonized subjects. When these systems developed the idea was that some laws like commercial transactions would be governed by the colonial laws and other laws such as family laws would be governed by traditional laws.

There is a growing concern that traditional laws and Islamic laws do not promote women’s rights. As a consequence Committee on Elimination of Discrimination against Women (CEDAW) has called for unification of legal systems within countries.

Analysis

This chapter discusses the transition of Orientalist tradition to Legal Orientalism. John Strawson, professor of law at University of East London School of Law in his book ‘Encountring Islamic Law’ (2000) draws attention towards the fact that Islamic law is represented as defective legal system by the Orientalists and their scholarship affirms the superiority of Western laws. In 2003, Hallaq in “Quest for Origins or Doctrine” shows increasing Western interest in the study of Origins and early history of Islamic law and European colonialism. He further argues that the Orientalist project has misappropriated Islamic law as a field of knowledge especially the early history of Islamic law. This was due to the fact that Colonizers needed laws to regulate the day to day affairs of their colonies which were not possible without having knowledge of their existing laws. It was also essential to compare the laws of colonies and European laws brought by the colonizers and apply a system which should neither be totally new for the colonies and it should facilitate the supremacy of colonizers. In doing
so colonizers started representing the laws of colonies as deficient and defective established the supremacy of their own laws. Specifically the Constitutional and Commercial laws were implemented by the colonizers and Personal laws were adopted as prevalent in the colonies. Numerous examples can be quoted of this exercise, such as French laws being implemented in Algeria, Malaysia under Portuguese and Dutch colonial rule, Russian control over Central Asia and British rule in the Indian sub-continent. Colonial administrators decided which mode of constitution will be implemented in their colonies and they chose the trade laws which suited them. Legal Orientalism made its way through application of laws and through literary researches in the field of comparative law. Comparison of laws always projected Western laws as superior to the laws of colonies. This chapter carries the detail of how laws were applied by the colonial administrators in the sub-continent under British rule. Prominent names of the colonial administrators who were instrumental in applying legal orientalism in British India were Sir, William Jones, Warren Hastings, Alfred Layall and Lord Macaulay. It also deals with appropriation of Islamic legal texts by the Orientalists such as Hamilton, William Jones and Baillie. These Orientalists and colonial administrators had mastered Oriental languages and studied classical Islamic legal texts. They also sought guidance from various Ulemas for the interpretation of the texts and implemented according to their own discretion. Ebrahim Moosa rightly indicates in his article ‘Colonialism and Islamic Law’ (2009) that most undesirable effects of legal Orientalism are seen in the application of Islamic and customary laws. Digest of Mohammadan laws was the result of the efforts of these colonial administrators which helped the administrators to collect revenues from the colonies and implement their rules. Since the primary objective of colonizers was to implement their rule therefore their sincerity towards application of Islamic laws and interpretation of its legal texts. Islamic law was applied without consideration to native norms and social practices. Major reason for such an application is that Islamic law was being implemented by foreign rulers who had no religious affiliation with Islamic law. It was natural that they would only use the laws of the colonized state to achieve their motives only. The responsibility of justified application
and rational interpretation of Islamic laws lay on the shoulders of Muslim jurists and scholars.

Besides this writings of Goldziher, Wansbrough and Schacht also had far reaching effects on Islamic law. These scholars focused their attention on the philosophy of Islamic law and its Origins. Their studies and researches raised major controversies in the academic circles and left a lingering debate conflicting with ideas proposed by Muslim scholars and *fuqaha*. They attacked the very basis of Islamic law by claiming that the primary sources of Islamic law are documents not of the time they claim to be and are a collection of legal norms, customary practices and dogmatic beliefs carrying foreign elements. They totally rejected the idea of revelation and religious belief in the authenticity of these sources and proposed historical research to understand the Origins of Islamic law. On the whole the outcome and findings of the Orientalists working on Islamic law were criticized by many Western scholars. They tried to show that this body of knowledge was imperialistic in nature and had nothing to do with positive scholarship.
CHAPTER 6

WESTERN SCHOLARSHIP ON ḤADĪTH

Introduction

Leading Orientalists’ views on Islamic law have been discussed at length in the previous chapter. Writings of Goldziher and Schacht became the basis for future study of Islamic law and raised considerable amount of discussion among the Muslim and Western scholars. Muslim writers responded in the form of rebuttals and wrote on the authenticity of Prophetic traditions. It has also been observed that the trend of Western scholarship has changed over a passage of time from direct criticism of Muslim hadith literature to counter-criticism by Western scholars of previous Western scholarship. This change seems to go hand in hand with the changing political agendas of the West. This chapter will analyze the critiques and responses to Schacht and Goldziher’s scholarship on Hadith written by Western and Muslim Scholars

Firstly a brief overview of criticism of Hadith by Western scholars of 19th and 20th century is given. Views of two towering skeptics of hadith, Goldziher and Schacht are discussed in detail. This is followed by concluding major assumptions of Western scholars on Muslim hadith literature. These assumptions (mainly three) are then analysed in the light of writings of twenty first century Western hadith scholars. Most prominent scholars of Hadith chosen from Western academia are Harald Motzki and Jonathan Brown selected for their most recent and extensive scholarship on Muslim hadith
literature. Their arguments are substantiated with rebuttals and responses of Muslim scholars. Finally an analysis of the entire discussion concludes this chapter.

When we look at Western criticism on the early history and Origins of Islamic law, i.e during of first three centuries after Hijra, the debate revolves around codification of Ḥadīth literature, emergence of classical schools of fiqh and political developments from the era of Prophet till the Abbasids. Western scholars have conducted inquiry in the first three centuries of Islam on historical and sociological grounds.

Muslim Ḥadīth literature is codified in the six canonical compilations, these are:

1. *Ṣaḥīḥ Bukhārī* (by Imām Bukhārī, d.256)
2. *Ṣaḥīḥ Muslim* (by Muslim Ibn-e-Hajjaj, d.261)
3. *Ṣunan Abū Dāwood* (By Abū Dawood, d.275)
4. *Ṣunan Nisai* (by al Nisai, d.303)
5. *Ṣunan Majah* (by Ibn-e- Majah, d.273)
6. *Jamia Tirmizi* (by al Tirmazi, d.279)

Parallel to this, is the emergence of the classical schools of Islamic fiqh, namely Ibadi, Hanafi, Maliki, Shafi, Zahiri, Hanbali and Jaferi schools, development of their legal theories and their crystallization into formal schools of thought. Alongside this, is the political development from era of the Prophet to four Caliphs and then to Umayyad Caliphate and finally to Abbasid Caliphate. Encounter with the Eastern Roman Empire and Persian Empire and establishment of Islamic state over these empires is also witnessed during this era. Due to the above mentioned factors emergence of a body of legal percepts known as “Fiqh “ or Islamic Law has not only attracted the attention of Muslim intellectual activity but has also fascinated Western historians and social scientists.

The study of these first three centuries of Islam entails an in depth understanding of revealed texts and derivation of legal material from them. Gradual development of extra
scriptural material in the form of Prophetic traditions and their compilation in canonical form. Historical and political scenario in the first three centuries and impact of Muslim invasions of non-Muslim empires puts forward following two important assumptions regarding Islamic law, posed by Western critics.

1. Flawed and fabricated compilation and codification of Prophetic traditions (second primary source of Islamic law).

2. Influence of foreign laws, pre-Islamic customs and Umayyad practices on the development of Islamic law. Meaning thereby that Islamic law is neither divine nor original.

Both these assumptions are intertwined because it is assumed by the Western critics that foreign elements paved way into Islamic law through Ḥadīth literature.

Ḥadīth in 20th Century Western Scholarship

Criticism by Western scholars on Ḥadīth literature is summarized below with special emphasis on views of Goldziher and Schacht. Thus the study is narrowed down from general discussion about Islamic law in the writings of Western orientalists to their focus on the second primary source of Islamic law, the “Ḥadīth Literature”. This is presented in chronological order in the preceding pages.

Before Goldziher a number of Western scholars commented and published their viewpoints on Ḥadīth. Views of nineteenth and twentieth century Western scholars on Ḥadīth are summarized below. This summary largely draws upon the article on Ḥadīth literature written by Fatima Kizil.155

Disagreement on the issue of authenticity of Hadith literature by orientalists is observed even in nineteenth century. Gustav Weil (1808-1889) argued that all the aḥādīth in al- Bukhārī must be rejected. Aloys Sprenger (1813-1893) responded to Gustav’s

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assumption and contended that the Ḥadīth literature contains more authentic material than fabricated events. In “The Life of Muhammad” William Muir (1819-1905) has put forward a number of criteria to establish the authenticity of aḥādīth and has argued that in spite of the fact that distortions exist in Ḥadīth literature but it is a large store house of historical facts of the beginnings of Islam. According to Reinhart Dozy (1820-1883) hadith compilation carried fictitious literature because hadith codification began in the second century.156 That is almost a century after the demise of Prophet Mohammad.

Goldziher on Hadith

In Goldziher’s view majority of hadith were products of religious, historical and social conditions prevalent in the first two centuries of Islam. He supported the idea that people produced fictitious hadith for political and other purposes. They not only produced fictitious hadith but modified the existing hadith in order to support their respective positions or to justify their views. Goldziher also accuses Muslim scholars for relying solely on isnads, and showing negligence towards hadith content.


“We should not rule out the possibility that Hadith which we know from the transmission of later generations now and then contain the nucleus of ancient material, material that may not stem directly from the mouth of Prophet, but that does stem from the earliest generation of Muslim authorities. On the other hand it is easily seen that as spatial and temporal distance from the source grew, the danger also grew that people would devise ostensibly correct aḥādīth with chains of transmission reaching back to the highest authority of the Prophet and his Companions, and employ them to

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authenticate both theoretical doctrines with a practical goal in view. It soon became evident that each point of view, each party, each proponent of a doctrine gave a form of hadīth to his thesis, and that consequently the most contradictory tenets had come to wear the garb of such documentation. There is no school in the area of ritual, theology, or jurisprudence; there is not even any party to political contention that would lack a hadīth or a whole family of aḥādīth in its favor, exhibiting all the external signs of correct transmission.157

Commenting on the growth of hadīth he further adds that,

“Questions of authenticity and age pale in significance when we realize that hadīth is the direct reflection of the aspirations of Islamic community ....... For not only law and custom but theology and political doctrine also took the form of hadīth. Whatever Islam produced on its own or borrowed from outside was dressed up as hadīth. In such form alien borrowed matter was assimilated until its origin was unrecognizable. Passages from Old and New Testaments, rabbinic sayings, quotes from apocryphal gospels and even doctrines of Greek philosophers and maxims of Persian and Indian wisdom gained entrance into Islam disguised as utterances of the Prophet...........It is among the most fascinating problems of research for those who devote their attention to this province of religious literature to track down the widely different sources from which this motley material springs and to understand the trends and aspirations that it documents.”158

This was stated by Goldziher in 1907 in one of his lectures on Islamic Law, which he was to deliver in American universities. Owing to poor translation these lectures could not be published in the form of a book and instead his views were published in “Vorlesungen uber den Islam” in 1910.


158 Ibid., p. 40-41
Snouck Hurgronji (1857-1936) agreed with Goldziher’s assertions about Hadith. To Hurgronji the idea that these *ahadith* can be traced all the way back to Prophet Mohammad (PBUH) was false, he advocated the view that *ahadith* were created by various groups in Muslim community to achieve their objectives.

Henry Lammens (1862-1937) a Belgian Orientalist agreed with Goldziher that Muslim scholars could not notice ‘obvious anachronisms’ in hadith texts and confined their attention to narrative chains (*isnads*) only. Thus they failed to notice obvious logical and historical impossibilities. He also agreed with Goldziher in that Islamic law was influenced by Roman law and these elements of Roman law and other foreign laws were falsely attributed to Prophet Muhammad (PBUH) and his Companions through hadith fabrication, thereby portraying that Islamic law was an original and authentic legal tradition.

David Samuel Margoliouth (1858-1940) believed that the concepts of infallibility of Prophetic traditions and the idea of non-recited revelation (*wahy ghayr matlu*) as falsely constructed theories to strengthen the position of Prophet Mohammad (PBUH) as a legitimate source of law. Josef Horovitz, a contemporary of Margoliouth deviated from the conventional Orientalist assumption that hadith was a product of second century hijra. Horovitz presumed that *ahadith* emerged in the last quarter of the first century and G.H.A. Juynboll also agreed with Horovitz in dating the Prophetic traditions. Although Horovitz differs from his predecessors on the issue of the chronology of the Isnād, he occupies common ground with them in terms of the assertion that Islam contains many elements from other religions and cultures. He describes Islam as “an area where syncretism dominates.”

A Dutch Orientalist Arent Jan Wensink (1882-1939) claims that Hadith literature contained elements of Roman and Jewish law and traces of Christian ethics. He agreed with Goldziher that numerous *ahadith* were created by competing groups to strengthen their point of views. Wensinck assumed that the Qur‘ān was authored by the Prophet Mohammad and the *aḥādīth* were produced by Islamic society after him.
Above summary of views of orientalists of nineteenth century on hadith literature shows that they all shared a common skeptical attitude towards the hadith literature. John Fueck (1894-1974) a German Orientalist carried a different viewpoint from his predecessors. He believed in the originality of hadith literature and supported his view with a logical argument that most of the ahadith were reported from young sahaba and not from Prophet’s Companions. If hadith were fabricated then they should be fabricated in the name of Companions who died earlier.

**Schacht on Hadith**

Half a century later Goldziher’s research and views were carried forward by Joseph Schacht (1902-1969) in his leading treatises “Origins” (1950) and “Introduction to Islamic Law” (1964). Even before the publication of Origins, Schacht’s views were articulated in his article, ‘A Revaluation of Islamic Traditions’. Schacht says that the impact of Goldziher’s research and findings has gradually whittled down and their implications neglected since he published his work. Following in Goldziher’s footsteps, he proposed to reevaluate the entire corpus of hadith literature with a new critical approach. Schacht also borrows from A.N.Poliak that the collection of Islamic traditions is a mass of contradictory views formulated at uncertain times by unknown persons.\(^{159}\) Out of his analysis of the technical legal problems he concludes that the concept of Medina as a true source of sunnah turns out to be a fiction of early third century of Islam. Furthermore traditions from the Prophet did not possess an overriding authority in Iraqi, Madani and Syrian schools of thought who relied heavily on the traditions from companions and their successors.

Schacht tries to give a workable alternative supporting Goldziher’s formula. Describing the methodology he adopted to test the critical approach to Islamic traditions he chooses to follow Legal Historical Method of research. He gives two reasons for selecting this methodology, firstly that the literary sources of law carry us back further in history and they are much more abundant and secondly our judgments on formal and

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\(^{159}\) A.N.Poliak, in AJCL 57, 1940:50
abstract problems of law and legal science is less likely to be distorted if we had a recourse to political or religious history. He adds that Muslim studies are based on historical intuition which needs to be replaced by historical criticism.

Regarding Prophetic traditions Schacht, in his article, “Revaluation of Islamic Traditions” (1949) says

“This assumption should be abandoned that there originally existed an authentic core of information going back to the time of Prophet (Peace Be Upon Him) due to the fact that tendentious and spurious additions were made to the original mass of hadith literature in every succeeding generation.”

On authenticity of Hadith, Schacht goes beyond Goldziher, in his “Origins” he says

“Every legal tradition from the Prophet until contrary is proved must not be taken as authentic…. but as fictitious expression of a legal doctrine formulated at a later date.”

Schacht saw his studies as an extension of Goldziher’s work. According to Schacht it was Shafi (150-204 A.H.) who gave hadith the status of a legitimate source of law gaining an ultimately authoritative position. Schacht assumes that the marfu ḥadīth emerged in the middle of the second century (AH), and hadith belonging to the Companions (mawkuṭ) traditions emerged in the early second century. Furthermore, although he admits that the aḥādīth about theological issues could be dated to an earlier time than the legal traditions, Schacht nevertheless asserts that not all of these aḥādīth can be dated to the first century. In short Schacht became a major figure in orientalist literature, greatly influencing the later scholars - so much so that the subsequent


161 Ibid., p. 149.
generations of orientalists have been divided into either those who accept his claims or those who do not, making him a central figure in the literature on ‘Origins’ of Islamic law.

**Hadith in 21st Century Western Scholarship**

Twentieth century hadith scholarship by Western scholars has been discussed in detail bringing out the contentions of leading hadith critics. A detailed account of goldziher and Schacht brings out most important issues raised in twentieth century scholarship. We shall now precede to the discussion of twenty first century Western hadith scholars. For this purpose work of three hadith scholars of contemporary era is selected namely, Harald Motzki, Jonathan Brown and Eerik Dickinson.

Professor Motzki is a German trained scholar of Islam and he has conducted extensive research on transmission of hadith. He received his Ph D in Islamic studies in 1978 from University of Bonn. He is currently Professor of Islamic Studies in Nijmegen University in Netherlands.

Professor Brown is Associate Professor at Georgetown University in the department of Islamic Studies and Muslim Christian Understanding. He also holds the office of Associate Director of Prince al Waleed Bin Talal Center for Christian- Muslim Understanding. He has also been selected a term member for the Council on Foreign relations.

Eerik Dickinson completed his PhD in 1992 from Yale University in Arabic language and taught at Yale and Hunter College in New York City. He writes on Muslim hadith and has translated Ibn al-Salha’s ‘Muqaddima’.

**Harald Motzki on Hadith**

Harald Motzki’s research also demonstrates that Schacht’s premise that an early scholar’s failure to employ a Prophetic hadith in a debate in which it would have been pertinent somehow proves that this Prophetic hadith did not exist at that time was a
flawed *argument e silentio*. Motzki after consulting sources far more expansive than those examined by Schacht and Juynboll, demonstrates that certain traditions actually appeared earlier than these scholars believed that the *hadīth* existed or did not consider it useful for the argument. Rather than being active forgers of *hadīth* early legal scholars and *hadīth* transmitters such as Zuhri (d. 124) and Ibn-e- Jurayj (d. 150) and SufyanIbn-e-Uyayna (d.196) were reliably passing reports from the previous generation.

Motzki regards Schacht’s thesis “*that portions of Isnāds that extended into the first half of the second century and into the first century are without exception arbitrary and artificially fabricated*” as untenable at least in this degree of generalization. He further states in “*The Origins of Islamic Jurisprudence*” (2002) that an investigation of the Meccan strands of sources leads to the conclusion that roots of legal scholarship in Mecca can be traced back to the middle of 1st century and their further development to the middle of 2nd century A.H. can be ascertained with a stunning wealth of detail that exceeds our dreams. He introduces Mussanaf of Abdul Razzak as San‘ani (d.211) as an important source of history of law. He was a contemporary of Shāfi‘i. This source in contrast to classical *hadīth* collections of 3rd century represents an early stage of development and more voluminous than Mawṭṭā. However the significance of this source lies in the fact that it contains sources from the first half of the second century which are lost as independent works or have not surfaced until today. Musannafs are not originally compilations limited to *hadīth* in narrow sense i.e traditions from the Prophet, rather they contain reports of the statements and modes of behavior of all past generations, including the immediate teachers of the compilers. These Musannafs are potential sources for early history of Islamic law and Islamic Jurisprudence. Musannafs of Abdul Razzaq and Ibn-e- Abi Shyba are broadly structured and not confined to single scholarly tradition. Imām Bukhārī was a student of Ahmad Ibn-e- Hanbal and Yahya Ibn-e- Maʿin, who in turn were the students of Abdul Razzaq.

Motzki notes Schacht’s mistrust of chains of transmission which preceded the individual texts and states that Schacht’s mistrust blocked him from undertaking a consistent source analysis aimed at reconstructing the history of transmission. According to Schacht books surviving from ancient schools of law such as Mawṭṭā of Imām Mālik
include far more authoritative reports from Companions than from Prophet himself. Collections compiled after Shāfi‘i such as the canonical six books and Sunan of Daraqutni (d. 385) were undeniably focused on Prophetic reports. A report in Mawṭṭā may be attributed to a Companion, while a generation later al-Shāfi‘i attribute the same report to the Prophet through a defective mursal Isnād (gap between Prophet and the person quoting him). Two generations later we find the same Ḥadīth with complete Isnād in Shīḥ Bukhāri. This led Schacht to believe that after Mawṭṭā Prophetic versions of reports have been forged. Schacht’s conclusions have been further developed by G.H. A. Juynboll. Harald Motzki however demonstrates that Schacht’s and Juynboll’s conclusions about origins and dating of hadith are problematic.

Motzki challenged the reigning conclusions of Joseph Schacht and the late G. H. A. Juynboll by demonstrating convincingly that their study of early hadith and law used only a small and selective body of sources, and that it was based on skeptical assumptions which, taken together, often asked the reader to believe a set of coincidences far more unlikely than the possibility that a hadith might actually date from the genesis of the Islamic community. Motzki’s work and that of those who have followed in his footsteps have contributed greatly to advancing the study of early Islamic history and law.

Following analysis of Harald Motzki’s research and approach is based on the articles edited in “Analyzing Muslim traditions: Studies in Legal, Exagetical and Maghazi hadith “Published by Brill in 2010. This is the English translation from German, of some very important articles on hadith literature. Contents of the following paragraphs draw heavily on the review of this book by Ahmad al Shamsy.

Harald Motzki introduced a new and badly needed approach to the study of early Islamic intellectual history. To describe his method of analyzing and dating Āḥādīth Motzki coined the term “isnād-cum-matn” analysis. It is based on three main assumptions:

- Firstly, the variants of a Ḥadīth are, at least partially, the results of the process of transmission.
Secondly, the isnāds of these variants of a hadīth reflect, at least partially, the actual course of their transmission.

Thirdly, if the texts of these variants emanating from a supposed common source are both similar enough and seemingly independent, then that source would seem to be an “authentic moment” of transmission.

Behind Motzki’s method lies an even more important assumption, namely, that it is inaccurate to assume that intentional forgery and deception are the most likely explanation for all phenomena of hadīth transmission. Touted by earlier scholars such as Juynboll as the commonsense explanation behind the Byzantine web of hadīth transmissions, Motzki sees “forgery” as less likely in many instances than a number of other realistic and totally predictable factors.

This does not imply that Motzki believes Hadīth to be generally authentic. Motzki is mainly concerned with dating the traditions and assumes that traditions found in surviving compilations carry a history that can be retraced to a certain point in time. Whether hadīth corpus is authentic or forged is not the focus of his research.

Motzki offers a corrective to Schacht’s conclusions in his famous article, “The Jurisprudence of Ibn-e-Shihab al-Zuhri: A Source-Critical Study.” (1991) (This article was revised and translated from the original “Der Fiqḥ des -Zuhri: Die Quellenproblematik” (Der Islam 68). He uses the Musannaf of “Abd al-Razzaq al-San’ani (d. 211/826) to prove that Schacht’s conclusions were tainted by (1) the lack of early Published sources (Schacht relied principally on Malik’s Mawṭṭā) and (2) hypothesis-driven analysis that judged the provenance of early legal material based on overly skeptical assumptions.

Motzki uses the hadīth corpora of two of al-Zuhri’s students, Ma’mar b. Rashid (d. 153/770) and Ibn-e-Jurayj (d. 150/767), as contained in the Musannaf, to shed light on al-Zuhri’s narrations. By comparing them with Malik’s book, he uses his analytical method to strengthen the claim that material attributed to al-Zuhri actually came from him. He argues that in their transmissions Ma’mar and Ibn-e-Jurayj drew on such diverse sources and were so willing to admit both ignorance of who some transmitters
were and difference of opinion within transmissions, as well as between their own opinions and those they transmit, that there is very little indication that they fabricated the material they attribute to al-Zuhri. By solidifying the transmission from al-Zuhri and then showing that al-Zuhri’s material was itself compiled from several sources; Motzki proves that the material dates back to the time of the Companions in the second half of the first hijri century.

This finding of Motzki coupled with that of Azami’s reference to the personal compilation of Qasim Ibn-e- Abū Bakr (d.112 AH) refutes Schacht’s claim that aḥādīth were transmitted orally in the first century A.H. and recording of hadith began only in the second century A.H.

Motzki wrote his most influential article “Whither Ḥadīth Studies” (1996) as a rebuttal to Juyonboll’s claims that Ḥadīth supposedly transmitted by the successor Nafi Ibn-e- e Umar (d. 118/ 736-7) are mostly forgeries by Malik (93-179) and there was no historical relationship between Nafi” and Malik and other narrations transmitted via Isnād Ibne- e Umar- Nafi were not authentic. Juynboll uses argument e silentio to prove the fabrication of Ḥadīth which Mokzki rejects completely. He says that there can be plenty of reasons why a tradition was transmitted from one person to another and not from many to many as in the early Islamic period narrators often did not feel the need to give more than one narration of a Ḥadīth - many narrations simply went unstated. Finally, many of the books that have survived from the early Islamic period and that are not under suspicion of forgery were transmitted by only one Isnād, such as al-Shâfi”i (d. 204/820)’s al-Umm.

Motzki also points out Juynboll” s flawed inferences that Nafi did not really exist as a transmitter. According to Motzki early biographical sources like the Tabaqat of Ibn-e- Sa”d (d. 230/845) do not furnish a great deal of biographical information about Nafi. Motzki also demonstrates that Juynboll’s conclusions are based on his sparse use of hadith sources. Using only the main canonical hadith sources, along with his assumptions about transmission, Juynboll concluded that a hadith attributed to Nafi dealing with zakat al-fitr was made up after Nafi”s time. By studying a much larger number of sources, including vital pre-canonical hadith sources such as the Musannaf of Abd al-
Razzaq, Motzki proves that there were eleven well-established transmitters of this hadith from Nafi. Employing his Isnād-cum-matn analysis, Motzki argues that this multiplicity of sources means that they all drew on one common source: Nafi. Through analysis of “Nafi’s case” by Motzki is an important contribution to refute Juynboll’s and Schacht’s claims regarding Ḥadīth forgery, common links and back growth of Isnāds.

Both the above mentioned articles by Motzki confront two towering skeptics of hadith studies, Joseph Schacht and Juynboll. Motzki argues Schacht and Juynboll that a substantial amount of the material narrated by these two prolific transmitters can be traced back to the beginning of the second Hijri century, and that some of the material can in fact be credibly attributed to the first Muslim generation. Motzki’s argument proceeds in three steps. First, he gathers all available chains of transmission for a particular ḥadīth report and draws up a transmission tree that synthesizes the chains into a single diagram. Second, he examines and compares the various versions of the actual content of the ḥadīth. And third, he combines the results of these two analyses by correlating patterns of variance in the content with the structure of the transmission tree. Motzki initially follows Juynboll’s overall methodology and terminology by identifying “common links,” that is, transmitters whose role is corroborated by the large number of individuals to whom they are recorded as having transmitted a particular ḥadīth. But then he parts ways with Juynboll. He criticizes both Juynboll and Schacht for not including older and more extensive works on ḥadīth and consequently in many cases identifying the common link a generation or so later than it actually was. He also faults them for categorically considering the common link the earliest historically tenable point at which the ḥadīth’s existence can be assumed. Common links generally appear in the early second Hijri; prior to this, most ḥadīth reports carry only single chains of transmission. Motzki demonstrates that this phenomenon can be explained by considerations outside the world of isnāds by drawing on the sociology of knowledge. He argues that the common links prominent among them al-Zuhri and Nāfi represent the first systematic collectors of ḥadīth, who, in turn, became sought-after teachers of ḥadīth, thus giving rise to the multiplicity of transmitters in the next generation. As the subsequent chapters show, this argument was understood by others to mean that Motzki assumes a priori that
ḥadīth reports predate their common links, a misunderstanding that he emphatically disavows. Rather, Motzki is merely open to the possibility that a ḥadīth could be dated earlier than its common link. For example, al-Zuhrī is the common link for a ḥadīth from Muḥammad’s wife ʿĀʾisha regarding the legal effects of giving breast milk to adults. Motzki reasons that since this ḥadīth contradicts the legal position held by al-Zuhrī himself, he would have had little motivation to invent it, which makes it likely that the ḥadīth in fact goes back to al-Zuhrī’s alleged informant ʿUrwa in the first Hijri century. Same reasoning holds for ʿUrwa, whose position corresponds to al-Zuhrī’s. This suggests that the ḥadīth in question indeed originates with ʿĀʾisha.

Thus by using the example of “Zuhrī” and “Nafi” as common links Motzki argues with Schacht and Juynboll that common links are not the earliest historically tenable point at which existence of a particular hadīth can be assumed, instead hadīth reports predate common links. To prove his point he not only uses older and most extensive hadīth sources than those employed by Schacht and Juynboll but also confronts them logically by referring to hadīth from Aisha on legal effects of giving breast milk to adults. (Al-Zuhri being the accepted common link for this hadīth). This hadīth predates its common link, that is it goes back to Aisha and it cannot be forged because this hadīth contradicts legal position taken by al-Zuhri, which leaves little room for motivation of forgery.

Nicolet Boekhoff-van der Voort in “The Raid of Hudhayl: Ibn-e-Shihab al Zuhri’s version of the Event” and Sean W. Anthony’s “Crime and Punishment in Early Madina: The Origins of Maghazi Traditions” both the authors have used Motziki’s Isnād-cum-Matan analysis to find the correct dating of these traditions. Nicolet concludes that this tradition can possibly be dated to as early as the last quarter of the first century A.H and Sean Anthony after applying Motzki’s Isnād cum matan analysis proposes that cluster of reports attributed to Anas Ibn-e-Malik can, in fact, be traced to Basra in the last quarter of the first century A.H. Anthony argues that the suggested additions and changes made to the traditions are due to early scholars trying to draw legal rulings or lessons from it as well as the akhbar and maghazi narrators drawing on other bodies of lore, such as tribal stories. Anthony’s findings are contrary to scholars like Juynboll and
Wansbrough, he suggests that there is a possibility that many historical reports may have originated more with Umayyad-era muhaddithan than with “Abbasid-era sira and maghazi scholars.

Isnād-cum-matn analysis is most extensively developed by Harald Motzki which has brought Western scholarship on criticism of hadith closer to the Muslim scholarship on Ḥadīth criticism.

Most importantly, Motzki insists that his method is not a mathematical formula into which one can feed data to achieve results in a mechanistic way. He emphasizes that the isnād-cum-matn analysis requires judgment and the weighing of evidence. He does not claim to have discovered any universal truths about ḥadīth (thus rejecting Berg’s assertion that Motzki has declared most ḥadīths to be authentic). Nor does Motzki claim that a report that in one instance is attributed to Muḥammad and in another to a second-generation personality must necessarily be assumed to originate with either the latter or the former. Rather, he stresses the need to develop methodological tools specifically to fit the particular context of the reports in question.162

Al Shamsy163 notes that Isnād-cum-matn analysis can be employed as a research agenda for investigating early Islam. Growing popularity of this approach among young scholars in both Europe and the United States is not surprising: it provides a critical methodology for utilizing the vast amount of available material and for dating each ḥadīth on a case-by-case basis, in contrast to the sweeping judgments of earlier modern scholarship on ḥadīth. It raises the standard of theorization of ḥadīth and promises to invigorate the debate on how to study early Islam. Motzki’s account of the isnād-cum-matn analysis is, however, a work in progress that has at least one significant blind spot. The method of examining both the isnād and the matn of each ḥadīth under study represents the closest approximation of Western scholarship to the classical Muslim science of ḥadīth criticism—in terms of methodology, that is, rather than conclusions

163 Ahmad al Shamsy is currently working as Assistant Professor at University of Chicago.
regarding the status of individual ḥadīth. This raises the question of why Motzki declines to address this relationship. While he does draw on the auxiliary literature of classical ḥadīth studies, such as biographical dictionaries, ḥadīth collections appear in his work primarily as depositories to be mined for chains of transmission; the process of sifting that went into the composition of these works remains untheorized. It would seem that a sustained intellectual engagement with the classical ḥadīth sciences in their early literary manifestations from the third to the fifth Hijri centuries would add a new dimension to the capabilities of the isnād-cum-matn analysis. Recent studies by al-Sharīf Ḥātim b. Ṭārif al-‘Awnī, Scott Lucas, and Jonathan Brown have begun to show what such engagement might look like, and it remains to be seen whether and how its insights will be integrated methodologically into the isnād-cum-matn approach.164

Jonathan Brown on Hadith

Jonathan Brown is a Muslim American Ḥadīth scholar, from 2006 to 2010 he taught in the Department of Near Eastern Languages and Civilization at the University of Washington in Seattle, he writes on history of Ḥadīth collection and its criticism and evolution of Western Ḥadīth scholarship. Since 2010 he has been Assistant Professor in Islamic Studies and Muslim-Christian Understanding in the School of Foreign Service at Georgetown University.

He has written extensively on Ḥadīth scholarship and made remarkable contributions to the study of Ḥadīth. A discussion on his works and contribution is based on the following articles:


164Shamsy, Ahmad al Shamsy, op. cit.,

Jonathan Brown selects Daraqutni (d. 385-995)’s “*Kitāb al Ilzamat wa-tatabbu*” “The Book of Suggested Additions and Revisions” which he considers as the most salient and influential critique on Muslim’s authoritative compilations of Muḥammad Ismail al Bukhārī (d.256/870) and Muslim b. al-Hajjaj (d. 261/875). He supports Goldziher’s claim that "veneration of the Sahihs (al Bukhārī and Muslim) never went so far as to cause free criticism of the sayings and remarks incorporated in these collections to be considered impermissible or unseemly…".\(^{165}\) Brown refers to some contemporary Muslim Ḥadīth critics such as Shaykh Taha Jabir al Ulwani, Ibn-e-Uthaymin (d. 2001), a Salafi cleric and Nasir ud din al Albani (d. 1991) who have dared to question some of the contents of *Sahihayn*. Though Shia scholars are not bound by Sunni consensus but Brown refers to Abd ul Husayn al Musawi (a shi’a scholar)’s severe criticism of Sahihayn by discounting all of Abū Huraira’s hadih as unreliable.\(^{166}\)

In Daraquṭni’s time the works of Bukhārī and Muslim had already emerged as leading collections but Ḥadīth canon did not yet exist as we now understand it. We should therefore view Darqutni’s criticisms as part of canonization process and not a challenge to it.\(^{167}\) Scholars like Goldziher\(^{168}\) and Abd al Rauf\(^{169}\) have dealt with Daraquṭni’s criticism of Sahihayn in their discussion on development of hadīth literature but according to Brown “*these two studies are too general to delve into the specifics of al-Daraquṭni’s work.*”\(^{170}\) Darquṭni’s approach towards hadīth criticism revolves around


chain of narrations to the exclusion of contents of hadīth. Scholars like Ibn-e- Hajar and al-Nawawi have provided the most comprehensive rebuttal of Daraqutnī’s criticism of Shīḥ Bukhāri and Sahih Muslim. They defend the two Sahih collections by asserting that Daraqutnī’s objections do not call into question the provenance of the substantive meaning of any Ḥadīth but Nawawi nonetheless places Daraqutnī’s Kitāb al tatabbu in the acceptable genre of mustadrak works. Daraqutnī’s approach to Ḥadīth is that he addresses narrations and not traditions. Both Bukhāri and Muslim habitually included multiple narrations of a prophetic tradition and these narrations were the focus of Daraqutnī in his critique.

Daraqutnī while analyzing and adjusting hadīth collections focuses only on hadīth transmitters and their chains. He did not touch other subjects related to hadīth study such as criteria for accepting sound traditions (shurut), technical terms used in hadīth literature (mustalahat) and hadīth contents (matan). His focus exclusively remained on Asma ar Rijāl and the chains they formed. It has been correctly posited that early hadīth criticism revolved entirely around examination of Isnāds. 171

Brown also explains the notion of ziyada or additions in Ḥadīth literature. There are three kinds of ziyada: the addition of sanad (Isnād addition), addition of matan (matan addition) and addition of normative matan (normative matan addition). Darqutnī deals mainly with Isnād additions in his critique on Sahihayn and rarely criticizes a lone narration. In his Kitāb al tatabbu he suggests formal adjustment of narrations rather than a polemical criticism. Brown further emphasizes the constructive tone throughout Kitāb al tatabbu by referring to a tradition in which Prophet lists a number of hygienic duties that Muslims should perform, Daraqutnī suggests two superior narrations that Shaykhayn did not use and at another place referring to a different tradition the scholar states that another chain could have provided a more direct link to the Prophet. To conclude, Jonathan Brown’s analysis of this classical source of hadīth criticism demonstrates that Daraqutnī was a master traditionist who did not think himself unworthy of pointing out

al- Bukhāri and Muslim’s oversights. His critique of the two most esteemed collections of Prophetic traditions provides irrefutable proof of the critical review process through which even these canonical texts have passed.

Brown concludes that his persona disorients the historian accustomed to the contours of modern Sunni orthodoxy and its reverence for Sahihayn. Daraqutni’s Kitāb al tatabbu seems to flout its canonization. His focus on comparing and evaluating individual narrations without addressing their content meant that he never overtly rejected any of Prophetic traditions included in al- Bukhāri’s and Muslim’s collections. He never intended to alter theological, ritual or legal material of Shaikhayn with his own material. His adjustment of them constituted an act of productive criticism.172

Jonathan Brown draws extremely important deductions relating to Sunni Ḥadīth literature that writings of Baghhdadi, al-Nawawi and Ibn-e- Hajar demonstrates that centuries following Daraqutni’s death first saw a more lenient approach to additions and later an abandonment of the general rules of ziyaḍat al-thiqa, embodied in works such as Kitāb al-tatabbu in favour of reliance on the expert judgment of al- Bukhāri and Muslim. It was this later development in sunni Ḥadīth scholarship and al-Daraqutni’s lack of interest in questioning the actual substance of al- Bukhāri or Muslim’s Aḥādīth that allowed later scholars such as al-Nawawi and Ibn-e--Hajar to reconcile the tenth-century critic’s work with the Ḥadīth canon.173

Having established his point that Sahihayn too were subjected to productive criticism he moves ahead to examine works devoted to criticize Ḥadīth narrations (ilal) from 3rd to 8th century A.H. He discusses his findings in the article, “Critical Rigour Vs Juridicial Pragmatism: How Legal Theorists and Ḥadīth Scholars Approached the Backgrowth of Isnāds in the Genre of Ilal al Ḥadīth” (2007). Jonathan Brown concludes that original non-prophetic versions of many Ḥadīth survived alongside their Prophetic counterparts well into the 5th century A.H. More importantly, certain Ḥadīth scholars from 3rd century to 7th century A.H. believed that Prophetic reports in the canonical

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173 Ibid., p. 37.
Hadīth collections were actually statements of other early Muslims. The position of these critics were marginalized in the 5th century A. H, when mainstream Sunni jurists chose to accept the Prophetic versions categorically. Although the jurists’ position became dominant in Sunni Islam, criticism of the back growth of Isnāds has continued in the work of select Ḥadīth scholars until today. 174

Brown examined the books of Ḥadīth criticism (kutub al ilal) and established that certain Ḥadīth scholars of 3rd and 4th centuries believed that reports considered Prophetic in the canonical Ḥadīth collections were actually statements made by Companions and other early Muslims. Jonathan Brown says that a central tenet of the Schachtian framework remains: Isnāds do seem to have grown backwards. A Companion’s report that Malik introduced in his Mawṭṭā in the mid-2nd century appears as a prophetic Ḥadīth in Ṣaḥīḥ Bukhārī a century later. Did this change in legal epistemology occur silently? Could this have happened without leaving ample historical evidence? Was this orchestrated by the early Muslim community? Such were the questions posed by leading Western Scholars like Juynboll and Fred Donner. Jonathan proves that this redaction of traditions did not go unnoticed. Western scholars have overlooked evidence of this lingering debate because they have so far focused on almost exclusively on the great hadīth compendia of the 3rd and 4th centuries A.H. By expanding the scope of analysis to include books on flawed reports (kutub ilal al hadīth) show that some classical Muslim hadīth scholars were very aware of the backgrowth of Isnāds and they debated this issue even after the compilation of canonical collections in the 3rd century.

If this was the state of affairs then Goldziher, Schacht, Juynboll and those who follow them in this line of argument have reached the same conclusion at which Muslim Ḥadīth critics of 3rd and 4th century had reached centuries before. In short this is to say that both groups detected and acknowledged backgrowth of Isnāds.

It is pertinent to suggest here that it was Muslim hadīth critics such as Daraqutni who detected the back growth of Isnāds in 3rd and 4th centuries, but due to the lenient approach of latter scholars such as Nawawi and Ibn-e- Hajar towards additions, that rules of ziyadat al-thiqah were abandoned in favor of expert judgment of Bukhāri and Muslim. It would not be wrong to say that Western scholars picked the threads of their lingering critique on hadīth from the works of Muslim hadīth critics thus replicating their ideas into a massive scholarship posed to be original and innovative. The onus of this scenario cannot be put entirely on the shoulders of Orientalists because it was equally the responsibility of Muslim scholars especially Arab Muslim scholars to explore the Muslim scholarship of 4th and 5th centuries on hadīth criticism and continue with this debate in a logical manner.

This task is initiated by a Professor Jonathan Brown who seems to define difference in the approach towards criticism of hadīth by Western scholars as against hadīth criticism by Muslim scholars on the issue of back growth of Isnāds and obvious archaisms (old words or expressions no longer in use) in matan.

Brown adds that out of thousands of extant Ḥadīth Schacht based his conclusion about the back growth of legal Isnāds only on forty-seven traditions and concluded from his findings that this has undermined the prima facie historical reliability of the entire hadīth corpus. On the other hand Muslim critics whom Jonathan examines in his article identify a total of seventy-six instances of back growth of Isnāds. But for them those reports that do not exhibit this flaw are prima facie words of the Prophet. Criticism of the Western scholarship is content based whereas Muslim scholars criticized different narrations of a hadīth without dismissing Prophetic tradition as a whole for example Muslim hadīth critic would only reject one sanad of a hadīth, while upholding the authority of that tradition via other narrations.

hadīth critics of 3rd and 4th centuries were aware that hadīth transmitters were elevating the standard of mawqif ahādīth (report attributed to a Companions or late

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figures) to marfu hadith (report attributed to Prophet). Shu’ba b. al-Hajjaj (d. 160) was known as “serial raiser” (raffâ) of mawquf reports to the Prophet.176 Similarly Ibn-e- Adi (d.365) notes that Abû Ali al-Hasan b. Ali b. Shabib al Mu’ammari (d. 295) used to raise mawquf Ḥadîth to Prophet and this was particularly common among the transmitters of Baghdad.177 Muslim scholars understood the notion of backgrowth of Isnâds through the notion of ziyada (addition). Ziyada being of three kinds, matan addition, sanad addition and normative matan addition. Here we are concerned with Normative matan addition which involved the addition of normative weight to a tradition by elevating the status of the report from mawquf to marfu.178 It literally pushed back the Isnâd of a narration from a latter figure to the Prophet. For Schacht and Western scholars Normative matan addition was enough proof of fabrication of marfu hadîth whereas Muslim hadîth scholars accepted the co-existence of marfu and mauquf hadîth For Muslim hadîth scholars, reliability of a report ultimately hinged on the reputation of its transmitter and corroboration. If transmitters of both marfu and mauquf hadîth are trust worthy then Muslim critic would be hard pressed to dismiss either as incorrect.

Ibn al-Madni’s work is one of the earliest surviving work which preserves Muslims’ responses to the backgrowth of Isnâds. Abû Zur’a al Razi (d. 264) and Abû Hatim al-Razi (d.277) and his son Abd al-Rehman Ibn-e- Abi Hatim al-Razi were the leading hadîth critics of 3rd century. Abd al-Rehman’s Ilal al Ḥadîth contains thousands of narrations in which these early critics found some flaw. They were the contemporary of leading hadîth collectors who recorded hadîth in the six canonical collections. The study of ilal and backgrowth of Isnâds continued into the 4th century when the most famous ilal works were produced. Ibn-e- Ammar al Shahid (d. 317) composed a small illal work on Sahih Muslim’s collection. Out of 36 flawed narrations culled from Muslim’s Sahih, Ibn-e- Ammar notes three instances of Isnâds growing backwards. Another hadîth scholar of 4th century who composed two ilal works was Ali b. Umar al-

176 Jami al Tirmidhi: Kitâb al-ilm, bab ma ja’a fi al-akhdh bi’l-sunna wa ijtinab al-bida.
177 Jonathan Brown, ‘Criticism of Proto-Hadith Canon; Al Daraqutni’s Adjustment of the Sahihain’ 
178 Ibid., p. 8-11.
Daraqutni of Baghdad (d.385). One of these non-polemical *ilal* works is on the contents of *Sahihayn* titled as *Kitāb al-tatabbu*. Out of 217 narrations that Daraqutni criticizes in *Sahihayn* he notes 15 instances of inappropriate normative *matan* addition in which Isnāds have been pushed back to the Prophet. In al-Daraqutni’s much larger *Kitāb al-Ilal* which consists of 2,336 criticized narrations he notes that certain narrations of hadīth attributed to the Prophet in six canonical collections were actually words of the Companions. Ibn-e- Taymiyya in his small *mawduat* work analyzing sixty-four Ḥadīth circulating at his time, 8th century revealed the presence of backgrowth of Isnāds. He criticized five hadīth as sayings of members of early community pushed back to Prophet. Ibn-e- Taymiyya’s statement is reminiscent of the critical rigor of al-Daraqutni and Razi; No matter how useful a report attributed to the prophet might seem, “It is not possible to say “from the Prophet (PBUH) for what he did not say.”

Parallel to the above mentioned Hadīth critics there emerged a group of jurists who accepted normative *matan* addition unconditionally provided the transmitter of the narration was reliable. These scholars accepted co-existence of marfu and mawqūf Aḥādīth. The list of such scholars includes, Ibn-e- Hibban (), Abū Ishaq al-Shirazi (), Abū Muzaffar al-Samani (d. 489), Abū Yala Ibn-e- Farra al-Baghdad (d.458), al Katib al-Baghdadi (d.463), Sufyan Ibn-e- “Uyayna (d.643), Jamal ud din al-Mizzi (d.742), Jalal ud din al-Suyuti (d.911), Shaikh al Islam Zakariyya al Ansari (d. 926), Ibn-e- al-Qattan (d. 628), and the great Indian Hanafi scholar Abd al-Hayy al-Laknawi (d. 1304).

These scholars sided with legal theorists as opposed to hadīth critics, for them a transmitter narrating Prophetic version has preserved knowledge that transmitter of mawqūf version has not. They justified co-existence of mawqūf and marfu’ by saying that Companions may quote the Prophet on one occasion and paraphrase him on another when delivering his own legal ruling. This difference in approach towards acceptance of marfu in the presence of mawqūf Aḥādīth among legal theorists could have been due to their application of Ḥadīth literature for the development and application of legal theories. For

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these legal theorists every piece of information that sprang from the era of the Prophet carried weight and was a useful storehouse of information. As the chances of a marfu‘ hadīth to be culled as forged or be accepted as authentic were same to them, therefore they invoked the legal maxim “in matters of epistemology the affirmative supersedes the negative”. For legal theorists collection of marfu‘ hadīth was an important storehouse of information that could be used in the understanding of law therefore it could not be straight away discredited. They treated marfu‘ and mawquf hadīth as two totally different aḥadīth. They however rejected the most blatant backgrowth of Isnāds but accepted addition by a trustworthy narrator (ziyadat al-thiqa).

The stringent critics of normative matan addition such as Razis, al-Daraqutni and the scholars with a moderate approach towards the acceptance of normative matan addition like Ibn-e- Hajar al-Asqalani and al-Dahahabi together cannot compete with the list of figures associated with categorical acceptance of normative matan addition. Continuation of more rigorous approach to the backgrowth of Isnāds manifested itself in a small number of ilal works produced after 5th century as well as several mawduat books.180

Jonathan Brown also throws light on the continuity of ilal criticism in modern period with hadīth scholarship of traditional Moroccan Sufi Ahmad b. al-Siddiq al-Ghumari (d. 1960) who criticized and identified the flaws in Jami al-Saghir a ḥadīth collection compiled by Jalal al-Din Suyuti. Ghumari had to rely on earlier masters for the details of ilal criticism; he thus cites experts such as al- Bukhāri , Malik, Ibn-e- al-Hazm and al-Dhahabi. In one case he states that a report was originally said by Ali, another by caliph Umar b. Abdul Aziz (d. 101) and another by Jafar al-Sadiq (d.148).181

**Matan Criticism**

Jonathan Brown in his article "How We Know Early Hadith Critics Did Matan Criticism and Why Is It So Hard to Find" says that Western Scholarship have accepted

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181 Brown, Ibid., p. 36.
that Muslim Ḥadīth scholars have focused principally on Isnāds to determine the authenticity of traditions and ignored the key components of modern historical investigation: the contents of the reports themselves. In his research Brown studies Sunni hadīth critics of 3rd and 4th centuries. First of all he provides examples of early critics rejecting hadīth on the grounds of their contents proving that content criticism was an established component of their critical arsenal. Secondly he demonstrates that early Sunni hadīth tradition consciously manufactured an image which portrayed their indifference to contents of hadīth and this was an essential part of the cult of methodology they created around the Isnād in the face of their rationalist opponents. Finally he demonstrates that when Sunni hadīth tradition openly shifted its attention from Isnād criticism to matan criticism in 6th century, hadīth critics drew directly on the material that earlier critics ostensibly had criticized for Isnād flaws.

From this Brown concludes that the correlation between the material that later critics rejected for content reasons and early Isnād criticisms suggests that early hadīth scholars employed content criticism far more often than would appear.

It was Ignaz Goldziher who first deduced that Muslim scholars investigated reports “only in respect of their outward form, and judgment of the value of contents depends on the judgment of the correctness of the Isnāds” Even if the text of a ḥadīth is replete with suspicious material, “Nobody is allowed to say: “because the matan contains a logical contradiction or historical absurdity I doubt the correctness of the Isnād” From this Goldziher concludes that “Muslim critics have no feeling for even the crudest anachronisms provided that the Isnād is correct.” He intimates that the Muslim religious worldview fosters such critical charity, for the Prophet’s divinely granted knowledge of the future explains any anachronisms in his ḥadīths.182

Alfred Guillaume seconded Goldziher’s conclusions. “Ḥadīth” he states, “was not criticized from the point of view of what was inherently reasonable and to be regarded as

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worthy of credence from a consideration of the reputation which the guarantors of the tradition bore.” “On the other hand,” he adds, “if the subject matter (matn) contained an obvious absurdity or an anachronism there was no ground for rejecting the hadīth if the isnād was sound.” Later scholars such as A.J. Wensinck, Joseph Schacht, James Robson, von Grunebaum, Fazlur Rahman, G.H.A. Juynboll, F.E. Peters, and Ron Buckley have upheld these conclusions.\(^\text{184}\)

Christopher Melchert on Hadith

Building on Harald Motzaki, Christopher Melchert records that Schacht took Shāfi‘i too much at his word. In the first half of the 3rd century Ibn-e- Hanbal (d.241) and Abd al Razzaq al-San‘ani (d. 211) continued to rely on the legal opinions of the companions when Prophetic hadīth were absent. Nonetheless Melchert agrees that one of the defining developments of jurisprudence in the 3rd century was that hadīth reports from the Prophet eclipsed reports from the Companions and later authorities.\(^\text{185}\)

Eerik Dickinson\(^\text{186}\) on Hadith

Yet another Western scholar Eerik Dickinson\(^\text{187}\) picks up the statement of Goldziher that “Criticism of hadith transmitters reached maturity with Ibn e Abi Hatim al-Razi (240/854-327/938)” Instead of studying the entire collection written by Ibn e Abi Hatim al Razi Dickinson concentrates on ‘Taqdimat al Ma‘rifa li Kitab al Jarah wa‘l tadil’ referred to as ‘Taqdima’. Taqdima is Ibn e Abi Hatim’s introduction to his biographical dictionary Kitab al Jarah wa‘l tadil. This introduction provides defence of the techniques of the collectors of hadith against polemical attacks of their detractors. In Taqdima he

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\(^{186}\) Eerik Dickinson completed his PhD from Yale University in Arabic and has taught at Yale and Hunter College in New York,

\(^{187}\) Eerick Dickinson,*The Development of Early Sunnite Hadith Criticiism* (Vol. 38). (Boston: Brill, 2001)
traces the history of earliest hadith criticism till the time of Al Razi (195/811-277/890). Dickinson highlights those aspects of Taqdima which links general principles of hadith collectors with the environment in which it was written. He concentrates on the early sunni collectors of hadith and identifies the techniques employed by hadith collectors to find the genuineness of a hadith. In Taqdima Ibn e Abi Hatim uses three evidences to prove his assertion that “God has bestowed upon certain individuals the status of hadith critics.” These three evidences are, the testimonial evidence the biographical evidence and the documentary evidence. These will be discussed in detail in the following pages.

Since the earliest centuries of Islam Quran and Hadith were considered primary documents in doctrinal matters. Major hindrance in the acceptance of this status for Hadith was contradictions within hadith corpus. Scholars employed reason to resolve this contradictions many of them adopted objective criteria for hadith criticism. Ibn e Abi Hatim was also one of those scholars who adopted objective criteria for hadith criticism.

In the first two centuries after the death of the Prophet (P.B.U.H.) Muslim’s intellectual efforts were divided in different intellectual centers. Scholars in these centers drew their doctrines mainly from Quran and local customs. It is alleged by Dickinson and by many other Western scholars that in addition to Quran and local customs these Muslim scholars employed their own notions of fairness and the way they interpreted and understood the prophetic sunnah and teachings of Companions and Followers. These intellectual centers though were not completely isolated but still worked in relative isolation and engaged in different methods. As a result they arrived at conflicting answers to the questions posed in Muslim community. This problem was recognized by Muslims thinkers especially in the field of law where uniformity was particularly desirable. Scholars of that time called for legal uniformity which we find in the writings of Ibn e Muqaffa (ca. 102/720-139/756) and al Jahiz (ca.160/776-255/868). Caliphs demanded a uniform legal code for promulgation in the entire Muslim empire. Dickinson considers the demand for special emphasis to be given to Prophetic hadith as a product of impulse towards uniformity. In Muslim’s view reference to a single authority would definitely produce uniform or single answer and this authority was represented by the Prophet
Thus the scholars referred to sunnah of the Prophet in case of disagreement. In the time of Inb e Abi Hatim Muslim scholars were divided into two major groups ahl al hadith and ahl al ray. Ibn e Abi Hatim belonged to Ahl al Hadith and thus laid great importance to prophetic traditions over reason like other Hijazians. Both these competing groups criticized each other and the major criticism of ahl al Hadith towards ahl al ray was that the exercise of reason was arbitrary and it was because of this arbitrariness that it was difficult to achieve uniformity. It was mainly ahl al Kalam who were divided into various groups holding differing opinions on matters of theology. This was unlike mathematicians engineers and geometricians who always reached the same conclusion and arrived at a single answer. Therefore the adherents of hadith believed that submission to the authority of the Prophet (P.B.U.H.) was the only escape from contradicting views and varying solutions. But this was their wishful thinking as growth in hadith literature number of opinions ascribed to the Prophet also increased until several points of view on a given question found expression in prophetic traditions. In such circumstances the problem arose which of the hadith should be considered as authentic and which ahadith to be rejected as fabricated so as to enable to reach a single answer especially in questions of law and more so in theology. Ahl al Hadith took two different approaches to this dilemma:

- One group from among ahl al Hadith tried to resolve the contradiction in hadith through rational means
- And the other group tried to resolve the contradiction on the basis of scrutiny of hadith which was based on the history of transmission.

Dickinson says that “these two approaches may not have been totally inimical, but there were a few scholars who made significant contributions in both domains before the fourth/tenth century.”

One such scholar whose work is dealt with in details is Ibn e Abi

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Hatim al Razi. Ibn e Abi Hatim al Razi wrote six books on hadith criticism; their names are listed below;

1. *Bayan Khata’ Muhammad ibn Ismail al Bukhari fi ‘l Ta’rikh*

2. *‘Ilal al Hadith*

3. *Kitab al Jarah wa ‘l tadil*

4. *Kitab al Kuna*

5. *Kitab al Marasil*


Eerik Dickinson selects *al Taqdima* out of these six collections and states that,

“In Taqdima Ibn Abi Hatim justifies the employment of hadith criticism in his own day on the basis of the precedent set by prestigious Hijazian scholars of earlier generation. He links these early authorities to his contemporaries by means of a genealogy illustrating the passage of hadith criticism from one generation to the next. To make the case that these early scholars were critics of hadith, he cites and arranges a wide variety of transmitted material in a frame work determined by his conception of the history of hadith transmission.”

Hadith criticism works of third and fourth century carried both technical and polemical aspects. Technical aspects included definitions and explanations of important terms and polemical aspects included justification and defences of hadith criticism aimed at the attacks of ahl al Ray and ahl al Kalam. Ibn e Abi Hatim justifies hadith criticism on the basis of its usage by the earlier scholars. Eerick remarks that the “*Taqdima is the most ambitiously conceived and most elaborately executed work of this kind.*”

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189 Ibid., p. 41.
Ibn e Abi Hatim divides hadith critics into four tabaqat. He mentions three hadith critics in the third century as the most prominent exponents of hadith criticism. These are Ahmad bin Hanbal, Abu Zur‘a and Abu Hatim. However all scholars that he mentions were recognized as prominent transmitters of Hadith. The three tabaqats and the scholars enlisted in each are given below:

**Hadith Critics in Ibn Abi Hatim’s Taqdima**

- **The First Tabaqa**
  1. Malik bin Anas
  2. Sufyan Bin Uyayna
  3. Sh‘ba b. al-Hajjaj
  4. Hammad B. Zayd
  5. Sufyan al-Thawri
  6. Awza‘i

- **The Second Tabaqa**
  1. Yahya b. Sa‘id al Qattan
  2. Waki b. al Jarrah
  3. Abdullah b. al Mubarak
  4. Abd al Rehman b. Mahdi
  5. Abu Ishaq al Fazari
  6. Abu Mushir

- **The Third Tabaqa**
  1. Ahmad bin Hanbal
2. Yahya b. Main
3. Ali b. al Madini
4. Ibn Numayr

- **The Fourth Tabaqa**

  1. Abu Zur’a
  2. Abu Hatim

Critics of Ibn e Abi Hatim’s first *tabaqa* seems to be important transmitters of hadith in their respective local traditions and his selection of critics reflects that transmission of hadith started as isolated local traditions which later and later became single universal tradition. Another observation is that his first *tabaqa* constitutes the later Followers. In constitution of the second *tabaqa* of Ibn e Abi Hatim al Razi geography plays a less important role. The names mentioned in second *tabaqa* shows dispersal of independent local traditions and beginning of the formation of single local traditions. The third and fourth tabaqa consists of four scholars who are well known as hadith critics and in their constitution regionalism ceases to have any importance.

Having discussed the division in to four groups Eerick Dickinson elaborates three evidences discussed by Ibn e Abi Hatim in his Taqdima;

1. The Testimonial Evidence
2. The Biographical Evidence
3. The documentary Evidence.

**The Testimonial Evidence**

Most of the scholars whose testimony Ibn e Abi Hatim records were traditionally recognized as Hijazians but he also assembles evidence that some of the rationalists were also in agreement with his proposition.
He assures that the early Kufans did acknowledge the first hadith critics. By early Kufans he means Abu Hanifa and his two disciples Abu Yousaf and Mohammad b. Hassan al Shaybani. Ibn e Abi Hatim quotes passages in *Taqdima* which speak of the superiority of Hijazi scholars over the leading scholars of Kufa. He first quotes line which provide testimony to the fact that Sufyan al-Thawri asserts his own superiority over Abu Hanifa.

“I did not ask Abu Hanifa about anything. He used to come to me and ask me about things.” 190

Ibn e Abi Hatim says that by consulting Sufyan al Thawri Abu Hanifa has conceded his superiority.

In another report Ibn e Abi Hatim finds confession by Abu Hanifa of Malik’s superiority. He quotes still another conversation between Shafi’i and Shybani over the relative merits of Malik and Abu Hanifa. Shybani asked who is knowledgeable in Quran, Sunnah and views of Companions and Shafi’i replied ‘Malik’. What remains is Qiyas which is based on things and one reverts to it when he does not know the sources. This shows that Shfi’ I acknowledged superiority of Abu Hanifa in matters of analogy and reasoning only and not in the knowledge of sources. Shaybani himself claimed that he learned about seven to eight hundred hadith from Malik and whenhe would promise to people that he would transmit from Malik the place would be flocked with people and when he would transmit from someone else there would be few people. Moreover Kufans were scourged for faulty reasoning, disputatiousness and lying and Ibne Abi Hatim al Razi is no exception in this regard. He held the same opinion about the Kufans. Dickinson says that to discredit the Kufans would clearly not serve Ibn e Abi Hatim’s purpose because he has included Kufian hadith critics in his list which favors existence of Hadith critics.

**The Biographical Evidence**

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190 *Taqdima* p. 3.
Ibn e Abi Hatim has included large material in *Taqdima* which is biographical in nature. It contains details of incidents of the critics in his selected list. This biographical material in Taqdima is arranged topic wise, four of which Eric mentions are as follows:

1. Dreams
2. The Study of Hadith
3. Zuhd and Wara’
4. The Critics and Political Authorities

**Dreams**

According to Muslim belief dreams constitute a certain percentage of prophecy. Although prophecy has ceased, dreams persist as a means of divine communication. True dreams are even considered lower form of revelation. With this conception reception of dreams was taken as divine favor by the Muslims. In Taqdima Ibn e Abi Hatim narrates various dreams seen by the critics of hadith mentioned in his list which account for their exalted status. Furthermore the hadith scholars accepted hadith as legitimate sources of information. Gustave E. Von Grunebaum writes,

“It cannot be emphasized enough that a medieval Muslim, lay or scholar, the cognitive power of the dream does not present an epistemological problem” 191

The scholarly merits and knowledge of hadith forms the largest category of reports in *Taqdima*. Thus by elaborating their knowledge of hadith Ibn e Abi Hatim signals to his audience that eighteen scholars in Taqdima were critics of hadith. He mentions of the hardships that these scholars suffered for the sake of their studies brings glamour to their name.

**Zuhud and Wara’**

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Zuhud and Wara’ are the moral qualities which a hadith scholar must possess. Reference to moral temperament of eighteen hadith critics is mentioned in Taqdimia. The concepts of Zuhud and Wara carry a lot of importance in Islamic moral thought. To Ibn e Abi Hatim these concepts pay a very important role in defining the status of hadith scholars.

Critics and Political Authorities

The fourth biographical detail with which Ibn e Abi Hatim deals is the critics' relationship with the caliphs and their subordinates. Eerick says that the common characteristic of such reports is that it depicts tension between the religious scholar and the political authority. The author quotes numerous instances of such an interaction. These scholars almost always seem to reject and the rulers from which Eerick infers that probably Hijazian scholars had little success in gaining positions within the government.

After discussing these major biographical traits Eerick concludes that usefulness of these incidents and narrations as historical evidence is severely limited.

Documentary Evidence

The last evidence that Ibn e Abi Hatim discusses in Taqdimia is the documentary evidence of these hadith scholars. He uses this evidence as a proof that scholars mentioned in Taqdimia were critics of hadith. This evidence commonly takes the form of technical statements ascribed to his critics about the reliability of transmitters and authenticity of hadith. Eerick seems to be in agreement with Goldziher when he says that hadith criticism came to assume its technically mature form with Ibn e Abi Hatim. Eerick concludes that the consistency in authentication of hadith was the aim of these critics. By the time of Ibn e Abi Hatim the technical criticism was fully developed in all its practical aspects. At the same time Eerick says that the critics were aware that if the standards of authentication were made too strict, fewer hadith will be accepted as authentic. He further concludes that the Muslim critics devised the best possible means for identifying authentic hadith and that their basic method resembles Schacht’s Common Link Theory. Eerick, while making this statement is forgetting the fact that
Schacht has built the Common Link Theory on the basis of his study of third and fourth century hadith critics and there is hardly anything new in this theory.

Where the collection of hadith and its authentication remains the most enduring legacy of Muslim scholars, the study of hadith criticism and monographs of Muslim hadith critics remains the most lasting and preferred occupation of Western scholars.

**Critical Issues**

Before we precede any further it is important to explain the following terms used in the discussion on hadith literature;

1. **Common Link Theory**
2. **Argument e Silentio**
3. **Back growth of Isnāds**

These terms are frequently referred to in the academic discussion on Ḥadīth literature by Orientalists but it is important that explanation of these terms be given for a layman.

**Common Link Theory**

One of Schacht’s central theory is that existence of a “Common Link” in a chain of transmission which indicates that the Ḥadīth in question originated at the time of that common narrator. This common link is that person whose name appears in almost all narrations of a particular hadīth. According to Schacht “this allows us to date the time of forgery”. Schacht divides the sanad portion of a Ḥadīth into two parts, one before the “Common Link” and other after the “Common Link”. The portion before the common link reaches either to a Companion or to the Prophet and Schacht calls it the “fictitious higher part” and the portion after the common link is termed as the “real lower part” of the transmission.
Argument e Silentio

“Argument e Silentio” means non-existence of a tradition at a certain time. In Schacht’s own words, “The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed”\(^{192}\) Schacht has frequently used this argument to show non-existence of traditions in early period of Islam. This argument has thoroughly been refuted by Zafar Ishaq Ansari with supporting evidence and rejected out rightly by Harald Motzki. Its details will be discussed in the preceding pages.

Backgrowth of Isnads

“Back growth of Isnāds” is a central tenet of Schachtanian framework. It means that the status of “mauqif” hadīth is raised to “marfu” to show that it existed in the time of Prophet because Muslim scholars of 2nd and 3rd centuries gave more authority to the reports of the Prophet. It means that the status of a hadīth is raised by the use of “normative matan addition”. In simple words it means that a Companion’s report that Malik introduced in his Mawḍūṭ in the mid-2nd century appears as a prophetic Ḥadīth in Ṣḥīḥ Bukhārī a century later, this proves that Isnāds do seem to have grown backwards. Muslim hadīth critics of 3rd and 4th centuries also noticed this phenomenon but their approach towards this fact was different from those of Orientalists. Jonathan Brown explains this difference.

Response to Ḥadīth Criticism


2. Mustafa ‘Āzmi’s Response (b. early 1930s- still alive)
3. Zafar Ishaq Ansari’s Response (b. 1932- still alive)
4. Harald Motzki’s Response (b. 1948- still alive)

**Nabia Abbott’s Response**

In “Studies in Arabic Literary Papyri” Published in 1967 Nabia Abbott observed that the phenomenal growth of the corpus of Ḥadīth literature is not due to growth in content but due to progressive increase in the parallel and multiple chains of transmission, i.e., Isnāds. She says,

“... the *traditions of Muhammad as transmitted by his Companions and their Successors* were, as a rule, scrupulously scrutinized at each step of the transmission, and that the so called phenomenal growth of Tradition in the second and third centuries of Islam was not primarily growth of content, so far as the Ḥadīth of Muhammad and the Ḥadīth of the Companions are concerned, but represents largely the progressive increase in parallel and multiple chains of transmission.” \(^{193}\)

This remarkable finding of Nabia Abbott helps to refute Sachacht’s thesis on Ḥadīth forgery from three dimensions. Firstly, it negates his projecting back hypothesis, secondly creation of supporting traditions and thirdly suppression of undesirable material.

Late Nabia Abbott points out that isnād criticism did not establish itself until after the outbreak of the *Fitna* (most likely the Second Civil War) and that prior to that the Companions of the Prophet had relied on content criticism to verify attributions to Muhammad (Peace Be Upon Him). There are indeed famous reports of the Prophet’s wife ‘Ā’ishah rejecting Ibn-e- ‘Umar’s statement that the Prophet warned mourners that a dead relative would be punished for his family’s excessive mourning over him because

she believed that it violated the Qur’ānic principle that “no bearer of burdens bears the burdens of another (lā taziru wāziratun wizra ukhrā)194 In another famous report, ʿĀʾisha upbraids a Companion who said that the Prophet told the Muslims that their prayer is invalidated if a woman, a black dog or a donkey passes in front of them. “You have compared us to donkeys and dogs!” she retorts. “By God I saw the Prophet (PBUH) praying with me lying on the bed between him and the direction of prayer…!”195

**Muḥammad Mustafa ʿĀzmi’s Response**

Professor Azami’s work “*On Schacht’s Origins of Muhammadan Jurisprudence*” (2004), presents a detailed analysis and critique of Schacht’s “*Origins of Muhammadan Jurisprudence*”. Professor Azami exposes fundamental flaws of Schacht’s thesis and says that Schacht’s findings are “startlingly at variance with the Muslim view” and contradicts many historical facts. Azami says that Schacht instead of employing original sources of Islam draws his conclusions from the writings of early scholars and has failed to consult some of the most relevant literature. He proves intangibility of Schacht’s view that traditions from the Prophet, all fabricated, gradually suppressed the living traditions that existed before the Prophetic traditions. Commenting on the weakness of Schacht’s thesis, he says Schacht made arbitrary use of source material, tended to over generalize and one can detect internal inconsistencies in his thesis.

Schacht’s logic about the credibility of sunnah was mainly based and gleaned from Shafi’I’s research and his accusations against his opponent peers. Whereas Schacht himself has been critical of Shafi’s inobjectivity at many occasions. To quote Schacht criticizes Shafi as under,

“He (Shafi) often misrepresents the Iraqi doctrine” and

“Shafi often misrepresents the Medinese doctrine”

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194 Al-Quran 53:38

Schacht himself mentions numerous examples of Shafi’i’s imprudent bias towards his opponents. While Schacht himself considers Shafi’i as an unreliable source yet one wonders why Schacht based his own theories on Shafi’s polemical texts. That clearly indicates that Schacht arbitrarily accepts Shafi’s writings at his will and without any logic. At occasions where Shafi’s texts are considered as unanimous by all concerned parties he (Schacht) does not take the same view point as probably it does not suit his designs.

Secondly, Schacht basis his thesis on generalization of doctrine amongst the ancient schools of law as under:

- His assumption that school of Malik bin Anas is representative of whole of Medina.
- His assumption that doctrine of Hanafi school of Kufa to cover the whole of Iraq.

The above rejection or acceptance of any source/ material without sound and logical literary backup/support does not indicate sound and accurate scholarship. Therefore Schacht’s conclusion about hadith can not be relied upon being inconsistent and inaccurate.

Thirdly, Schacht’s book ‘Origins of Mohammadan Juriprudence’ according to M.M Azmi is full of conflicting assertions thus being inconsistent and incoherent in his logic. One such example is when he says “Traditions from the Prophet had to overcome a strong opposition on the part of the ancient schools of law” contradicts his own argument e-silentio.

Azami proves that Schacht was wrong in his claim that ancient schools of law offered strong resistance to traditions from the Prophet, instead Azami puts forward evidences of adherence of Maliki, Hanafi and Auzai schools of thought to the Prophetic traditions.

Azami says that one of the issues raised by the Orientalists against the validity and the authenticity of hadīth is that the hadīth was orally transmitted for over a century
before its compilation into a book form. They argued further that the traditions were invented through an assumed chain of narrators down to the Prophet to emphasize either political affiliation or dogmatic doctrine. Put in plain terms, the corpus of traditions from the Prophet are alleged to be the product of a large-scale pious forgery.\footnote{Mohammad Mustafa Azmi, \textit{On Schacht's Origins of Mohammadan Jurisprudence}. (Riyadh: King Saud University, 1985), p.5.}

Azami states that the official recordings of \textit{ahādīth} came during the time of Umar Ibn-e- Abdul Aziz who ordered a scholar called Abū -Bakr Ibn-e- Hazim to compile a book of \textit{hadīth} for official use.\footnote{Muhammad Shadhili an-Nayr,‘Tarikh Tadwinu-sunnah fil-Qarnaynil Awal wa Thani’ in \textit{Majallah Rabitatul cAlamil-Islami}, vol 20 (1) p.94.} However, individual compilations predated this official directive. The attempt could be regarded as a modest move geared towards the protection of \textit{ahādīth} from containing false information, interpolation and the alleged pious forgery. This is evidently clear from the directive itself. “Ibn-e- Hazim was asked to rely on the collection of Qasim Ibn-e- Abū -Bakr (d. 112A.H) the only survivor among the seven jurists who were the center of reference on religious matters.\footnote{The names of the jurists are as follows:} This implied that the jurists themselves relied on personal collections of \textit{hadīth}, which they referred to before arriving at a final verdict.

On the issue of excessive growth of traditions and back growth of Isnāds, Azami devotes the seventh chapter of his critique to refute Schacht’s assumptions. He says that Schacht has used 50 examples in 2nd chapter of his “Origins” to prove his point. To refute Schacht, Azami elaborates almost fifty percent of these examples to establish

\begin{itemize}
\item Abu Muhammad Said ibn al Musayab (d. 112 A.H )
\item Al-Qasim ibn Muhammad ibn Abi –Bakr As-Sidiq (d.112 A.H)
\item Urwah ibn Zubayr ibn al Awam (d. 94.A.H)
\item Abu-Bakr ibn Abdur Rahman ibn al Harith (d. 112 A.H )
\item Ubayd – Allah ibn Abdullah (d.94 A.H).
\item Abu Zayd Kharijah ibn Zayd ibn Thabit (d.100 A.H)
\item Ayub ibn Sulaiman ibn Yasar (d. 100 A.H)
\end{itemize}

\textit{See Majallah Rabitatul cAlamil-Islami} vol 20 (1)p.93
inconsistencies in the use of source material by Schacht. He further indicates unwarranted assumptions, unscientific methods of research, mistakes of fact, ignorance of geographical and political realities and misinterpretation of the meaning of the texts quoted in Schacht’s thesis.

Thus Professor Azami uses historical and logical methods to refute Schacht on the issue of early recording of Ḥadīth and back growth of Isnāds. According to Professor Azami recording of traditions in first century A.H. in the form of personal compilations such as the collection of Qasim Ibn-e- e Abū Bakr (d.112 AH) was followed by official recordings of aḥādīth in the time of Umar Ibn-e-Abdul Aziz (d.). Azami indicates various inconsistencies in the use of source material while refuting the examples quoted by Schacht to prove back growth of Isnāds.

Professor Zafar Ishaq Ansari’s Response

Schacht has frequently used the argument *e silentio* to show the non-existence of many traditions in the early period of Islam. Dr. Zafar Ishaq Ansari refutes, *argument e silentio* of Schacht by carrying out a comparative study of a fair assortment of legal doctrines of 2nd century jurists to show inadequacy of Schacht’s assumptions. He compares Malik’s (b.95 A.H.) Mawṭṭā and Shaybani’s (b.135 A.H.) Mawṭṭā A large number of traditions found in Malik’s Mawṭṭā are not to be found in Shaybani’s Mawṭṭā inspite of the fact that Shybani is younger of the two. Even more probing is the fact some traditions of Malik’s Mawṭṭā which are supportive to the doctrines of Shaybani are not found in Shaybani’s Mawṭṭā. Professor Ansari quotes numerous examples to justify his stance, for instance the section on timings of the prayers in Malik’s Mawṭṭā contains in all 30 traditions, out of which only three have been mentioned in Mawṭṭā .Sh. On the question of the preferred time for morning Prayer, the disagreement between the Kufans and the Medinese is well known. “The Medinese were in favour of performing the morning prayer when it was still dark, while the Kufans were of the view that prayer should preferably be held a little later when there was some light. Mawṭṭā . Sh. mentions this doctrine of the Kufans. Strangely enough, Shaybānī makes no mention of a tradition from
the Prophet which is found in Mawṭṭā. and which supports the doctrine of his school.\textsuperscript{199}

In another example, in the section on “Istidhān al-bikr wa al-ayyim” three traditions are found in Malik’s Mawṭṭā, while only one is found in Mawṭṭā. Sh. The missing ones include a tradition from the Prophet. Here Professor Ansari makes an interesting observation and cites in the foot notes that non-citation of this tradition does not mean that Shaybani was unaware of this tradition for he refers to it in Hujaj with exactly the same Isnād as found in Malik’s Mawṭṭā and basis his doctrine on this very tradition. This contradicts Schacht’s assumption that a scholar always cited the tradition he knew and even more so non-citation of a tradition by a scholar indicated its non-existence.

Dr Ansari also compares Athar Abū Yousaf and Athar Shaybani and concludes that a large number of traditions in Athar Abū Yousaf are not mentioned in Athar Shaybani although the author of the former work is not only older but was also the teacher of Shaybani. Moreover, Shaybānī edited the works of Abū Yūsuf and himself composed works which were either based on or parallel to those of Abū Yūsuf. Hence, if a considerable number of traditions which are mentioned by Abū Yūsuf are not found in the parallel works of Shaybānī, it greatly undermines the validity of those assumptions which alone can validate the \textit{e silentio} argument of Schacht.\textsuperscript{200}

\begin{flushright}
Harald Motzki’s Response
\end{flushright}

Harald Motzki’s research on Hadith literature has been discussed in detail above. Here we will highlight his response to Western hadith critics of 20\textsuperscript{th} century leading among them being Goldziher and Schacht. Motzki considers Schacht’s argument

\textsuperscript{199} Zafar Ishaq Ansari, ‘Authenticity of Traditions: A Critique of Joseph Schacht’s Argument \textit{e Silentio}’ retrieved from file:///C:/Users/a/Documents/PhD/Orientalism/Hadith%20criticism/07-20The%20Authenticity%20of%20Traditions.htm on 25/4/2013.

\textsuperscript{200} Ibid., foot note no. 15.
e-silentio as a flawed argument. He reaches these conclusions after consulting sources far more expansive than those consulted by Schacht. Motzki demonstrates that some hadith actually appeared earlier than what Schacht believes to be its date of origin.

Motzki’s second contention is that roots of legal scholarship in Mecca can be traced back to the middle of 1st century rather than 2nd or 3rd century as alluded by his predecessors.

Motzki also states that Schacht’s mistrust of chains of transmission blocked him from undertaking a consistent source analysis to construct history of transmission. He also demonstrates in his research that Schacht’s conclusions about Origins and dating of traditions are flawed.

**Jonathan Brown’s Response**

Jonathan Brown’s findings on Muslim hadith literature and views of Muslim critics in 3rd and 4th century have been dealt with in detail above. Brown based his conclusions on selected *ilal* works of third and fourth century Muslim hadith critics such as Daraquti, Dahabi…..

Considering Schacht’s notion of back growth of *isnads* as polemical criticism, Brown approaches the issue in a more logical manner in which he even used counter-criticism of Schacht. He refers to Daraqutni’s *kitab al tatabbu* and basis his conclusions on the arguments of 3rd and 4th century Muslim hadith critics. In his discussion he substitutes Schacht’s “backgrowth of isnads” with an academically acceptable notion of “normative matan addition”. This means that “status of *mauquf* traditions was raised to *marfu* traditions” in the third century. To explain further he means that status of narrations from Companions was raised to narrations from Prophet himself by the process of ‘normative matan addition’. Normative matan addition means that the text of a tradition was not changed but weightage was given to the contents of hadith by extending the chain of narration to Prophet himself. Thus infact he too confirmed backgrowth of isnads but instead of indulging in polemical criticism he used classical Islamic scholarship to reach or reinforce these results. Brown thus establishes his argument that *Sahihayn* too were subjected to productive criticism by Muslim hadith critics. He adds that if this was the state of affairs then Goldziher, Schacht, Juynboll and those who follow them in this line
of argument have reached the same conclusion at which Muslim Ḥadīth critics of 3rd and 4th century had reached centuries before. In short this is to say that both groups detected and acknowledged backgrowth of Isnāds.

In Jonathan Brown’s view the difference between Muslim and Western hadith critics is that Muslim scholars only rejected one sanad of a hadith while upholding the authority of that tradition via other narrations. Whereas Western critics dismissed the Prophetic tradition. In simple words it can be said that Muslims dismissed one sanad of a tradition in which an anomaly was observed whereas Western critics would dismiss the contents of that tradition if an irregularity was observed in any of the narration. Thus Muslim critics rejected only one narration but upheld the basic matan unless subjected to matan criticism but Western critics would dismiss all narrations resulting in matan rejection.

The second issue towards which Jonathan Brown draws attention is a statement by Goldziher alludes that Muslim hadith scholars did not investigate into the content of a hadith to judge its correctness. He quotes Goldziher that Muslim hadith critics examined hadith “only in respect of their outward form, and judgment of the value of contents depends on the judgment of the correctness of the Isnāds”. To answer this Jonathan Brown studies sunni hadith critics of 3rd and 4th centuries in his article “How We Know Early Ḥadīth Critics Did Matan Criticism and Why Is It So Hard to Find” and he provides examples of early critics rejecting Ḥadīth on the grounds of their contents proving that content criticism was an established component of their critical arsenal. Secondly he demonstrates that early Sunni Ḥadīth tradition consciously manufactured an image which portrayed their indifference to contents of Ḥadīth and this was an essential part of the cult of methodology they created around the Isnād in the face of their rationalist opponents. Finally he demonstrates that when Sunni Ḥadīth tradition openly shifted its attention from Isnād criticism to matan criticism in 6th century, Ḥadīth critics drew directly on the material that earlier critics apparently had criticized for Isnād flaws.

From this Brown concludes that the correlation between the material that later critics rejected for content reasons and early Isnād criticisms suggests that early Ḥadīth scholars employed content criticism far more often than would appear. Thus on the issue
of backgrowth of isnads he accepts Schachtanian theory but regarding matan criticism he supports Muslim hadith scholars.

**Characteristics of Modern Western Scholarship on Hadith**

A significant trend is observed in modern Western scholarship of Prophetic traditions. During the twentieth century direct criticism of these traditions was adopted by almost all scholars of Europe and Great Britian. However this trend has considerably changed rather reversed in the twentyfirst century in the name of academic honesty. Professor John Esposito of Georgetown University is one of the reigning authorities on Islam in the West whose text books are taught at universities for courses on Islam. He has made the following counter-criticism of Schacht's traditional position:

>'Accepting Schacht's conclusion regarding the many traditions he did examine does not warrant its automatic extension to all the traditions. To consider all Prophetic traditions apocryphal until proven otherwise is to reverse the burden of proof. Moreover, even where differences of opinion exist regarding the authenticity of the chain of narrators, they need not detract from the authenticity of a tradition's content and common acceptance of the importance of tradition literature as a record of the early history and development of Islamic belief and practice.' 201

The position of Esposito perhaps reflects the growing trend of Western scholarship to counter criticize the Orientalist’s writings on Islam in the twentieth century.

Western scholarship on Islam is closely linked with Western political agenda. This is evident from an interesting report published by RAND Corporation202 entitled

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202 The RAND Corporation is a nonprofit institution that helps improve policy and decision making through research and analysis.
‘Civil Democratic Islam: Partners, Resources, Strategies’. This report had two fold agenda firstly to present an image of Islam which suits post 9/11 agenda and secondly to create divisions within Muslim societies. This report contains following material on hadith,

‘Even if that were not the case, objectively speaking, there is little doubt that hadith is at best a dubious, flawed instrument. Consider that Al-Bukhari is the compiler of what is generally considered to be the most authoritative and reliable collections of hadith. He collected 600,000 hadith, examined them for their authenticity, eliminated all but 7,600 of them, deleted some for redundancy, and was left with a collection of about 4,000.’

Such statements have been made by numerous orientalists about canonical hadith collections. We must however see the Muslim perspective or at least see what Imam Bukhari had to say about his collection,

"I have not included in my book al-Jami` but what is authentic, and I left out among the authentic for fear of [excessive] length"

Professor Mustafa Azmi further supports this statement of al-Bukhari in following words,

Al-Bukhari did not claim that what he left out were the spurious, nor that there were no authentic traditions outside his collection. On the contrary he said, "I only included in my book al-Jami` those that were authentic, and I left out many more authentic traditions than this to avoid unnecessary length." He had no intention of collecting all the authentic traditions. He only wanted to compile a manual of hadith, according to the wishes of his Shaikh Ishaq b. Rahwaih, and his function is quite clear from the title of his book al-Jami` al-Musnad al-Sahih al-Mukhtasar min umur Rasul Allah wa Sunanhi


Abi Bakr Ahmad Ibn `Ali al-Khaṭīb al-Baghdadi, Tarikh Baghdad Aw Madinah as-Salam, 1931 (1349 AH), Volume II, Maktabat al-Khanji, Cairo & Al-Maktabah al-`Arabiyyah, Baghdad and Matba'at as-S'adah near the State Department, Cairo, pp. 8-9.
wa ayyamih. The word al-Mukhtāsar, 'epitome', itself explains that al-Bukhārī did not make any attempt at a comprehensive collection. 205

Thus Professor Azmi first clarifies what Imam Bukhari had said and then explains logically how the meaning of the title of his canonical compilation corresponds to the material selected for it.

The reversal of position in recent time (i.e post 9/11) with the advent of academic honesty on the part of Western scholars the trend is of counter criticism of the Orientalist scholars of twentieth century.

Even Wael Hallaq a strong critic of Schacht agrees that by 830 CE, “the full authority to determine law was transferred from the hands of the Muslims to those of God and his Messenger”206

Chapter five of his “Origins” deals with the Prophetic authority and modification of legal reasoning Hallaq says that the argument that Islamic religious law arose only with the emergence of Prophetic Ḥadīth amounts to overlooking the entire first Hijri century contribution to Islamic law and Islamic ethical values of this era. The argument that the entire Ḥadīth corpus that proliferated in the second hijri century was fabricated would overlook the prophetic sunan that existed from the very beginning

“. Yet, it is undeniable that much of the Ḥadīth is inauthentic, representing accretions on, and significant additions to, the Prophetic sira and sunan that the early Muslims knew. As we have seen, many of these additions were the work of the story-tellers and tradition-(al)ists, who put into circulation a multitude of fabricated, even legendary, aḥādīth. Indicative of the range of such forgeries is the fact that the later traditionists – who flourished during the third/ninth century – accepted as “sound” only some four or five thousand Aḥādīth out of a

corpus exceeding half a million. This is one of the most crucial facts about the Ḥadīth, a fact duly recognized by the Muslim tradition itself.207

Hallaq identifies the urbanized garrison towns of Iraq as the region where Ḥadīth fabrication may have taken place in the beginning of second century. This mass of Ḥadīth literature circulated throughout Muslim countries often contradicted with the memory and practice of Muslim communities in some regions. This was most obvious in Hejaz where Prophetic sunnah still survived in their memory. For Medinan scholars Prophetic sunnah was attested by their own practice. It would be a mistake however, to view the Medinese doctrine as a categorical rejection of hadīth in favour of local practice as some modern scholars have done.208

According to Hallaq even the Muslim jurists had acknowledged the “precarious epistemological status” of hadīth, therefore fascination of Orientalists with the pseudo-problem of hadīth authenticity is gratuitous.209

First and Second Century (A.H.) Ḥadīth Collections

We can show the evidence of existence of hadīth collections from first and second century of hijra. It is important to emphasize here that the Ḥadīth is the product of the first generation of Muslims. And so is “ilm al-darāyah for instance, Urwah Ibn-e-al-Zubayr used to record hadīth from Sayyida ‘Āishah. His compilation was either merged in later collections or lost, especially the Prophet’s Maghazi.

Al-Azami picked up those hadīth narrated by Urwah and came up with Maghāzi Rasul Allah. Similarly, ‘Adullah Ibn-e-‘Amr Ibn-e-al-As recorded hadīth in the Prophet’s lifetime and can be found in Musnad Ahmad especially on Mithaq al-Madinah, ghazwa bani Mustaliq, issues relating to diya, and khutba hujjah al-wida” and so forth.

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207 Wael B. Hallaq, Origins and Evolution of Islamic Law. (Canada: Mac Gill, 2004), p.104
208 Ibid., p 105.
Among the sahabah some other names are ‘Abdullah Ibn-e- ‘Abbas and al-Barā’ Ibn-e-‘Āzib

**Sahifa of Hammam Ibn-e-Munabbih (d. 110/719 A.H.)**

Hammam bin Munabbih was a Yemenite Sunni scholar of hadith and a student of Abu Hurairah (d.58/677). Hammam’s Sahifa comprises of 138 hadith and is believed to have been written around the mid-first century AH/seventh century. Out of these 138 traditions in Sahifa ninety-eight of them are codified in Bukhari and Muslim compilations. We also see that all but two of the narrations are found in one section of the Musnad of Imām Ahmad again witnessing the preservation of Ḥadīth and that earlier works were faithfully rendered in later documents.

Using the first century Sahifa of Hammam Ibn-e-Munabbih as a “control group” Marston Speight compared it (i.e., the Sahifa) with about the 1500 variant readings of the same Aḥādīth found in the collections of Ibn-e- Hanbal (Musnad), al- Bukhārī (Sahih) and Muslim (Sahih); the last three collections date from 3rd/9th century. Speight says that “the texts in Hammam and those recorded in Ibn-e- Hanbal, Bukhārī and Muslim with the same Isnād show almost complete identity, except for a few omissions and interpolations which do not affect the sense of the reports. On the other hand, the same ahādīth as told by other transmitters in the three collections studied show a rich variety of wording, again without changing the meaning of the reports. He quotes that, “I have found practically no sign of careless or deceptive practices in the variant texts common to the Sahifa of Hammam Ibn-e-Munabbih.

In other words, it shows the careful and meticulous nature in which hadith was transmitted as well as high moral and upright characters of the transmitters as well as collectors of the hadith; a fact that Islamic traditions had always asserted and now the Western scholarship endorses it.

**Musannaf of Ibn-e- Jurayj (d.150 A.H.)**

His father was a Muslim scholar and his grandfather Jurayj was a Roman Christian. His life is described in Tahdhib al-Tahdhib by Ibn-e- Hajar Asqalani. He
collected Ḥadīth in Mecca. His narrations are quoted in Sunan Abū Da’ud. He is known for his most retentive memory.

Harald Motzki says about Musannaf of Ibn-e- Jurayj that such a diversity can hardly be the result of systematic forgery, but, rather, must have developed over the course of time. We must therefore-until the contrary is proven-start from the assumption that the traditions for which Ibn-e- Jurayj expressly states a person as his source really came from that informant, and thus Ibn-e- Jurayj’s transmission, in my opinion, should be regarded as authentic.210 Motzki says that Ibn-e- Jurayj had an encyclopedic interest in traditions since he collected traditions of highly diverse provenance and passed on to his students even those which collided with his own opinion and those of Meccan Fiqḥ. Nevertheless his passion of collecting is directed towards legally relevant traditional material. This juridical “function” of of Ibn-e- Juryj’s traditions is also discernable in organizing principle according to which he arranged them.211

Musannaf of `Abd al-Razzaq San’ani (d.211 A.H.)

Harald Motzki introduces Musannaf of `Abd al-Razzaq San’ani (211/826) as an important source of history of law. He was Yemani and a contemporary of Shāfi‘i but clearly not influenced by Shāfi‘i. This source in contrast to the classical collections of 3rd century represents an early stage of development and more voluminous than Mawṭṭā. However special significance of this source lies in the fact that it contains sources from the first half of the 2nd century lost as independent works or have not surfaced until today. Musannaf works are not originally compilations limited to Ḥadīth in narrow sense. Rather they contain reports of the statements and modes of behavior of all past generations. These Mussanafs, of Abdul Razzaq and Ibn-e- e Abi-Shayba are the potential sources for early history of Islamic law and Islamic jurisprudence. They are broadly structured and not confined to a single scholarly tradition. Both works are available in edited form since 1970s.

211 Ibid, p. 235
Musannaf of Ibn-e- Abi Shaybah \(^{212}\) (d. 235 A.H.)

Abū Bakr Ibn-e- Abi Shaybah (159-235 A.H.)\(^{213}\), the name with which he is better known, is “Abd Allah Ibn-e- Muhammad Ibn-e- Ibrahim. He was a contemporary of Imām Ahmad Ibn-e- Hanbal, Yahya Ibn-e- Ma’in, Ishaq Ibn-e- Rahwayh and “Ali Ibn-e- al-Madini. It is an Andalusian book which records Kufan perspective on Islamic knowledge in circulation in the year 2000 A.H.

His narrations are found in all six of the famous collections of Ḥadīth besides the collection of Imām al-Tirmidhi. Ibn-e- Hibban said: “He was a proficient and trustworthy master [of Ḥadīth ], of those who wrote and collected and compiled, and he was the most retentive from the people of his time.” (Tahdhib al-Kamal, Bashshar “Awwad ed. 16:34-42) His work al-Musannaf is one of the largest collection of narrations including marfu”, mawquf and maqtu” reports.

Abū Bakr Ibn-e- Abi Shaybah has over forty reports in his renowned al-Musannaf with Abū Ḥanifah in their chains. There is always only one narrator between him and Abū Ḥanifah, and these single intermediaries give us an excellent insight into those who would narrate Aḥādīth from Abū Ḥanifah. The number and calibre of Ḥadīth scholars who narrate from a shaykh after hearing from him is an indication of the shaykh’s rank and reliability. As Shaykh Muhammad “Awwamah said, Ibn-e- Abi Shaybah narrated from Abū Ḥanifah “through the medium of 12 of his most eminent shuyūkh.”

Analysis

In this chapter three major observations of Western scholars about Muslim hadith literature have been discussed. Putting in simple words these are restated as follows Common link theory, argument e-silentio and back growth of isnads. We will now analyse this chapter under these three headings.

Common Link Theory

\(^{212}\) Published by Maqtabah ar-Rashid, Riyadh, Saudia Arabia.

\(^{213}\) According to khatib al Baghdadi , Ibn abi shayba was born in 156 A.H.
Common link is that person whose name appears in almost all versions of a particular hadith. By common link theory the orientalists mean that the hadith was forged during the time of this common link. This theory thus gives a clue to the time when a particular hadith was invented. He faults Schacht for considering the common link the earliest historically tenable point at which the hadith’s existence can be assumed or this in any way reflects on hadith forgery. Motzki proves with the help of examples that hadith reports pre date common links. The difference in the conclusions of both these Western scholars is due to the fact that Schacht relied only on the chains of narration and concluded. He did not take into consideration the text of hadith. Another reason for reaching at different conclusions is identified by Motzki himself when he states that Schacht has used small and selective body of sources and that his study was based on skeptical assumptions. The method that Motzki uses in order to analyze traditions is based on critical scrutiny of both text as well as chains of a narration. He also faults Schacht for not using older and more extensive works on hadith and consequently identifying the common link a generation or so later than it actually was. Motzki also asserts that the possibility exists that a hadith could be dated earlier than its common link thereby refuting Schacht’s claim that common link indicates the dating of a hadith. He reaches this conclusion by drawing on sociology of knowledge and by carrying out matan analysis of hadith. In hadith from Aisha regarding giving breast milk to adults, the common link is al-Zuhri but this hadith contradicts the legal position taken by al-Zuhri on this issue thus he would not be inclined to invent a tradition that contradicts his legal stance. Zuhri was informed by Urwa of this hadith whose legal position corresponds to al-Zuhri thus same reasoning holds for Urwa which suggests that hadith indeed originated with Aisha. This particular example explains

- All hadith are not fabricated and the contents of hadith were carried forward honestly and with extreme deliberation.
- The narrators were reliable and did not attempt to change the contents according to their own whims and wishes.
- That ahadith pre date their common links
• That hadith originated in the first century A.H.

• It also disapproves the concept of back projection of a hadith into the mouth of a Companion

• It is inaccurate to assume forgery and deception in the process of hadith transmission.

The isnad cum matan method employed by Motzki has brought Western scholarship on criticism of hadith closer to Muslim scholarship on hadith criticism in terms of results or conclusions arrived at. Also this method of analysis requires judgment and weighing of evidence which is not arbitrary or based on one’s personal opinion but rests on sound logical reasoning and strong historical evidence. Another positive aspect of Motzki’s research is that he does not generalize his conclusions for entire hadith corpus but insists on adopting proper methodological tools to analyze traditions individually. This methodology has been successful in claiming support of American and European scholars alike. Motzki also differs from earlier Western scholars of hadith because he does not make sweeping judgments but weighs each hadith case by case.

Another very important assertion by Joseph Schacht that hadith were orally transmitted in the first century and recording of hadith began only in the second century is refuted by

• Motzki’s study and analysis of the hadith corpora of Ma’mar bin Rashid and Ibn e Juraij (students of al-Zuhri) as contained in Musannaf of Abd al Razzaq () which shows that it leaves little room for allegation that they fabricated the material attributed to al Zuhri.

• Mustafa Azmi’s reference to the personal compilation of Qasim ibn e Abu Bakr (d. 112 A.H.)

• Discovery of Sahifa of Hammam bin Munabbih (d.110) believed to have been written around mid- first century

*Argument e Silentio*
Put in simple words *argument e silentio* means that by showing that a hadith was not used as a legal argument in a discussion where reference to that hadith was imperative proves that the hadith did not exist at that time. Or, simply proving non-existence of a hadith at a particular time.

This argument has been frequently used by Schacht to prove non-existence of traditions in the early period of Islam. Following are some logical refutations of this argument:

- By comparing Malik (b.95 A.H.)’s Muwatta with Shaybani (b. 135 A.H.)’s Muwatta, Ansari concludes that a large number of traditions recorded in Malik’s Muwatta were not recorded in Shybani’s Muwatta although Shybani’s Muwatta was compiled later in time.

- Traditions in Malik’s Muwatta which are supportive to doctrines of Shybani are not found in Shybani’s Muwatta. This did not imply that Shaybani was unaware of those traditions because he has mentioned those traditions elsewhere.

- On comparing Athar Abu Yousaf and Athar Shaybani Ansari concludes that a large number of traditions mentioned in athar Abu Yousaf were not mentioned in athar Shaybani although Shaybani was not only younger than Abu Yousaf but was also his student.

Logical arguments refuting e-silentio

- Perhaps the scholar did not know that the hadith exists.

- The scholar might not consider that hadith useful for that argument.

This undermines the validity of assumptions that support *e-silentio* argument.

It would be worthwhile to show here how Professor Azmi concludes that Schacht himself contradicts his argument e-silentio. He quotes Schacht as saying that ‘the two generations before Shafi’i reference to the ahadith of the Prophet were an exception’ and ‘that all ancient schools of law offered strong resistance to the ahadith of Prophet’ \(^{214}\)

\(^{214}\) Origins, p.57.
If we accept these statements to be true it is difficult to reconcile with Schacht’s e-silentio argument that a tradition could not have existed if it was not used in a legal argument, since those resisting them would hardly have likely to have used them. Thus Schacht’s argument e-silentio is contradicted by Schacht himself.

**Backgrowth of Isnads**

Schacht’s *premise* that *ahadith* were projected back into the mouth of Prophet Mohammad speaks of hadith fabrication. This issue is dealt in detail by Professor Jonathan Brown in three articles which he wrote in 2004, 2007 and 2008. Brown relates Western hadith critics understanding of back projection of hadith with Muslim hadith critics understanding of the concept of ‘ziyada’ (addition). Briefly stating Brown meant to say that Muslim hadith critics 3rd and 4th century noticed normative *matan* addition of *ahadith*. This means that the status of a hadith is raised from *mawquf* to *marfu*. Same if put in Christopher Melchert’s words would be that in the 3rd century after hijra hadith reports from the Prophet eclipsed the reports from Companions and later authorities.

There seems to be an apparent similarity in the observation of both Western and Muslim hadith critics but they differ in the inferences they draw from these observations. The similarity is that they both deduce that *ahadith* were projected back. The difference is that Western hadith critics inferred forgery as a natural outcome of back projection and denied the acceptance of all versions of that hadith. On the other hand Muslim hadith critics justified the existence of both *marfu* and *mawquf* hadith on following grounds:

1. Companions may quote Prophet on one occasion and paraphrase him on another while delivering their own legal ruling.

2. They denied rejection of *marfu* hadith because for them every piece of information that sprang from the era of Mohammad was an important store house of information for the development and application of legal rulings.

3. Chances of *marfu* hadith to be discarded as forged or accepted as authentic were same to them, it did not out rightly suggest forgery as a natural outcome of normative *matan* addition.
4. They also invoked the legal maxim that “that affirmative supersedes the negative
in matters of epistemology”

5. They treated both mawqif and marfu narrations as two different ahadith.

6. However most blatant back growth of isnads was rejected by them.

We can conclude that Schacht’s statement that:

‘ahadith were projected backward into the mouth of Prophet’,

Brown’s statement that:

‘Muslim hadith critics acknowledged normative matan addition’

Hallaq’s statement that:

‘Muslim jurists had acknowledged the precarious epistemological status of ahadith’ and

Melchert’s statement that

‘the reports from Prophet eclipsed the reports from Companions and later generations’

All imply hadith forgery though the mannerism in which these statements are
made vary considerably. Schacht borrowed they idea from the literature of classical
Muslim hadith critics but did not acknowledge and proposed the theory of back
projection in his name. He acknowledged Goldziher’s contribution and claimed that he
folled in his footsteps but in whose footsteps did Goldziher follow? It a well- known fact
that Goldziher studied the Zahiri school of thought with immense interest even though
Zahiri school did not gain much popularity amongst Muslims and became extinct very
soon. The legal methodology or the legal theory of Zahiri school rejected analogy and
gave prime importance to the textual sources. While considering textual sources they
limited themselves to the apparent meaning of the texts. This approach often led them to
contradictions which they did not consider important to resolve to give relief to the
parties. With this approach this school was bent upon accepting all sort of material in
hadith texts or even attributing ahadith to Prophet Mohammad which he had not said as
the texts of Quran and Sunnah of the Prophet were the only sources acceptable to them to
draw conclusions. The question arises why did Goldziher study Zahiri school of fiqh and not other mainstream popular sunni school such as Hanafi or Shafi schools of fiqh.

Schacht picked up Shafi school of thought and called him the master architect of Islamic jurisprudence. He first elevated Shafi’i’s status and established that he was a thorough traditionist. Proponents of his legal theory adhered to Quran and traditions and had very strict criteria for admittance of analogy. Then relying upon the findings of Muslim hadith critics criticized Prophetic traditions overwhelmingly. On the one hand he gained favor of Muslims by referring to Shafi’i and on the other hand tried to prove that the hadith literature to which Shafi adhered so strongly was a mass of forged and fabricated reports.

The objectives of both these Orientalists seem to coincide when we see on which classical Islamic literature they have built their edifice. For both these scholars writing on Islamic law their primary source would be the classical Islamic texts on which they built upon their thesis. However the approach of both Godziher and Schacht was similar in that they criticized Prophetic traditions directly. Their mannerism was scholarly but they avoided to acknowledge the contribution or relevance of the sources on which they relied to build their theories.

As we move forward in the twenty first century the trend seems to change and the prime example is that of Jonathan Brown. Jonathan Brown acknowledges the sources he relies upon which of course are classical Muslim hadith critics illal books. Not only this Professor Brown compares the approach of Western and Muslim hadith critics satisfying the underlying objective to prove that Prophetic ahadith were indeed projected back. He goes on to prove that this fact was first noticed by Muslim scholars and enlists a number of hadith critics of the 3rd and 4th century. He places the entire onus of this discovery on the shoulders of classical Muslim scholars.

Hallaq too apparently siding with the Muslim scholars but actually affirming the Western approach towards hadith exclaims that the ‘Muslim jurists had acknowledged the precariously epistemological status of hadith’
Thus the Orientalist paradigms remain constant from 20th to 21st century it is only the methodology or the approach and trend that has been changing from Medieval era to Post 9/11 era. Orietalist writings were directly addressed to Muslims as their enemy and were polemical in nature. This trend gradually whittled down and religious mooring was replaced by cultural domination. Later the agenda was social science research which now prevails with counter criticism of orientalist’s writings by the orientalists under the garb of academic honesty.
CHAPTER 7

INFLUENCE OF PRE-ISLAMIC NON-ARAB LAWS
ON
ISLAMIC LAW

“We may never know for sure if Shāfī‘ī sat, literally or metaphorically at the feet of Talmudic sages- just as we may never know for sure if Caliph ‘Umar “had a Jew lawyer at his elbow.””

Judith Romney Wegner

Introduction

It is presumed by Western scholars that it is through fabricated hadith literature that percepts of pre-Islamic non-Arab laws have paved way into Islamic law. It is also alleged that Holy Prophet was a reformer and not a legislator and did not contribute much towards establishing a legal system for Muslims. Western academia emphasizes that it was with the efforts of Umayyads and Abbasids that Islamic law took its shape as we see it today. It is also claimed by Western academia that influence of Roman and Jewish laws on Islamic law is unmistakable. This chapter carries out an
analytical study of the writings of Western scholars on the probable influence of Pre-Islamic non-Arab laws on Islamic Law. It is generally argued in Western academic circles that Islamic law is involved in “systematic borrowing” from or “indebted” to various foreign non-revealed laws; such as Persian, Roman and Provincial law. Among revealed laws most striking resemblances have been claimed with Jewish or Talmudic law but Canon law of Eastern churches also draws attention. It is also alleged that as the development of Islamic legal theories and their codification took place in the second and third centuries of Islam therefore popular Umayyad practice, laws of the conquered territories and non-Arab converts who embraced Islam had a strong role to play in the development of Shari’ah.

The standpoint of Muslim scholars is that Shari’ah is of divine origin and the fundamentals of legal reasoning in Shari’ah as well as the foundations of its legal theories are based purely on legal and moral percepts mentioned in Qur’ān, Prophetic traditions and later developments of Muslim jurists. This viewpoint is unacceptable to the Western scholarship. They are of the view that it is impossible to explain how Islamic law could have developed so fast without the underlying assumption of foreign influence on Islamic law. Islamic law could not have been born by parthenogenesis. Whether Muslim views are right or the Western scholarship is correct is not the scope of this chapter. Instead an effort is made to examine the outcome of discussions in Western scholarship. Disarray is observed even among the very penetrating researches of Orientalists and Western scholars on the issue of foreign influence on Islamic law. But at the same time effort will be made to ward off such comments passed by Orientalists, that Islamic law is, “A pious conspiracy of silence among the Arabic writers as to the sources from which they drew their material.”

Some evidences of Islamic legal activity from the first century of Islam after the demise of Prophet Muḥammad (PBUH), other than the first four Caliphs are the role

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of Qāḍi Shuraih (frequently referred to in Western scholarship). Qāḍi Shuraih Ibn-e-Haris was the chief Judge of Kufa who imparted judgments for about 75 years and is reputed to be most brilliant legal luminaries of Islamic world. Schacht says that he was a legendary figure of Kufa over a long period of time. His legal activity coincided with the establishment and spread of Islam and reflects the transition from old to new form of administration of justice. He made an important amendment in witness Laws. Formerly all witnesses appeared together. He suggested that all witnesses should appear separately before the Qaḍi. Shuraih was known for his extensive knowledge of Islamic law and was respected for his good judgment. After his services in Kufa he was transferred to Damascus by Caliph Muawiyah. On account of this, Shuraih became known as “the Judge of the Two Great Cities”. He retired from office only a year before his death, and he is supposed to have lived to the age of 108 or 110 years. Qāḍi Shurayh was the Qāḍi of Kufa in the reign of Umar, Usman, Ali and Ubaidullah. The third letter of Nahj ul-Balagha is addressed to Qāḍi Shurayh on purchase of a house.

The next important figure in Islamic legal history is Jabir Ibn-e- Zayd al Azdi also known as Abū Sha’tha” who died in 122AH. Jabir Ibn-e- Zayd was not a Kharji but a Tabe”e. Jabir wrote a large book of traditions and juridical opinions known as “Diwan Jabir Ibn-e- Zayd” which Ibadis followed and upon which they based their school of thought. This book is considered to be the oldest book on Fiqḥ written by Khwārij to extract their law. Ibadi School attaches great importance to Hadīth and their third source of law is views of the Companions. Today Ibadi School is predominant in Oman and there are several areas where it continues to be followed such as Zanzabir, parts of Libya, Tunisia and Algeria. According to Goldziher Ibadis live mainly in

218 http://en.wikipedia.org/wiki/Shuraih_Al-Qadhi
219 In another source Jabir Ibn e Zayd is said to have died in 93A.H. Jabir was born either in 18A.H. or 21 A.H., some sources reveal that Jabir was present in Medina on the day Caliph Abu Bakr was elected as Khalīfa.
220 www.islamcity.com, retrieved on August 16, 2012
North Africa, in Mzab region in the district of Jabal Nafusa and East Africa and Oman in Arabia.222

**An Overview of Western Scholarship on Influence of Pre-Islamic non-Arab Laws on Islamic Law**

Although the question of foreign influence on Islamic law was taken up for extensive discussion by a 19th century Orientalist, Von Kremer (1828-1889) in his “Culturegeschichte” in which Kremer rejected the theory that Muslims studied Roman law books but allowed for continuity of legal practice. Kremer also pointed out that several Roman institutions could have entered Islamic law indirectly through borrowing from the Jews.

Twentieth century saw a rigorous debate on this subject reflected in the writings of Hungarian Orientalist Goldziher (1850-1921), Italian Orientalist Nallino (1872-1938), Fitzgerald, Schacht (1902-1969), Crone (b. 1945), Hallaq (b. 1955) and Motzki (alive). A critical analysis of these writings is the focus of this chapter.

Goldziher whose writings had the most profound influence on the future researches on this topic emphasized foreign influence on Islam as a religion and stated that legal percepts in Qur’ān were insufficient for dealing with new situations. He adds that in Islam the principle of toleration, forbearance and moderation in the treatment of non-Muslims were to have the force of law and the most important and immediate task was to develop a legal view of the relations between Islam, the conqueror and the subject. During Umayyad rule to deal with day to day legal problems the secular authorities relied on common usage and the wisdom and arbitrary judgment of those who administered

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justice. Goldziher also asserts that foreign cultural influences had an effect on the evolution of Islamic legal method and on various details of its application. In his view Roman law was instrumental in defining the methodology adopted by Muslim jurists, he states, “Islamic law shows undeniable traces of the influence of Roman law both in its methodology and in its particular stipulations.”

Fitzgerald (1950) criticizes the writings of earlier Western scholars and says that they have adopted unscientific methods of research to prove their opinions and support their assumptions. Fitzgerald states that:

“... to string together a list of resemblances, sometimes real but generally superficial and too often imaginary; and then to assert that such resemblances are in themselves proof of borrowings by the later from the earlier system. This unscientific method of dealing with the problem has been bolstered with unhistorical history, question begging epithets and a priori assumptions.”

On the other hand Patricia Crone in her 1978 publication, “Roman, Provincial and Islamic Law” commenting on the writings of Goldziher says,

“... his writings on the question are uncharacteristically weak: he postulated large-scale borrowing of Roman concepts on the basis of purely external similarity, disregarded the possibility of transmission via Jewish law, and had the most elementary knowledge of the legal system to which he attributed so crucial a role”.

She also said that, Goldziher being a Jew with an intimate knowledge of Jewish law could have made an effortless case of Jewish influence on ancient Islamic law but he argued for Roman law instead. Crone argues that it is Provincial law that influenced

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223 Ibid., p. 37.
224 Ibid., p. 44.
227 Ibid., p. 106.
Islamic law rather than Roman law and supports her premise with the example of Islamic Patronage being borrowed from Provincial law.

Hallaq in his review on Crone’s “Roman, Provincial and Islamic Law: The Origins of Islamic Patronage” says that “Her premise that the Arabs possessed little when they arrived in the Fertile Crescent and they were forced to borrow virtually everything from the nations they conquered leads her to the most unreasonable conclusions.” Furthermore, Hallaq comments on the negative attitude of the Orientalists that “Insists on depriving the early Muslims of all civilized values that determines for Crone when a piece of evidence should be admitted, twisted or suppressed”. For Hallaq, “In Crones work it is the hypothesis that shapes evidence, not the other way round.”

Hallaq discusses at length the development of Islamic law in its formative period in his “Origins and Evolution of Islamic Law” (2005). He says not even a single volume have been published to date on the history of formative years of Islamic law. Furthermore none of the three works that have appeared with the title “Origins” (the work of Joseph Schacht in 1950, of Harald Motzki in 1991 (translated by Marion H. Katz in 2002) and Yasin Dutton in 1999 can boast that it truly reflects what is implied in the titles. In these scholarly writings study of the formative period of Islamic law has been done through a narrow lens. Hallaq dates the beginning of Islamic legal conception as a few years before the demise of Prophet Muḥammad (PBUH). Soon after the demise of Prophet Muḥammad (PBUH) Islamic polity was shaped by Qur’ānic ethical and legal contents and customary laws of peninsular Arabs. In stating so he differs fundamentally from Schacht and other Orientalists. He redefines the formative period of Islamic law as an era in which the “legal system arose from rudimentary beginnings and then developed

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229 Ibid., p.7.
230 Hallaq, Ibid., Intro, p. 4.
to the point at which its constitutive features had acquired an identifiable shape”. The essential attributes, according to Hallaq that gave Islamic law its shape are four;

- Complete judicial system
- Fully developed positive legal doctrine
- Fully developed legal methodology
- Emergence of doctrinal legal schools

Hallaq says by the middle of fourth century hijra all attributes had developed into complete form. Thus refuting the old claim, that Islamic law crystalized fully in the third century of Islam with the establishment of Shafi’i’s school of thought. Hallaq differs from Schacht regarding the end point of the formative period of Islamic law. Schacht concluded that the end point of formative period of Islamic law is middle of third century but according to Hallaq the point at which Islamic law came to contain all its major components stated above is the end point of formative period and this must be dated around middle of fourth century.

He says that more challenging than defining the end point of formative period of Islamic legal history is determination of its beginning. Problems related to the beginning of formative era of Islamic law have arisen from unproven assumptions. Sound historical evidence has not been provided to prove hypothetical beginnings. The major assumption is that Islam absorbed cultural and legal elements of the societies it conquered, the Sassanid and Roman Byzantine empires which imply Syria and Iraq as the centers of legal transmission and not Medina.

In Hallaq’s view Muslims neither imposed their laws on the conquered territories nor interfered with their laws. This segregation gave them space to develop their legal system independent of other legal systems on the basis of their own ideology.
According to Hallaq what guided the development of Islamic law, were the customary laws, tribal values, commercial practices and other paradoxes prevalent in the Semitic culture of the Near East. Permeating all this he says is the Qur’ânic spirit which increasingly altered the pre-existing laws and customs.\(^{231}\)

Commenting on the possible influence of pre-Islamic non Arabic systems of law on Islamic jurisprudence, Harald Motzki limits the scope of such influence temporally to the end of 1\(^{st}/7\(^{th}\) century A.D/CE including pre-Islamic times and spatially to the Arabian Peninsula (Hejaz and Makkah). To Motzki influence of Near-Eastern Provincial law which was strongly infused with Roman law and especially by Jewish legal reforms is inconceivable with these spatial and temporal limits. But since we so far know nothing precise about the dissemination and substance of the laws in the Arabian Peninsula in 6\(^{th}\) and 7\(^{th}\) centuries or about pre-Islamic law in Mecca concrete proof of their influence on Islamic law is difficult to adduce. Patricia Crone’s study shows how one can approach this problem but dating and localization remains speculative.

Harald Motzki has challenged Western scholarship’s assumptions regarding the role played by scholars of non-Arab decent in the formative period of Islamic law\(^{232}\). He took a sample of 115 scholars from al-Shirazi’s *Tabaqat al Fuqaha* a prosopography of Muslim jurists written in 5\(^{th}\) century of Islamic era. This sample includes the most important jurists of 1\(^{st}\) and 2\(^{nd}\) centuries A.H. excluding the generation of Prophet’s companions. The selected scholars who belong to Medina, Mekkah, Yemen, Syria, Egypt, Kufa, Basra and Khorasan. Since Motzki’s study is based on the first two centuries of Islam, he has disregarded all Baghdadi scholars mentioned by al-Shirazi because they belonged to the third century A.H. The scholars included in the sample comprised of 55% Arab and 45% non-Arab scholars which clearly proves that non-Arab mawali did not dominate the world of Islamic legal scholarship. Another important

\(^{231}\) Hallaq, Ibid., p. 198.

finding is that the number of important non-Arab scholars is not higher in the centers of jurisprudence situated outside the Arabian Peninsula. In the first generation of scholars the ratio of Arab vs. non-Arab scholars is 63%: 37%, this contradicts the opinion expressed in Muslim tradition that after the generation of the Companions legal knowledge passed to mawali in nearly all regions of Islamic kingdom.

Motzki’s investigation of the ethnic origin of non-Arab scholars in his sample indicates that three quarters had an Eastern background and came from regions of Sassanid Empire. Scholars of Christian and Jewish roots were very few in number. Most of these scholars are Muslims of second and third generation, whereas most first generation scholars entered Arab-Muslim society as children and grew up in an Arab – Muslim environment cut off from their ethnic roots.

Motzki concludes that these findings lend no support to the assumption that scholars of non-Arab origins brought the purported borrowings with them from their native legal system. Therefore we can no longer take it for granted that scholars of non-Arab descent were the natural vehicles of borrowings from pre-Islamic non-Arab legal systems. But even if there were any, such cases must be demonstrated. Motzki claims that he does not know of any such case from the first two centuries A.H. on the basis of this research.

This is briefly a summary of analytical comments of scholars of twentieth century writing on the subject of influence of pre-Islamic non-Arab laws on Islamic law which reflects their attitudes and divergent views. Having said this, our discussion now moves to analyze the contents of twentieth century writings on foreign influence on Islamic law to see what issues are raised, what methodology is adopted and what conclusions are drawn. The issue of foreign influence on Islamic law is based on the controversial discourse on the origins and evolution of Islamic law. Literary sources on the first century of Islam are extinct; it is coupled with the fact that available scriptural and extra-
scriptural sources which are revered in Muslim scholarship are a subject of heated debate and controversial discussions in Western scholarship. Western scholars see the sources of Islamic law as fabricated and a result of large scale pious forgery (this has been discussed at length in the previous chapter). Regarding methodology of Western scholars to reach at these conclusions, they adopt historical method of research and philological analysis of available material. Though, on the recommendation of Sir Hamilton Gibb contemporary works have integrated social science methods to elevate the standards of research. In their view Muslim jurist’s mind is incapable of espousing scientific methods of research and hence theories of law put forth by them and the development of Islamic law was not possible without borrowings from Hellenistic thought and Roman and Jewish legal principles.

It is true of Islamic law that exhaustive study of the problem by a single scholar has not been made so far but a collective assimilation of works of twentieth century clearly lay down the frame work and paradigms of the topic under discussion. Foreign influence on nascent Islamic law can be studied under two headings:

1. Influence of non-revealed laws (Persian, Roman and Provincial Laws).
2. Influence of revealed laws (Jewish law).

We will take on these two areas of study separately.

**Influence of Non-Revealed Laws**

Out of the three non-revealed legal systems mentioned above Western scholarship attributes the strongest influence on Islamic law to be that of the Roman law. However, Patricia Crone is of the view that it was the Provincial law with Roman elements that influenced Islamic law in its formative years. Not much has been written about the influence of Persian law but Western scholarship has advocated the impact of Hellenistic thought on the dogmatic development of Islamic theology which is not the scope of current research.
While Roman law needs no introduction the term “provincial law” refers to the non-Roman law practiced in the provinces of Roman Empire especially the provinces formerly ruled by Greeks. There were thus two quite different sets of legal institutions in the Roman Near East which fell to the Arabs.\textsuperscript{233}

\textbf{Roman Law}

Adrian Reland (1676-1718) of Holland, professor of Oriental languages at Utrecht was probably the first Western scholar to draw a comparison of Roman and Islamic law. After Reland the “\textit{a priori}” case of Roman influence on \textit{Shari’ah} was forcefully put forward by Sheldon Amos (1835-1886) who wrote in 1883. He pointed out that there is not much legislation in Qur’\text{"}an and Syria was a province in which Roman law was not only practiced but also studied. The converts must have brought their legal notions with them and such foreign notions could easily have been formulated as traditions from the Prophet. In Nallino (1872-1938)’s view Roman law was not applicable to the multitudinous tribes of Ishmael and considers legal traditions from the Prophet as genuine.\textsuperscript{234}

According to Goldziher, two kinds of influences determine the history of an institution, influences that spring from the nature of the institution and the intellectual influences from outside.\textsuperscript{235} He further adds that impulses of former kind were not lacking in Islam but the most important stages in its history were characterized by the assimilation of foreign influences. The original nucleus of Islamic law was rich in its ideology and moral principles and unique in claiming that authority of law rests in divine source, thereby negating the very basis of all other laws, this uprooted the claims for similarity of original nucleus of Islamic law with other laws.

\textsuperscript{233} Crone, op. cit., p.1.
Based on this view of Goldziher that influences that spring from the nature of Islam as an institution were not lacking we shall proceed to discuss foreign intellectual and cultural influences which helped shape the contours of Shari'ah. From sound legal thought emerges a well-founded legal system and it is essential that the two should be harmonious. Goldziher’s statement that, “dogmatic development of Islam took place under Hellenistic philosophy” has no basis. In Hellenistic philosophy the Cynics and Stoics emphasized on virtue and reason, but Epicureans placed pleasure at the heart of good life and maintained a materialistic approach, whereas Sceptics dogmatic approach was based on Scepticism which led them to achieving tranquility without good moral practice. All these Hellenistic schools were soon eclipsed by the rise of Christianity. Speaking of Islam’s dogmatic development under Hellenistic thought is sheer error as Islamic theology is based purely on firm belief and faith in the Divine authority coupled with following moral and ethical example of Prophet Muḥammad. Goldziher’s second assertion that “in Islam’s legal system the influence of Roman Law is unmistakable” calls for prudence.

Fitzgerald refutes Goldziher in 1950 in his article “The Alleged Debt of Islamic to Roman Law” by stating that Shari‘ah differs radically in character and intention from the Roman law. The former is a system concerned with the relation of the individual human soul to God whereas latter is always a lawyer’s law.

“Presumably the Christian courts followed in the main the general principles of Roman law consciously or unconsciously so far as they understood them. But that is very different from the alleged survival of Roman courts with their highly trained professional staff. It was obviously impossible for the Arabs to tolerate the continued existence of courts deriving their authority from and owing allegiance to a foreign power which had not submitted to Islam.”236

Fitzgerald makes use of all the logical reasons and information available of the legal activities in the first century of Islam to support his argument. He also uses oral

traditions in support of his argument such as Omar’s instruction to the Qāḍī 237 (Abū Mūsa). In Fitzgerald’s view the methods of thought by which a Muslim judge at that early date was expected to guide himself and by which Muslim jurisprudence had been built were set out very clearly during the first century. Although the first writers and teachers of Islamic jurisprudence whose work has come down to us, the Imāms of four schools of thought belonged to the second century, but an enormous mass of jurisprudential work must have preceded them. These writers differ in minor details but the main outline is the same in all which is only possible if the main foundations of law had been firmly laid: such foundations were not laid in Syria or Egypt or Baghdad but in Medina and Kufa.238 Medina where Islam saw its first great development in Shari’ah was “within the reach of Jewish but a very long way from Roman influence.”239 Fitzgerald also dismisses the possibility of borrowings of legal terms form Roman to Islamic law and disagrees with those scholars who equate fiqḥ with prudentia arguing that all legal systems are inevitably based on the use of reason. He calls it an absurdity to suggest that the words nyaya (logic) and mimansa (interpretation) which are used in Hindu law indicated a connection with Rome. Or it is equally unjustified to assume that Rabbinical and Muslim lawyers derived the use of human intelligence from Rome.240 For when an institution and idea is borrowed by one people from another it is usual to find that the label by which it is known is borrowed with it.241 To Fitzgerald Roman and Islamic law were irreconcilably opposed on the fundamental principal of the true source of law. Even if some similarities were found in both laws the debt of Islamic to Roman law was not a matter of direct borrowing by lawyers from the lawyers. He supports his contention by three general considerations.

- The evidence of language
- Adoption of oral law instead of written, whereas Roman law being well documented.

237 Fitzgerald. Ibid., p. 93.
238 Ibid., p 94.
239 Ibid., p.97.
240 Ibid., p.94
241 Ibid., p.98
• No mention of any source of direct legal borrowing in Islamic legal literature.\textsuperscript{242}

An opposing view on the subject of Roman law influence on Islamic law is put forward by the leading scholar of twentieth century Joseph Schacht (1902-1969). Schacht carried his research in the footsteps of Goldziher and observes a number of parallels between Roman and Islamic law, which he calls “too numerous and too striking to be coincidences”\textsuperscript{243} He states that these parallels are not only restricted to positive law but extend to legal concepts, principles and fundamentals of legal science.\textsuperscript{244} While elaborating on these parallels Schacht takes up the task of not only accounting for the existence of such parallels in jurisprudence but of overcoming the apparent historical impossibility and of explaining the manner in which it happened. By reversing the first center of Islamic legal activity from Medina to Iraq Schacht overcomes the impasse of apparent historical impossibility, which is very much in line with his findings on back projection of Hadīth and argument e-silentio. He adds further that

“\textit{Muḥammadan jurisprudence started about the year 100 A. H. It follows not only that the whole first century of Islam was available for the adoption of foreign legal elements by nascent Islamic society, but that Islamic legal science began at a time when the door of Islamic civilization had been opened to potential transmitters of these legal concepts, the educated non-Arab converts.”}

This is in striking contrast to Muslim scholarship which claims city state of Medina as the first center of learning and development of Islamic legal percepts which later spread to the conquered territories. Iraq being the seat of Hanafi legal school does not preclude Medina from being the center of oral transmission of legal corpus to various schools of \textit{fiqh} which developed later.

\textsuperscript{242} Ibid., pp.98-101

\textsuperscript{243} Schacht, ‘Foreign Elements in Ancient Islamic Law’ \textit{Islamic Law and Legal Theory.} (1950) p. 10.

\textsuperscript{244} Ibid., p.11.
Examples that Schacht gives are of Ijmāʿ (consensus) in Islamic law and its parallel opinion prudentium in Roman law, concept of rahan (mortgage) in Islamic law and institution of pignus in Roman law. Similarly he quotes an Islamic legal maxim “the child belongs to the marriage bed “with its corresponding Roman parallel. And a tradition on the punishment of theft for a thief on whom the Qur’ānic penalty of mutilation cannot be applied was to be responsible for double the value of object stolen, had its parallel in the Roman law of furturm.

Ayman Daher’s article on the influence of Roman law on Shari‘ah was published in Mac Gill Journal of Classical Studies in 2005. In this article he discusses the phenomenon that laws and languages, both are linked to culture and society. Comparing Semitic and Indo-European languages he says that both languages differ from each other. In spite of the fact that both languages have a different lineage many Arabic words have been assimilated into Indo-European languages. These words have no roots in the new language then why such a “foreign” word has made its way in the new language? Through analogy he poses the question that does this phenomenon applies to law as well? Can legal concepts be taken from other legal traditions and made to fit into a host legal system? Or to put in exact words can Roman legal concepts be made to fit into Islamic legal system? Considering two opposing views Sheldon Amos stating that “Islamic law is Roman law in Arab dress” and R.Mottahedeh’s statement that “Any law other than the law of Islam is obsolete.” Ayman argues 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. Ayman does not follow historical method of research as adopted by Joseph Schacht instead he carries out a legal analysis, under which he compares structural elements and substantive

246 Ibid., p. 110.
247 Crone, op. cit., p.2.
249 Ibid., p.17.
concepts of Islamic and Roman law. According to him common structural element is the role of a Jurist and compares *Asaba* and *Mahar* as the common legal concepts in substantive law.

**Common Structural Element: Role of a Jurist**

Comparing the structural elements of Roman and Islamic law A. Daher analyzes the role of a jurist in both legal systems. Roman and Islamic law has a fundamental common ground in the role of a Jurist.

In both traditions jurist has a limited authority to legislate and a reverence to customary and historical analysis is observed. 250 Both laws are jurist based legal systems; they allow affluent learned men to become legally authoritative. Jurists are largely independent of governments being a jurist was not a profession; they took no money for their services. The materials on which they work are usually older and authoritative and require interpretation. Roman jurists would base their opinions on their knowledge of legal texts as well as on the opinions of other interpretations and their general deductive reasoning, logic and studies. Similarly source of a Muslim jurist’s authority comes from his recognized knowledge, not from government or from central religious authority like clergy in Christianity. It is the *Qādi* (judge) who is appointed and has the backing of state but Qādi”s rulings are not the foundations of Islamic law the major difference between the two is that Roman law is secular but Islamic law is religious. In Islamic law jurist is both religious and legal expert, he dealt in theoretical Islamic law (fiqh). A. Daher reconciles this difference between the two and says that the “Twelve Tablets” the documented law of the Romans, were limited in scope and College of Pontiffs was the sole body permitted to interpret these laws. This gave a religious hue to Roman law.

Common Substantive Legal Concepts

After discussing the common facets of a jurist in both laws, the substantive legal concepts common to Shari’ah and Roman Law that A. Daher discusses in his article are “Asaba” and “Mahr”.

The translation of Syro-Roman law book of the 5th century A.D. Published in 1880 in Germany has greatly advanced the legal studies.251 This code is a combination of Imperial Roman Law, Roman legal literature and Provincial Roman Law. Muslims conquered the area where this law code held jurisdiction. A common element shared by Shari’ah and Syro –Roman Code is the structure of intestate succession based on the principle of the agnatic line “asaba”. Borkowsky states that it is “truly” a Roman principle.252 In Islamic law after the division of the prescribed shares what is left goes to the nearest agnate (male kin) or the “asaba”. 253 to the exclusion of the female relatives of the deceased. Word asaba appears at article 19 of the Syro-Roman Law Code whereas Qur’ān has no mention of this word although it becomes a critical feature of law of succession in Islam. Crone states that it is now recognized that many elements of Roman law influenced the development of Shari’ah because of the conquest of Syria.254 It is important to mention here that Shia sect does not recognize asaba. In the absence of male heirs the daughter receives under Shia law the whole succession. This is exactly opposite to the sunni sect of Islam. This law was prevalent in Persian Zoroastrian (Sasanian) legal tradition in The Eastern fringe of Iraq.

The second element of substantive law taken up by A.Daher to establish similarity between Islamic and Roman law is “Mahr”. Concept of Mahr in Islamic law corresponds to Donatio Ante Nuptias (marital gift before marriage) in Roman law which is a marital

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251 Syro-Roman Law Code was translated in 1880 by Karl George Burns and Eduard Sachau.
253 C. Mallat, op., cit., p. 710
254 Crone, op. cit., p. 103.
gift to the bride by the husband on marriage. Justinian enlarged this institution and allowed such contributions during marriage and renamed it *Donatio Propter Nuptias* (marital gift on account of marriage). This is crystalized in Book V of the Code of Justinian. Besides apparent similarity more important is to see the parallels established in the objectives of this law in both legal systems. Daher says that in Islamic as well as Roman law this concept is understood as a penalty for unjustified divorce and to provide extra provision for widow. He also states that Qur’ān and several muftis have stressed that *mahr* has nothing to do with divorce, but in classical Islamic legal circles as well as modern ones the institution of *mahr* has taken on the roles that *Donatio Propter Nuptias* implies. Although an Arabian equivalent of this law also exists in pre-Islamic Arabia but the juristic justification given to *mahr* is taken from Roman legal thought.

Since A.Daher lays emphasis not on the apparent similarity but on the parallels established in the objectives of this law in both legal systems, it is important to mention here that the primary sources of Islamic law both Qur’ān and Sunnah exhorts on payment of *mahr* as a marital gift. Mahr is solely a gift of union and to be paid to the bride. It is clearly a consideration from the groom for entering a marriage contract. The penalty of unjustified divorce is termed as “*Mata at Talaq*” in Qur’ān. This concept is stated in verses 2:236, 2:241 and 33:49 of Qur’ān. Verse 241 of the second chapter is translated as, “*For Divorced Women Maintenance should be provided on a reasonable scale, this is a duty on the righteous*”. This is also termed as a parting gift as Islam emphasizes on even the divorce process to be carried out in an amicable manner. Verse 240, of chapter 2 of Qur’ān clearly states the provision for widows, it stays that “*If you die and leave widows behind you should bequeath for your widows a year’s maintenance and residence*”. So both these concepts penalty for unjustified divorce and provision for widows should not be confused with the concept of Mahr or Donatio Propter Nuptius. Having stated this Islamic law proposes three different concepts Mahr, Mata at Talaq and provisions for widows in wasiya (bequeath) with different underlying considerations first is a marital gift second is a parting gift and third is a provision for the widows. It is the general understanding of the society which has wrongly presumed that Mahr is a penalty
for unjustified divorce and a provision for widow. Thus the objective of Mahr is entirely
different from the objective of Donatio Propter Nuptius and thus it is wrong to equate
both concepts. The societal practices and understanding of Muslims might have been
overshadowed by the Syro-Roman legal concepts, but both laws remain distinctly
separate in their original concepts when studied in depth.

The third concept discussed by Daher which has common roots in Islamic and
Roman law is “Wala” or the Roman Patronage. This is discussed at length by Patricia
Crone and Martin Hinds in *Roman Provincial and Islamic Law*, Published in 1987. Wala
is the dependence on and affinity for another, It is a patron-client relationship that
develops when an outsider has to be integrated in a host group. The main consequence of
Wala is that the manumitter inherits as an agnate of the freedman. The law of the Twelve
Tables also 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. This is recounted in the institutes of Justinian in Book III title VII. Institution of
wala also existed in pre Islamic Arabia, the two main characteristics of the pre-Islamic
patronate are that it is formed between an individual and a tribe and is non-assimilative.
Therefore Patricia Crone hypothesizes that due to structural differences between the
Arabian and Islamic patronate, and structural similarities between the Roman and Islamic
patronate, that the Shari‘ah was influenced on this issue from its contact with Roman
Law.

Daher concludes by quoting C. Mallat that in the Middle East evolution of law has
a certain linear pattern that goes from the code od Hammurabi, through Assyrian Law,
Rabbinic Law, Greek Law, Byzantine Law and finally to Islamic law. Although the
name of the legal regime that is in effect changes, the people living under it do not. It is

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255 *Sui Heredes* means those who are heirs of a dead person, and who succeed to the powers, assets, and
liabilities left by the decedent


257 See generally C. Mallat.
these people that bring a rule from one tradition to another. When 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”.258

**Roman Provincial Law**

Patricia Crone in her 1987 Publication, “Roman, Provincial and Islamic Law: The Origins of Islamic Patronate” rejects an absolute aeration of Roman influence and contends that if Roman elements have entered Islamic law they would have done so only through provincial law. Provincial law is the non-Roman law practiced in the provinces of Roman Empire. Hallaq says that Crone dismisses the writings of Goldziher, Schacht and others who wrote on the influence of Roman law on Islamic law on the grounds that they merely affirm rather than demonstrate what they set out to prove. Crone also shifts the geographical area of influence from Iraq (established by Schacht) to Syria. The means by which this influence was affected were the early Umayyad Caliphs who made Syria their capital. So it was the Umayyad’s law that the jurists took as their starting point. She further stresses the presence of residues of Roman and/or Provincial component in Umayyad law. She finds the institution of Roman Patronate (*Wala* in Islamic law) as one of the residual components of Provincial law in Islamic Law. She then discusses the concept of *wala*” (Islamic Patronate). She tries to find the roots of the concept of patronate in Roman and Provincial laws. Discussing the history of Islamic patronate she says after the conquests were over the Arabs confronted the problem of defining the status of non-tribal members of their society. Muslims declared all natives of the peninsula who participated in the conquests as adherents of the new faith equal members of a new commonwealth as distinguished from the rest of the world. Though not Arabs they were accepted as among the Arabs and their brothers so they became part of the general mass of the Arabs. The real problem arose when the conquests were over and the dividing line between the tribesmen and non-tribesmen reasserted itself. Formers were

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now rulers of the world and latter were defeated enemies. From tribal point of view they were pariahs (outsiders). Owing to their conversion to Islam they were attached individually to the persons responsible for their presence in Arab society as their manumitter or as someone who had sponsored their conversion and endorsed their membership. This Arab was their patron who was responsible for their blood-money and general good behavior in return for a title to their estates. Crone says this form of acceptance of non-tribesmen into the tribe was a customary practice in the Roman Near East. So the concept of an individual tie carrying with it a title to succession was a model of Roman patronate over freedman. The newcomer was affiliated to the patron for administrative purposes and he was in a position of dependence while he was part of Arab commonwealth. It was an administrative requirement to have the name of the patron next to the name of the client in official documents and failure of non-Arab converts without patrons to have their membership of Arab society officially accepted. After explaining the whole concept of “wala” Crone concludes that this was substantially a provincial practice and partly Roman law which entered Shari‘ah.259

The idea proposed by Crone in the light of the concept of “wala” and tracing its roots she suggests that for Islamists concerned with raw material of Shari‘ah the traditional question regarding foreign influence is reformulated as contribution of provincial law including Roman elements, rather than Roman law including its provincial variants on the development of Shari‘a.260

Wael B. Hallaq examines Crone’s assumptions and evidence as well as methodology she adopts to establish her thesis.261 He says that Crone’s

“[p]remise that Arabs possessed little when they arrived in the Fertile Crescent and that they were forced to borrow virtually everything from the

259 Crone, op. cit., p. 89-92
260 Ibi.d., p.92
261 Hallaq, The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law (1987)
nations they conquered leads her to the most unreasonable of conclusions....... It is this negative attitude that insists on depriving the (early) Muslims of all civilized values that determines for Crone when a piece of evidence should be admitted, twisted or suppressed. As we shall see in Crone’s work it is the hypothesis that shapes the evidence, not the other way round.”

Hallaq also remarks that Crone’s inability to demonstrate conclusively foreign influences is evident and not at all surprising because Shar‘iah in its final form does not resemble any of the legal systems that it came into contact with during its formative years. The laws which Muslims came into contact with in the conquered territories had to be modified in accordance with Qur‘ān. The structural differences between the Islamic and Near Eastern legal systems make the possibility of their influence on Islamic law very remote or virtually impossible. But the nagging suspicion of borrowing can never be confirmed with the present state of documentation. He compares her writing with that of Von Kremer and concludes that Kremer’s statement on the subject in his Culturgeschichte written over a century ago remains superior to that of Crone. Kremer’s conclusion about the entire legal institution of slavery being of Semitic origin is more in accord with the known facts of the Semitic history of the ancient Near East.

**Persian Law**

The Sassanid Persian Empire was the last pre-Islamic Persian Empire, ruled by the Sassanian Dynasty from 224 CE to 651 CE. It was recognized as one of the main powers in Western and Central Asia, alongside the Roman-Byzantine Empire, for a period of more than 400 years. The Sassanid Empire, is considered to have been one of Persia’s most important and influential historical periods, and constituted the last great Iranian empire before the Muslim conquest and the adoption of Islam.

Western scholarship does not make a strong case of Persian law influence on Islamic law. Goldziher makes only passing reference of incorporation of “Persian
maxims disguised as utterances of Prophet.” Schacht asserts that “...very little is known of Persian Sassanian law, so that the question of its influence on ancient Muḥammadan law has remained purely hypothetical.”

Influence of Revealed laws on Islamic law

Jewish Law

“Halakha” often translated as “Jewish Law” literally means “the path” just like “Shari’ah” translated as “Islamic law” literally means “the path”. Halakha constitutes the practical application of commandments in the Torah (the written law) and is the collective body of religious laws for the Jews including Biblical laws and later Talmudic and Rabbinic laws as well as customs and traditions. Torah (written law) and Talmud (Oral law) are the two sources of Jewish law. Talmudic literature consist of collection of laws, traditions and scholastic discussions presented as commentaries on the Mishnah (early third century), the Palestinian Talmud (early forth century) and the Babylonian Talmud (mid fifth century).

Like Muslims, orthodox and conservative trends are found in Jews too. Orthodox Jews believe that Halakha is an unalterable authority whose core represents the revealed will of God and this cannot be overridden. Conservative Judaism holds that while God is real, Torah is not the word of God in literal sense but is mankind’s record of its understanding of God’s revelation, thus still has divine authority.

The comparison of Jewish and Islamic legal traditions has attracted scholars since the very early stages of Oriental studies in Western academies. The Jewish-Islamic comparative perspective has also played a major role in various areas of Islamic studies and consequently shaped the leading scholarly paradigms. Nevertheless only recently have scholars began to demonstrate sensitivity to the methodologies of these comparative

263 Schacht, ‘Foreign Elements in Ancient Islamic Law’ Islamic Law and Legal Theory (1950) p. 10
Joseph E. David rightly asserts that many of the comparative studies of Jewish-Islamic legal traditions are largely led by curiosity about influences and borrowings, and are not necessarily troubled by wider questions of comparability.

From historical view Jews lived under Muslim political and cultural domination which provided intellectual and cultural encounters of scholars of both religions. It served as a vehicle for exchange of legal concepts and perceptions. Both legal systems have similar theological apparatus and both are committed to “religious legalism” i.e. religions that acknowledge the subordination of law. Both Jewish and Islamic laws are theocratic legal systems resting on the concept of a divine law revealed to a prophet.

Jewish law developed during the first five centuries A.D., culminating at the editing of Talmud (Pentateuch) in the sixth century. Islamic law developed during the seventh through the ninth centuries culminating in the classical theories of Islamic jurisprudence of four major schools of thought.

Muslims conquered Mesopotamia in 637 A.D. when the region was renamed Iraq. Hanafi school of thought proposing its own legal theory originated in Iraq and at that time Iraq was also the center of Talmudic learning. This region had previously been part of Persian Empire. Aramaic was the language spoken in this region which was later replaced by Arabic in the 7th century.

Scholars like Snouck Hurgronje, Fitzgerald, Schacht and Liebensy have proposed that in searching for early influence on Islamic law, Jewish law is an obvious starting point. This is because of shared theocratic orientation and geographic

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265 Ibid., p. 5.

266 Snouck Hurgronje, Selected works (eds. Bousquet and Schacht, Leiden, 1957), pp 48-74; Fitzgerald, pp.85 and The Alleged Debt of Islamic to Roman Law, 67 Law Quarterly Review (1951), p. 81-
proximity of the two systems. Talmud the religious book of Jews was completed about the time of birth of Prophet Muḥammad. Moreover, Kufa, the site of Hanafi School of Islamic law was close to the Jewish academies of Sura and Pumbedita where scholars studied the Talmud throughout the formative period of Islamic law.

Judith Romeny Wegner compares four roots of Islamic and Talmudic law, to assert striking resemblance in both laws which cannot be called co-incidence. Each of these roots has its linguistic and conceptual counterparts in Jewish law. According to Wegner's findings strong resemblance of Talmudic law is observed with Shafi’s legal theory Wegner undertook the comparative study of Islamic and Talmudic law inspired by the following statement of Joseph Schacht.

“[n]o comprehensive study of pre-Islamic legal terminology has been undertaken so far”

Wegner compares the four usūl ul fiqh roots of Islamic Jurisprudence i.e. Qur’ān, Sunnah, Ijmāʿ and Qiyās with four basic sources of Talmudic law which are Miqra, Mishnah, Ha-kol and Heqqes.

First source of Islamic law Qur’ān comes from the root verb qara’a which means “to read aloud” and the corresponding term used for Torah in Jewish law is miqra as it was read aloud in weekly portions during Public worship in synagogue in the 5th century B.C. The recitation of Qur’ān in the mosques is called qira’a a precise equivalent of Hebrew qeri’a Public Torah reading. Qur’ān is referred to as al-Kitāb in Qur’ān and Torah is referred as ha-katub throughout Talmud. Both al-Kitāb and ha-katub means that which is written. The term Kitāb is also morphologically equivalent to Hebrew/Aramaic ketab meaning a “legal decree”.

102; Schacht, Foreign Elements in Ancient Islamic Law, Journal of Comparative Legal and International Law. 32 (1950) pp. 9-17.

267 J. R. Wegner was a visiting Scholar at Harvard Law School.

The second root Sunnah a body of oral tradition which later came to be known as practice of the Prophet as transmitted in Hadîth reports. Parallel to this is the Hebrew verb sinnen. Arabic noun Sunnah and Hebrew verb sinnen stem from common Semitic root. The analogy extends still further; the Arabic Sunnah is conceptually identical with Jewish Mishnah. Mishnah was an early codification of the rules of Jewish oral law. Thus sunnahh in the sense of rules extracted or based upon the Hadîth reports by Muslim jurists parallels Mishnah which is the corpus of rules of oral law handed down by Jewish sages. Another seemingly unremarked coincidence that Wegner finds while comparing the two is that both systems of oral tradition are known as “six books”.

The third root Ijmâ’, the consensus of scholars corresponds with the Jewish halaka which is the rule of Jewish law as laid down by Talmudic sages. The word ha-kol means everybody signifies unanimous consensus. This word appears hundreds of times throughout Talmud which further states that in cases of dispute “the halaka follows the majority”.

The fourth root Qiyâs, deduction by analogy with earlier rulings found in Qur’ân or Sunnah corresponds to heqqesh in Jewish law and thus is a Jewish borrowing.²⁶⁹ (M Khadduri agrees whereas Ahmad Hassan vehemently denies). Margoliouth was the first one to notice this connection. Wegner adds that Islamic ra’y and Talmudic re”aya both in language and in concept are parallel to each other.

Analyzing Shâfi’i’s theory Wegner concludes that at the turn of 9th century Shâfi’i’s postulation of the divinity of the sunnah relates with the doctrine of divinity of oral law in Judaism thus it is borrowed from Talmudic jurisprudence. Wegner ends the article suggesting possible directions for further research such as more detailed comparison of Shâfi’i’s terminology with the language of Talmud and more detailed

investigation of parallels between Islamic and Talmudic law in substantive areas such as family laws, law of evidence and procedure.

However among Jewish medieval thinkers Sa”adya b. Yosef Gaon (882-942 CE) the head of Suraian academy understands jurisprudence as a formal discipline “that transcends the particular content of each religion, and therefore allows a shared terminology and conceptual vocabulary”.

Joseph E David in his article argues that tracing the influence of Jewish legal tradition on Islamic law is not always asymmetrical. Many comparative legal studies reveal the impact of Islamic legal thinking on Jewish legal literature, either Rabbinic or Karaite of that period. The ideological motives of exploring influences were obviously related to 19th century philological zeitgeist.270

Through ninth to twelfth century i.e during the golden age of Islam, Jewish jurists were inspired by Muslim legal thinking and their legal institutions.271 In “Legal Comparability and Cultural Identity: The Case of Legal Reasoning in Jewish and Islamic Law” Joseph E. David elaborates how cultures, religions and praxis should be compared he is of the view that the objective of comparison should not only be confronting similarities and underlying differences but should provide a better understanding of


compared systems and contribute knowledge, which otherwise would not be achieved. Furthermore Joseph David remarks that ‘comparative projects also run the risk of being held hostage to biased paradigms, simplistic preconceptions and preoccupations with self-understanding and inadvertent commitments to political agendas’\(^{272}\). Having said this, David endeavors to compare the foundations of legal reasoning in both Jewish and Islamic legal thought.

The intellectual motives that guide such comparative projects are to discover or locate influences, borrowings and adoptions (19\(^{th}\) century philological zeitgeist), to affirm dignified historical realities enjoyed by Muslim and Jewish thinkers in the scholastic environment during the Golden Age and later affected by European enlightenment, these disciplines were taken as a common foundation for universal reflections of a higher order and a means to bridge the peculiarities of each religion. This perspective implicitly presumed a political vision as well. Contrary to the second motive the third aimed towards essentializing differences within the compared legal systems irrespective of the considerations whether an actual encounter between the traditions occurred; thus a kind of thought experiment.

For historical observation of Islamic and Jewish legal systems the observation would go beyond the question of borrowings or influence to understand how jurists and judges understood their engagement within their respective legal systems.

Another aspect relevant to the comparison of Jewish and Islamic legal system is the sharing of common culture and language which served as a vehicle for exchange of legal doctrines, institutions and perceptions. Both systems also share similar theological and structural apparatus. They have a common dualistic conceptualization of law i.e divine imperatives subject to human manipulations. Both are law centered religions in which theology is intertwined in legal theory.

Joseph David suggests two models prevailing in Islamic and Jewish legal traditions, namely vertical and horizontal dualism. Vertical dualism is a dual layered

\(^{272}\) Ibid., p.7.
paradigm in which legal reasoning occupies a secondary place whereas knowledge through revelation occupies a primary position. On the other hand horizontal dualism is a bi-polar scheme which divides religious laws into rational norms and revealed norms. This approach assigns reasoning and intellectual activity an equal status to that of revelation.

Joseph E. David focuses on legal reasoning in medieval Rabbinic jurisprudence through a comparison to its role in Islamic jurisprudence. He examines Rabbinic jurisprudence from three angles, the legal concepts in Talmudic and post–Talmudic rulings, relationship between rationalism (human reason as an essential component of any legal activity) and traditionalism (law as an outcome of divine revelation as opposed to reliance of human reason) and the Rabbanite - Karaite polemic which reached its climax in the first half of tenth century.

Legal reasoning was indeed a controversial topic in Rabbinate- Karaite polemic, just as it was at the heart of rationalist –traditionalist tension in Islamic jurisprudence.

Imran Ahsan Khan Nayazee states that Western scholars in their effort to show similarities between Islamic and Jewish law have stretched the meanings of principles of Istihsan and Istislah to equate them with legislation undertaken by Rabbinites through takkanot and minhag is incorrect. He establishes that Karaites methodology is influenced by Shāfi‘i’s methodology which is evident in al- Qirkisani’s book Kitāb al Anwar wal Maraqib (Book of Lights and Watchtowers).

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Analysis

Whereas the influence of foreign laws on Islamic law is concerned Western scholarship remains divided on this issue. Out of non-revealed laws that is, Roman, Roman Provincial and Persian law, Western scholarship does not make a very strong case of Persian law influence on Islamic law. Godziher and Schacht only make a passing reference to it and the studies on Persian influence on Islamic law were not carried forward for lack of resemblances. In 17th century, Adrian Reland drew a comparison between Roman and Islamic law and in 1883 Sheldon Amos argued for influence of Roman law on Islamic law. Goldziher asserted that the original nucleus of Islamic law is rich in ideology and moral principles thereby negating the possibility of influence of other laws on the original nucleus but he affirmed the influence of Roman law on Islam’s legal system. Schacht followed in Goldziher’s footsteps and observed a number of parallels between Roman and Islamic law. In 1950 Fitzgerald dismissed the possibility of borrowings of legal terms and notions from Roman to Islamic law. Regarding Roman Provincial law Patricia Crone has argued for its influence on Islamic law in her monograph “Roman, Provincial and Islamic Law: The Origins of Islamic Patronate” (1987) she rejects the proposition of Roman law influence and contends that if Roman elements have entered Islamic law they would have done so only through Provincial law. Hallaq remarks that Crone has not been able to demonstrate conclusively the influence of Roman Provincial law on Islamic law. According to Hallaq Shar‘iah in its final form does not resemble any of the legal systems that it came into contact with during its formative years.

Among revealed laws Jewish law or Halaka is the only law with which Western scholarship claims resemblance with Islamic law. Judith Romeny Wegner274 compares four roots of Islamic and Talmudic law, to assert striking resemblance in both laws. Each of these roots has its linguistic and conceptual counterparts in Jewish law. According to Wegner's findings strong resemblance of Talmudic law is observed with

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Shafi’s legal theory. Wegner undertook the comparative study of Islamic and Talmudic law inspired by the following statement of Joseph Schacht.

“[n]o comprehensive study of pre- Islamic legal terminology has been undertaken so far”²⁷⁵

Scholars like Snouck Horgronje, Fitzgerald, Schacht and Liebensy have proposed that in searching for early influence on Islamic law, Jewish law is an obvious starting point.²⁷⁶ This is because of shared theocratic orientation and geographic proximity of the two systems. Talmud the religious book of Jews was completed about the time of birth of Prophet Muḥammad. Moreover, Kufa, the site of Hanafi School of Islamic law was close to the Jewish academies of Sura and Pumbedita where scholars studied the Talmud throughout the formative period of Islamic law.

CHAPTER 8

SUMMARY, ANALYSIS AND CONCLUSION

Summary

Study of Islam, Muslim societies and Islamic history has attracted interest of the West since antiquity. Christian churches of medieval era approached the study of Islamic texts and Semitic languages especially Arabic in order to understand and refute the claims made by Islam regarding Christianity. They were threatened by the rapid spread of Islam as a religion so they confronted Islam as its enemy. Qur’an elaborated the teachings of the emerging new religion Islam, its theology, eschatology, morality and law. It also discussed past events, history, prophets and religions. It addressed Christians and Jews as people of the Book and explained that Islam is continuity of Christianity and Judaism but with certain modifications in order to perfect the religion for entire humanity. Islam made no discrimination on the basis of cultures, civilizations, societies or ethnicity. It treated and addressed the Occident and the Orient as single humanity, all born of Adam and Eve.

Romans and Persians were the most civilized nations when Islam emerged from peninsular Arabia. They had always looked down upon Arabs conveying their superiority. Their interest in the study of Islam was aroused due to the tremendous achievements and vast conquests of the Muslims. First foundation of scholarly tradition
on the study of Qur’ān and Islam by the West was laid down by John of Damascus. His scholarship (Heresy of Ishmaelites) instead of harmonizing the differences between Arab Muslims and the rest of the world aimed at essentializing the differences and it became a source of all future writings on Islam in Europe. After this a significant body of literature was produced on Islam which contained heavy bias and strained Christian and Jews sentiments towards Muslims.

During European medieval era Muslims continued to flourish in all fields of life and made tremendous intellectual and literary advancements under Umayyad and Abbasid rulers. Attempts were made to devastate Muslim’s intellectual achievements first in the 13th century by Mongols in Baghdad and finally in the fifteenth century by Arch Bishop of Toledo and Christians crusaders in Spain. Muslim centers of civilization, libraries, research centers, observatories, laboratories, institutions and infrastructures were destroyed and millions of books were burnt ruthlessly as a result of which Muslim intellectual life came to an end. This was followed by European colonization in Americas, Asia and Africa in the fifteenth century.

Colonization continued till the 19th century, and during colonialism study of the Orient, learning of Arabic language and literature and interest in Islamic philosophy remained an enduring feature of Western learning. West had learnt that they will be able to subordinate the East with the help of knowledge. This era was dominated by orientalist trend in Western scholarship. D’Herbalot’s “Bibliotheque Orientale” published in 1697 A.D. remained the standard reference work on orientalist scholarship in Europe until early nineteenth century. West keenly studied Far Eastern and Near Eastern societies based on certain assumptions and were able to create a unique stereotyped image of the Arabs and Muslims, authenticity of which was never verified by other sources. Literature produced on Islam and Arabs was short of objectivity and loaded with misrepresentations. Muslims as a nation were projected as uncivilized and regressive.

Period of Modern Orientalism started in the nineteenth century. Classical Arabic texts were translated into European languages which were then analyzed, criticized and exploited by the European scholars against the Arabs and Islam. This wealth of information and knowledge replicated by the West about the East was popularly known
as Orientalist scholarship. This scholarship flourished under European Imperialism and kept on reinforcing essential differences between the Muslim World and Europe. It also paved way for incorporating ideological agendas of the West. The interpretive framework within which this body of knowledge was shaped had an imprint of hostile encounters between Muslims and the West. The primary objective of Orientalists was to belittle and reduce the contribution of Islam and Arabs to the progress of human civilization. The scholarship thus produced was instrumental in achieving this aim. In generalized and politically motivated tones, leading Western thinkers, scholars, historians, philologists and legal experts dominated the field of Orientalism. For this tradition of scholarship, revelation is not an event but a process; its creative agent is not the Prophet but the community (or communities); and its geographical locus is not the Hijaz but the Muslim cities of North Africa, Syria, and Iraq. H.A.R Gibb illustrates within itself two approaches by which Orientalism has responded to modern Orient. Firstly that a Muslim suffers from a permanent disability of “rationalism” and the Arab mind lacks the “sense of law”. Eighteen years later when Gibb spoke as director of Center of M.E Studies at Harvard he announces his new approach that there is a need of the traditional orientalist and a social scientist working together and a new name was given to the orientalists as “Area Experts”.

By mid twentieth century that is after the World Wars and during Cold War era Americans had started influencing the world politics in all its spheres so the orientalist tradition was dominated by American scholarship in the 20th century. American academy accepted most of the European paradigms for the study of Islam. After the Second World War American policy makers identified the need of experts on Islam, oriental languages and cultures of Middle East for intelligence and Foreign Service. At this time United States was projecting its role as super power and increasing its global involvement. Large scale funding was sanctioned for Middle Eastern Studies under National Defense Education Act (NEDA) passed by Congress in 1958, followed by fellowships for Middle Eastern Studies by Ford Foundation and ARAMCO. Gibb a leading American Orientalist suggested change in methodology of orientalist scholarship from historical and philological approach to Social Science techniques. Gibb and Bowen wrote a book in
1957 which provided a blue print for the development of Middle Eastern Studies in U.S. By 1996 Area Studies was under attack from scholars in several fields who in general argued that area studies had been an invention of the Cold War, reflected US political interests and Eurocentric prejudices, and now that Cold War was over the area studies has lost its rationale and value. Numerous charges were levied at Area Studies scholars such as imposition of national agendas through scholarly writings. It was argued that the orientalists through their writings are denigrating other societies that have almost always been politically and economically subordinated. After Gibb the banner of orientalism passed to Bernard Lewis whose work is characterized as the prime example of orientalism.

Response in the form of scholarly writings also emerged in the nineteenth century from Muslim scholars. In mid nineteenth century the foundation of this response was laid down by Jamāl ud Din Afghāni who identified that after conquering India, European Imperialism now threatens the Middle East. He also wrote a rebuttal of Renan’s thesis which became very popular among Muslims. Muḥammad Kḥurd Ali, Abdul Latif Tibawi and Anwer Abdul Malek with their writings presented a more accurate picture of Islam and Arab civilization to counter the efforts of Western scholars and explained that Christian missionaries and classical orientalists had a common agenda to study and evaluate Islam and Muslim societies and to present them in derogatory manner. Abdul Malek informed that the colonial powers provided the orientalists, texts and manuscripts from Asia to be manipulated in Western libraries. He believed that like colonizers, orientalists believed that Asians are to be ruled in the name of progress and civilization. Numerous Muslim scholars contributed towards response to orientalist scholarship but it is Edward Said who fundamentally changed the theory by his 1978 publication “Orientalism”. Said asserted that Orientalism is a textual construction and a false representation of the Orient in which West locates himself in an upper level or a superior level and East is to remain in an inferior position.

This orientalist tradition is the dominant trend in Western Scholarship. It will be clear in the proceeding discussion that this orientalist tradition has a strong connection with writings on Origins of Islamic Law. Although Edward Said did not deal with law in
particular but John Strawson (1993) and Wael Hallaq (1995) have argued for recognition of “Legal Orientalism”. Strawson says that “the 20th century critique of Islamic law remain within the Orientalist problematique, where Islamic law has been represented as an essentially defective legal system.” and Hallaq draws connection between European colonialism and increasing Western interest in study of origins and early development of Islamic law.

Legal orientalism was applied to Islamic law in two ways and both these modes were applied simultaneously. During European colonization, colonizers who ruled over colonies with Muslim majority population manipulated their laws and legal codes and prime example of such manipulation is observed during British colonization of Indian sub-continent. Colonial administrators in order to establish their authority over the colonies instituted their law officers, translated and interpreted Islamic legal codes and applied Islamic law in consultation with the natives of respective colonies. This exercise is termed as “Applied Legal Orientalism”. Leading orientalists who were instrumental in exercising Applied Legal Orientalism in British India were of Sir William Jones (1746-1794) judge of Supreme Court, Calcutta, Warren Hastings (1732-1818) the first Governor General of Bengal, Lord Macaulay (1800-1859) who served for the Supreme Council of India from 1834-1838 and Sir Alfred Layall (1835-1911).

On the other hand classical Islamic texts were being studied by many orientalists to understand the theoretical and philosophical aspects of Islamic law. Leading Orientalists whose writings shaped the contours of “Origins” of Islamic law are Ignaz Goldziher (1890), Joseph Schacht (1950) and John Wansborough (1970). Main focus of their studies was issues regarding the “Origins of Islamic Law”. Origins of Islamic Law meant the study of the first three to four centuries of Islamic history and Islamic legal development. It involves an in depth study of questions listed below:

- When was Islamic law conceived? (Dating of Islamic legal conception).
- Where was the first center of Islamic legal activity? (Hejaz, Iraq or Syria)
- Are the primary sources of Islamic law (Qur’ān and Hadīth) authentic?
• Were *ahādīth* fabricated and projected back into the mouth of Prophet Muḥammad (Peace Be Upon Him)?

• Instead of being original and divine, did Islamic law originate out of pre-Islamic customary laws and Umayyad practices and borrowed elements from revealed and non-revealed laws?

“Origins” (1950) by Joseph Schacht, “Origins” (2002) by Motzki and “Origins” (2004) by Wael B. Hallaq, are the principal monographs which have been written on “Origins” of Islamic law in which discussion revolves around the above mentioned questions. Besides these leading monographs, numerous articles and books are also written by Western academia on Islamic law.

What was common in the efforts of both genres of orientalists was that they neglected the areas of International law, Constitutional law and Commercial laws of Islam and invoked European laws instead. Whether this neglect was by a design or not, but eventually they achieved the aim of projecting Islamic law as a deficient legal system incapable of being compared with the European legal systems. In both these genres Islamic law was misappropriated; it reflected Western cultural and political attitudes towards Islam. As a result of these writings first the *Ḥadīth* and then the *Qur’ān* were separated from the lifetime of the Prophet Muḥammad (Peace Be Upon Him) and the foundation of Islamic Legal Orientalism was laid. In Hallaq’s words “Islamic Legal Orientalism” is a “paradigmatic doctrine” which has little to do with the particulars of diverse positive scholarship.

Within the European world, Islamic legal history, specially its origins has been studied as integral to the orientalist project. Western orientalists generally have not accepted the traditional Muslim account of the origins of Islamic law. They have produced an important alternative account of origins of Islamic law. Goldziher demonstrated that historical and theological *ḥadīth* could not be accepted as reflecting the lifetime of the Prophet, but must be the product of dispute within the community throughout the first and second centuries after the Hijrah. Schacht extended this insight to include juristic *ḥadīth*, perceived by him as not a cause but a product of juristic debate in
Muslim communities. Wansbrough has argued that the Qurʿān, too, is not a product of the Prophet’s lifetime but a liturgical reflection of two hundred years of community worship and sectarian debate. For this tradition of scholarship, revelation is not an event but a process; its creative agent is not the Prophet but the community (or communities); and its geographical locus is not the Hijaz but the Muslim cities of North Africa, Syria, and Iraq.

Leading text, which has had so much influence on current thinking about ‘Origins’ of Islamic law, is Joseph Schacht’s “Origins of Muḥammadan Jurisprudence” (1950) and “Introduction to Islamic Law” (1964) which largely draws upon the writings of German scholar Ignaz Goldziher. Goldziher in his “Introduction to Islamic Theology and Law” (1910) raised certain issues which were revived by Schacht in a detailed and systematic manner. Key issues in Islamic Legal Orientalism based on the writings of Goldziher, Schacht and Wansbrough have already been identified in the introduction of this thesis, they are summarized again below:

1. Qurʿān: Authorship of Qurʿān is ascribed to Muḥammad (Peace Be Upon Him). Provisions made in Qurʿān were limited to the primitive conditions of Arabia. Guiding principles in Qurʿān were insufficient and inadequate for dealing with new situations. As a source of law Qurʿānic legislation was ignored for approximately a century.

2. Ḥadīth: Traditions from the Prophet are documents not of the time to which they claim to belong, but of the successive stages of development of doctrines during the first centuries of Islam.277 Traditions originated towards the middle of second century.278 Tendentious and spurious additions were made to the original mass of traditions in every succeeding generation. Traditions began to be fabricated and were used as devices to substantiate particular points of view. Traditions are a direct reflection of the aspirations

278 Ibid., p.4.
Traditions of the Prophet were historically the last authoritative ingredients in the formulation of Islamic law, not the first.

Qur’ān and Ḥadīth are not revealed and material contained in them is borrowed from various sources: such as pre-Islamic practices, local customs, and laws from the Fertile Crescent. Umayyad practices, doctrines of law schools, Jewish and Canon law influenced the development of Islamic law. Islamic law did not originate in Medina but in Iraq or Syria.

These assumptions put forward by orientalists about sources of Islamic law were not easy for the Muslims to absorb as it shook the entire basis of their theological belief and centuries old literary efforts of Muslim scholars.

Wael B. Hallaq, Harald Motzki, Christopher Melchert and Jonathan Brown and Patricia Crone are amongst those contemporary Western scholars whose writings on Origins of Islamic law have added to the readjustment of Schacht’s findings on Ḥadīth criticism and influence of foreign laws on Islamic law. Furthermore discovery of hadith collections of first century hijra such as Sahifa Hammam Ibn-e-Munabih and Musannafs of Abdul Razzaq and Ibn-e- Juraij have also been instrumental in necessitating revision of Goldziher and Schacht’s thesis.

Predecessors of Goldziher, such as, Gustav Weil (1808-1889) Aloys Sprenger (1813-1893), William Muir (1819-1905) and Reinhart Dozy (1820-1883) were also skeptical about the authenticity of hadith literature. But it was Ignaz Goldziher (1850-1921) who laid the foundation of Criticism of Ḥadīth. Hugronje (1857-1936), Margoliouth (1858-1940), Lammens (1862-1937), Horovitz (1874-1931) and Wensinck (1882-1939) followed in Goldziher’s footsteps but it was Joseph Schacht (1902-1969) who accomplished the theory postulated by Goldziher in Muhammedanische Studien (1890) in which Goldziher revealed his overall distrust of the Ḥadīth literature.

Hallaq asserts that orientalist scholarship on origins of Islamic law was a direct product of “hegemonic discursive tradition”. This Orientalist scholarly tradition has

separated the study of Islamic law from the study of Islam and the study of hadīth has been separated from the study of life time of Prophet Muḥammad (Peace Be Upon Him). Whereas in view of Muslim scholars “Islamic law was never considered outside the jurisdiction of religion.” This scholarship operates within a “closed epistemological network” with the exception of a few scholars.

Since the primary focus of this research is origins of Islamic Law in Western scholarly writings therefore the discussion is narrowed down to Western criticism on Ḥadīth and influence of pre-Islamic non-Arab laws on Islamic law. Western scholarship on Qurʾān the primary source of Islamic law has been left out, as it requires an independent study.

It is assumed by the Western scholars that great majority of the aḥādīth were products of the religious, historical and social conditions prevalent in the first two centuries of Islam. Ḥadīth literature contains all kinds of competing political view, with people frequently producing fictitious aḥādīth for political or other purposes. Different groups would either make up many aḥādīth that supported their respective positions, or modify existing traditions to justify their views, or else censor the aḥādīth that had been adopted by others. According to Hurgronje hadīth literature was a product of dominant groups in the first three centuries of Islam, and thus it reflected their views. The concept of the “sunnah” was originally used to refer to pre-Islamic customs/traditions that had not been abolished by the Qurʾān. The concepts of infallibility (ismah) and non-recited revelation (wahy ghayr matluw) were constructed to justify the position of the Prophet’s sunnah as a legitimate source of the law. Muslim scholars were accused of relying solely on the Isnād (chain of transmitters) without paying attention to “obvious anachronisms” in hadīth texts. It is argued in Western scholarships that Muslim ‘Ulamāʾ largely confined their efforts to the critique of narrative chains (Isnād) and paid insufficient attention to the internal/textual critique of the aḥādīth they failed to notice logical and

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280 See conclusion of Zafar Ishaq Ansari’s PhD thesis, The Early Development of Islamic Fiqh in Kufa with Special Reference to the Works of Abou Yousaf and Shaibani. (PhD), (Canada: Mac.Gill University, 1966)

281 Ibid., p.15.
historical impossibilities and anachronisms in the narrations. The idea that the roots of these Aḥādīth can be traced all the way back to the Prophet is completely false and that the life and teachings of the Prophet cannot be re-constructed based on these traditions.

Strongest criticism came from Schacht who carried out a detailed study and critical analysis of aḥādīth with legal contents specially those concerning family laws. On the issue of Ḥadīth fabrication his writings include “A Revaluation of Islamic Traditions”, “Origins of Muḥammadan Jurisprudence” (1950) and “Introduction to Islamic Law” (1964). Schacht attributes his conclusions to the original hypothesis of Goldziher and investigations of Professor Brunschvig. Schacht carried out a historical study of the development of Islamic legal theory. His starting point was al-Shafi’i (d. 204 A.H.) and his legal theory. He advocated the idea that the entire Ḥadīth corpus was not the product of the life time of Muḥammad (Peace Be Upon Him) but in fact expressions of practices and opinions of Muslim community some two to three hundred years after the demise of Prophet Muḥammad. Schacht presumes that Aḥādīth were fabricated and projected back by artificially created Isnāds during the time of Shafi’i” to lend support to each and every legal ruling. To incorporate the newly fabricated aḥādīth into the hadīth corpus new chains of narration were devised which reached back to Prophet Muhammad (Peace Be Upon Him). This resulted in an enormous growth and back projection of fictitious Ḥadīth. However Horovitz and Juynboll differed about the starting date of employing Isnād for hadīth narration, according to Horovitz and Juynboll Isnāds first emerged in the last quarter of the first century AH. Most of the traditions were created after 100 A.H. as devices to substantiate particular points of view. Western scholars writing on Islamic law hold that early doctrines of the schools of law were almost always traced (usually apocryphally) to an earlier jurist or to the Companions, virtually never to the Prophet and all authentic early writings of Islamic law are virtually devoid of any mention of traditions.

Schacht’s propositions and findings stirred the scholars of Muslim community but it is surprising to find that very few scholarly responses to Schacht’s writings came from the Muslim scholars. Western scholars feel that Muslim scholars are unable to accept Schacht’s conclusions. Western scholars also believe that Muslims are unable to face the
implications of Schacht’s discoveries and thus ignore his findings. According to them, Muslim scholars also bar Western scholars from hadith criticism on grounds of disbelief. Orientalists feel that if Schacht’s views are correct then a fundamental rethinking of Islamic law is in order. And if Islamic Law is to be rethought, then Muslim society itself may be in for a watershed change.

M.M.’Āzmi published a detailed critique on Schacht from Riyadh.’Āzmi’s critique is not very popular among Western scholars and is labeled as polemical but this detailed and comprehensive critique cannot be ignored as it rightly indicates weaknesses of Schacht’s thesis. Dr. Zafar Ishaq Ansari has also written a rebuttal to Schacht’s argument e silentio in the form of an article and has proved that Schacht’s thesis is based on unproven assumptions. Not only Muslims but many Orientalists showed hesitation in embracing Joseph Schacht’s ideas. Johann Fueck (1894-1974) criticizes the skeptical approach of Joseph Schacht, arguing that the Prophet had set an ideal example for Muslims from the beginning. H.A.R. Gibb and Montgomery Watt also disagree with Joseph Schacht and suggest that “Schacht may have taken the analysis too far”. Fuat Sezgin too did not agree with Schacht’s findings. The most developed challenge to Schacht came from N.J. Coulson, in his “History of Islamic Law “(1964). Among the contemporary scholars Weal Hallaq, Harald Motzki, Christopher Melchert and Jonathan Brown have been able to prove Schacht’s findings as unproven assumptions and his dependence on scarce source material and have come up with sound academic research.

Below are the responses of some Western scholars namely Fueck, Abbott, Motzki, Brown and Hallaq on the question of Hadith fabrication.

Johann Fueck (1894-1974) stresses the uniting, as opposed to dividing, aspects of the hadith literature, focusing on independent and neutral hadith scholars rather than an idea of competing groups fabricating prophetic traditions. According to Fueck, those who see the hadith literature as simply a collection of views of later generations ignore the deep influence of the Prophet on believers. They thus fail to see the originality of the hadith literature, regarding it instead as a “mosaic” composed of many foreign elements. Consequently, they accept the aḥādīth as fabricated until proven otherwise. For Fueck,
however, despite the fact that hadith scholars were not completely successful in eliminating fabricated aḥādīth the hadith literature contains many authentic traditions.

Late Nabia Abbott points out that isnād criticism did not establish itself until after the outbreak of the Fitna (most likely the Second Civil War) and that prior to that the Companions of the Prophet had relied on content criticism to verify attributions to Muhammad (Peace Be Upon Him). She quotes several cases of content criticism of hadīth by Companions thus proving that Muslim scholars were not careless towards hadīth content.

According to Hallaq the argument that entire hadīth corpus that proliferated in the second hijri century was fabricated would overlook the prophetic sunan that existed from the very beginning. Hallaq identifies the urbanized garrison towns of Iraq as the region where hadīth fabrication may have taken place in the beginning of second century. This mass of hadīth literature circulated throughout Muslim countries often contradicted with the memory and practice of Muslim communities in some regions. This was most obvious in Hejaz where Prophetic sunnah still survived in their memory. For Medinan scholars’ Prophetic sunnah was attested by their own practice. Hallaq says that it would be a mistake however, to view the Medinese doctrine as a categorical rejection of hadīth in favor of local practice as some modern scholars have done.282 According to Hallaq even the Muslim jurists had acknowledged the “precarious epistemological status” of Ḥadīth, therefore fascination of Orientalists with the pseudo-problem of hadīth authenticity is gratuitous.283

Harald Motzki introduced a new and badly needed approach to the study of early Islamic intellectual history. Motzki challenged the reigning conclusions of Joseph Schacht by demonstrating convincingly that his study of early hadīth used only a small and selective body of sources, and that it was based on skeptical assumptions. He demonstrates that Schacht’s and Juynboll’s premise “that an early scholar’s failure to

employ a Prophetic hadīth in a debate in which it would have been pertinent somehow proves that this Prophetic hadīth did not exist at that time was a flawed argument \textit{e silentio}”. Motzki regards Schacht’s thesis “that portions of Isnāds that extended into the first half of the second century and into the first century are without exception arbitrary and artificially fabricated” as untenable at least in this degree of generalization. Motzki confronts Juynboll in his most influential article “\textit{Whither Hadīth Studies}” (1996) which he wrote as a rebuttal to Juynboll’s use of argument \textit{e silentio} to prove the fabrication of hadīth which Mokzki rejects completely. Motzki also demonstrates that Juynboll’s conclusions are based on his sparse use of hadīth sources. By studying a much larger number of sources, including vital pre-canonical hadīth sources such as the Musannaf of Abd al-Razzaq, Motzki proves his point. He criticizes both Juynboll and Schacht for not including older and more extensive works on hadīth and consequently in many cases identifying the common link a generation or so later than it actually was. Motzki employs \textit{sanād cum matan} analysis to analyze and date a hadīth. Behind Motzki’s method lies a very important assumption, that it is inaccurate to assume that intentional forgery and deception are the most likely explanation for all phenomena of hadīth transmission. Motzki uses the Musannaf of “Abd al-Razzaq al-San’ani (d. 211/826) to prove that Schacht’s conclusions were tainted by (1) the lack of early published sources (Schacht relied principally on Malik’s Mawṭṭā) and (2) hypothesis-driven analysis that judged the provenance of early legal material based on overly skeptical assumptions.

Nicolet Boekhoff-van der Voort in “\textit{The Raid of Hudhayl: Ibn-e- Shihab al Zuhri’s version of the Event}” and Sean W. Anthony in “\textit{Crime and Punishment in Early Madina: The Origins of Maghāzi Traditions}” both the authors have used Motziki’s Isnād-cum-Matan analysis to find the correct dating of these traditions. Motzki’s work and that of those who have followed in his footsteps have contributed greatly to advancing the study of early Islamic history and law.
Al Shamsy284 notes that Isnād-cum-matan analysis can be employed as a research agenda for investigating early Islam. Growing popularity of this approach among young scholars in both Europe and the United States is not surprising: it provides a critical methodology for utilizing the vast amount of available material and for dating each ḥadīth on a case-by-case basis, in contrast to the sweeping judgments of earlier modern scholarship on ḥadīth. It raises the standard of theorization of ḥadīth and promises to invigorate the debate on how to study early Islam. The method of examining both the isnād and the matn of each ḥadīth under study represents the closest approximation of Western scholarship to the classical Muslim science of ḥadīth criticism—in terms of methodology, that is, rather than conclusions regarding the status of individual ḥadīth. Recent studies by al-Sharīf Ḥātim b.ʿĀrif al-ʿAwnī, Scott Lucas, and Jonathan Brown should be consulted in this regard.

Jonathan Brown has written extensively on ḥadīth scholarship and made numerous contributions to its study. His critique of the two most esteemed collections of Prophetic traditions provides a proof of the critical review process through which even these canonical texts have passed at the hands of Muslim scholars. In Brown’s writings we can easily see that he has relied heavily on classical Muslim sources on ḥadīth written after 3rd century by Muslim ḥadīth critics.

Commenting on the central tenet of the Schachtian framework: “Isnāds seem to have grown backwards” Brown poses some insightful questions. He says a companion’s report that Malik introduced in his Mawṭṭā in the mid-2nd century appears as a prophetic ḥadīth in Sahīḥ Bukhāri a century later. Brown proves that this redaction of traditions did not go unnoticed. By expanding the scope of analysis to include books on flawed reports (kutub iʿal al Ḥadīth) he shows that some classical Muslim ḥadīth scholars were very aware of the backgrowth of Isnāds and they debated this issue even after the compilation of canonical collections in the 3rd century. He thus proves that Muslim ḥadīth critics of 3rd and 4th century and the orientalists who follow the line of Schachtanian argument both detected and acknowledged backgrowth of Isnāds. He then proceeds to elaborate the

284 Al-Shamsy is Assistant Professor at University of Chicago in the Department of Near Eastern Languages and Civilizations.
difference in the approach of Muslim and Western scholars on the back growth of Isnāds. He says out of thousands of extant hadīth Schacht based his conclusion about the back growth of legal Isnāds only on forty-seven traditions and concluded from his findings that this has undermined the prima facie historical reliability of the entire hadīth corpus. On the other hand Muslim critics whom Jonathan examines in his article identify a total of seventy-six instances of back growth of Isnāds.

Jonathan provides a list of Muslim scholars who accepted marfu’ hadīth if the transmitters were reliable. These scholars sided with legal theorists as opposed to hadīth critics, for them a transmitter narrating Prophetic version has preserved knowledge that transmitter of mawquf version has not. They justified co-existence of mawquf and marfu’ by saying that Companions may quote the Prophet (Peace Be Upon Him) on one occasion and paraphrase him on another when delivering his own legal ruling. Jonathan Brown also throws light on the continuity of ilal criticism in modern period with hadīth scholarship of traditional Moroccan Sufi Ahmad b. al-Siddiq al-Ghumari (d. 1960) who criticized and identified the flaws in Jami al-Saghir a hadīth collection compiled by Jalal al-Din Suyuti.

Jonathan Brown says that Western Scholarship has accepted that Muslim hadīth scholars focused principally on Isnāds to determine the authenticity of traditions and ignored the key components of modern historical investigation. Brown first proves that content criticism was an established component of Muslim hadīth scholars’ critical arsenal. Secondly he demonstrates that early Sunni hadīth tradition consciously manufactured an image which portrayed their indifference to contents of hadīth and this was an essential part of the cult of methodology they created around the Isnād in the face of their rationalist opponents. Finally he demonstrates that when Sunni hadīth tradition openly shifted its attention from Isnād criticism to matan criticism in 6th century, hadīth critics drew directly on the material that earlier critics ostensibly had criticized for Isnād flaws. From this Brown concludes that the correlation between the material that later

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critics rejected for content reasons and early Isnād criticisms suggests that early Hadīth scholars employed content criticism far more often than would appear.

Below are a few points which elaborate the difference in approach of Muslim and Western scholars towards Prophetic hadīth

1. For Western scholars a handful of hadīth if proved to have projected back artificially, undermines the prima facie historical reliability of entire hadīth corpus. But for Muslim scholars those reports that do not exhibit this flaw are prima facie words of the Prophet.

2. Muslim hadīth critic would only reject one sanad of a hadīth if the chain is found faulty while upholding the authority of that tradition via other narrations.

3. Muslim Hadih critics were aware that hadīth transmitters were elevating the standard of mawqūf āḥādīth to marfu hadīth. If transmitters of both marfu and mawqūf hadīth are trust worthy then Muslim critic would be hard pressed to dismiss either as incorrect.

4. Muslim scholars understood the notion of back growth of Isnāds through the notion of ziyada (addition) to be more precise the normative matan addition which involved the addition of normative weight to a tradition by elevating the status of the report from mawqūf to marfu.286 It literally pushed back the Isnād of a narration from a latter figure to the Prophet. For Schacht and Western scholars Normative matan addition was enough proof of fabrication, whereas Muslim hadīth scholars accepted the co-existence of Marfūʿ and Mawqūf hadīth.

5. For Muslim legal theorists every piece of information that sprang from the era of the Prophet carried weight and was a useful store house of information. Also as the chances of a marfu hadīth to be culled as forged or be accepted


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as authentic were same to them, therefore they invoked the legal maxim “in matters of epistemology the affirmative supersedes the negative”.

Having discussed the assumption of hadīth fabrication in the writings of orientalist scholars and their refutations and responses by some Western scholars we now precede to the conclusions on the issue of foreign influence on Islamic law. Discussion above imply that hadīth the second primary source of Islamic law contained large amount of borrowed material and the entire hadīth literature was heavily influenced by Jewish, Christian and Roman laws and customary practices. It is generally argued in Western academia that Islamic law is involved in “systematic borrowing” from or “indebted” to various foreign laws; such as Persian, Roman and Provincial law. Among revealed laws most striking resemblances have been claimed with Jewish or Talmudic law. It is also alleged that as the development of Islamic legal theories and their codification took place in the second and third centuries of Islam therefore popular Umayyad practice, laws of the conquered territories and non-Arab converts who embraced Islam had a strong role to play in the development of Shari‘ah. However disarray is observed even among the very penetrating researches of Orientalists and Western scholars on the issue of foreign influence on Islamic law.

Sheldon Amos (1835-1886) Chair of jurisprudence, University College, London pointed out in 1883 that there is not much legislation in Qur‘ān and Syria was a province in which Roman law was not only practiced but also studied. The converts must have brought their legal notions with them and such foreign notions could easily have been formulated as traditions from the Prophet. Contrary to Sheldon Amos Nallino (1872-1938) an Italian orientalist asserts that Roman law was not applicable to the multitudinous tribes of Ishmael and considers legal traditions from the Prophet as genuine. According to Goldziher the original nucleus of Islamic law was rich in its ideology and moral principles and unique in claiming that authority of law rests in divine source, there by negating the very basis of all other laws, this uprooted the claims for similarity of original nucleus of Islamic law with other laws. Goldziher’s second

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assertion that “in Islam’s legal system the influence of Roman Law is unmistakable” calls for prudence.

Goldziher whose writings had the most profound influence on the future researches on this topic emphasized foreign influence on Islam as a religion and stated that legal percepts in Qur’ān were insufficient for dealing with new situations. Goldziher also asserts that foreign cultural influences had an effect on the evolution of Islamic legal method and on various details of its application. In his view Roman law was instrumental in defining the methodology adopted by Muslim jurists, he states, “Islamic law shows undeniable traces of the influence of Roman law both in its methodology and in its particular stipulations.”288

Contrary to Goldziher Fitzgerald believes that, Sharia differs from the Roman law. The former is a system concerned with the relation of the individual human soul to God whereas latter is always a lawyer’s law. In Fitzgerald’s view the methods of thought by which a Muslim judge at that early date was expected to guide himself and by which Muslim jurisprudence had been built were set out very clearly during the first century. The main foundations of law had been firmly laid not in Syria or Egypt or Baghdad but in Medina and Kufa.289 The efforts of Western scholars to equate fiqh with prudentia and similarly other legal terms are absurd because one cannot assume that Muslims borrowed logic from Rome. Schacht carried his research in the footsteps of Goldziher and observes a number of parallels between Roman and Islamic law. The center of Islamic legal activity is shifted from Medina to Iraq by Schacht and from Iraq to Syria by Patricia Crone.

A contemporary Western Scholar Ayman Daher while discussing influence of Roman law on Shari‘ah proposes a question whether Roman legal concepts be made to fit into Islamic legal system? Considering two opposing views Sheldon Amos stating that


“Islamic law is Roman law in Arab dress”\textsuperscript{290} and R. Mottahedeh’s statement that “Any law other than the law of Islam is obsolete.”\textsuperscript{291} Ayman argues that the answer lies between these two poles. Ayman does not follow historical method of research as adopted by Joseph Schacht instead he carries out a legal analysis, under which he compares structural elements and substantive concepts of Islamic and Roman law.

Daher concludes that in the Middle East evolution of law has a certain linear pattern that goes from the code of Hammurabi, through Assyrian Law, Rabbinic Law, Greek Law, Byzantine Law and finally to Islamic law.\textsuperscript{292} 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 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”.\textsuperscript{293}

Crone rejects the possibility of Roman influence and contends that if Roman elements have entered Islamic law they would have done so only through Provincial law. Crone also shifts the geographical area of influence from Iraq (established by Schacht) to Syria. The means by which this influence was affected were the early Umayyad Caliphs who made Syria their capital. So it was the Umayyad’s law that the jurists took as their starting point. She further stresses the presence of residues of Roman and/or Provincial component in Umayyad law. She finds the institution of Roman Patronate (\textit{Wala} in Islamic law) as one of the residual components of Provincial law in Islamic Law.

The idea proposed by Crone in the light of the concept of “Wala” and tracing its roots she suggests that for Islamists concerned with raw material of Shari’ah the traditional question regarding foreign influence is reformulated as contribution of


\textsuperscript{291} R. Mottahedeh, ibid.

\textsuperscript{292} See generally C. Mallat.

Provincial law including Roman elements, rather than Roman law including its provincial variants on the development of Shari‘ah.\(^{294}\)

Crone’s inability to demonstrate conclusively foreign influences is evident and not at all surprising because Shari‘ah in its final form does not resemble any of the legal systems that it came into contact with during its formative years. The structural differences between the Islamic and Near Eastern legal systems make the possibility of their influence on Islamic law very remote or virtually impossible. But the nagging suspicion of borrowing can never be confirmed with the present state of documentation. Hallaq compares Crone’s writing with that of Von Kremer and concludes that Kremer’s statement on the subject in his Culturgeschichte written over a century ago remains superior to that of Crone. Kremer’s conclusion about the entire legal institution of slavery being of Semitic origin is more in accord with the known facts of the Semitic history of the ancient Near East.

Western scholarship does not make a strong case of Persian law influence on Islamic law. Goldziher makes only passing reference of incorporation of

\[\text{“Persian maxims disguised as utterances of Prophet.”}\] \(^{295}\) Schacht asserts that

\[\text{“…very little is known of Persian Sassanian law, so that the question of its influence on ancient Muhammadan law has remained purely hypothetical”}\] \(^{296}\)

The comparison of Jewish and Islamic legal traditions has attracted scholars since the very early stages of Oriental studies in Western academies. The Jewish-Islamic comparative perspective has also played a major role in various areas of Islamic studies and consequently shaped the leading scholarly paradigms. Nevertheless only recently have scholars began to demonstrate sensitivity to the methodologies of these comparative


\(^{296}\) Schacht, ‘Foreign Elements in Ancient Islamic Law’ Islamic Law and Legal Theory. (1950) p. 10
studies. Joseph E. David rightly asserts that many of the comparative studies of Jewish-Islamic legal traditions are largely led by curiosity about influences and borrowings, and are not necessarily troubled by wider questions of comparability.

From historical view Jews lived under Muslim political and cultural domination which provided intellectual and cultural encounters of scholars of both religions. It served as a vehicle for exchange of legal concepts and perceptions. Both legal systems have similar theological apparatus and both are committed to “religious legalism” i.e. religions that acknowledge the subordination of law. Both Jewish and Islamic laws are theocratic legal systems resting on the concept of a divine law revealed to a prophet.

Jewish law developed during the first five centuries A.D., culminating at the editing of Talmud (Pentateuch) in the sixth century. Islamic law developed during the seventh through the ninth centuries culminating in the classical theories of Islamic jurisprudence of four schools of thought.

Schacht and others have dated the origins of Islamic jurisprudence to the second centuries of Islam, though latest researches have shifted the origins to the first century CE.

Muslims conquered Mesopotamia in 637A.D. when the region was renamed Iraq. Hanafi school of thought proposing its own legal theory originated in Iraq and at that time Iraq was also the center of Talmudic learning. This region had previously been part of Persian Empire. Aramaic was the language spoken in this region which was later replaced by Arabic in the 7th century.

Scholars like Snouck Horgronje, Fitzgerald, Schacht and Liebensy have proposed that in searching for early influence on Islamic law, Jewish law is an obvious starting point. This is because of shared theocratic orientation and geographic proximity of the

298 Ibid., p. 5
two systems. Talmud the religious book of Jews was completed about the time of birth of Prophet Muḥammad. Moreover, Kufa, the site of Hanafi School of Islamic law was close to the Jewish academies of Sura and Pumbedita where scholars studied the Talmud throughout the formative period of Islamic law. Wegner inspired by the following statement of Joseph Schacht

“no comprehensive study of pre-Islamic legal terminology has been undertaken so far”³⁰⁰

compares the four *usūl ul fīqḥ* roots of Islamic Jurisprudence i.e. *Qur’ān, Sunnah, Ijmā‘* and *Qiyās* with four basic sources of Talmudic law which are *Miqra, Mishnah, Ha-kol* and *Heqqes.*

Analyzing Shāfi‘i’s theory Wegner concludes that at the turn of 9th century Shāfi‘i’s postulation of the divinity of the *sunnah* relates with the doctrine of divinity of oral law in Judaism thus it is borrowed from Talmudic jurisprudence.

Wegner ends the article suggesting possible directions for further research such as more detailed comparison of Shāfi‘i’s terminology with the language of Talmud and more detailed investigation of parallels between Islamic and Talmudic law in substantive areas such as family laws, law of evidence and procedure. In the end the statement that “*We may never know for sure if Shāfi‘i sat, literally or metaphorically at the feet of Talmudic sages—just as we may never know for sure if Caliph “Umar “had a Jew lawyer at his elbow.”*

Jurisprudence should be understood as a formal discipline that transcends the particular content of each religion, and therefore allows a shared terminology and conceptual vocabulary.

Joseph E David in his article argues that tracing the influence of Jewish legal tradition on Islamic law is not always asymmetrical. Many studies concerning early medieval Rabbinic literature are motivated by a desire to demonstrate the impact of Islamic legal thinking on Jewish legal literature, either Rabbinic or Karaite of that period.

The ideological motives of exploring influences were obviously related to 19th century philological zeitgeist.\textsuperscript{301}

Joseph E. David elaborates how cultures, religions and praxis should be compared he is of the view that objective of comparison should not only be confronting similarities and underlying differences. Comparison should provide a better understanding of compared systems and contribute knowledge. Furthermore comparative projects also run the risk of being held hostage to biased paradigms, simplistic preconceptions and preoccupations with self-understanding and inadvertent commitments to political agendas.

Having said this, David endeavors to compare the foundations of legal reasoning in both Jewish and Islamic legal thought. He carries out the comparison between Jewish and Islamic legal system on the basis of common culture and language which served as a vehicle for exchange of legal doctrines, institutions and perceptions. Both systems also share similar theological and structural apparatus. They have a common dualistic conceptualization of law i.e. divine imperatives subject to human manipulations. Both are law centered religions in which theology is intertwined in legal theory.

Joseph David suggests two models prevailing in Islamic and Jewish legal traditions, namely vertical and horizontal dualism. Vertical dualism is a dual layered paradigm; legal reasoning occupies a secondary place whereas knowledge through revelation occupies a primary position. On the other hand horizontal dualism is a bi-polar scheme which divides religious laws into rational norms and revealed norms. This approach assigns reasoning and intellectual activity an equal status to that of revelation.

Joseph E. David focuses on legal reasoning in medieval rabbinic jurisprudence through a comparison to its role in Islamic jurisprudence. He suggests that comparison or influence of laws should not only be carried out to confront similarities and underlying


Libson. “Interaction between Islamic Law and Jewish Law During the Middle Ages” (paper presented at the Law in multicultural societies: proceedings of the IALL meeting, Jerusalem, July 21-26, 1985, Jerusalem,
differences but should provide a better understanding of compared systems and contribute knowledge, which otherwise would not be achieved.

Commenting on the possible influence of pre-Islamic non Arabic systems of law on Islamic jurisprudence, Motzki limits the scope of such influence temporally to the end of 1st/7th century A.D/CE including pre-Islamic times and spatially to the Arabian Peninsula (Hejaz and Makkah). To Motzki influence of Near-Eastern Provincial law which was strongly infused with Roman law and especially by Jewish legal reforms is inconceivable with these spatial and temporal limits.

Motzki has challenged Western scholarships assumptions regarding the role played by scholars of non-Arab decent in the formative period of Islamic law302. Motzki concludes that his findings lend no support to the assumption that scholars of non-Arab origins brought the purported borrowings with them from their native legal system. Therefore we can no longer take it for granted that scholars of non-Arab descent were the natural vehicles of borrowings from pre-Islamic non-Arab legal systems. But even if there were any, such cases must be demonstrated. Motzki claims that he does not know of any such case from the first two centuries A.H. on the basis of this research.

Content Analysis

In the first chapter “Introduction” of this research six research questions were proposed which guided this study. In the light of the entire discussion answers to these questions provide an in depth analysis and a critical review of Western Scholarship on Islamic Law. It throws light on the Orientalist tradition of Western scholarship and elaborates Orientalists paradigms. It gives an answer to the question whether these paradigms are shared by the entire Western scholarship or is a trait of Orientalists only. It also explores the objectives of Orientalists who are engaged in the study of Islamic law and to what extent they have achieved these aims. This research suggests the use of term

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“Islamic Legal Orientalism” and divides it into “Applied Legal Orientalism” and “Literary Legal Orientalism”. This research carries out a detailed critical review of two major assumptions by the Orientalists, Hadîth fabrication and influence of pre-Islamic non-Arab laws on Islamic law and discusses rebuttals and responses put forward by the Western scholars. It also gives a passing reference of response of Muslim scholars on these issues. Answers to all six questions are discussed below in detail:

Q1. Does Western scholarship on Islamic law remain within the Orientalist paradigm?

Orientalism is an ancient tradition of Western scholarship. It is the Western discourse on Islam saturated with preconceived biases and ideological distortions and aims at essentializing the differences between Muslims and the West. The roots of this scholarship can be traced back to the writings of John of Damascus during Umayyad era and D’ Herbelot’s “Bibliotheque Orientale” published in seventeenth century which remained standard reference works on Orientalist scholarship in Europe till early nineteenth century.

It is pertinent to state here that European scholars started taking interest in the study of Islamic law in nineteenth century which resulted in production of a significant body of literature on the Origins of Islamic law. European scholarship on Islam did not recognize the role of Prophet Muḥammad (Peace Be upon Him) as legal reformer. It was coupled with the the orientalist tradition of projecting Islam and Muslims as backward and inferior in comparison with the Western world. Within the European world, Islamic legal history, specially its origins has been studied as integral to the orientalist project. Foundation for the study of Islamic law was laid down by the nineteenth century Hungarian scholar Ignac Goldziher (1850- 1921). Systematic and increased interest in writings on Islamic law first began with Goldziher’s publication of “Vorlesungen über den Islam” in 1910. The chapter he wrote on Islamic law in his Vorlesungen gained more popularity probably due to the general nature of the work and the issues raised in it about Islam. In “Muhammedanische Studien” he showed how hadîth reflected the legal and doctrinal controversies of the two centuries after the death of Muhammad (Peace Be Upon Him) rather than the words of Mohammed (Peace Be Upon Him) himself. He was a
strong believer in the view that Islamic law owes its origins to Roman law. Having studied Goldziher, Schacht was surprised why his writings and discoveries on Islamic law have been neglected. Goldziher’s studies on Islamic law were resumed and considerably extended by J. Schacht in his two major works, ‘The Origins of Muḥammadan Jurisprudence’ and ‘An Introduction to Islamic law’. Until his death in 1969 Schacht insisted that his conclusions confirmed the original hypothesis of Ignaz Goldziher. His writings have had a tremendous influence on academic writings on Islamic law in the Western world and was heavily quoted and referred to in writings on origins and early development of Islamic law till the turn of 21st century. Thus the Western scholarship on Islamic law remained within the orientalist paradigms till the turn of the 21st century.

It would not be wrong to say that the Western interest in the study of Islamic law began in nineteenth century. Orientalist trend dominated this scholarship till the end of 20th century. This trend was considerably changed due to the efforts of some Western scholars at the turn of twenty first century. To name a few Wael B. Hallaq (non-Muslim Arab Scholar, who studied at University of Washington joined MacGill university and moved to Columbia University after 2005), Harald Motzki (b. 1948, a German trained scholar of Islam, received his PhD from university of Bonn and now a Professor of Islamic Studies in Nijmegen University in Netherlands. Schacht’s writings on Islamic law were counter criticized at the turn of the twentieth century by these Western scholars. This approach was said to have been adopted as a result of intellectual honesty on the part of Western scholars.

There is a need to delve deeply into this question that whether the scholarship of 21st century still remains within orientalist paradigms and only the approach has changed or has the Modern Western scholar advanced towards academic honesty?

To answer this question we must take into consideration the observations of Turner when he says:

“Knowledge of the Orient cannot be separated from the history of European expansion into the Middle East and Asia”

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When the orientalist scholarly tradition reached American scholarship after the World Wars the interest of US state department and foreign affairs departments in Middle Eastern studies departments of various universities was noticeable. On the political front it was obvious that the Americans were establishing their political hegemony over the Middle-East and the Muslim world during cold war. Thus on tracing the history we can say that,

‘knowledge of the Orient cannot be separated from the history of American political hegemony over the Middle East and Islamic societies’

Thus the essential paradigms for the study of Islam and the Orient remained the same with the change from philological approach of the Europeans during colonialism to the social science research agenda of Americans after the World Wars as proposed by Gibb when he was at Harvard.

Here we must add that Hallaq draws a connection between European colonialism and increasing Western interest in study of origins and early development in Islamic law.

‘the Orientalist scholarship on Origins of Islamic law was a direct product of ‘hegemonic discursive tradition’

This discursive tradition developed during colonial expansion when the West established its political control over the Muslim World and dominated the region culturally and economically. Extensive scholarship on Islamic law by Western scholars began during European colonial expansion and Modern discipline of Islamic legal history was laid down in mid nineteenth century. Colonial administration decided constitutional destiny of its colonies and European Law regulated all important commercial transactions. Though remaining law was left to the colonies but it was used to secure colonial rule in their regions. Laws were used to reflect colonial preoccupations more accurately than indigenous norms.

It would not be wrong to say that the Western interest in the study of Islamic law began in nineteenth century. Orientalist trend dominated this scholarship till the end of twentieth century. This trend was considerably changed due to the efforts of some Western scholars at the turn of 21st century.
Q2. What are the objectives and essential paradigms for the study of Islamic law which guide the West in their academic efforts to understand the first centuries of Islam?

Since antiquity West wrote on Islam with an objective to essentialize the difference between Muslims and the West and to project Muslim societies as backward, uncivilized and lawless. Law is essential to every society and it relates to the society in which it operates. Evolution of law takes place conditioned by local, temporal and situational changes and Islamic law is no exception to this phenomenon. In addition to this religion and theology also have a deep impact on the development of a legal system. Study of Muslim and Western scholarship reveals that a scholar’s political views and cultural affiliations have a direct relationship on his scholarship. The Orientalist scholarly tradition first separated the study of Islamic law from the study of Islam by asserting that the two primary sources of Islamic law Qur’ān and Ḥadīth which are also the source of religion Islam are inauthentic and fabricated. The West then provided alternate sources for Islamic law as pre-Arabian customs, Umayyad practices, Roman, Canon and Jewish laws prevalent during the first three centuries of Islam and claimed that these penetrated into Islamic law through fabricated Ḥadīth literature. By establishing their point of view West was able to prove that Islamic law as a cultural expression is heavily indebted to the West and had no roots in the religion of Prophet Muḥammad (Peace Be Upon Him). This helped in changing the terrain of critique from Muslim religion to Muslim culture. Critical discourse on Muslim culture not only overcame the problems associated with writings on religion and theology but aided Western scholarship to continue the study in centuries old hegemonic framework and share the old paradigms for study. According to Hallaq the Orientalist scholarship on Origins of Islamic law was a direct product of “hegemonic discursive tradition. This discursive tradition developed during colonial expansion when the West established its political control over the Muslim World and dominated the region culturally and economically.

Orientalists have been considerably successful in achieving their objectives by projecting that Islamic law was dependent on borrowings from well-established legal
systems of the West since its inception and Islamic legal system was an essentially defective and deficient legal system devoid of logic and reason.

Q3. Are these paradigms for study of Islamic law shared by the entire Western scholarship?

Simple and straightforward answer to this question is “No”. Western scholarship can conveniently be divided into Orientalist scholarship and non-Orientalist scholarship. An analysis of the nineteenth and twentieth century writings reveal that parallel to Orientalist scholarship a continuous effort in the form of positive and unbiased researches also emerged in the West. This scholarship came in all shades, responses, rebuttals and critiques and original researches. These researches were neither a priori nor hypothesis driven conclusions. Such neutral and unbiased scholarship remained a regular feature of all eras as is seen in the literature review of this thesis. Extensive interest in Islamic law was taken by the West in mid nineteenth century and numerous scholars took up writing on the sources and origins of Islamic law. Where we come across orientalist scholarly productions aimed at projecting an image of Islamic law and the Orient that suits their political aspirations, we also come across such scholars whose primary focus is to write and judge in the light of facts and are not influenced by state agendas or funding for that reason. Similarly in the twenty first century although the entire approach or the trend has changed from polemical and social science researches aimed at giving a negative image to Muslim societies and their laws. We do come across such writings which are based on sound research designs. It greatly helped ward off the extreme position taken by some Orientalists and at the turn of 21st century it is seen as bridging the gap between Muslim scholarship and Western scholarship by introducing academic honesty.

Q4. Is it appropriate to coin the term Islamic legal Orientalism?

John Strawson argued for recognition of the term “Legal Orientalism” in 1993. This research proposes the term “Islamic legal Orientalism” and suggests that it is divided into “Applied Legal Orientalism” and “Literary Legal Orientalism”. Linguistic terms are coined only after the society has undergone evident transformation and same is
true for the term “Islamic Legal Orientalism”. Legal orientalism is a broad term and extends to Chinese law, colonial Malaya and laws of Algeria, Tunisia and Morocco during French colonization. Just like Islamic law Chinese law has also been subjected to criticism by the Orientalists. Teemu Raskola draws attention towards Legal Orientalism being applied to Chinese law in the article “Legal Orientalism”303 (2002) in which the author focuses on Western representation of “Chinese Law” and historic claims of Western scholars that China lacks an indigenous tradition of law and Chinese law is not even worthy of the term “jurisprudence”. Current research thus focuses on and proposes the term “Islamic legal Orientalism” to limit the discussion only to the Orientalists writings on Islamic law.

Further division of “Islamic legal Orientalism” into “applied” and “Literary” advances the discussion and suggests that “Applied Legal Orientalism” seems to have emerged well ahead of “Literary Legal Orientalism” and can be traced back to the British Imperial engagement with India in the eighteenth century. Anglo-Muḥammadan Jurisprudence in British India is a result of British colonial rule in the sub-continent. Since the primary objective of colonizers was to establish their supremacy and control over the colonized states the local and religious laws were used to achieve this purpose. Colonial judges applied religious laws to attain certainty and uniformity therefore they were less concerned about the accuracy of application. They did not pay attention to the flexibility, genuine differences and discretion given to a Muslim judge in deciding cases; instead they imposed rule bound legal system. The mental bent of British lawyers also influenced the method of interpretation of Islamic laws which of course was fundamentally different from the Muslim jurists and lawyers. Colonial rulers had understood that it was inevitable to understand and study indigenous and religious laws of local population as they adhered to them in personal matters and to have a better control and smooth administration. Primary objective behind the Anglo-Muḥammadan Jurisprudence was to adapt indigenous arrangements to implement colonial rule and eventually to collect revenue from the colonies.


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The irony was that the Islamic texts were applied in ignorance of social circumstances. British rulers did not take native norms into consideration while applying these laws and primacy was given to texts over practice and Islamic law emerged as an essentialist static law. The application of laws also reflected British pre-occupations and their indifference towards and ignorance of native norms of the colonized subjects. Anderson rightly states that “colonial administrators may never have changed Islamic legal arrangements quite so profoundly as when they were trying to preserve them”.

This was followed by interest of the European world to study Islamic legal history, specially its origins and languages of the Orient. This exercise was taken up as integral to the Orientalist project. Application and implementation of laws was not their primary concern. They exploited classical texts of Islamic law to understand the theoretical aspects and history of Islamic legal development. They tried to establish their supremacy over the Orient by undermining the Islamic legal system and demonstrating it as inferior, borrowed, fabricated, deficient and lacking in law and reason. The consequences of this biased and racial discriminatory position and non-scientific writings and researches which were short of objectivity is that it has today generated heated debates on non-democratic, non-humanitarian and non-pluralistic nature of Islamic law and Muslim societies. The West today boasts that they are the champions of democracy, human rights and pluralism and they have a right to rule the East to teach them these essential norms. However the truth is that the concepts of democracy is compatible with Islamic norms as explained by Professor Fadl and the conception of human rights and pluralism are embedded in Islamic teachings. It is the East that has to be awakened to realize what their heritage had been in the Medeival ages and what wealth of scholarship was produced by Muslim philosophers, scientists, jurists and religious experts which needs to be explored by the Muslim world.

Therefore this research strongly proposes the recognition of term “Islamic Legal Orientalism”.
Q5. **Has Western scholarship proved beyond reasonable doubt massive fabrication of Ḥadīth literature?**

First Goldziher and then Schacht challenged the authenticity of Ḥadīth literature. An intensive reading of their contributions reveals that both these scholars have relied heavily on the *ilal* works written by Muslim scholars of 4th and 5th centuries. Having read this literature combined with their theological beliefs and social and political affiliations of these Orientalists they ended up proposing the thesis of wholesale fabrication of hadīth literature. Instead of analyzing Muslim Ḥadīth criticism they misused this criticism to cast doubts on the originality of the teachings and sayings of Prophet Muḥammad (Peace Be Upon Him). Their objectives were twofold first to undermine Muḥammad (Peace Be Upon Him) as a true Prophet and secondly to shake the very basis of Islamic law. Both these purposes were achieved by criticizing Ḥadīth. This was done at a point in time when study of Islam as Religion was being replaced by study of Muslim societies. Since law relates to the society in which it operates it led to the systematic study of Origins of Islamic Law which made reference to Prophetic Ḥadīth imperative.

Schachtanian thesis influenced Western scholarship since 1950 and his works were heavily quoted in academic writings on hadīth. At the turn of twenty first century Hallaq declared that even the Muslim jurists had acknowledged the “precarious epistemological status” of hadīth, therefore fascination of Orientalists with the pseudo-problem of hadīth authenticity is gratuitous. Then Motzki’s *sanad cum matan* analysis of hadīth and Jonathan Brown’s comparison of the approach of Muslim and Western Scholars on Prophetic Ḥadīth fundamentally changed Schacht’s theory. Discovery of first century Ḥadīth collections, especially Musannaf of Abdul Razzaq substantially strengthened that Schacht and Goldziher’s studies were devoid of reference to first century Ḥadīth collections which resulted in their fallacious conclusions.

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Discovery of the first century Ḥadīth collections was the life time effort of Muslim scholars of India and Pakistan (Musannaf Abdul Razzaq was arranged and edited by an Indian scholar Maulana Habib ur Rehman Āzmi’s and Sahifa Hammam Ibn-e-Munabih by a Pakistani scholar Dr. Hameedullah). These hadīth compilations provided conclusive proof of the weakness and inadequacy of Schachtanian thesis but employment of these Ḥadīth compilations to refute Orientalists claims was taken up by the Western scholars.

Motzki clearly states that Schacht’s thesis on hadith forgery is untenable at least in this degree of generalization. He provides solid arguments to prove his statement. By elaborating on Schachts central thesis on Common Link leading to or justifying hadith forgery and indicating the date of forgery Motzki proves that Schacht’s research is based upon limited number of sources and he has not taken matan of ahadith into consideration before reaching his conclusions. Motzki has also added that the common link does not necessarily indicate the exact time of origin of a hadith but in fact that hadith might have originated before the common link. He quotes the example of hadith narrated by Aisha regarding breast feeding of adults to explain his position. Motzki’s sanad cum matan method has gained popularity among European and American scholars today.

Thus not only that Western scholarship could not prove massive fabrication of hadīth literature contemporary writings in American and European University journals have refuted the orientalists stance to undermine hadīth literature. It has resulted in a rigorous growth of literature supporting the authenticity of hadīth literature.

Q6. Is Western scholarship successful in proving the influence of pre-Islamic non-Arab laws on Islamic law?

Western scholarship seems to be muddled regarding the question of foreign influences on Islamic law. Their objective obviously was undermining the originality and superiority of Islamic legal system. It is generally argued in Western academia that Islamic law is involved in “systematic borrowing” from or “indebted” to various foreign laws; such as Persian, Roman and Provincial law. Among revealed laws most striking resemblances have been claimed with Jewish or Talmudic law but Canon law of Eastern churches also draws attention. It is also alleged that as the development of Islamic legal
theories and their codification took place in the second and third centuries of Islam therefore popular Umayyad practice, laws of the conquered territories and non-Arab converts who embraced Islam had a strong role to play in the development of Shari‘ah.

Orientalist scholarship remains divided on the issue of influence of foreign elements and laws. All sorts of claims and their refutations have made way into their writings. Strangely though, Orientalists agree on one aspect that the original nucleus of Islamic law was rich in its ideology and moral principles and unique in claiming that authority of law rests in divine source. This uprooted the claims for similarity of original nucleus of Islamic law with other laws.

Commenting on the possible influence of pre-Islamic non Arabic systems of law on Islamic jurisprudence, Motzki limits the scope of such influence temporally to the end of 1st/7th century A.D/CE including pre-Islamic times and spatially to the Arabian Peninsula (Hejaz and Makkah). To Motzki influence of Near-Eastern Provincial law which was strongly infused with Roman law and especially by Jewish legal reforms is inconceivable with these spatial and temporal limits. Since, we so far know nothing precise about the dissemination and substance of the laws in the Arabian Peninsula in 6th and 7th centuries or about pre-Islamic law in Mecca. Concrete proof of their influence on Islamic law is difficult to adduce. Patricia Crone’s study shows how one can approach this problem but dating and localization remains speculative.

Harald Motzki has challenged Western scholarship’s assumptions regarding the role played by scholars of non-Arab decent in the formative period of Islamic law. Motzki’s investigation of the ethnic origin of non-Arab scholars in his sample indicates that three quarters had an Eastern background and came from regions of Sassanid Empire. Scholars of Christian and Jewish roots were very few in number. Most of these scholars are Muslims of second and third generation, whereas most first generation scholars entered Arab-Muslim society as children and grew up in an Arab –Muslim environment cut off from their ethnic roots.

Motzki concludes that these findings lend no support to the assumption that scholars of non-Arab origins brought the purported borrowings with them from their native legal system. Therefore we can no longer take it for granted that scholars of non-Arab descent were the natural vehicles of borrowings from pre-Islamic non-Arab legal systems. But even if there were any, such cases must be demonstrated. Motzki claims that he does not know of any such case from the first two centuries A.H. on the basis of this research.

It is also suggested that comparison of laws run the risk of being held hostage to biased paradigms, simplistic preconceptions and preoccupations with self-understanding and inadvertent commitments to political agendas. It is further argued that tracing the influence of foreign legal tradition on Islamic law is not always asymmetrical. Many studies concerning early medieval literature are motivated by a desire to demonstrate the impact of Islamic legal thinking on foreign legal literature of that period. The ideological motives of exploring influences were obviously related to 19th century philological zeitgeist.

In short Western scholarship is not successful in proving the influence of pre-Islamic non-Arab laws on Islamic law as there exists difference of opinion among Western scholars on this issue. They themselves are unable to reach a consensus as to which law has left most profound influence on Islamic law. Furthermore Islam itself speaks of the fact that Prophet (pbuh) while deciding legal issues would always ask about what was the law of plaintiff and the defendant if they were non-Muslims and would incorporate their law if it was not against the percepts of Islamic law and its philosophy. Similarly Prophet Mohammad (Peace Be Upon Him) also carried pre-Islamic laws if they did not contradict Islamic laws and he also modified the existing pre-Islamic laws to bring them in conformity with Islamic legal norms. This practice of Prophet (pbuh) does not in any way amount to ‘borrowing’ or ‘influence’ of foreign laws.

Q7. Does Western scholarship of 20th century on Islam and Islamic law differ from the Western scholarship of 21st century with respect to its mannerism, approach, trend, methodology and objectives of study?
Western scholarship of 20th and 21st century differ considerably in its methodology but we can not say for sure that there is much difference in their objectives of study. It differs from scholar to scholar and we find that scholars of both perspective i.e orientalist as well as non-orientalist exist side by side in the West. What needs to be seen is that.Is orientalism a dominant trend in their writings on Islamic law or not?

As far as methodology is concerned 20th century philological approach is replaced by 21st century social science approach. Thus Islamic societies have become more relevant to the West as compared to Muslim intellectual treasures of classical era. It does not mean that West has abandoned the study of classical Muslim texts but they have integeated social science research with historical and comparative linguistics.

Q8. Can Muslim and Western scholarship be reconciled at any point in their understanding and study of Islam in general and Islamic law in particular?

This is an extremely important question which is equally difficult to answer. Both Muslim and Western scholars come from a different social set up and belong to different faiths. Their orientations, environments and history differ. Their approach towards the study of Islam is aldo different. Above all the objectives of the study of Islam in by Muslim and Western scholars vary considerably. Their political and ideological motives towards the study of Islam also influence their scholarship to a great extent.

However these differences can be minimized by encouraging close academic interaction between these two scholarships and understanding each others perspectives. The approach of both scholarships needs to be logical rather than polemical. Respect and tolerance for each others faith and religiosity can also play a positive role in achieving reconciliation. Complete coherence seems to be impossible. If faiths can not be reconciled then how can scholarship on faith be reconciled?

Verification of Hypothesis
Following five hypotheses were formulated in the beginning of this research;

- Western scholarship has been instrumental in essentializing the differences between Muslims and the West through their writings on Origins of Islamic Law.

- Western study of development of Islamic law during first three centuries will always remain controversial and in conflict with the Muslims understanding of Islam and Islamic law.

- Western scholarship on Origins of Islamic law has not been able to reach a consensus on the issue of inauthenticity of hadith literature

- Western scholarship on Origins of Islamic law has not been able to reach a consensus on the issue of foreign influence on Islamic law.

- Scholarship of twenty first century does not support the assumptions of twentieth century scholarship on these two major issues. Thus theories proposed by Goldziher and Schacht cannot serve as basis of future studies on Origins of Islamic law.

First Hypothesis

**Western scholarship has been instrumental in essentializing the differences between Muslims and the West through their writings on Origins of Islamic Law.**

The first hypothesis, whether Western scholarship on origins of Islamic law has been instrumental in essentializing the difference between Muslims and the West is discussed at length in the chapter on “Islamic Legal Orientalism” By projecting Islamic law as a deficient legal system lacking in sense of law and highlighting Western legal systems as superior Western scholarship has been instrumental in essentializing the difference. Not only this but in the area of applied legal orientalism case of British rule over the subcontinent and its manipulation of Islamic law clearly speaks of colonial efforts of essentializing the differences Muslims and the West. Hence first hypothesis is proved correct.
Second Hypothesis

Western study of development of Islamic law during first three centuries of Islam will always remain controversial and in conflict with the Muslims understanding of Islam and Islamic law.

The study of the first three centuries of Islam poses numerous problems as not much documented information is available of the first century and the available literature that is Quran and Ḥadīth are not considered as revealed documents by the Western academia. Thus it seems that there is a strong possibility that the study of development of Islamic law will remain controversial because of lack of available literature and also due to the difference in attitude of Muslim and Western scholars towards this literature. Thus the second hypothesis is also proved correct.

Third Hypothesis

Western scholarship on Origins of Islamic law has not been able to reach a consensus on the issue of inauthenticity of Ḥadīth literature

This research has proved compatible with the third assumption that Western scholarship on Origins of Islamic law has not been able to reach a consensus on two major propositions, inauthenticity of Ḥadīth literature and influence of foreign laws on Islamic law. After an indepth study of the available literature on these two issues the researcher concludes that this hypothesis is correct. In nineteenth and twentieth century both these allegations against Islamic law were debated and most popular opinion was that entire Ḥadīth corpus is a fabrication and is a document not of the time it claims to be. Furthermore various elements of foreign laws and cultures penetrated in to Islamic law through Ḥadīth literature attributed to Prophet Muḥammad. Discovery of some earlier sources on hadith and numerous writings supporting authenticity of Ḥadīth literature refute the allegations raised by twentieth century scholars. This shift is due to the discovery of first century Ḥadīth collections and an analysis of writings of Muslim Ḥadīth critics of fourth and fifth century. Latest researches of Jonathan Brown and Harald Motzki have shaken the foundations of theories proposed by Goldziher and Schacht and has brought Western scholarship closer to Muslim scholarship.
Fourth Hypothesis

Western scholarship on Origins of Islamic law has not been able to reach a consensus on the issue of foreign influence on Islamic law.

Whereas the influence of foreign laws on Islamic law is concerned Western scholarship remains divided on this issue. Out of non-revealed laws that is, Roman, Roman Provincial and Persian law, Western scholarship does not make a very strong case of Persian law influence on Islamic law. Godziher and Schacht only make a passing reference to it and the studies on Persian influence on Islamic law were not carried forward for lack of resemblances. Goldziher asserted that the original nucleus of Islamic law is rich in ideology and moral principles thereby negating the possibility of influence of other laws on the original nucleus but he affirmed the influence of Roman law on Islam’s legal system. In 1950 Fitzgerald dismissed the possibility of borrowings of legal terms and notions from Roman to Islamic law. Regarding Roman Provincial law Patricia Crone has argued for its influence on Islamic law but rejects the proposition of Roman law influence and contends that if Roman elements have entered Islamic law they would have done so only through Provincial law Hallaq remarks that Crone has not been able to demonstrate conclusively the influence of Roman Provincial law on Islamic law. He adds in its final form Islamic law does not resemble any of the legal systems that it came into contact with during its formative years. Among revealed laws Jewish law or Halaka is the only law with which Western scholarship claims resemblance with Islamic law. According to Wegner's findings strong resemblance of Talmudic law is observed with Shafi’s legal theory. Thus Western scholarship remains divided on the issue of influence of foreign laws on Islamic law.

Fifth Hypothesis

Scholarship of twenty first century does not support the assumptions of twentieth century scholarship on two major issues discussed in this dissertation. Thus theories proposed by Goldziher and Schacht cannot serve as basis of future studies on Islamic law Origins.
Research and writings of Goldziher and Schacht represent the scholarship of 20th century on issue of Muslim hadith literature. Major contentions of these scholars are that that majority of hadith were products of religious, historical and social conditions prevalent in the first two centuries of Islam. People produced fictitious hadith for political and other purposes. They not only produced fictitious hadith but modified the existing hadith in order to support their respective positions or to justify their views. Muslim scholars are also accused for relying solely on isnads, and showing negligence towards hadith content. Schacht expressed these views in terms of Common link theory, argument e-silentio and back growth of isnads.

To see the trend and approach of of 21st century Western scholars, scholarship of Jonathan Brown, Harald Motzki, Wael Hallaq, Patricia Crone and Joseph E. David is chosen. A comparison of 20th century scholarship with 21st century scholarship on Muslim hadith literature and influence of foreign laws reveals that twentyfirst century scholars have shaken the very bases of 19th and 20th century researches on Origins of Islamic law and have advanced knowledge to a greater extent. With the help of use of extensive source material and discovery of first century musanaf works has proved scholarship of Goldziher and Schacht cannot serve as basis for future studies on Origins of Islamic law due to its shortcomings and their inadvertent commitment to political agendas and involvement in 19th century philological zeitgeist. However 20th century scholarship is an important storehouse of knowledge and has referential value.

**Conclusion**

Western scholarship on origins of Islamic law is divided into orientalist and non-orientalist scholarship. Criticism on Islamic law can be seen in the writings of orientalists and responses to these criticisms can be studied in the writings of Western non- Orientalists.
First the Qur’ān and then Ḥadīth was subjected to criticism in orientalist Scholarship. This tradition is not new but can be traced back to the advent of Islam and Umayyad rule in the writings of John of Damascus. It continued through the medieval era, crusades, colonial era, during the two World Wars, and cold war era but essential paradigms for the study of Islam remained same throughout these stages. In the contemporary age this scholarship is dominated by American scholarship. This scholarship is closely linked to the power relationships in this ever changing dynamic world. It has served the states to implement their foreign policies effectively by preparing grounds for them before any military inventions or to justify their oppressions in the name of religion, culture or human rights. State fundings in the form of establishment of institutions, organizations, research centers, centers of study and departments in universities for this purpose have proved governmental support and state involvement.

Hadīth literature has been of prime importance to the Western scholars who took up researches on Islamic law. Orientalist scholarship asserts that entire Ḥadīth literature is a product of second and third century of Islam, that is, it originated 100 years after the demise of Prophet Muḥammad (Peace Be Upon Him). It was orally transmitted for about 100 years. It is thus a fabrication based on the political aspirations of people of that time. Popular Umayyad practices and pre- Islamic customs formed the basis of this literature. It also contained elements of Roman and Provincial laws and was infused with legal percepts of Jewish and Canon law.

Material gained from these sources was codified in the form of Ḥadīth literature in the second century of Islam. When Shāfiʿi laid down his legal theory in which he gave high status to prophetic Ḥadīth, an enormous growth in Ḥadīth literature was observed all reaching back to the mouth of Prophet Muḥammad (Peace Be Upon Him). In Orientalists writings this is termed as large scale pious forgery by the Muslim scholars. It is also asserted that Muslim scholars have remained completely ignorant towards content criticism of Ḥadīth and only criticized the chains of narration.

It is further asserted that Muslims were incapable of formulating original law of their own, so the edifice of Islamic law was erected on borrowings from foreign laws.
Constitutional, International and Corporate laws of Islam are never discussed in the orientalist writings thereby presenting Islamic law as a deficient legal system.

Contemporary researches by some American and European scholars have shaken the basis of Orientalist’s writings and have put forward their results and discoveries after conducting very penetrating researches. The results of these researches deny whole sale fabrication of Ḥadīth literature at least in the degree asserted by 20th century orientalists. It is also argued that Islamic law originated in Medina not in Iraq or Syria and soon after the demise of Prophet Muḥammad (Peace Be Upon Him) and not in the second or third century as is asserted by the Orientalists

Focus of 20th century Orientalists was the exploration and study of first three centuries of Islamic legal development and Muslim scholarship during this era. They used small and selective body of sources and their studies were based on skeptical assumptions. These Orientalists studied Shāfi‘i’s Risala and Kitāb al Umm, the six canonical compilations of Ḥadīth Shybani’s Siyar, Tabaqt Ibn-e- e Sa”ad, Sjerah, Ibn-e- e Ishaq along with other classical literary efforts of Muslim scholars. They based their findings on the study of scholarly material of 2nd and 3rd century A.H. Their analysis and study was deprived of earlier and most extensive Muslim scholarship on one hand and selective reading on the other hand. The earlier scholarship provide solid grounds for certain assertions which contradict assumptions of 20th century Orientalists, whereas 4th and 5th century Muslim scholarship are helpful and provide insightful information about the questions raised by Orientalists regarding Ḥadīth literature.

21st century Western scholars stand in a better position as compared to 20th century Orientalists with discovery of 1st and 2nd century Ḥadīth collections in hand and their efforts to include literary works of 4th and 5th century Muslim scholars. This has enlarged the radius of Scholarship and has resulted in bringing Western scholarship closer to Muslim Scholarship on “Origins” of Islamic law.

Another important conclusion that can be drawn is that assumptions and findings of Western scholarship on Ḥadīth are always based upon the classical Muslim Scholarship. We may also conclude form this that Western scholarship is not original in its strict
meaning despite posing itself as innovative. However putting both these conclusions together we can presume that broader the range of scholarship under study, more accurate will be the conclusions. Clear examples of this effort are the Isnād-cum-matan analysis of Motzki and Brown’s findings regarding history of hadīth collection and criticism by Muslim scholars. Combined efforts of both these scholars have brought Western scholarship closer to Muslim scholarship on the issue of hadīth.

The second major assumption of Western scholars regarding the origins of Islamic law is possible influence of pre-Islamic non-Arab laws on Islamic law. This is because they believe that Islamic law could not have developed in parthenogenesis. The strongest influence on Islamic law as asserted by Western scholarship is that of Roman law among the non-revealed laws and that of Jewish law among the revealed laws. The entire discussion shows that there is no consistency in the findings of Western scholars and they remain divided on this issue. Also we do not find extensive reading material by the West in foreign influence if we compare it with hadith literature.

As mentioned in the introduction and preface this researcher was intrigued by the thought that what Following is the result of comparison of 20th and 21st century scholarship in terms of similarities and differences in their approach and methodology adopted towards the study on Origins of Islamic law.

Twenty first century Western scholarship on Origins of Islamic law is:

- not based upon skeptical assumptions
- is non-polemical
- not based on sweeping generalizations
- based on more extensive source material
- based on hadith literature of 1st and 2nd centuries of Islam which were not consulted by the scholars of 20th century
- Scholars of 21st century have been honest in acknowledging and referring to classical Muslim hadith literature
is driven by the motivation of bringing Western scholarship closer to Muslim scholarship on hadith

more accurate and in depth as compared to the research of 20th century scholars.

has greatly advanced previous knowledge on the subject and has added new dimensions to it

Twenty first century scholars have realized that the objective of comparison of religions, laws and praxis should not only be confronting similarities and underlying differences but should provide a better understanding of compared systems and contribute knowledge.

Twenty first century Western scholars of Islam are also aware of the fact that they are not to become hostage to biased paradigms.

They have to caution pre-occupations with self-understanding and inadvertent commitments to political agendas to promote academic honesty.

They refrain from 19th and 20th century philological zeitgeist

They have even challenged the assumptions of 20th century scholars and adopted counter-criticism of 20th century Western scholarship in their writings

Recommendations

On the basis of this research, this researcher would like to make a few recommendations at macro and micro levels.

At Macro Level

By analyzing the orientalist perspective this research indicates that there is a strong connection between ‘Scholarship’ and ‘World politics’. Muslim world lags behind the Western world in the field of knowledge and scholarly endeavours. Islam spread through the scholarship of Quran and hadith and it still dominates the thinking process of
millions of Muslims today. The underlying emphasis of Islam is that ‘intention (thought process) precedes actions’.

*Juda ho deen siyasat se to reh jati hai changaizi...*

*Allama Mohammad Iqbal*

Muslim Ummah must realize their weaknesses and shortcomings which have lead them to the present state of affairs. The dilemma is that Muslim world has not been able to draw a connection between Quranic and Hadith scholarship with their sociology and politics. It has neither endeavoured to make a whole hearted effort to bring all the think tanks of Muslim Ummah together to find ways how Muslim scholarship can influence the minds and thinking process of the Muslim world and the Western world.

The researcher recommends that Muslim scholars and think tanks should propose a plan where they want to see themselves after 50 years with respect to the rest of the world. To find out what challenges will be faced by them, identify their weaknesses and give solutions to overcome them. Furthermore it should be an unabated activity of the Muslim world to remain engaged in updating their vision and mission to suit the upcoming challenges of Muslim Ummah. It should be a continuous process to read and reply the orientalists’ writings and it should be patronized by the Kingdom of Saudi Arabia as the leading center of Muslim activity.

The platform of OIC should be used to gather Muslim states and give vision to Muslim ummah how to promote scholarly activities among decision making bodies, research centers established for this purpose and build their own think tanks. Institutions of Higher learning should be involved in charting out an education plan aimed towards achievement of the laid down objectives.

Muslims should not alienate themselves due to differences in culture or religion from interacting with the West. They must also gain mastry over their language in order to read and understand them better and refute their allegations.

Muslim’s educational institutions should interact with Western educational institutions to know their thinking and close engagement policy should be adopted.
Western world gives prime importance to subjects like Quranic studies, hadith literature, Islamic law, Islamic history and Muslim culture to know the Muslims better and then use this knowledge in their best interest. Contrary to this Muslims World has shown little interest towards Islam and Muslim history and almost no interest in history, society and religions of the West, therefore they are unable to refute or respond to their writings effectively.

**At Micro level**

At micro level efforts should be made by the government of Pakistan along with Higher Education Commission to outline the paradigms of religious education from grass root to highest level. At university levels there is a dearth of history departments and where we do find history departments they are in a poor state of affairs. Western universities have very strong history, culture and language departments where both occident and orient is studied and researched. Large scale funding and grants are provided to universities to run oriental studies and Islamic studies departments. These departments are then engaged to conduct research studies and ethnic studies to know Muslim and Arab societies better.

In this age of pluralistic societies we must overcome our sectarian differences by promoting research on them and by inculcating tolerance among the public on conflicting issues.

Quran and hadith are the hallmarks of Muslim scholarship government should patronize sound academic endeavours to conduct unbiased study and research on religious issues and promote message of peace and tolerance as given by Islam.

Laws are essential to every society and Islamic law is the epitome of Islamic learning. Three fourths of the entire classical Islamic literature is devoted to Islamic law. Correct interpretation of Islamic law and Islamic legal history should be encouraged by the departments of Islamic studies across all public and private sector universities.

In Pakistan madrash education and its curriculum is criticized world over, their syllabi should be revised on correct lines and Wafaq ul Madaris should join hands with
Islamic studies departments of Pakistani Universities to promote uniform educational standards for religious education.

**Suggestions for Further Research**

1. A detailed study of Muslim responses to orientalist scholarship on Islamic law during 19th and 20th centuries should be carried out followed by its comparison with Western responses as highlighted in this thesis.

2. An independent study of the *ilal* works (*ḥadīth* criticism) of Muslim scholars of 4th and 5th centuries should be carried out by Muslim scholars to understand Muslim criticism on canonical Ḥadīth compilations of 2nd and 3rd centuries.

3. An intensive study of the contents of Mussanaf Abdul Razzak followed by its comparison with *Sahīḥain* can throw light not only on the process of hadīth codification but codification of knowledge in the area of Islamic law.

4. Analytical study of writings of two leading American Orientalists Hamilton Gibb and Bernard Lewis can shed light on the changing trends of study of Muslim and Arab societies by Orientalists in the contemporary era.

5. Comparative study of three leading monographs on “Origins of Islamic Law” by Schacht (1950), Motzki (2002) and Hallaq (2005) should be carried out.

6. A detailed study of response to Orientalism by Kḥurd Ali, Tibawi and Abdul Malek and an analysis of their conclusion can shed light and lead to insightful conclusions pertaining to Orientalist tradition of Western scholarship.

7. Analysis of books written on Muḥammadan Law or Muḥammadan Jurisprudence during British rule in the subcontinent can lead to insightful conclusions as to how legal Orientalism was applied in British India.

8. Motzki’s *sanad cum matan* analysis is an important step towards carrying out a detailed study of Ḥadīth literature. Views and comments of leading Muslim Ḥadīth scholars on
Motzki’s isnād cum matan analysis of hadīth are essential. So that it can either be embraced, refuted or suggest corrections.


10. Research should be carried out on academic debates in Western scholarship on contemporary issues in Islamic law such as Democracy, Human Rights and Pluralism. Participation in these debates should be a regular feature of Muslim scholarship.

11. Similar study as this research should be carried out on “Western scholarship on Qur’ān”.


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