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# Islamic Law Revisited: Rules and Rule-Systems from a Chronological Perspective

Christian Müller

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## 1. Introduction

The rules of Muslim legal thinking (*fiqh*) are recorded in thousands of juridical texts from the 8<sup>th</sup> to the 19<sup>th</sup> century. This literary tradition is a diverse one, including substantive law manuals and commentaries by various law schools, fatwa collections, notarial manuals, and treatises on specific juridical subjects, as well as Qur’an commentaries and works on prophetic traditions, to name only some basic types. This corpus, which is conventionally assumed to constitute the “Islamic heritage” remains understudied due to various reasons and in many respects, despite the growing recent interest in Islamic normativity which has spurred scholarly attention towards such *fiqh*-rules, among other similar topics. This renewed interest in “Islamic law” is to be welcomed, but much of the resultant scholarship has been grounded in religious convictions that take the existence and normative force of such a law for granted. It is a common premise of scholars working within this latter “Islamic law” tradition that Islamic normativity is primordial and unchanging, emanating as it does from God Himself. Accordingly, scholarship produced within this tradition tends not to consider how “Islamic normativity” might itself be historically contingent, nor how “Islamic law” might be shaped by shifting human and institutional dynamics and pressures. Scholarship of this nature, which we might term scholarship *in* Islamic law, thus differs from the more critical work of what we might term scholarship *on* Islamic law that examines *fiqh* rulings and their normative character from a systemic, non-religious perspective..

In the meanwhile, western academic research – which generally falls into the category of work *on* Islamic law – has paid little attention to the law schools’ formulation of a legal rule system that was considered unchanged over centuries since the alleged stagnation of Islamic law after the 12th century.<sup>1</sup> The fundamental question of whether these rulings constituted a fully articulated Islamic “system of law rules” was lightly dismissed under the assumption of a theory-practice antagonism, which was supposed of having determined Islamic law after its short “formative period”. According to this view, later juridical thinking became detached from legal practice<sup>2</sup> and *fiqh* rules served as part of a deontology that

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<sup>1</sup> For the stagnation paradigm in colonial research see the influential works by J. SCHACHT, *Introduction to Islamic Law*, Oxford 1964, paperback reprints, p. 5 and 75, N. COULSON, *A History of Islamic Law*, Edinburgh 1964, paperback reprints, p. 73.

<sup>2</sup> See B. JOHANSEN, *Contingency in a Sacred Law. Legal and Ethical Norms in the Muslim Fiqh*, Leiden 1999, p. 42-72 for a review on European scholarship on Sunni *fiqh* in the colonial period.

joined with Qur'anic laws and Prophetic Sunna to make up Islamic normativity. Unchanging *fiqh* rules were considered to be sacralized theory, not the mainstay of the historical law practiced in later periods.<sup>3</sup> In scholarly terms, this hypothesis is grounded on a small selection of juridical literary sources from the centuries-old law schools' tradition, which modern scholars had labeled "Islamic law" without considering its intrinsic systemic aspects. Here is not the place to explain the political reasons for this research hypothesis, which lay in colonial studies and in Muslim modernists' approaches to Islamic normativity.<sup>4</sup>

For any historian of Muslim legal practices, however, the widespread scholarly tendency to ignore the law's intrinsic links between juridical rules and applied law is highly unsatisfactory. One particularly unfortunate consequence of this tendency is that it has led to the factoring out from Muslim history the actual legal discussions of individual jurists.. What may be welcomed from a deontological perspective of Islamic normativity, its normative diversity, poses a serious problem for research on applied law. Sources citing sometimes contradictory rulings, be it in the *fiqh* literature or dispositions from the Qur'an and Sunna, rarely specify to what extent such rulings served as the norm in legal cases. The established explanation of a polysemic Arabic language and ambiguous treatment of juridical concepts risks overlooking the high technicality of Muslim legal thinking.

In this contribution, I propose adopting a rule-oriented approach to *fiqh* within the framework of a "legal system" and its institutionalized rule-enforcing mechanisms.<sup>5</sup> Conventional approaches take the normative character of *fiqh*-rulings for granted – doing so on the assumption that they are part of Islam's sacred law tradition, not because they are defined as "normative rules" by any legal system in the aforementioned sociological sense. Studies that take *fiqh* as the embodiment of a timeless Muslim normativity thus find themselves confronted with a huge set of partially contradictory juridical rulings. This makes it difficult to imagine *fiqh* rulings in their entirety as being the normative reference in applied law. Until now, Muslim history has generally tended to be written with little consideration of the decisive role played in this history by Islamic law – a state of affairs that is particularly ironic given the amount of preserved juridical sources for the premodern period.

My approach provides an explanation of "how" Muslim jurists build a body of laws for central fields of legal spheres, law-rulings that were legitimized by sacred normativity and went beyond Qur'anic

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<sup>3</sup> cf. SCHACHT, *Introduction*, 76-85, and COULSON, *History*, 120-134. Based on a larger source material since the 1980s, research considered Muslim legal practices mainly in fatwa-collections and notarial manuals.

<sup>4</sup> Cf. L. BUSKENS and B. DUPRET, "The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient", in F. Pouillon, J. C. Vatin (eds.) *After Orientalism: Critical Perspectives on Western Agency and Eastern Re-appropriations*. Leiden/Boston, 2014, 31-47.

<sup>5</sup> Cf. J. RAZ, *The Concept of a Legal System. An Introduction to the Theory of Legal System. Second Edition.*, Oxford 1980.

injunctions and Prophetic traditions. For this we need to distinguish between the law-rules' exact wording and references to situations that were considered to be normative by the law's actors. In Muslim legal thinking such links to the Qur'an and Prophetic tradition became formalized by the legal theory of *uṣūl al-fiqh* from the 10<sup>th</sup> century onwards, but may have existed implicitly earlier. In the remainder of this paper, I seek to enquire into the self-conception of juridical rulings in the Muslim jurists' own writings (juridical in-perspective) within the historical frame of "legal systems" that used *fiqh*-writings as normative references. In taking a functional, rather than an identarian stance on Muslim legal thinking, we distinguish two aspects of this latter phenomenon: providing legitimacy and guaranteeing practicability to the system of transmitted rulings. *Fiqh* reflected the teachings of the law-schools' sacred juridical tradition (legitimacy) and, secondly, the time-bound adjustments within the school's rule-set to contemporary juridical practices (practicability) - adjustments that in modern studies we find acknowledged only for fatwa collections. This distinction between transmitted and juridically validated rulings should help to solve the question of whether Islamic law was internally coherent from the perspective of an applied law-system at a given time, rather than by examining all *fiqh*-rulings in their entirety. The two-tiered approach to *fiqh*-rulings explains how the law-schools, those long-lasting collective institutions of thousands of contributing scholars, could formulate legal rulings with the legitimacy of a sacred law without claiming any legislative power beyond the legislators God and his prophet Muhammad. This said, law's historicity in Islam needs to be studied as applied law, which includes legal documents as its relics. From the perspective of law as a human institution, *fiqh*-rule citations in our sources are then to be distinguished by their function according to a) simple juridical statement (ruling), b) norm, and c) rule of law. In the technical understanding provided by legal philosophy, a "norm" overrules all other (practical and non-practical) reasons for behaviour. Therefore, a ruling can only serve as a "norm" if its scope of validity is defined and limited.<sup>6</sup> This can be expressed by the ruling itself or may be achieved by other rules.

Modern codified law defines a small body of law rules that are clearly distinct from other law rules. Rules of a different kind, so called "secondary rules", then regulate the solutions to adopt in specific cases, which turns law rules into norms. This way of conceiving legal normativity is adapted to a human lawmaker, who may change the laws. In contrast to codified law, Muslim legal thinking produced casuistry with countless specific regulations for cases that are considered as "laws". Case rulings lead to very different legal consequences in similar situations, as shown below. In casuistry, no secondary rules graduate the laws' normative significance, as in codified law. The rules' validity scope therefore depends

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<sup>6</sup> Cf. J. RAZ, *Practical Reason and Norms*, Oxford 2002; *pace* a non-specific use of "norm" for any ruling with authoritative character, not linking this in particular to human behaviour.

on the existence of other rules.<sup>7</sup> Casuistry is the preferred method within legal systems claiming divine origin, which allows for defining sacred laws to as many cases as intellectually possible. In both codified and casuistic law types, the normative dimension of any rule depends on integrating the rule system as a rule of law – which is to say, in an institutionalized way. This differs from believers in religion, who accept the normativity of a ruling for personal conduct in their forum internum and decide on how to apply it, whether by following this external advice or not.

These systemic considerations allow for evaluating the potential normative character of rule statements in our sources. Not all formulations in the Qur'an and Prophetic traditions had a content that made them apt for serving as legal norms. For example, the Qur'anic commandment "you have to pray" cannot serve as a law rule at face value without its defining the scope of its validity: Literally understood, this ruling provides no other possibility of human behaviour than praying. Praying all the time, however, is humanly impossible.<sup>8</sup> Two more examples illustrate the fact that single rule statements may lack the necessary precision of a normative ruling: 1. The order "pray five times a day" needs to be complemented by those other rules that define for whom, when, and how the five daily prayers are obligatory or desirable. 2. The statement "selling gold against gold is usury" can be understood in many ways (for example, as a referring to the practice of swapping raw-gold lumps) and becomes an economically important norm only when "selling", "gold", and "usury" are defined accordingly by other rules (see below). These examples illustrate the importance of studying the normative value of a rule statement in connection with all other rules that casuistry provides for defining and limiting its application. In a system of law rules, casuistry also regulates the rule application by institutions (court of law, judges) and legal consequences, like the confirmation of rights, sanctions, and punishment. For the mentioned examples, *fiqh* casuistry provided these: A Muslim non-prayer might be punished for refusal to pray (*tārik al-ṣalāt*) or lose his "honorability" (*'adāla*) to act as court witness; contracts in contradiction with transaction-type casuistry might be declared void and annulled.

*Fiqh* literature contains, among other things, a consolidated system of legal rulings - but this was not initially the case in the earliest days of its inception. Juridical rulings and citing them in literature served different goals throughout Islamic history. Unchanged rulings stood in a different relation to each other and consequently belonged to different perceptions of what was "Islamic law". To fully understand what constitutes "law" as a legal system with its institutions in general, and "Islamic law" in particular, we need to broaden the perspective beyond

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<sup>7</sup> There is one legal punishment for theft. If the rule-defined conditions are not fulfilled, jurists opt either for a different case solution or for discretionary penalization.

<sup>8</sup> For this example on the limits of a literal interpretation of the Qur'an see R. GLEAVE, *Islam and Literalism. Literal Meaning and Interpretation in Islamic Legal Theory*, Edinburgh 2012.

studying only the rules. My hypothesis on the evolution<sup>9</sup> of *fiqh*'s role in Islamic law is based on a chronological analysis of a variety of sources: juridical *furū'* and *uṣūl* texts; legal documents and notarial manuals as relics of legal practice; and historiographical information.<sup>10</sup>

## 2. A chronology of rulings in Islamic law?

Common assumptions perceive the Qur'an and prophetic Sunna as the historical beginning of "Islamic law" that preceded juridical thinking.<sup>11</sup> This basic assumption makes sense and is essential for the religious perspective of God's revealed law. However, the analytical study of rulings as part of a legal system, rather than as "holy predicaments", renders the historical past more complicated. As we showed above, the mere existence of Qur'anic rule statements, general or detailed, does not necessarily fulfill the requirements of a law rule and constitutes no proof that it was ever considered thus. It seems beyond doubt that certain Qur'anic verses influenced the Prophet's legal decisions and changed the rules of pre-Islamic tribal law. However, the Qur'an as God's revealed message, collected as a text under the third Caliph according to Muslim tradition, was not considered a simple law book by the Prophet, nor by his successors at the head of the Muslim community. This also holds true for transmitting prophetic traditions: had the Prophet been considered the holy "lawgiver" in the later *uṣūlī*-sense since his lifetime, and the traditions as normative indicators for his law rulings, why compile a selection of oral transmissions only two to three centuries later? A plausible explanation is that law in early Islam (the caliphal law with coexisting Late Antique legal traditions) went through different stages

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<sup>9</sup> In L. SALAYMEH, *The Beginnings of Islamic Law. Late Antique Islamic Legal Traditions*, Cambridge 2016, the author criticizes "evolutionary theories in history" as reflecting linearity going irreversibly from simple to complex (p. 139). This reductive perception of biological evolution, from where the term was originally borrowed (which is neither linear nor irreversible and always contingent for adaptations), matches with her disregard for doctrinal changes within Muslim legal thinking, cf. her "intentionally ahistorical" presentation of "trends and assumptions in orthodox legal discourse" for "Representative Medieval Jurists (c. 800-1400 CE)", p. 67, which is driven by the intention to demonstrate that "Prophetic precedent was not a significant factor in medieval Islamic legal reasoning", *ibid.* She apparently never opened a book on *uṣūl al-fiqh*. Despite some justified criticism on former scholarship, her comparative approach to Islamic legal tradition (with reference to three case studies: prisoners of war, p. 43-82, circumcision, p. 105-134, and wife-initiated divorce, p. 163-196) does neither substantiate what she rightly identifies as the "legal system" (p. 2), nor her own "legal historicising" (p. 146-161).

<sup>10</sup> C. MÜLLER, *Recht und historische Entwicklung der Scharia im Islam*, Berlin 2022.

<sup>11</sup> For an intelligent historical narrative based on this view see W. HALLAQ, *Sharia. Theory Practice Transformations*, Cambridge, 2009, p. 31-71.

before turning into a jurists' law that embraced the "hermeneutics of legal fundamentals" (*uṣūl al-fiqh*) from the 10<sup>th</sup> century onwards. Beyond a "sacred history", the formalized integration of the Qur'anic text and Prophetic traditions into *fiqh*'s system of law rules was a later phenomenon (see below).

The understanding of Muslim law as a "legal system" poses several questions: Who makes the laws? Who applies the legal rules? Which are the legal institutions? And who executes judgments emanating from the courts of law? Answered in a chronological perspective, these questions help to assess the normative character of *fiqh*-rulings and their importance as "law" in History.

The legal system of early Islam under the caliphs, successors of the prophet Muhammad as "commander of the believers", vicars of God on earth (*ḥalīfat Allāh fī l-arḍ*), and rulers over vast territories with a small Muslim minority population but extensive power and wealth, is difficult to assess for several reasons:

a) The course of history wiped over early caliphal legislative practices, first by the 'Abbāsīd revolution that overturned the Umayyad caliphate and discredited discredited Umayyad rule rule as a "worldly kingdom", secondly by the emergence of a jurists' law legitimizing itself as the interpretation of early Islamic normativity without later caliphal authority. We may only assume how the early caliphs shaped the law through their orders: by referring to prophetic practices in the domain of cultural practices, by using juridical advice in matters of economy and other domains governed by *fiqh*, but also by assimilating useful laws of the conquered territories.<sup>12</sup>

b) As stated, the rulings in early *fiqh*-literature, hadith-collections, or the Qur'an are not *per se* law rules and not proof of being considered as such within the historical setting in which they were pronounced. This is not a question of authenticity, but of the law's functioning. Some rulings described in hadith-collections may well have corresponded to early law, but it was not the fact of being cited as a hadith that defined the law then, contrary to later periods when Prophetic Sunna from hadith became acknowledged to be a formal legal "fundament" in the *uṣūlī*-perspective.

To assess the importance of Muslim legal thinking within "law", here is a short overview:

### 2.1 The beginning of scholarly legal thought

Muslim legal thinking (*fiqh*) emerged as a scholarly discipline under caliphal law during the Umayyad and early 'Abbāsīd periods. At that time, the teachings of jurists (*aqwāl*) had an advisory character but did not ultimately determine "the law". This was the prerogative of the Caliph in his capacity as God's vicar on earth.<sup>13</sup> Contrary to prevailing assumptions

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<sup>12</sup> SCHACHT, *Introduction*, 19-22, with examples from Roman provincial law, Sassanian law and Jewish religious law.

<sup>13</sup> See arguments and sources for this in MÜLLER, *Recht*, 70-79 and 96f.

about their normative importance, the teachings preserved from these early days were then theoretical thinking, not law.<sup>14</sup> They acquired their normative status only through the later law-school tradition. My argument for this is twofold: Juridical teachings from that time do not constitute a system of law rules, and the relics of practiced law, legal documents, do not comply with juridical teaching.

The major collections of juridical teaching from the 8<sup>th</sup> - 9<sup>th</sup> centuries, al-Shaybānī's *Kitāb al-aṣl*, Saḥnūn's *al-Mudawwana*, and the *Kitāb al-Umm* attributed to al-Shāfi'ī, to name only the most famous, contain a multitude of specific rulings by eminent jurists, who may contradict each other. From the legal perspective, these collections do not provide a coherent set of rules for essential aspects of law application, like judgments and proof, as well as for contracts and other law fields.<sup>15</sup> Legal teachings address such fundamental legal aspects in scattered case rulings without defining the terms juridically. The compilations' focus on individual juridical teachings and lack of normative coherence rules out - from a technical perspective - their use as authoritative "law books" of a jurists' law at that time. They might however have commented on existing rules of - caliphal - law with juridical expertise. Retrospectively, the 8<sup>th</sup>-century figures of Abū Ḥanīfa, Mālik, and al-Shāfi'ī became considered as "imams" of their respective law schools', which gave their rulings a particular weight as a normative juridical argument. This explains the preservation of their teachings in collections, which however is no proof for their teachings having been law before. The same holds true for the earlier collections of early opinions (*āthār*) and traditions by and from companions and successors next to those of the prophet.<sup>16</sup>

Judicial practice serves as the second argument: How would a qadi know, in this "period of personal law schools", which of the circulating personal "sayings" or *dicta* was the rule to apply? The lack of scholarly consensus does not signify a lack of legal rules during the 7<sup>th</sup>-9<sup>th</sup> century to which judges referred: Documents from Umayyad and early 'Abbāsīd times share common features that point to a legal system at this period of "Islamic law".<sup>17</sup> This law however did not always comply with juridical teachings.<sup>18</sup>

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<sup>14</sup> Numerous studies consider the sayings of the founding fathers Abū Ḥanīfa, Mālik, al-Shāfi'ī or Ibn Ḥanbal as "laws", see however Müller, *Recht*, 166-180 and 309-315, with further references; J. BROCKOPP, *Muhammad's Heirs. The Rise of Muslim Scholarly Communities, 622 – 950*, Cambridge/Mass. 2017, on the transformations of juridical scholarship.

<sup>15</sup> MÜLLER, *Recht*, 308-316.

<sup>16</sup> Preserved are the *Āthār* works by Abū Yūsuf (d. 798) and by al-Shaybānī (d. 805), Māliks (d. 795), *Muwaṭṭa'* in later recensions, and the *Muṣannaf* works by 'Abd al-Razzāq (d. 827), and by Ibn Abī Šayba (d. 849).

<sup>17</sup> MÜLLER, *Recht*, 279ff., 320.

<sup>18</sup> For legal practice see the cases studied by M. TILLIER, *Les cadis d'Iraq et l'état abbāsīde: (132/750-334/945)*. Damascus, 2009, and MÜLLER, *Recht*, 310-6, linking with contemporary juridical literature.

The caliphal law system that existed during the first three centuries of Islam is unknown, obscured as it is by the subsequent juridical tradition that integrated some of its features and erased most of its traces.<sup>19</sup> Caliphal law is like the cosmic mass composed by invisible black holes that are indispensable for the universe's cohesion, and by visible stars representing the known part of early legal rulings. An indirect way to identify some non-declared caliphal law rules may exist, however. Since 'Abbāsīd caliphs mostly appointed as qadis people who were adherents of the Ḥanafite *madhhab*, and since the Ḥanafite collection *Kitāb al-Aṣl* cites certain rules anonymously beside the personal teachings of Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī, this work may reflect shared teachings that referred to existing law-rulings.<sup>20</sup> The basically unchanged, field-defining *fiqh*-chapter division may also refer to structures within caliphal law. It can be traced back to the turn of the 9<sup>th</sup> century with the earliest juridical summaries.<sup>21</sup>

The fact that qadis in early 'Abbāsīd times were mainly followers of Abū Ḥanīfa and his disciples did not prevent other scholars from teaching and becoming famous jurists. This was the “formative period of Muslim legal thinking” – not of “Islamic law” which, at that time was controlled by the caliphs.

During the 9<sup>th</sup> century different approaches to “Islamic normativity” took shape and challenged caliphal authority not only politically: the *fuqahā*'s claim of being “heirs of the prophets” can be seen in this context. The well-known cleavage between *ahl al-ra'y* and *ahl al-ḥadīth* concerns a methodological dispute among scholars. It led to the emergence of a hadith-oriented law-school, named after Ibn Ḥanbal (d. 855).

## 2.2 From teachings to a casuistic rule system

Over time, Muslim legal thinking changed in form and function. From the 10<sup>th</sup> century on, a few professionalized “guild schools” replaced the many individual “ways of interpretation” by masters of a personal law school, both called *madhhab* in Arabic. At this new stage, the members of a guild law school had a formal local leader (*ra'īs al-madhhab fī l-balad*) and taught a curriculum of authored, and authoritative texts, which were only transmitted with a formal teaching permission (*ijāza*).<sup>22</sup> This allowed for the reliable transmission of the school's specific legal doctrines.

The teaching of rule manuals (*mukhtaṣar*: “summaries”) within the guild law schools transformed juridical thinking into a casuistic system. In earlier master-student transmission on an oral, personal level, the

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<sup>19</sup> On caliphal law M. TILLIER, “Califes, émirs et cadis. Le droit califal et l’articulation de l’autorité judiciaire à l’époque Umayyade”, *BEO* 63 (2015), 147-190. Abū Yūsuf’s book on landtax (*kharāj*) reflects a situation under caliphal law.

<sup>20</sup> We may look for cases in the *Kitāb al-aṣl* where “*idhā kāna ... fa-*” is not followed by “*wa-qāla*”.

<sup>21</sup> MÜLLER, *Recht*, 171f. with further references.

<sup>22</sup> Cf. C. MELCHERT, *The Formation of the Sunnī Schools of Law: 9th-10th Centuries C.E.*, Leiden 1997.

wording and amount of taught "sayings" might vary in successive lessons given on the same subject. Several students' recensions of Mālik's *Muwaṭṭa'*, as well as contradicting teachings of early authorities from later collections, attest to this phenomenon. Contrary to this, a manual contains a limited set of rules. Taught over time to generations of students, these rules acquire authority superior to any individual's juridical opinion.

Compendiums of juridical "teachings" existed since the 9<sup>th</sup> century,<sup>23</sup> as shorter collections of a particular master's teachings,<sup>24</sup> or in the abbreviated form of larger collections.<sup>25</sup> These were now authored books, not anonymously compiled collections.<sup>26</sup> At a later stage, the rules were "depersonalized" as the school doctrine, without reference to any individual juridical authority. Rules figured within a fixed, unchanging chapter order limiting the law fields covered by *fiqh* and forming a stable body of juridical rulings including procedural law, with differences only in details. Well-known examples from the 10<sup>th</sup>-11<sup>th</sup> centuries are the *Risāla* by Ibn Abī Zayd al-Qayrawānī (d. 386/996) and the manuals *al-Mukhtaṣar* by al-Qudūrī (d. 428/1037)<sup>27</sup> and *al-Kāfi* by Ibn 'Abd al-Barr (d. 463/1071).

Casuistry as a principle sets each case rule next to another at an equal level without any rule hierarchy or prevalence due to superior authority. The scope of validity for any rule is delimited by the existence of a different case, and its rules: Thus, for example, the case of Ramadan and its fasting obligation stands next to the case of a person travelling during the month of Ramadan, who then doesn't have to fast. (Travelling is seen not as an attenuating circumstance of a general rule but as the reason for a different ruling in a different case). When legal scholars choose from a set of rules, and not by picking from a large variety of individual teachings, then casuistry provides predictable legal solutions. A major substantive difference between later summaries to the voluminous collections of teachings by early juridical authorities, besides their smaller size, is the following: they provide a *coherent rule system* on central fields of any applied law like judgment and proof, as well as on commercial law on contracts, ritual, marriage, legal punishments, and blood delicts, and suchlike. In practice, rules were inductively inferred from earlier case teachings and regrouped in systematic *fiqh* chapters. As far as we see

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<sup>23</sup> Ibn 'Abd al-Ḥakam (d. 214/829) and al-Muzanī (d. 264/878); both citing teachings of respectively Mālik and Shāfi'ī, with limited lasting impact; cf. J. BROCKOPP, *Early Mālikī Law: Ibn 'Abd al-Ḥakam and his Major Compendium of Jurisprudence*. Leiden, 2000, and Muzanī, printed with the K. al-Umm.

<sup>24</sup> Cf. al-Muzanī, *al-Mukhtaṣar*, with „*qāla al-Shāfi'ī*“ throughout the work.

<sup>25</sup> Cf. al-Barā'idhī's *Tahdhīb* as a summary of Saḥnūn's *Mudawwana*.

<sup>26</sup> Cf. BROCKOPP, *Muḥammad's Heirs. op. cit.*, 99-101.

<sup>27</sup> Al-Qudūrī only rarely mentions a "dictum" by Abī Ḥanīfa, i.e. *Mukhtaṣar al-Qudūrī fī l-fiqh al-ḥanafī*, ed. K. 'Uwayḍa, reprint Beirut 1997, pp. 55, 95f., or juridical reasoning, p. 73.

today, this resulted from a long-term development within each law school, rather than from an external extra-judicial impulse.<sup>28</sup>

The transformation of individual juridical thinking into a legal system is here illustrated by a vital aspect of the 'Abbāsīd economy, the use of silver and gold coins. The early *Kitāb al-Aṣl* quotes twice the prophetic hadith stating that it is permissible to exchange gold, silver, wheat, dates, and salt each in equivalents (*mithl bi-mithl*) from hand to hand (*yad bi-yad*), whereas the exchange with surplus (*faḍl*) was usury (*ribā*).<sup>29</sup> This ruling makes a clear statement, but was it a law rule? How to decide that gold or silver coins exchanged in transactions were equivalent and that no surplus was involved? Historically, such transactions must have happened quite often since the use of gold and silver coins in the former Byzantine and Sassanid lands continued under Muslim rule as bimetallism with gold *dīnār* and silver *dirham*. It is hardly conceivable that the cited hadith was a law rule prohibiting commercial exchanges with gold and silver coins. Shaybānī's (d. 805) *Kitāb al-Aṣl* and other contemporary sources refer to gold or silver coins in various transactions like the delivery contract with food (*salam*)<sup>30</sup>, or the exchange of gold and silver coins by the qadi.<sup>31</sup> My point here is that early juridical texts give examples of licit<sup>32</sup> and illicit<sup>33</sup> transactions without providing legal rationality that defines cases.

Later juridical reasoning established a systematic approach to how to comply with this prophetic tradition and the Coranic *ribā*-injunctions<sup>34</sup> in an economically friendly way by defining different cases. According to legal casuistry, it was prohibited to sell (*bā'a, yabī'u*) coins of gold against gold, silver against silver and suchlike. It was permitted to sell any other species and fungible goods against gold, silver, or copper money. The sale contract allowed for a deferred payment or delivery. It forbade the sale of any money against money. Therefore, different currencies could not be sold against one another, but it was permitted to "exchange" (*ṣarrafa*) their price (*thaman*) on the spot and without the possibility of deferred payment. Since the price of these coins was considered identical (*mithl*) during the exchange – although not, of course, at later moments –, there was no usury implied. Juridical casuistry fixed specific rules for each type

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<sup>28</sup> On the self-reflective autopoietic evolution in *fiqh* see MÜLLER, *Recht*, 182-4.

<sup>29</sup> al-SHAYBĀNĪ, *K. al-Aṣl*, ed. M. Boynuḳalın, 12 vols. Beirut 2012, here vol. 2, p. 370, and 580, a variant with *ribā*, p. 590, without *ribā* pp. 585-7.

<sup>30</sup> SHAYBĀNĪ, *Aṣl*, 2:371ff.

<sup>31</sup> *Ibid*, 3:44.

<sup>32</sup> See the different cases of *ṣarf*, different from later definitions, *ibid*, 3:20-131.

<sup>33</sup> *Ibid.*, 3:432-440 (*bay' fāsīd*).

<sup>34</sup> *Ribā* in the Qur'an 3:130, 4:161, 30:39 and, most commonly 2:275-2:280.

of contract. In this example, it transposed the prophetic tradition and Coranic *ribā*-interdiction into juridical rules.<sup>35</sup>

The doctrinal emancipation from caliphal law and the caliph's role as lawgiver marked a decisive step with the hermeneutics of “fundamentals” (*uṣūl al-fiqh*) which emerged during the 10<sup>th</sup>-11<sup>th</sup> centuries after some precursory doctrinal developments.<sup>36</sup> The lawgiver (*shāri‘* and/or *ṣāhib al-sharī‘a*) is God and, by delegation, his Prophet. They provided, in the form of Qur’an and Sunna, indications (s. *dalīl*, *adilla*) that constitute, together with scholarly consent (*ijmā‘*) and deductive analogy (*qiyās*), the fundamentals (*aṣl*, pl. *uṣūl*) of the derived normative dispositions (*furū‘*). The early *uṣūl*-theory had two branches that used the same terminology for different goals: As far as we see today, it was first formalized in the Māturīdi milieu of Ḥanafite jurists in Transoxania<sup>37</sup> and then adopted in Shāfi‘īte Ash‘arite discourse<sup>38</sup>. “Theology” (*‘ilm al-kalām*) focused on “certain” (*qaṭ‘ī*) evidence for revelational Sharia prescriptions in view of the Last Judgment, whereas “jurisprudence” (*fiqh*) settled for “ambiguous” (*ẓannī*) indications that legitimated juridical rulings as “revelationally determined” (*mashrū‘*).<sup>39</sup> The historical context provides meaning to a “legal theory”, whose objectives former studies had difficulties to assess. The *uṣūl*-theory legitimized Muslim legal thinking as juridical rulings free free from (at least overt) caliphal interference. At the late 10<sup>th</sup> century, the law school-backed casuistry had acquired the necessary coherence and authority to serve as the major normative reference for qadis in their law practice, which did not prevent qadis from referring to local customary law in their decision making. Juridical thinking conceptualized this within different subordinate categories like “custom” (*‘urf*) - originally only a default category for missing contractual conditions (*al-‘urf ka-sharṭ*) - , or the Mālikī notion of “local judicial practice” (*‘amal*).<sup>40</sup>

### 2.3 Rewriting the juridical rule system

During the 10<sup>th</sup>-13<sup>th</sup> centuries, successive generations of jurists regrouped authoritative opinions on various situations into aspects of a single “legal case” (*mas‘ala*).<sup>41</sup> Each case then was governed by juridical solutions that

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<sup>35</sup> On “exchange” (*ṣarf*), as example AL-SARAKHSĪ (d. 490/1096), *K. al-Mabṣūṭ*, 30 vols., here 14:2-3; on casuistry in economics, MÜLLER, *Recht*, 387-90.

<sup>36</sup> See MÜLLER, *Recht*, 196ff on the development of a shariatic law.

<sup>37</sup> Al-Jaṣṣāṣ, al-Sarakhsī and al-Pazdawī.

<sup>38</sup> Al-Juwaynī, al-Shirāzī, al-Ghazālī, but also the Mālikī al-Bāqillānī.

<sup>39</sup> See MÜLLER, *Recht*, 186-235, with further references, based on *fiqh*-authors.

<sup>40</sup> See MÜLLER, *Recht*, 186 and 266-273, with further references.

<sup>41</sup> As example, see the Mālikī Ibn Ruṣd al-Jadd (d. 1126) restructuring al-‘Utbī’s (d. 869) *samā‘* in his *Bayān wa-taḥṣīl*, regrouped as *mas‘ala*; cf. F. BOUCHIBA: *Juifs et chrétiens au miroir du droit mālikite aux XIe-XIIe siècles. Épistémologie, herméneutique et norme juridiques envers les non-musulmans à l’époque almoravide dans l’œuvre d’Ibn Ruṣd al-ġadd (st. 520/1126)*, PhD Nantes 2018.

formed its “rulings” (*ḥukm*, pl. *aḥkām*). Guided by the methodology of *uṣūl al-fiqh*, Sunnī law schools proceeded with pondering (*tarjīh*) and cleansing (*tanqīh*) the transmitted teachings of their juridical authorities, thus defining also majority and minority opinions within a case (*mas’ala*). The rewriting of law-school teachings eventually distinguished some rulings as authoritative “school doctrine” (*mashhūr al-madhhab*) and others as isolated traditions (*shādhah*).<sup>42</sup> This terminology grades the authority of transmitted juridical rulings: Some acquire the status of unchanging “laws” within the *madhhab* and form the backbone of the school’s rule-casuistry, a set of rulings that superseded the authority of individual juridical “sayings” (*aqwāl*).<sup>43</sup> All transmitted “sayings” were valid (*ṣaḥīḥ*), but not all of them were considered to be applicable in legal terms (*mu’tabar*).

#### 2.4 Turning juridical casuistry into sacred laws

Rule perception changed fundamentally during the 13<sup>th</sup> century with what I call the “shariatic turn”<sup>44</sup> in Islamic law. The existing rules of school casuistry became integrated into the notion of “shariatic ordinances” (*ḥukm sharī* pl. *aḥkām shar’iyya*), which were inferred from indicants, either shariatic (*dalīl sharī*) or factually determined by God (*dalīl waqī*).<sup>45</sup> A shariatic ordinance then was composed of its unchanging pillars (*arkān*) and considered circumstantial real-world aspects, like “reason for being” (*sabab*), “condition” (*sharṭ*), temporary changes by human action (*‘illa*)<sup>46</sup> and impediments (*māni’*, pl. *mawāni’*).<sup>47</sup> From this time on, systematic

<sup>42</sup> They were collected in specific works, cf. for the Mālikī school the early Ibn Abī Zayd al-Qayrawānī (d. 996), *al-Nawādir wa-ziyādāt*, and the later al-Qarāfī (d. 1285), *al-Dhaḥīra*.

<sup>43</sup> Legal opinions were classified positively as being “preponderant” (*rājīh*) within the law-school, or negatively as “weak” (*qawl ḍa’if*). To what extent these classifications structured the process of fatwa-giving remains to be explored and certainly changed in times.

<sup>44</sup> English for “schariatische Wende”, cf. C. MÜLLER, *Recht*, 241, and idem, „Islamische Jurisprudenz als Gottesrecht: Die schariatische Wende des 12. Jahrhunderts“, in: *Islamische und westliche Jurisprudenz des Mittelalters im Vergleich*, Ch. E. Lange, W. Müller & Ch. K. Neumann (eds.), Tübingen 2018, 57 – 83.

<sup>45</sup> See C. MÜLLER, *Recht*, 241-247, with *ibid.* 226f. on the changing meanings of the word “*dalīl*”; on earlier notions of a sharia-*ḥukm*, *ibid.* p. 228ff., on *al-aḥkām al-shar’iyya* as the shariatic taxonomy of human actions in the 11<sup>th</sup> century, *ibid.* p. 223f.; with the schools’ law-rules as “determined by revealed law” (*mashrū’*) - not “*sharī’*”, *ibid.* 182, with SARAKHSĪ, *Mabsūṭ*, 1:10 (on the definition of *fiqh*).

<sup>46</sup> Like a sale for the change in property rights.

<sup>47</sup> See for an early systematization of the *aḥkām shar’iyya* AL-RĀZĪ (d. 1209), *Mabsūṭ*, 1:23-82 (*aḥkām shar’iyya*), cf. MÜLLER, *Recht*, 242-245, including al-Āmidī (d. 1233). On the complexity of the *ḥukm* see also S. JACKSON, *Islamic Law and the State. The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī*, Leiden 1996, 116, with al-Qarāfī (d. 1285), for

law manuals follow this new conceptual framework.<sup>48</sup> The rule system stays casuistic in the above-mentioned sense, as these composite elements stand next to each other without producing a graduated legal effect.

Legitimized by centuries-long juridical traditions and legal hermeneutics, the “sharia-laws” constituted Islam’s sacred law, which became called *sharī’a muṭahhara*, “purified Sharia” from the 13<sup>th</sup> century on,<sup>49</sup> in what research formerly called the “post-classical” period. The external trigger for this “shariatic turn” may well have been the Mongol conquests of the Eastern Muslim lands, which confronted scholars with the challenge of divine Mongol law (*yasā*).<sup>50</sup> Its impact on Muslim legal thinking was very subtle and profound. The originally local reaction by Sunnī scholars within the Mamluk state had transformed the inner structure of how sharia law-rules<sup>51</sup> were perceived within Sunnī Muslim legal thinking. This new perception then expanded within the law-schools to other regions of the Islamicate world. The outreach of this change in the jurists’ law legitimacy and its labelling as “sharia” in different regions of the Islamicate world remains to be studied in detail. Its impact on the juridical norm-discussion however becomes obvious by the overwhelming success of law-manuals written in the shariatic law-rule paradigm.<sup>52</sup>

The “sharia law” notion accentuated the difference between unchangeable legal doctrine and juridical adaptation. Fatwa-giving is a well-known aspect of Muslim legal practice. In the post-1200 period, it was defined as the juridical ruling for specific real cases by individual jurists. In daily practice, they had to consider existing fatwas of qualified jurists, who had interpreted the school doctrine and its shariatic rulings composites. Our systemic approach to Islamic law’s rulings allows for measuring the dogmatic distance between sacred law rules and the collection of authoritative fatwas as being a specificity of sharia law. Both were part of the same legal system based on juridical thinking (*fiqh*) in theory and practice.

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whom the *ḥukm sharī’i* still designated the shariatic taxonomy, *ibid.*, 119, with AL-QARĀFĪ, *Sharḥ tanqīḥ al-fuṣūl fī ikhtisār al-maḥṣūl fī l-uṣūl*, ed. A. al-Mizyadī, Beirut 2007, 67. On the development after the 13<sup>th</sup> century, MÜLLER, *Recht*, 250f.

<sup>48</sup> One of the first systematic law books using this approach was Nawawī’s *Minhāj al-ṭālibīn*, written in 1270, MÜLLER, *Recht*, 260.

<sup>49</sup> For references to the use of the term see MÜLLER, *Recht*, 239f.

<sup>50</sup> MÜLLER, *Recht*, 240 and *ibid.* 134-8 on law in the Mamluk state.

<sup>51</sup> A “sharia law-rule” as a textual commands in sacred texts, the Qur’an and Sunna, existed since the 11th century at latest, cf. the discussion in Müller, *Recht*, 230-235.

<sup>52</sup> Examples for this are the success of Nawawī’s (d. 1277) *Minhāj al-ṭālibīn* with the Shāfi’ites in South-East Asia and Ḥalīl’s (d. 767/1365) *Muḥtaṣar* in the Mālikī-dominated post-Almohad Maghreb. Both works served as basis of extensive juridical discussions and were commented many times throughout the following centuries.

The name *sharī'a* for the jurists' law ceased to be used in the 20<sup>th</sup> century with Muslim modernist thinkers accentuating the difference between revealed law (*sharī'a*) and human juridical interpretation (*fiqh*).

### 3. Conclusions

*Fiqh* literature, a major source on legal development in pre-modern Muslim societies, reflects a juridical tradition that was marked by dogmatic continuity and few changes. The jurists' law developed over centuries as a self-generic "autopoietic" system of knowledge: Scholars based their understanding of the law on what generations before them had taught and written, as did their successors. Far more than a cumulative system of knowledge, Muslim legal thinking reaffirmed and sharpened its own assumptions, driven by functional change within three forms of "Islamic law": as a knowledge system within early caliphal law, its emancipation as a system of law rules, and, finally, the juridical expression of Islam's sacred normativity. This fact is widely concealed by the phenomenon of Muslim *fuqahā'* writing their own history as bearers of the law from early on in their quest for legitimacy in prophetic and post-prophetic sayings – when these were not yet "law". A close reading of juridical texts from different centuries is required in order for us to discern the fundamental ruptures within Islam's legal development. As part of the same juridical tradition, the same keywords acquired precise technical meanings that allowed for differentiating concepts and formalizing the approach to Islam's sacred normativity. This finding affects research in *fiqh* sources: Given the importance of "time" for the long-term phenomenon of Islamic law, I propose a time-dimensional "chronodiastasic"<sup>53</sup> approach for the study of all known elements that participate in the "system of law" of their time - theory and practice as well as institutional and social aspects - , rather than focusing on any of these phenomena in separate enquiries.

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<sup>53</sup> From Greek "chronos" (χρόνος) and "diastase" (διάσταση) for time and dimension.