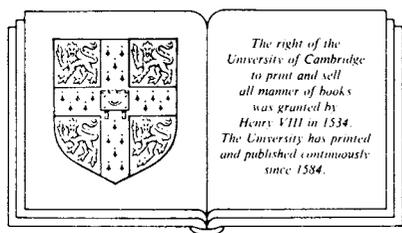


# Roman, provincial and Islamic law

The origins of the Islamic patronate

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## CHAPTER 1

### The state of the field

This book is concerned with the relative contributions of Roman and provincial law to the Shari‘a, the holy law of Islam. While Roman law needs no introduction, the term ‘provincial law’ may puzzle the reader. It refers to the non-Roman law practised in the provinces of the Roman empire, especially the provinces formerly ruled by Greeks. In principle non-Roman legal institutions should have disappeared from the Roman world on the extension of Roman citizenship to all free inhabitants of the empire in 212; in practice they lived on and even came to influence the official law of the land. There were thus two quite different sets of legal institutions in the Roman Near East which was to fall to the Arabs, and both need to be considered in discussions of the provenance of the Shari‘a.

This is not a new observation. It is nonetheless worth stressing it again, for in practice it has been forgotten. There is no literature on the genetic relationship between provincial and Islamic law; and though there are numerous works on the potential contribution of Roman law, their quality is mostly poor: apart from a handful of pioneer works written in the decades around the First World War, practically nothing has been added to our knowledge of the question since von Kremer wrote on it in 1875. This state of affairs reflects the intellectual isolation in which Islamic studies have come to be conducted since the First World War, and the present work is intended in the first instance as a plea for the end of this isolation: that the effect of specialist blinkers on the study of the cultural origins of Islamic law has been unfortunate should be clear from the following pages.

The first scholar to point out that a comparison of Roman and Islamic law would be of interest seems to have been Reland, a professor of Oriental languages at Utrecht who wrote in 1708.<sup>1</sup> Reland’s perspective was however comparative rather than genetic, and it was not until the mid nineteenth century that Muslim indebtedness to Rome began to be widely suggested. The *a priori* case for Roman influence on the Shari‘a was forcefully put by two professional lawyers, Domenico Gatteschi and Sheldon Amos, who wrote in 1865 and 1883 respectively.<sup>2</sup> Neither knew Arabic, but in their view

the Arabs could no more have failed to be influenced by the legal systems of the people they conquered than could the barbarians in the West.<sup>3</sup> They pointed out that there is not much legislation in the Qur'ān,<sup>4</sup> that Syria was a province in which Roman law was not only practised, but also studied,<sup>5</sup> that converts must have brought their legal notions with them, and that such foreign notions could easily have been formulated as traditions (*ḥadīths*) from the Prophet.<sup>6</sup> Legal institutions, they argued, are notoriously hard to change, even for conquerors,<sup>7</sup> and there are in fact many parallels between Roman and Islamic law;<sup>8</sup> unless we assume foreign influence it is impossible to explain how Islamic law could have developed so fast.<sup>9</sup> Both overstated their case: Islamic law certainly is not 'Roman law in Arab dress',<sup>10</sup> and the Muslims did not themselves study Roman lawbooks.<sup>11</sup> But unlike Henry Hugues, another lawyer who wrote on the same subject between 1878 and 1880,<sup>12</sup> they had perceived a fundamental point: Islamic law, as Santillana later put it, cannot have been born by parthenogenesis.<sup>13</sup>

Meanwhile Orientalists had arrived at similar conclusions. In 1853 Enger noted both the general likelihood of Roman influence on Islamic law and specific parallels in the terminology of ownership and methods of taxation.<sup>14</sup> Further parallels relating to sale and hire were adduced by van den Berg in 1868,<sup>15</sup> and in 1875 the question was taken up for extensive discussion by von Kremer in his *Culturgeschichte*. Von Kremer referred to van den Berg and added numerous parallels of his own; he rejected the theory that the Muslims studied Roman lawbooks, but allowed for continuity of legal practice, and pointed out that several Roman institutions could have entered Islamic law indirectly through borrowing from the Jews.<sup>16</sup> His discussion was in fact a well drafted programme of research.

Execution of the programme, however, was not and is not easy. The Islamic tradition consistently presents Islamic law as a modified version of Arab law, virtually every legal institution being traced back to pre-Islamic Arabian practice and/or to rulings by the Arabian Prophet and his immediate successors. Even institutions rejected by Islamic law are traced back in this fashion, pre-Islamic practice being in this case presented as pagan rather than Arab, while the Prophet and his immediate successors are employed to condemn rather than to validate. It is obvious that this presentation is doctrinally inspired, but the tradition is in fact armed to the teeth against imputations of foreign influence. Practically no borrowings are acknowledged, loan-words are extremely rare; and since both patriarchal practice and Canaanite malpractice are located in the Arab past, foreign systems are hardly ever mentioned, let alone discussed, not even by way of polemics.<sup>17</sup> At the same time no sources survive from the formative first century of Islamic law. We are thus entirely dependent on a late tradition hostile to our designs.<sup>18</sup>

Moreover, the one legal system which, despite the asseverations of the lawyers, manifestly did contribute to the formation of the Sharī'a is not

Roman, but Jewish law. The Shari'a and the Halakha are both all-embracing religious laws created by scholars who based themselves on scripture and oral tradition, employed similar methods of deduction and adopted the same casuistic approach: the structural similarity between Jewish and Islamic law is obvious to the naked eye,<sup>19</sup> and the habit of dubbing the 'ulamā' 'Muslim rabbis' is as old as Snouck Hurgronje.<sup>20</sup> Since the order of the subjects in the Mishna and the Muslim lawbooks is related,<sup>21</sup> while in a subject such as ritual purity there is virtual identity of both overall category and substantive provisions,<sup>22</sup> it evidently was not by parthenogenesis that the similarity arose;<sup>23</sup> and it does not take much knowledge of Jewish law to see its influence in the most diverse provisions of Islamic law.<sup>24</sup> This clearly does not make the identification of Roman elements any easier. Roman institutions transferred to so alien a setting were necessarily denatured, and what parallels there are between Roman and Islamic law tend to be either general or elusive or else specific, but isolated; either way they are hard to pin down.<sup>25</sup> And even when they can be pinned down, the possibility remains that they were borrowed via Jewish law.

Despite these problems, by the early twentieth century it appeared as if the problem of Roman influence on the Shari'a was going to be solved. In 1890 Goldziher published the second volume of his *Muhammedanische Studien*, in which he demonstrated that Ḥadīth, far from conserving the words of the Prophet, reflects the legal and doctrinal controversies of the two centuries following his death.<sup>26</sup> This was the first step towards a proper study of the Islamic tradition, and its implications for law, as for other subjects, were immense. Goldziher was moreover a zealous adherent of the theory of Roman influence. It must however be said that his writings on this question are uncharacteristically weak: he postulated large-scale borrowing of Roman concepts on the basis of purely external similarity, disregarded the possibility of transmissions via Jewish law, and had only the most elementary knowledge of the legal system to which he attributed so crucial a role.<sup>27</sup> But though his contributions were of poor quality, his authority lent prestige to the subject; and coming as they did in the wake of his work on Ḥadīth, his ideas held out the exhilarating prospect of demonstrating that Islamic civilisation did not spring from an Arabian void. It was this exhilaration which animated the researches of Becker published between 1902 and 1924,<sup>28</sup> Schmidt's study of *occupatio* which appeared in 1910,<sup>29</sup> and Heffening's monograph on laws relating to aliens which appeared in 1925.<sup>30</sup> It was these three scholars who for the first time tried to demonstrate, and not merely suggest, the Roman origin of specific institutions of Islamic law.<sup>31</sup>

At about the same time Santillana and Morand, two Orientalists active in Islamic legal reform,<sup>32</sup> also began to occupy themselves with the question, though not, apparently, under the influence of Goldziher.<sup>33</sup> Santillana, who accepted the *a priori* case for Roman influence, believed that the ground-

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work on Islamic law had to be done before the question could be profitably discussed;<sup>34</sup> he accordingly limited his contribution to the provision of Roman parallels in his various publications.<sup>35</sup> But Morand, in the course of a discussion of the legal nature of the Muslim *waqf*, more or less incidentally set out a crisp argument in favour of its Roman origin.<sup>36</sup> This was published in 1910, and together with the German researches already mentioned marked the beginning of studies in depth.

There is another and quite different reason why the early twentieth century ought to have been a turning point. In 1891 Mitteis published his *Reichsrecht und Volksrecht*,<sup>37</sup> a book as epoch-making in the field of late Roman law as was Goldziher's *Muhammedanische Studien* in that of early Islam. Mitteis demonstrated that the non-Roman subjects of the Roman empire in no way abandoned their native legal institutions on their acquisition of Roman citizenship in 212, and his work put the discussion of the relationship between Roman and provincial (Greek and Oriental) law on a new footing. This discussion was fed by a stream of papyrological publications, the discovery of Syriac lawbooks, and the first studies of Egyptian and ancient Near Eastern law. It continued into the 1930s, and it generated an immense amount of research on a subject of manifestly crucial importance to historians of Islamic law, viz. the nature of the law practised in the provinces conquered by the Arabs. One might accordingly have expected the Islamicists to join this second front. In fact, given the superb quality of the scholarship produced on this subject, especially by the Germans and the Italians, it is hard to see how anyone interested in the subject could fail to join in: whether one turns to books, articles or short notices, one finds prodigious learning deployed in relation to a single, overarching issue. And at first the Islamicists did indeed join in. Sachau helped to stock Mitteis' armoury,<sup>38</sup> Nallino himself participated in the fray,<sup>39</sup> and Santillana was aware that there was such a thing as provincial law.<sup>40</sup> But even then the Islamicists were curiously reluctant to reconsider their own views in the light of the discoveries of the classicists. Sachau, for example, had a very considerable knowledge of both Syriac and Islamic law, and he wrote on both; yet he never attempted to relate them. In so far as he was forced to consider both in his commentaries on the Nestorian lawbooks of early Islamic times, he took it for granted that whenever there was agreement between Nestorian and Islamic law, it was simply because the Nestorians were indebted to the Muslims; the idea that *both* might be equally indebted to the provincial law on which his colleague Mitteis wrote seems never to have suggested itself to him. Similarly Nallino never brought his impressive knowledge of Syriac law to bear on the question of the provenance of the *Shari'a*. And to Santillana 'provincial law' was clearly a label without much concrete content. In any case, the Islamicists did not participate in the excitement of the classicists for long: after the First World War they dropped out.

The work of Heffening and Bussi apart,<sup>41</sup> the post-war period was marked by a sudden loss of enthusiasm for the theory of Roman influence on the Shari'ah. In 1925 Bergsträsser published an article arguing that it was Arab custom rather than Near Eastern law (Roman or other) which went into the Shari'ah,<sup>42</sup> and in 1933 Nallino argued much the same.<sup>43</sup> In 1947 and 1949 Bousquet, Hassam and Wigmore all asserted the parthenogenetic origins of Islamic law,<sup>44</sup> while FitzGerald in 1951 classified Roman influence as 'alleged';<sup>45</sup> and though occasional discussion, and even occasional suggestion, of Roman influence has continued since then, it has not been to much effect.<sup>46</sup> There is no more striking illustration of this loss of interest than the fate of the Nessana papyri. These papyri are the literary and documentary remains of a Christian Arab settlement in a remote outpost of the Roman empire in the desert nowadays known as the Negev. Written between 500 and 700, they include a number of legal documents, one of which is bilingual in Greek and Arabic. The legal documents were discovered in 1936 and reported in the following year at a papyrologist conference where the news of their discovery created a stir.<sup>47</sup> They were discussed by historians of late Roman law in various publications of 1938, 1940–1, 1943, 1947, 1948, 1961, 1964 and 1967,<sup>48</sup> and they were lavishly edited with translations, indices and helpful comments in 1958.<sup>49</sup> So far not a single historian of Islamic law has as much as mentioned them.

Why was the subject dropped? It is certainly unfortunate that one of the first classicists to take an interest in Islamic law was Carusi, a believer in the essential unity of the legal systems of the 'Mediterranean Orient' who picked up a smattering of Syriac and Arabic and made propaganda for the view that Islamic law had its roots in 'Oriental Roman law'.<sup>50</sup> His ideas were as wild as they were woolly, and some of Griffini's more fanciful notions would appear to have been developed under his influence.<sup>51</sup> Having been exposed as an incompetent, not to say fraudulent scholar by Nallino in 1921,<sup>52</sup> his effect on the Islamicist front was largely negative.<sup>53</sup> Since the claims of Goldziher, the most authoritative Islamicist, were no better founded than those of Carusi, the most notorious classicist, it began to look as though there were nothing to the subject but wild speculation. All the papers subsequently written against the theory of Roman influence were devoted to refuting these two scholars; the works of Becker, Schmidt, Morand and Heffening were ignored.<sup>54</sup>

Yet it clearly was not Carusi's excesses that killed the subject, any more than it was Lammens' excesses that killed the critical approach to the *Sīra* which Goldziher's research had initiated.<sup>55</sup> For one thing, no paradigm shift fails to be accompanied by a proliferation of misguided claims; the fact that wild ideas were rampant in the early study of provincial law did not cause the classicists to ignore Mitteis' conclusions.<sup>56</sup> For another thing, the criticism levelled at the theory of Roman influence was pitched at none too high a level. Nallino's views on Roman and Islamic law (as opposed to his views on

Carusi) were presented in a conference paper which was published after his death: a short sketch without notes, it merely set out an *a priori* case against the theory.<sup>57</sup> Hassam's article was a piece of Muslim apologetics,<sup>58</sup> while the notes appended by Wigmore are unworthy of an undergraduate.<sup>59</sup> And though FitzGerald's criticism of Goldziher was to the point, he too perpetrated an impressive number of mistakes.<sup>60</sup> But above all, the withering of the discussion of Roman influence was not isolated. It could not be said that wild speculation was all there was to the question of *Jewish* influence on Islamic law. Yet here too Heffening was the only Islamicist not to lose interest after the First World War.

This loss of interest is one out of many examples of a general shift in the direction of research in Islamic studies, or indeed in the arts at large, after the First World War. All branches of the arts suffered from professionalisation, or in other words from the transfer of scholarship to universities, where standard syllabi, departmental divisions and academic career structures soon led to loss of depth and range alike. It was not just Islamic studies that went into Splendid Isolation at that time.<sup>61</sup> In the case of legal studies, the change was all the more drastic in that Germany and Italy, the leading countries as regards the study of Roman and provincial law, had begun to exchange Roman law for national codes about the turn of the century, thereby depriving Roman legal studies of their practical importance.<sup>62</sup> But for Islamicists a political factor was also at work. As the era of the colony gave way to that of the mandate and eventually to that of independence, Islamicists increasingly preferred to study Islam as an autonomous system developing internally in response to its own needs and by the use of its own resources.<sup>63</sup> At the same time the Russian revolution helped to redirect attention from cultural origins to socio-economic problems. In principle, of course, there is no reason why the study of Islam as a system in its own right should preclude an interest in its genetic make-up, anymore than socio-economic preoccupations should rule out an interest in the way in which cultures are formed. But in practice an interest in genetic links has long come to be regarded as somewhat old-fashioned – philological as opposed to sociological, diffusionist as opposed to structuralist. Worse still, it is now considered ethnocentric and offensive to Islam; and though Greco-Roman influences are likely to be somewhat less offensive than Jewish ones, it is only in the field of Islamic art, science and philosophy that the classical *Fortleben* is nowadays discussed without circumlocution or apology.<sup>64</sup> (All three fields are of course considerably more marginal to the Muslim self-definition than theology and law.) As the old-fashioned Orientalist has given way to the modern historian, Arabist or social scientist with a tender post-colonial conscience and occasionally more substantial interest in maintaining Muslim good-will, both the inclination and the ability to view the *Werden und Wesen* of the Islamic world from the point of view of the Fertile Crescent have been lost, and Islamic civilisation has come to be taught and studied

with almost total disregard for the Near East in which it was born. It is hard to imagine historians of Europe confining their attention to the tradition of the barbarian invaders in more or less complete neglect of the Roman world in which they made themselves at home, and there are encouraging signs that historians of the Islamic world are now abandoning the one-sided approach. But it is still prevails in the field of law.

Nothing was to happen in our field until Schacht resumed Goldziher's work on the Islamic tradition. Schacht's *Origins of Muhammadan Jurisprudence*, which appeared in 1950, may be regarded as a belated sequel to Goldziher's *Studien*, and like the *Studien* it is a work of fundamental importance. It showed that the beginnings of Islamic law cannot be traced further back in the Islamic tradition than to about a century after the Prophet's death, and this strengthened the *a priori* case in favour of the view that foreign elements entered the Shari'a. Schacht was himself a zealous adherent of this view; it is his numerous writings on the subject which currently define it. But though he deserves full credit for having restored the issue to its former prominence, the restoration was in one respect too faithful: if Goldziher's writings on the subject were uncharacteristically poor, the same is true of Schacht's.

In part the weakness of Schacht's work on the cultural origins of Islamic law arises from the fact that deference to Goldziher made him repeat all Goldziher's mistakes, but more particularly it is due to the fact that he wrote at a time when Islamicists had lost contact with the Near Eastern background to Islam. His perspective was that of the purebred Arabist to whom the pre-Islamic Near East is *terra incognita*; and most of what he wrote on the subject will have to be discarded as a result. Ungrateful though it may seem (given my own debt to him), I should like to demonstrate the truth of this contention in detail.

The limits of Schacht's perspective are apparent in his very definition of the problem. Goldziher and Becker had both regarded the Arab façade of Islamic civilisation as deceptive,<sup>65</sup> and Becker in particular insisted that the real origins of this civilisation lay in the cultural traditions of the Fertile Crescent: it was for their value as residues of and clues to these traditions that he was interested in foreign elements, be they in law or elsewhere.<sup>66</sup> Since Schacht was an admirer of Goldziher, made reference to Becker's views,<sup>67</sup> and described the formation of Islamic law in a vein similar to theirs,<sup>68</sup> one might have expected his approach to be the same. In fact, however, this approach was alien to him. He had a strong sense of the nature of the evolution from the Prophet's Arabia to the scholars' Iraq: Islamic law was not born in its classical form. But he had virtually no sense that the Fertile Crescent played a role in this evolution: the transition from *antiquity* to the scholars' Iraq is almost wholly lost in his work. Though he frequently spoke of the heterogeneous origins of the Shari'a, his actual presentation

evaded the question of what non-Arab traditions went into its making.<sup>69</sup> He identified the foreign elements sometimes as irregularities introduced by converts into a nascent or existing system,<sup>70</sup> and sometimes as residues of foreign borrowings which had been rejected when the system arrived.<sup>71</sup> his favourite metaphor described them as infiltrations.<sup>72</sup> But they were never the raw material of the system itself.<sup>73</sup> His work showed that the system had taken longer to develop than had so far been assumed, but not out of *what* it had developed.

The Arabist's perspective reappears in his discussion of the problem of transmission. Goldziher had no doubt that the transmission of Roman elements took place in Syria,<sup>74</sup> and the same conclusions emerged, with considerably more evidence, in Heffening's discussion of the laws regarding aliens, which also demonstrated that from the later Umayyad period onwards the borrowings were subject to erosion at the hands of the '*ulamā*'. Since Schacht similarly regarded the 'popular and administrative practice' of the Umayyads as having furnished the '*ulamā*' with their starting point,<sup>76</sup> one might have expected him to examine the nature of this practice in detail; and it is of course here that he might have considered the evidence which the historians of late Roman law had by now made available. But the 'popular and administrative practice' remained a somewhat nebulous concept. He did try to identify a considerable number of Umayyad regulations; but he did so with a view to tracing the evolution of Islamic jurisprudence, not in connection with his work on foreign elements in Islamic law,<sup>77</sup> and he never compared these regulations, or for that matter popular practice, with the legal institutions of the Near East. He cited no papyri, not even Arabic ones, being completely ignorant, it would seem, of those from Nessana; he displayed no interest in the Syriac lawbooks, and he made virtually no use of the massive secondary literature on late Roman and provincial law.<sup>78</sup> The only explanation for so uncharacteristic a lapse from scholarship is that he found it impossible to transcend the orientation of the Islamic tradition.

Schacht never discussed the possibility that Roman law was transmitted to Islam through Umayyad Syria. On the whole he believed all foreign elements to have been picked up in Iraq, the province in which the classical Shari'ah was born; and the fact that supposedly Roman elements frequently looked somewhat un-Roman he attributed to the wear and tear to which they had been exposed before transmission to Islam. He frequently referred to them as 'worn coins', Pretzl's expression for ideas of classical origin which had lost their classical contours in the course of circulation in the Fertile Crescent;<sup>79</sup> and the bearers of such coins he proposed to find in converts with a rhetorical education.<sup>80</sup> This theory must be characterised as far-fetched.

Nothing was wrong with its basic ingredients. 'Worn coins' are an apt metaphor for such phenomena as Roman law transmitted by Jews or philosophical ideas transmitted by rhetors; and since rhetorical studies were extremely popular in the classical world, the chances that they acted as a

channel of transmission of late antique culture are high. In fact, it has recently been demonstrated that they played a crucial role in the formation of the style of argument which the Arabs were to call *kalām*.<sup>81</sup> It is also true that advocates in the classical world were once trained as orators, not as jurists, with the result that forensic oratory was taught to all students of rhetoric regardless of whether they intended to go on to a legal career. But between these facts and the hypothesis which Schacht put together from them there is a considerable gulf.

First, granted that rhetorical studies are likely to have transmitted late antique culture to Islam, they are still most unlikely to have transmitted Roman *law*. They never imparted much legal knowledge. Their purpose was not to acquaint the student with the law, but rather to teach him how to argue, and this was done by presenting him with the most unlikely cases. The forensic skills of Greek and Roman students were nurtured on legal problems involving 'tyrants and pirates . . . plagues and madmen, kidnapping, rape, cruel stepmothers, disinherited sons, ticklish situations, remote questions of conscience';<sup>82</sup> and the laws used for their solution were typically imaginary or obsolete.<sup>83</sup> Students of such a course did not receive instruction in even the most elementary aspects of securities for debts, contracts or hire, or modes of acquisition – these being some of the Roman elements which they transmitted to Islam according to Schacht.<sup>84</sup> According to Cicero, students of rhetoric learnt little more than verbal fluency.<sup>85</sup> Cicero and Quintilian both argued for a closer integration of legal and rhetorical studies, Quintilian being particularly insistent that if the exercises did not imitate real pleadings, they were merely 'theatrical display, or insane ravings';<sup>86</sup> but both argued in vain. To this must be added that it was Latin rather than Greek rhetors who excelled at legal *controversies*. It was Latin rhetoric that Cicero and Quintilian wished to reform. And the rhetor who taught Gregory Thaumaturgos some Roman law on the ground that it was the best equipment for life whatever career he might take up was likewise a teacher of Latin.<sup>87</sup> But nobody in the east studied Latin unless, like Gregory, they intended to go on to legal studies proper. It was precisely as an author of 'insane ravings' that Jacob of Edessa, almost five centuries later, thought of the minor rhetor.<sup>88</sup>

Evidently, students of rhetoric who proceeded to a career as advocates would acquire some knowledge of the law in the course of so doing; but that is merely to say that it was advocates, not educated laymen in general, who had a smattering of legal knowledge. Whether such advocates would have been able to transmit what Schacht believed to be Roman elements in Islamic law is beside the point: by the later empire they had lost their predominance to professionals. Already by the fourth century it was legal rather than rhetorical studies which led to both advocacy and high office; those who knew only the art of eloquence were now laughed out of court, as Libanius bitterly complained.<sup>89</sup> When, in 460, an examination in law

became an official requirement for practice in court, the role of the amateur lawyer was further reduced.<sup>90</sup> To be sure, rhetoric continued to be a popular subject, and future advocates would usually study it before proceeding to a study of the law.<sup>91</sup> But whatever legal knowledge it may have imparted in the past, there was no reason why it should impart any now.<sup>92</sup>

Secondly, it is not obvious that rhetoric of any kind was studied in Sasanid Iraq. If rhetoric was taught anywhere in Iraq, it was taught at Nisibis, and one could perhaps adduce some evidence that it was.<sup>93</sup> But even if we accept this evidence, and for good measure accept that it was also taught in the monastic schools,<sup>94</sup> it is clear that it can only have been taught as an exercise in literary composition, not as a training for advocacy. It is not easy to imagine forensic pleadings in the classical style being conducted in the Nestorian episcopal courts, and it was hardly on the strength of proficiency in Greek oratory that the Nestorians found jobs in the Shāhānshāh's bureaucracy. At any rate, the Nestorians would scarcely have nurtured their rhetorical skills on *Roman* law. It certainly was not on the strength of proficiency in Roman law that the Nestorians found their aforesaid jobs; and as Nallino pointed out long ago, there is no evidence that Roman law was known to the Nestorians before the arrival of the Syro-Roman lawbook in Iraq about a century after the Arab conquest.<sup>95</sup>

The idea that *Roman* law was transmitted by *Greek* rhetoric in the *Persian* province of Iraq is so patently implausible that it could only have been proposed by a scholar to whom the non-Islamic world was unknown territory about which anything could be said and nothing checked. That this was indeed the frame of mind in which Schacht wrote is easy enough to demonstrate.

Schacht, following Goldziher, identified the Arab maxim *al-walad li'l-firāsh* as the Islamic version of the Roman principle that *pater est quem (iustae) nuptiae demonstrant*.<sup>96</sup> Both phrases do indeed mean that the child belongs to the marriage bed. According to Schacht, the Roman principle passed to the Arabs because it was 'familiar to all persons trained in Greco-Roman rhetoric'.<sup>97</sup> But how did he know? By late antiquity the two most popular rhetorical handbooks were those of Aphthonius and Hermagoras; by Byzantine times they had come to constitute the rhetorical *cursus*.<sup>98</sup> Aphthonius, a late fourth-century author (and in fact a pupil of Libanius) owed his popularity to the fact that he gave not only rules, but also illustrations, and his illustration of a legal *controversia* is of direct relevance to us. It is an argument against a proposed law to the effect that the adulterer caught in the act should be killed on the spot (an obsolete Roman law); in the course of it the speaker (after referring to non-existent city laws) maintains that on the contrary the adulterer should be publicly tried and executed, among other things because 'a publicly tried and executed adulterer will make the parentage of the child better known. For no one will be uncertain as to whom the child belongs to by birth, as a descendant of a departed

adulterer'.<sup>99</sup> Had Schacht cast a glance at the standard rhetorical handbook, he would have seen that Roman law might say, in rhetoric the child belonged to the progenitor.

The idea of rhetoric as the transmitter of Roman law was suggested to Schacht by the fact that a number of Roman (or supposedly Roman) elements are found in Jewish and Islamic law alike. The simplest explanation of this fact is of course that the Muslims borrowed the elements in question from the Jews, as von Kremer pointed out,<sup>100</sup> and both Goldziher and Schacht conceded that this might at least sometimes be the case.<sup>101</sup> Both however adhered to the somewhat implausible view that the Jews and the Muslims borrowed independently, though somehow identically, from the same Roman source. Schacht was familiar with Daube's argument that the Jews (of first-century Palestine) had borrowed something classical (viz. Hellenistic modes of reasoning) through the medium of rhetoric; and what he did was simply to recycle this argument.<sup>102</sup> He replaced first-century Jews of Palestine by eighth-century Muslims of Iraq, added Roman law to Hellenistic modes of reasoning, postulated widespread availability of a rhetorical education imparting knowledge of both in Iraq, and proceeded to argue that the presence of the same classical elements in Jewish and Islamic law *proved* that the Muslims had borrowed these elements through the medium of rhetoric;<sup>103</sup> in short, he substituted tortuous reasoning for evidence.<sup>104</sup> His ideas have nonetheless won widespread acceptance.

Not a single item of Goldziher's and Schacht's list of Roman elements in Islamic law has been proved, and several are demonstrably wrong. There never was such a thing as *opinio prudentium* in Roman law; the Romans knew of *interpretatio prudentium* and *responsa prudentium*, but neither has anything to do with either *ra'y* or *ijmā'*. *Istislāḥ* (or *maṣlaḥa*) is not the Roman notion of *utilitas publica*, nor is *istishāb* identifiable with a Roman notion of presumptions.<sup>105</sup> There is no real parallel to adultery as an impediment to marriage in eastern canon law; there is a Jewish parallel,<sup>106</sup> just as there is a Jewish parallel to *al-walad li'l-firāsh*.<sup>107</sup> A couple of lines do not suffice to establish Roman influence on the laws regarding hire, security and theft, particularly not when theft is a subject in which there are manifest Jewish elements.<sup>108</sup> In general, no argument suffices until the Jewish side has been checked. Becker's *Lese Frucht* from Severus did not 'decisively prove' Morand's theory regarding the origins of *waqf*, nor did it pretend to do so.<sup>109</sup> Brunschwig did not 'confirm' von Kremer's suggestion regarding the *legitima aetas* in Ḥanafī law: he merely repeated it.<sup>110</sup> Van den Bergh did not demonstrate the Stoic origins of the *ahkām al-khamsa*: he merely asserted them.<sup>111</sup> And it is sheer accident that the identification of the Hellenistic *agoranomos* with the Muslim *muḥtasib* may have something to it.<sup>112</sup> (The supposedly Persian loans, incidentally, are no better.)<sup>113</sup> Schacht's list of Roman borrowings is a cardboard citadel hastily erected for defensive action against Nallino, Bergsträsser and others, and he patrolled it