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## The making of law in Islam: *fiqh* as delivery of verdicts <sup>1</sup>

### Abstract

This article deals with the logic of *fiqh* as the understanding of *Šarī‘ah*. Its core argument is that the distinctive nature of *fiqh*, as a specific type of law making, consists of the delivery of verdicts.

To support this theory, the article preliminarily focuses on the tenets of Muslim cosmology/legal theology (the ‘religion of *fiqh*’), where the real (*ḥaqq*) is conceived as the immediate result of God’s decree/decision (*ḥukm*). Within this semantic universe, if the *pre*-scribed rule (*ḥukm*) has been revealed through *Šarī‘ah* in its transcendental dimension, its human understanding (the ‘law of *fiqh*’) necessarily proceeds by means of verdicts (from the late Latin *vere dictum*, ‘to say, to report, to make explicit the truth/real’ of *Šarī‘ah*) in order to *de*-scribe the right (again, *ḥaqq*) in its empirical/worldly manifestations. Accordingly, if by delivering the truth of *Šarī‘ah*, the right (*ḥaqq*) realises (in the specific sense of ‘making real’) God’s decree/decision (*ḥukm*), the notion of verdict becomes crucial to define *fiqh* as the law making *par excellence* in the Muslim civilisation, as well as to foster a more critical view of the idea of Islamic law from a comparative approach.

**Keywords:** Islamic law; *fiqh*; *Šarī‘ah*; verdict

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**Diagram 1** – Outline of the logic of law making in Muslim *fiqh* (Author’s elaboration)

<sup>1</sup> A preliminary version of this article was presented in the International Conference on *Law as Religion, Religion as Law*, Faculty of Law, The Hebrew University of Jerusalem, Israel (5-7 June 2017). I want to express here my gratitude to all the participants for the valuable feedback I received during the event, that led to a partial reformulation of the subject matter. However, the final version of the text owes essential improvements to the feedback that CALUMET anonymous reviewers provided, that allowed me to add important elements about the idea of verdict (*vere dictum*) as ‘telling the truth/real/right’ (*ḥaqq*) in Islam: my most sincere thanks for this.

## 1. Introduction. The conundrum of Islamic law: looking at the logic of *fiqh* through a law and religion perspective

*Fiqh* is a curious term of art<sup>2</sup>.

While academic legal scholarship usually describes Islam through the lenses of its sacred Law, the *Šarī‘ah*<sup>3</sup>, the notion of *fiqh* (lit. the ‘understanding’ or ‘knowledge’ of God’s Will) is concurrently identified as the quintessence of the ‘law’ in the religious, cultural and social space of classical Muslim societies. Consequently, the apparently simple notion of *fiqh* as ‘Islamic law’, where religion, (divine) Law and (human) law overlap, depicts in much literature a multi-layered domain, a condensed blend, that, if on the one side tries to keep together the sacred and the secular, the theory and the practice, the ‘ought’ and the ‘is’, on the other side can easily perplex the Western interpreter.

In his overview of the topic for *The Oxford Handbook of Islamic Law*, Anver M. Emon witnesses this hermeneutical struggle by remarking how “[*fiqh* is a curious term of art, let alone genre of literature, in Islamic legal history”<sup>4</sup>. He then goes on by quoting the *Encyclopaedia of Islam*, where *fiqh* (in the entry originally written by Ignaz Goldziher, and later revised by Joseph Schacht) is described as “understanding, knowledge, intelligence” and later specified as

the technical term for jurisprudence, the science of religious law in Islam. It is, like the *iurisprudentia* of the Romans, *rerum divinarum atque humanarum notitia* and in its widest sense covers all aspects of religious, political and civil life<sup>5</sup>.

The hermeneutical riddle of *fiqh* seems to date back to the very origins of Western modern scholarship on Islamic law (as the entry shows, Ignaz Goldziher and Joseph Schacht were among the first promoters of the religion/Law/law overlap).

Not by chance, it also emerges from the very first pages of Schacht’s renowned *Introduction*, where the phrase Islamic law describes simultaneously “the core and kernel of Islam itself”; the “sacred Law of Islam” as the “all-embracing body of religious duties”; and “the knowledge [*fiqh*] of the sacred Law as the knowledge *par excellence*”<sup>6</sup>. Unsurprisingly, moving from such a broad definition, in all his book Schacht strives to keep a balanced assessment on the nature of the Law/law of Islam, with its combination of religious, spiritual, secular, ethical as well as material dimensions: his comment on the history of Islamic law as dominated by a “contrast between theory and practice”<sup>7</sup> leads the reader to the risk of being stuck to an intricate conundrum. As a result, Schacht must advance the conclusion (somehow contradictory in relation to the title of his book) that it might “seem as if it were not correct to speak of an Islamic law at all, as if the concept of law did not exist in Islam... [if not with] the proviso that Islamic law is part of a system of religious duties, blended with non-legal elements”<sup>8</sup>.

<sup>2</sup> Emon (2016).

<sup>3</sup> That is to say, the ‘Path’ revealed to the mankind as the totality of Allāh’s commands, which regulate any aspect of Muslim life.

<sup>4</sup> Emon (2016).

<sup>5</sup> Goldziher and Schacht (2012).

<sup>6</sup> Schacht (1964: 1).

<sup>7</sup> *Ibidem*: 199.

<sup>8</sup> *Ibidem*: 200-201.

In fact, the ambiguity of the notion of Islamic law is not limited to the overlap between the secular and the religious. As recently argued by legal anthropologists, the idea itself of ‘law’ in its Western meaning did not belong originally to Islam but was ‘invented’ in modern times during the colonial move and later assimilated as standard manifestation of normativity in Muslim societies<sup>9</sup>. More generally, as Norman Calder remarks,

Western scholarship (even when written by Muslims) has rarely presented Islamic law in such a way as to demonstrate its values rather than the values of the observer. It is legal practice in the Western sense (which admittedly corresponds to the special concerns of some Muslim jurists) that dominates the standard introductions to the subject... Certain features of Muslim juristic discourse, those perhaps which are most revealing of its nature and its intentions, are in such works disregarded in favour of a search for practical rules (certainly present, but strangely hard, sometimes, to find)<sup>10</sup>.

The present article does not aim at unravelling the cultural riddle of Islamic law<sup>11</sup> and the historical and social connotations that have altered Muslim normativity through the absorption of Western legal positivism (as held by Buskens and Dupret); nor it intends to face the *querelle* of the opposition between theory and practice, religion and secularism, the ‘spirit’ and the ‘body’ of the Law/law of Islam as maintained by Schacht.

Differently, in the attempt to contribute to the study of the subject from a law and religion perspective, this study builds on some recent works that have dealt with the problem of law making in Islam through investigating the logic of *fiqh* as the classical component of the Islamic legal tradition, its original normativity as cultural, religious, and social space.

More precisely, these pages take as immediate background for their elaboration,

- the volume by Rumea Ahmed<sup>12</sup>, dealing with the logic of medieval Islamic theories (that is to say, the hermeneutical principles nourishing the ‘understanding’: in Arabic, *uṣūl al-fiqh*);
- the book by Behnam Sadeghi<sup>13</sup>, describing the process of reasoning in classical Islamic law with regard to the evolution of rule-formulation and adaptation for the issue of women’s prayer;
- and an article that I previously published describing the logic of *fiqh* in terms of Peirce’s ‘abduction’ and Harman’s ‘inference to the best explanation’<sup>14</sup>.

Each of these texts looks at the process of law making in Islam from a specific angle, focusing either on the theories elaborated by Muslim scholars to justify rules in the light of the tradition (Ahmed); or inserting the reasoning of *fiqh* within the framework of legal history and sociology (Sadeghi); or elaborating on the fact/law relation in symbolic terms, hence through a semiotic approach, to depict the application of abduction as key form of inference in the law of Islam (Cattelan).

<sup>9</sup> Buskens and Dupret (2012).

<sup>10</sup> Calder (1996: 979).

<sup>11</sup> Calder also emphasizes how the connotations of what is ‘Islamic law’ are “in part a product of Western perceptions and have been introduced now to Muslim societies through linguistic calques like Arabic *al-qānūn al-islāmī*. There is no corresponding phrase in pre-modern Muslim discourse. There, the two terms which expressed the commitment of the Muslim community to divine law were *fiqh* and *Shari’ah*” (Calder 1996: 980).

<sup>12</sup> Ahmed (2012).

<sup>13</sup> Sadeghi (2013).

<sup>14</sup> Cattelan (2016).

Moving forward in the analysis, this study deals with the logic of *fiqh* (as the process of reasoning in classical Islamic law) in a different way, and more specifically by investigating the overlap between Islam, (divine) Law and (human) law through a law and religion perspective and by interpreting the logic of understanding God's Will as specific manifestation of the tenets of Muslim religion. In this light, the research embraces the peculiar anthropological relation between 'fact' and 'law' in Islam within a conceptualization of the reality that, according to Clifford Geertz,

[is] in its essence imperative, a structure not of objects but of wills. The moral and the ontological change places, at least from our [Western] point of view. It is the moral, where we see the "ought", which is a thing of descriptions, the ontological, for us the home of the "is", which is one of demands. [...] The "real" here is deeply moralized, active, demanding real, not a neutral, metaphysical "being", merely sitting there awaiting observation and reflection; a real of prophets not philosophers<sup>15</sup>.

Accordingly, following the tenets of Muslim cosmology and legal theology, this article outlines the religious background of the 'science of understanding' (*'ilm al-fiqh*),

- from the divine creation of (legal) 'facts' in historical times and the 'sources' (*uṣūl al-fiqh*) of the Law as (divine) 'proofs' *pre*-scribing the Pathway of *Ṣarī'ah*,

- to the Guidance of the believer through 'branches' of (human) law (*furū' al-fiqh*) that, in turn, *de*-scribe (factual) 'rules' by discovering the (actual) materialization of God's Will in the creation of the (material/moral) world of Islam in relation to the attribution of rights to the Muslim believers.

Within this circular (abductive) logic, the implicit clue suggested by this study is that the conundrum of Islamic law *cannot* be resolved by maintaining the rationales of the Western juristic discourse: on the contrary, these rationales may lead to paradoxical outcomes, as if we were imprisoned in a chapter of *Alice's Adventures*<sup>16</sup>. On the contrary, it is by embracing the cosmology and legal theology of Islam by linking 'fact', 'law', and 'religion' that the logic of *fiqh* ("ce monument de l'esprit humain digne de la plus entière admiration", in the words by Yvon Linant de Bellefonds<sup>17</sup>) can be disclosed in terms of

a conceptual replica of social life, not necessarily aspiring to be either complete or practical but balanced between revelation [the 'religion'], tradition [the 'law']<sup>18</sup> and reality [the 'fact'], all three of which feed the discussion and exemplify the concepts. [Within the logic of *fiqh*] [t]he literature of *uṣūl* identifies the divinely revealed sources of the [L]aw (Qur'ān and *Sunnah*), auxiliary sources (like consensus - *ijmā'*) and the hermeneutic disciplines which permit the complex intellectual cross-reference between revelation, tradition and reality which is exemplified in a [law] work of *furū'*<sup>19</sup>.

As we are going to see, much of this study sheds light on Calder's definition of *fiqh* as a "conceptual replica of social life" (which, at a first glance, may appear unconventional if compared with the common notion of 'law' in Western theory and practice), by looking at the logic of *fiqh* as manifestation of the tenets of Muslim religion in the fact/law relation.

<sup>15</sup> Geertz (1983: 187-188).

<sup>16</sup> Cattelan (2016).

<sup>17</sup> Linant de Bellefonds (1965: 18).

<sup>18</sup> On 'Islamic law' as 'tradition' through the transmission of verdicts, see Section 3 of this article.

<sup>19</sup> Calder (1996: 981).

To this aim, the work is divided into two main parts.

Its first part focuses on the ‘religion of *fiqh*’ by discussing the cosmological and theological assumptions of Muslim legal scholarship in dealing with *Šarī‘ah* as *pre*-scribed Law. Accordingly, this part inserts the ‘science of understanding’ of *fiqh* within a conception of the reality, where, as previously remarked, “the moral and the ontological change places, at least from our [Western] point of view”<sup>20</sup>. In Islam, in fact, the moral/legal status of the action relates to the (divine) Law as an ‘object’ that is, in its transcendental dimension, ‘out there’ to be discovered by the human agents. This divine Rule (*ḥukm*) is linked to discerning through Qur’ānic proofs the status of the action revealed by *Šarī‘ah*, when inserted in the flow of human agencies (Section 2).

But, at the same time, this discerning, by looking at the reality as immediate materialization of God’s Will, also *de*-scribes the divine creation as a matter of ‘fact’ which is then incorporated in the (human) ‘law of *fiqh*’, and then in the attribution of what is true/real/right (*ḥaqq*) as “conceptual replica of social life”. Accordingly, following this hermeneutical approach the study argues that the making of the ‘law of *fiqh*’, when inserted within its *own* cultural background, occurs *not* in the terms of a ‘production of norms’ (in Western legal terms) *but* of a ‘delivery of verdicts’ that are shaped in line with the intellectual elaboration transmitted by *fiqh* tradition.<sup>21</sup>

In fact, in the making of Islamic law, it is the verdict (from the late Latin *vere dictum*, ‘to say, i.e. to make explicit, the truth/real’ of *Šarī‘ah*) by the Muslim jurist (as the formal finding of the right - *ḥaqq* - linked to the ‘law’) that nurtures the process of discernment. And it is precisely by delimiting the morality-into-being to the specific occurrence of the ‘fact’ that the verdict of *fiqh*-law connects the eternal divine judgement with historical human actions, leading the believer to perform *Šarī‘ah* through the right (*ḥaqq*) related to the rule (*ḥukm*). Hence, if by ‘delivering the truth of *Šarī‘ah*’, the right (*ḥaqq*) realises (in the specific sense of ‘making real’) God’s decree/decision (*ḥukm*), the notion of verdict becomes crucial to define *fiqh* as the law making *par excellence* in the Muslim civilisation (Section 3): by describing the right as direct result of the *ḥukm*, the normative science of *fiqh* precisely ‘tells/reports the true/real/right’ of *Šarī‘ah* (all these meanings, as we are going to see, converge in the *ḥaqq*).

To conclude, the study will show how, by interpreting *fiqh* as delivery of verdicts through the finding of the empirical rule for the specific occurrence, and so the right that is attributed to the Muslim believer, consequent considerations can be derived in a comparative perspective to explain the casuistry that inherently belongs to Islamic normative pluralism, as well as the narrative function of *fiqh* as moral knowledge and its epistemological unity as revealed (divine) Law / transmitted (human) law in Islam. Through the same comparative approach, a more critical view of the idea of Islamic law can be advanced as well (Section 4).

<sup>20</sup> Geertz (1983: 187).

<sup>21</sup> As the text will remark later, if “*fiqh*-judgement in the fact/law interplay implies a ramified casuistry, ... it is the tradition of *fiqh*-literature that guarantees its *epistemic unity*, the centripetal nature of *fiqh*-knowledge in the narrative function... resulting from the record of verdicts” (Cattelan 2016: 383; italics in the original text).

## 2. The ‘religion of *fiqh*’ as *pre*-scribed Law: the transcendent *ḥukm* revealed through *Šarī‘ah*

To Him is due the primal origin of the heavens and the earth:  
when He decreeth a matter, He sayth to it: “Be,” and it is (Q. II:117).

As Schacht correctly points out in much of his scholarship, “there is no doubt that there exists a close connection between Islamic law and Islamic theology, although it is often difficult for us to see a direct relationship between questions of jurisprudence and the fundamental problems of theology”<sup>22</sup>. In fact, the Muslim conception of justice strongly embraces deep-rooted assumptions about the nature of the ‘is’ and the ‘ought’ in the light of a cosmology and legal theology (what this Section depicts in its title as the ‘religion of *fiqh*’), whose conceptual connotations have been usually underestimated by Western legal scholarship.<sup>23</sup>

On the contrary, these connotations clearly emerge when inserted within a cosmology (as the conceptualization of the origin, evolution, and destiny of the universe as dependent, at any instant, on God’s Will) that Ian Richard Netton has summarized under the notion of the ‘Qur’ānic Creator Paradigm’.

This paradigm, from which fundamental aspects of Islamic legal theology and epistemology can be derived, “embraces a God who (1) creates *ex nihilo*; (2) acts definitely in historical time; (3) guides His people in such time; and (4) can in some way be known indirectly by His creation”<sup>24</sup>. In Islamic legal theology, in fact, not only is God the only Ruler, but also the Sovereign of all the universe and the direct Owner of anything that He creates. Hence, orthodox Aš‘arī theology upholds the absolute freedom and arbitrariness of God’s Will (*irāda*) as manifestation of His undeniable omnipotence (“God is not bound by reason or by wisdom”<sup>25</sup>), and al-Ghazālī (d. 505/1111), in his doctrinal *kalām* work *al-Iqtīṣād fi’l-I’tiqād* summarizes the character of the divine Will in the sentence: “What He wills, is and what He does not will, is not”<sup>26</sup>.

This extends to the least, seemingly insignificant, occurrence: “... not even the casual glance of a spectator nor the stray thought in the mind come to be outside the sphere of His will”. Will is also expressed by the term *mashī‘ah*, “volition”, and so it is that the word *shay’*, “thing”, deriving from the same root, is sometimes glossed as “what has been willed [by God] to exist”<sup>27</sup>.

Accordingly, to Him “is due the primal origin of the heavens and earth. When He decreeth a matter, He saith only “Be,” and it is” (Q. II:117) (corresponding texts in Q. III:47, 59; VI:73; XVI:40;

<sup>22</sup> Schacht (1971: 4). Similarly, Afchar remarks how “for the Muslim, law is that which God wishes to be such. [...] Law, morality and social behaviour are all encompassed by religion and cannot be known without its light nor outside its framework” (1973: 96).

<sup>23</sup> As Ebrahim Moosa notes, “[m]odern students of Islamic law have not sufficiently probed the relationship between law and theology” (1998: 1).

<sup>24</sup> Netton (1989: 22).

<sup>25</sup> Ormsby (1984: 196).

<sup>26</sup> Quoted in Ormsby (1984: 192).

<sup>27</sup> *Ibidem*. Similarly, commenting on the unity of the concepts of ‘truth’, ‘right’ and ‘obligation’ in Islamic legal theology, Smirnov emphasizes how the existent as *the thing* “often serves as the starting point for theoretical reflection in Islamic thought” (Smirnov 1996: 349, note 14). This clue will prove extremely relevant in the analysis of the notion of *ḥaqq* in the light of the *de*-scriptive nature of *fiqh* (here, Section 3).

XXXVI:82; XL:68). God's perpetual creativity, where the dogma of the divine free arbitrariness combines with an atomistic conception of time and the flow of contingent agencies is inserted in the eternal creativeness of God,<sup>28</sup> is the

*leitmotiv* par excellence throughout the entire text of the Qur'ān. He has created all things... It takes only His divine fiat for something to come into existence. He continues to remember His creation and He does not tire of guarding the heavens and the earth. God may, indeed, create again should He so wish<sup>29</sup>.

There are eight names for God, among the canonical ninety-nine, which direct our attention to Allāh as the source of all that is: *al-Badī'* (Absolute Cause), *al-Bāri'* (Producer), *al-Khāliq* (Creator), *al-Mubdi'* (Beginner), *al-Muqtaḍir* (All-Determiner), *al-Muṣawwir* (Fashioner), *al-Qādir* (All-Powerful) and *al-Qahhār* (Dominator), each with various connotations of creating<sup>30</sup>.

... [E]verything that occurs, does occur necessarily, but not because in and of itself it must. It occurs necessarily because of God's prior decree and volition<sup>31</sup>.

If God is the Creator of everything, good and evil, and the Muslim lives 'in surrender' to God's absolute omnipotence that controls any event and human action, how to reconcile divine creation and human responsibility? According to the Aš'arīs, human beings become responsible by 'acquiring' the action created by God<sup>32</sup>: the concept of 'acquisition' (*kasb, iktisāb*) can be also formulated, according to a more functional translation, in terms of 'performance' of God's command<sup>33</sup>, but also of attribution, as we are going to see in a while, of what is real/true/right (*ḥaqq*) to the Muslim believer. As a result, Islamic legal theology embraces a theory of moral action which is constructed to reconcile divine voluntarism and human responsibility within a *creator-agent relationship* or *created agency*<sup>34</sup>. Thus, for the orthodox Aš'arīs "God is the creator of human acts, of which man is merely the receiving subject (*maḥall*)... God 'attributes' to a man his acts (the theory of *kasb* or *iktisāb*) and hence are justified both human responsibility and the Judgment promised in the Qur'ān"<sup>35</sup>.

<sup>28</sup> On the notion of time in Islam, fundamental considerations have been advanced by Böwering: "each person's destiny is in the ends of God who creates male and female, gives life and brings death, and grants wealth and works destruction. [...] From the 'Be!' of a person's creation to the time of death, human existence falls under the decree of God: Allāh is the Lord of each instant; what He has determined happens". Thus, "Muslim tradition saw time as a series of predetermined events binding divine omnipotence to the certain occurrence of each instant of a person's life span" (Böwering 1997: 58).

<sup>29</sup> Netton (1989: 23).

<sup>30</sup> Burrell (2008: 141).

<sup>31</sup> Ormsby (1984: 195-196).

<sup>32</sup> On this point, see Gimaret (1980); Watt (1985); Schwarz (1972).

<sup>33</sup> Frank (1983).

<sup>34</sup> "And if human beings are agents, how is it that God most High is agent? Or if God Most High is an agent, how is a human being an agent? There is no way of understanding "acting" as between these two agents. In response, I would say: indeed, there can be no understanding when there is but one meaning for "agent". But if it had two meanings, then the term comprehended could be attributed to each of them without contradiction, as when it is said that the emir killed someone, and also said that the executioner killed him; in one sense, the emir is the killer and, in another sense, the executioner. Similarly, a human being is an agent in one sense, and God is an agent in another. The sense in which God Most High is agent is that He is the originator of existing things [*mukhtari' al-mawjūd*], while the sense in which a human being is an agent is that he is the locus [*maḥall*] in which power is created after will has been created after knowledge has been created, so that power depends on will, and action is linked to power, as a conditioned to its condition" (Ghazālī trad. 2001: 276).

<sup>35</sup> Gardet (2012).

But how does the human being become *knowledgeable* about the *status* of the action for which he is considered responsible? Or, looking more precisely at the epistemology of *fiqh*, how do “jurists know the moral imperative, in the form of the transcendent rule”<sup>36</sup>? “The crucial intersection of the divine will into history occurs by means of the *ḥukm*”<sup>37</sup> (the divine rule/decreed/decision) as revealed in the *Ṣarī‘ah*. The complementary dogmas in Islamic legal theology of God’s omnipotence and human responsibility find their reconciliation through the revealed Law communicated to the human beings through the *Ṣarī‘ah* (literally, ‘the road leading to water’, the ‘Way’, the ‘Path’).

In order to make human beings consciously responsible of their actions, God has given the Qur’ān, lit. ‘what is read’, the ‘recitation’, and sent the Prophet as reminder of the Message. Accordingly, the Guidance expresses the “decision by God intervening under the form of a communication (*kitāb* [book]) concerning human actions”<sup>38</sup>.

As previously mentioned, the crucial problem is how the human being can become knowledgeable, aware of the divine Law (the revealed ‘rule of God’, *ḥukm Allāh*, as ‘God’s Word’ communicated to the mankind) that refers to the acts of those who are obliged (*mukallaf*) to observe His precepts. Combining the dogmas of divine creation and human responsibility, “one cannot avoid noticing that the term *ḥukm* is employed to describe two moves simultaneously: it involves an empirical judgement, as well as a transcendental judgement”<sup>39</sup>. In fact, when “making a finding regarding the status of a hypothetical or a real-life question, the ruling or opinion provided by a jurisconsult is... called *ḥukm* [too]”<sup>40</sup>: here, in the sense of ‘empirical’, not ‘transcendental’, judgement. However, and most importantly,

the authority of the empirical dimension is dependent on its relationship with the transcendental and metaphysical *ḥukm*. If we do show some awareness of these two dimensions, we will begin to understand the complexity of the human-divine interaction in the process of discovering “God’s rule” in Islamic law. The *ḥukm* proper is a transcendental norm, of which the empirical *ḥukm* is but a temporal manifestation. It is in such scenario that God is the real *ḥākim* (transcendent monothete or sovereign ruler) and the real *shāri‘* (Supreme Legislator)<sup>41</sup>.

Moosa’s reflections on the concept of *ḥukm* can foster further interpretation when (a) the dual nature of God’s Rule/rule is contextualized in a cosmology of the created agency, as previously described; and (b) the investigation looks at the empirical *ḥukm* as a ‘temporal manifestation’ in history of the eternal, transcendental and ‘Real’ *ḥukm*, hence how the ‘real’ *ḥukm* is then known in the flow of human agencies as realised in the right/true/real (*ḥaqq*) of Muslim lives.

(a) On the one side, the divine-human interrelation between creation and agency is revealed by the bilateral relationship between the Law in its transcendental dimension and its moral incorporation in human law. The first transcendental dimension appears in the description of Islamic law as

<sup>36</sup> Moosa (1998: 5).

<sup>37</sup> *Ibidem*.

<sup>38</sup> Milliot and Blanc (2001: 172).

<sup>39</sup> Moosa (1998: 7).

<sup>40</sup> *Ibidem*.

<sup>41</sup> *Ibidem*.



the decision (*ḥukm*) of the Ruler (*ḥākim*), whose essential object (*maḥkūm bihi*) is the qualification of human actions according to God's will and the determination of their effects, the rights and obligations of human beings; the decision is addressed to the person, the subject to the rule (*maḥkūm lahu*, 'alayhi) [...]. The *ḥukm* is a judgment in the philosophical sense of the word: [...] to put order into a determined situation<sup>42</sup>.

The second dimension, from the empirical angle, depicts Islamic law as materialization of *Ṣarī'ah*, as the divine Word performed by the human being as 'ethical being'. And it is in this precise sense that

the divine Word on its descent... splits into "ruling" (*ḥukm*) and "report" (*khbar*)... the "ruling" into "command" (*amr*) and "prohibition" (*nahy*). The various branches of the two categories of "ruling" finally form all the categories of "evaluation" of the Sharī'ah... [Thus] the divine law is a manifestation of the divine Word. The implication of this statement for ethics is that the human being as an ethical being is a being of the word. [...] Humans can therefore not be adequately understood in their ethical dimension as already constituted beings "before the Law" who are then asked to find out by which means they will reply. Or rather, they can be understood in this way only because the law as a particular manifestation of the divine Word constitutes them *by way of word*<sup>43</sup>.

(b) How the knowledge of the *ḥukm* can be pursued in a conception of the reality which is 'deeply moralized' as *materialization* of God's Will (see, previously in these pages, Geertz)? This is precisely the core hermeneutical issue in describing the logic of *fiqh* while moving from the transcendental *ḥukm* (embodied in the *Ṣarī'ah*) to the empirical/(de)ontic *ḥukm* (as assessment known by the Muslim jurist).<sup>44</sup>

To pursue this knowledge not only does Islamic jurisprudence follow the proofs of the revelation (*uṣūl al-fiqh*) rooted in the Qur'ān and Sunna, but also see *any* event as a sign of God's creativeness. Thus, *any* human action, despite not explicitly regulated in the two textual roots of understanding, is interpreted as a manifestation of God's Will, on which Muslim jurists can reach a *consensus (ijmā')* of the correct *collocation* in the ethical categories established by God. The emergence of a new case ('new' in the sense of not yet 'understood', but whose ethical nature has already been established by God) imposes the scholars to rely on the '*illa*, the (efficient) 'cause' of a given legal effect, that is to say, the (sovra-rational) God's authorial intent which allows a corresponding qualification through analogical legal reasoning (*qiyās*). More relevantly, in Islamic legal theory it is the *sabab* (as the 'empirical circumstance' to whose existence or appearance the rules of 'Law' are linked) that affects the discussion about the knowledge of the (divine) *ḥukm* and entails the moral/legal obligations for the human being to act, hence becoming responsible by 'acquiring' the action in the (empirical) *ḥukm*. This action (either in form of an occasion, *sabab*, that brings about the legal effect: al-Sarakhsī; or by considering the revelation as the event setting morality-into-being: Ḥanbalī and Šafi'ī schools<sup>45</sup>) relies in Muslim legal theology on the innate accessibility for the human reason ('*aql*) to moral knowledge, discerning through Qur'ānic indicators (*adillah*) the status (*ḥukm*) of the action revealed by *Ṣarī'ah*.

It is the move from the transcendental/ontological to the empirical/(de)ontic *ḥukm*, in the light of the Qur'ānic Creator Paradigm, with its cosmological assumptions and impact both on Islamic legal

<sup>42</sup> Milliot and Blanc (2001: 171); my translation.

<sup>43</sup> Stelzer (2008: 169); italics in the original text.

<sup>44</sup> On the interlink between the cause of the action ('*illa*) and its (de)ontic qualification (*ḥukm*) one of most important references, in relation to the typology of Islamic legal theories, remains Zysow (2013: see in particular 196 and ff.).

<sup>45</sup> Reinhart (1983: 197-198).

theology and the production of law, that the next Section of this article (n. 3) is going to elaborate, hence shifting from the search of the (divine) Law to the production of (human) law in Islam.

In particular, if the ‘religion of *fiqh*’ looks at the transcendental *ḥukm* as *pre*-scribed by the revealed *Ṣarī‘ah*, the *materialization* of God’s Law in human life (for the human being to be ethical being by *way of the word*) implies its contextualization within the social reality analysed by the Muslim scholar, in order to determine the empirical *ḥukm* as *de*-scribed ‘law’ when delimiting the ‘right’ (*ḥaqq*). In this frame, the study will show how, if the *pre*-scribed/ontological Rule belongs only to God in Islamic legal theology (see Moosa, as previously quoted), the work of Muslim scholars, in discovering this Rule, brings about the *de*-description of empirical/(de)ontic rules. This description occurs in terms of a delivery of verdicts which represent a “conceptual replica of social life” (Calder), where the ‘fact’ is deeply moralized as result of a materialized Law; verdicts that are later transmitted in the tradition giving rise to a production of norms that is quite distant, in its hermeneutical assumptions, from the Western legal one.<sup>46</sup>

### 3. The ‘law of *fiqh*’ as *de*-scribed law: defining the *ḥaqq* through the empirical *ḥukm*. *Fiqh* as discovery, delivery, and transmission of verdicts

The previous paragraph has referred to Netton’s Qur’ānic Creator Paradigm as the hermeneutical tool to link the specific cosmology and legal theology of Islam, then underlining the dual nature of the *ḥukm* as transcendental and empirical rule as discovered in relation to the ‘fact’. The ‘law of *fiqh*’, as human construction, is deeply grounded on the conceptualization of the reality as direct materialization of God’s Will to which the man participates as agent.

Accordingly, no proper understanding of the peculiarities of Islamic law can be pursued outside the recognition of the absolute freedom of God’s Will in creating the reality, and human actions (as part of reality), according to His ruling (*ḥukm*, pl. *aḥkām*).

On the matter, Santillana straightly points out that in Islam “the Law is the Will of God, the rule given by Allāh Legislator to the People that He has chosen, and according to which He will judge them”<sup>47</sup>. Accordingly, in al-Ghazālī’s view, “the law, *ḥukm*, is the word directed by Allāh... (through His Prophet) and that refers to the acts of those who are obliged (*mukallaf*) to observe the precepts”<sup>48</sup>. This study has already highlighted the intersection of a divine (transcendental) and human (empirical) dimension in the concept of *ḥukm* as ‘(legal) ruling’, ‘rule’, but also ‘decision’, ‘verdict’, ‘provision’, ‘assessment’, ‘status’, ‘qualification’, ‘judgement’, all possible translations into English of the Arabic root *Ḥ-K-M*.<sup>49</sup> In view of that, Al-Ghazālī (d. 505/1111) explains in his *al-Mustaṣfā* (*The Quintessence*), that “a rule (*ḥukm*)... denotes the dictum of the revelation when it is linked to the acts of those made responsible [*inna ḥukm ‘indanā ‘ibāra ‘an khiṭāb al-shar’ idhā ta‘allaqa bi af‘āl al-mukallafīn*]”<sup>50</sup>. In other words, the rule is the result of God’s Will affecting the life of the Muslim, who becomes fully responsible

<sup>46</sup> The topic covered in Section 2 of this article finds similar elaboration about the *dictum* of the revelation in Islam as *pre*-scribed Law in Cattelan (2023: 56-59).

<sup>47</sup> Santillana (1926: 5).

<sup>48</sup> Quoted in *ibidem*.

<sup>49</sup> Wehr (1979).

<sup>50</sup> Quoted in Moosa (1998: 9).

(*mukallaf*) for the action he acquires (*kasb*). The point is remarked in contemporary scholarship by Mohammed Hashim Kamali:

*ḥukm* is defined as a communication from the Lawgiver concerning the conduct of the *mukallaf* (legally competent person) and consisting of a demand (something obligatory [*wājib*] or prohibited [*ḥarām*]), an option (*takhyīr*), or an enactment (*waḍ'*)... A demand is usually communicated either as a command or a prohibition. When communicated in emphatic and decisive terms, the former is known as *wājib* and the latter as *ḥarām*. If the command is not utterly emphatic, the former is classified as recommended (*mandūb*) and the latter as reprehensible (*makrūh*). An option allows the individual to choose, and the resulting ruling is known as neutral (*mubāh*), as it is neither obligatory nor forbidden<sup>51</sup>.

The divine *ḥukm*, as seen, is conceived within an atomistic logic of time according to which “the universe doesn’t subsist unless by an eternal creation. There is no law in the nature; everything depends, in any instant, on the completely free Will of God the creator”<sup>52</sup>. As indicated by Kamali, the centrality of the ‘rule’ is confirmed by a normative ethics that specifically derives from the concept of *ḥukm* the taxonomy of the ‘quintuple qualifications’ (*al-aḥkām al-khamsa*, lit. ‘the five statuses’; *aḥkām* pl. of *ḥukm*). In the framework of the ethical status of the action created by God, Islamic jurisprudence collocates any human act into one of the five ‘decided status’, already established by God (*al-aḥkām al-khamsa*): (1) obligatory, duty (*wājib*, *farḍ*); (2) recommended (*sunna*, *mandūb*, *mustaḥabb*); (3) neutral, indifferent (*mubāh*); (4) reprehensible, disapproved (*makrūh*); (5) forbidden (*ḥarām*) (whose opposite is *ḥalāl*, not forbidden)<sup>53</sup>.

While the Rule (*ḥukm*) establishes the status of the human act in a transcendental sense, the ‘rights’ (*ḥuquq*, sing. *ḥaqq*) are the means thanks to which God *realizes* (in the sense of ‘making real’) the rule (*ḥukm*) as empirically known by human agents. The term *ḥaqq* stems from the Arabic root *H-Q-Q*, whose primitive meaning was ‘to carve’ (on the wood, the metal, or the stone), and later ‘to be real, true, legal, right, correct’.<sup>54</sup> Thus, “although the primary meaning of *ḥaqq* is “established fact” or “reality” (*al mawjūd al thābit*), in the field of law its dominant meaning is “truth” or “that which corresponds to facts”. Both meanings are equally prominent”<sup>55</sup>.

The primitive sense of *ḥaqq* is ‘established fact’ (*al-thābit ḥaqqīqat<sup>m</sup>*), from which ‘reality’, and the sense: ‘that corresponds to the facts’ [...] “*Ḥaqq*... is one of the names of God..., and it appears several times in the Qur’ān with this meaning [...]. But the usage of *ḥaqq* in the Qur’ān, in the Islamic traditions... and in the Arabic literature in general is not limited to the divine name; it can designate all the ‘reality’, every ‘fact’, all the

<sup>51</sup> Kamali (1993: 347).

<sup>52</sup> Chehata (1965: 7-8); my translation.

<sup>53</sup> Schacht (1964: 121). “Ethics occurs in Islamic theology first and foremost as a matter of the assessment or the evaluation of acts... this differs from Western philosophical thought where the ethical occurs first of all in regard to the constitution of an act. Accordingly, in Islamic moral thought “ethical” refers to a knowledge which allows us to locate a particular act on a predefined scale of categories, while “ethics” denotes the science which defines the means for such a localisation. The scale is distilled from the Qur’ān. Whatever the particular categories are, be they “*ḥasan*” and “*qabīḥ*” (“good, acceptable” and “detestable”), or “obligatory” (*wājib*), “recommended” (*mandūb*, *mustaḥabb*), “permissible” (*mubāh*), “offensive” (*makrūh*), and “unlawful” (*ḥarām*), they are always acceptable or non-acceptable to someone, and that someone is not myself, but God. The central question for this interpretation of Islamic ethics is, therefore, not only “What does God want me to do?”, but also, and perhaps more importantly, “Which means do I have to find this out?” (Stelzer 2008: 165).

<sup>54</sup> Wehr (1979).

<sup>55</sup> Kamali (1993: 342).

‘truth’... Another meaning of *ḥaqq* (pl. *ḥuquq*), deriving directly from the first sense, is ‘demand’ or ‘right’, as legal obligation...; this usage of the term is already utterly developed in the Qur’ān. [...] To sum up, the meanings of the root *Ḥ-Q-Q*, from that of the ‘carved’ statute, valid and permanent, have extended to the ethical concepts of legal and real and right and true, and developed till including the divine and spiritual reality<sup>56</sup>.

To sum up, it can be said that *ḥukm* (‘law’) and *ḥaqq* (‘right’) merge in the divine creation, as ‘established’ in the *ḥukm* Rule and ‘realized’ by the *ḥaqq* of the empirical *ḥukm* rule. In this precise way, the Muslim believer is guided along the Path of *Ṣarī‘ah* in the performance of God’s Will: in a nutshell, the *ḥaqq* realizes what the *ḥukm* rules.

In the attempt of depicting Islamic legal sensibility, cultural anthropologist Clifford Geertz proposes a similar analysis of the couple *ḥukm* - *ḥaqq*. He recognizes that *ḥaqq* is more comparable to the Western notion of ‘right’ rather than of ‘law’, while the notion of ‘rule’ is embodied in the concept of *ḥukm*, “from a root having to do with delivering a verdict, passing a sentence, inflicting a penalty, imposing a restraint, or issuing an order”<sup>57</sup>. But, much more importantly, as previously reported, he points out how

*ḥaqq* is something else again: a conception that anchors a theory of duty as a set of sheer assertions [that communicated in the *Ṣarī‘ah*]... in a vision of reality as being in its essence imperative, a structure not of objects but of wills. The moral and ontological change places, at least from our point of view. It is the moral, where we see the “ought”, which is a thing of descriptions [those elaborated by *fiqh*], the ontological, for us the home of the “is”, which is one of demands. [...] The “real” here is a deeply moralized, active, demanding real, not a neutral, metaphysical “being”, merely sitting there awaiting observation and reflection; a real of prophets not philosophers. [...] This connection is made... by the word itself. For at the same time as it means “reality”, “truth”, “actuality”, “fact”, “God”, and so on, it, or this being Arabic, morphophonemic perpetuations of it, also means a “right” or “duty” or “claim” or “obligation”, as well as “fair”, “valid”, “just” or “proper”<sup>58</sup>.

How can we enter this universe of sense where the moral and the ontological change places?

In Islam the *ḥaqq* realizes (de-ontically speaking) the *Word*, the ‘Rule’ (*ḥukm*) which “denotes the *dictum* of the revelation *when* it is linked to the *acts* of those made *responsible*” (Al-Ghazālī). In other terms, the *reality* is the *materialization* of the *revelation* in the *ethical action* of the believer: human beings are constituted as *being of the word* (Stelzer, see previously). Consequently, the ‘real/true/right’ (*ḥaqq*) becomes in its essence ‘imperative’, a structure of (divine) wills, of revealed assertions as rules (*aḥkām*) and not of objects (Geertz). In other terms, the ‘real/true/right’ itself, as empirically presented as *ḥaqq*, is essentially legal, the expression of the ‘rule’, *ḥukm*, in the empirical world, that can be ‘known’ by the believer through the proofs of the revelation: subsequently, “in Islamic legal sensibility, to determine the empirical situation is to determine the jural principle. Facts, in other words, are normative; there is no fact/law dichotomy”<sup>59</sup>.

More precisely, the ‘moral’ law (where we see the ‘ought’) is *de*-scribed as a *fact* in the category of *ḥaqq* (by the science of *fiqh*), while at the same time the ‘ontological’ Law (for us the home of the ‘is’) is

<sup>56</sup> MacDonald and Calverley (1975).

<sup>57</sup> Geertz (1983: 187).

<sup>58</sup> *Ibidem* (187-188).

<sup>59</sup> Merry (1988: 886).

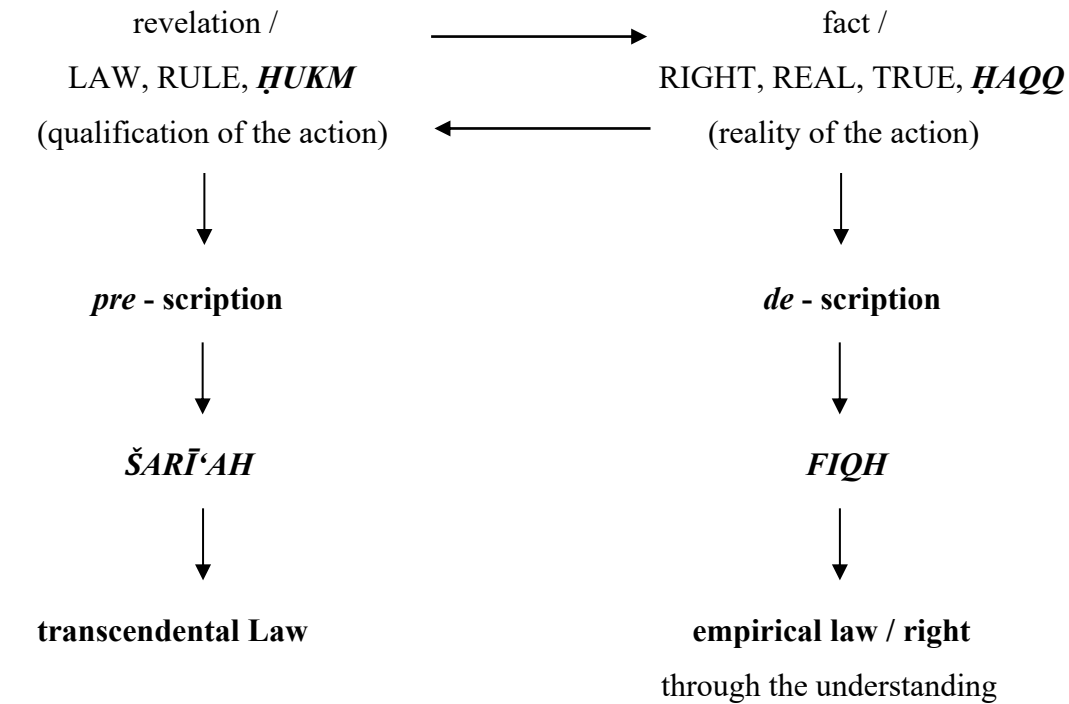
*pre*-scribed as the realm of the *unique* Will, the revealed *Word*, the demand, the transcendental Rule (*ḥukm*) which can be empirically known by the rule (*ḥukm*) attached to the ‘fact’.

Accordingly, the ‘right’ becomes extremely empirical, casuistic in the *de*-scribed ‘law’ of the ‘fact’, the ‘real’ (*ḥaqq*); but, contemporarily, Muslim scholarship (*de*-scribing the ‘real’ as a divine manifestation) upholds the *pre*-scription of the ‘Law’, the Truth of the Rule (*ḥukm*), as prerogative of *one* Will, the one of the only Ruler. The outcome is a theory of justice which is, at the same time, *strictly monistic* (God is the only Lawgiver) and *empirical* (the ‘right’ is ‘real’ and thanks to the reality the understanding of the Message by the *fuqahā*’ can be pursued). Empiricism and monism shape the Islamic conceptualization of ‘law’ and ‘right’ in the science of *fiqh*, within a universe of sense where the ‘rule’ (*ḥukm*) is ‘real’ (*ḥaqq*), and the ‘fact’ itself (*ḥaqq*) subsists as manifestation of the *Word* (the ontology of the *ḥukm*); ‘rule’ and ‘real’ are both dependent on the divine eternal creation, and performed by the agents; but, while the ‘Law’, the ‘Rule’ (*ḥukm*) is an exclusive prerogative of God, as *pre*-scription, the ‘right’, the ‘real’ (*ḥaqq*), participated by the human beings as ‘agents’, becomes *de*-scriptable in the empirical/(de)ontic ‘rule’ (*ḥukm*).

In summary, while the *Šarī‘ah*, the Guidance, incorporates the ‘Law’ as revealed and transcendental/ontological *pre*-scription (*ḥukm*), its understanding, *fiqh*, identifies the ‘right’ (*ḥaqq*) as something ‘real’ (again, *ḥaqq*), object of *de*-scription in the definition of the empirical/(de)ontic ‘law’ (again, *ḥukm*).<sup>60</sup> It is exactly within this epistemological frame, derived from Islamic cosmology and legal theology, that in the logic of law making in Islam *revelation*, *reality* and *tradition* merge through an intellectual enterprise that can be explained in terms of *discovery*, *delivery* and *transmission of verdicts*, as Diagram 1 suggests (see next page).

<sup>60</sup> For an explanation of the science of *fiqh* as ‘*de*-scribed law’ in relation to a *iurisdictio* of verdicts, please refer to Cattelan (2023: 59-67) too.

**DIVINE CREATION AND HUMAN AGENCY**



**DISCOVERY, DELIVERY and TRANSMISSION of VERDICTS**

Diagram 1 - Outline of the logic of law making in Muslim fiqh (Author's elaboration)

The epistemology of *fiqh* connected to the notion of verdict has been rarely taken into proper consideration by Western legal scholarship, stuck to the conundrum of Islamic law (Section 1). Indeed, contextualizing *fiqh* within its own legal theology, it is the delivery of verdicts that seems the most appropriate formula to represent the making of law in Islam as a “conceptual replica of social life” (as for the definition by Calder, previously quoted in this article) where the dichotomy fact/law is basically removed (Merry), being the reality deeply moralized, “a reality not of philosophers, but prophets” (Geertz).

Being Allāh the only Ruler, the only Judge, the transcendental/ontological *ḥukm*, the divine judgement precedes the ‘fact’; in other terms, the divine qualification of the action enjoys an ontological primacy over the reconstruction of the ‘right’, the ‘real’ (*ḥaqq*) by the jurist in the formulation of the empirical-(de)ontic *ḥukm* in the ‘law’. In this light, the divine judgement, the ‘sentence’, comes before its discovery through the delivery of a ‘verdict’ (from the late Latin *vere dictum*, or *veredictum*, ‘to say, i.e. to make explicit, the truth’ of *Šarī’ah*, which is the precise purpose of *fiqh* as normative discipline). In a

nutshell, *sentence first, verdict afterwards*.<sup>61</sup> The role of the Muslim jurist, in such a universe of sense, becomes to ‘report the Truth’ of *Šarī‘ah* as embedded in the real/true/right (*ḥaqq*) of the Muslim life. Moving from the transcendental/ontological to the empirical/(de)ontic dimension of the rule (*ḥukm*) implies a duty for the Muslim jurist to ‘tell/report the Truth of Islam in the truth of Muslim life’: here, ‘to say’ (*dicere*) the ‘true’ (*verus*) precisely translates the idea of ‘telling what is the right to which the person is entitled’ when the ‘right’ is conceived as something ‘true/real/right’: that is to say, the *ḥaqq* itself, where all these meanings converge. In other words, ‘telling the (legal/moral) right’ corresponds, for a Muslim jurist, to ‘saying the Truth/truth’ of *Šarī‘ah* within an ‘economy of certainty’ that is always open to fallibilism and possible improvements: it is not an ontological Truth (that belongs only to God), but a (de)ontic truth, mirroring the Truth of the revelation.<sup>62</sup> In this regard, it is not by any chance that the IV form of the Arabic root *Ḥ-Q-Q* specifically means “to tell the truth”, but also “to be right” as well as “to enforce” or “to make into a duty of God”,<sup>63</sup> with a sense that spans from the ‘right’ (*ḥaqq*) to the ‘rule’ (*ḥukm*). At the same time, the idea of ‘telling of truth’ converges with the ‘search for the Truth’ of *Šarī‘ah* as core purpose of *fiqh*, reinforcing the interpretation of its law making in the form of delivery of verdicts, as argued in this study.

The delivery of each verdict, in fact, cannot be conceived as an isolated assessment of the Muslim jurist, but it is inserted in the construction of a collective enterprise where the jurist acts as a contributor to the long-lasting tradition of *fiqh* knowledge.

The deep intersection between ‘law’ and ‘fact’, to the extent that a dichotomy does not exist anymore (Merry), emerges from this overlap between revelation, reality and tradition, in the light of which Muslim jurists “did not question or innovate principles or injunctions; they were ‘facts’ and part of the inherited legacy of their legal school... ‘facts’ that were practically unchangeable”<sup>64</sup>. Therefore, if from a certain angle the process of legal reasoning guiding the Muslim jurist may be linked to the provision of a *fatwā* as the “opinion on a point of law, the term “law” applying, in Islam, to all civil or religious matters”<sup>65</sup>, this opinion cannot be misunderstood as a free act of interpretation of the revelation.

The process of understanding, in fact, is actually bound on the one side to the adherence to the ‘roots of understanding’ (*uṣūl al-fiqh*) that allows the *discovery* of God’s Will (the transcendental *ḥukm*) through the revealed proofs; and on the other side to the materialization of God’s creation in the ‘real’ of the ‘right’ (*ḥaqq*) which addresses the jurists towards the finding of the empirical dimension of the *ḥukm* by developing the ‘branches of understanding’ (*furū‘ al-fiqh*). All the epistemological challenge of *fiqh*, in the end, lies between the probative value of the revelation and the role of the jurist in the interpretation of the reality according to the transmitted tradition. With regard to the probative value of the revelation,

[f]rom the perspective of the Muslim jurist, legal theory can be regarded as a “science of proofs,” leading to standards that regulate human actions. These standards derive primarily from a discovery, through a defined

<sup>61</sup> On the hermeneutical distance of this logic from the reversed *verdict first, sentence afterwards* of Western legal practice, please refer to Cattelan (2016: specifically, 379-383).

<sup>62</sup> Important reflections on the concept of the ‘economy of certainty’ can be found in the fundamental volume by Zysow (2013).

<sup>63</sup> Wehr (1979: 224).

<sup>64</sup> Ahmed (2012: 7-8).

<sup>65</sup> Tyan (2012).

set of sources and techniques, of the *ahkām*, the qualification of actions or, more specifically, God's determination of the moral value of individual acts<sup>66</sup>.

Even clearer on the point of the *discovery* of the transcendental 'Law' in *fiqh* are the reflection by Bernard Weiss, when he remarks that it is

a fundamental principle of Islamic jurisprudence that the law properly so called – that is to say, the Sharī'ah – exists independently of all human deliberation, whether legislative or judicial... The law, is, for the Muslim jurist, “out there” before human beings even exist... for the real “locus” of the law is within God, and God is beyond time and space. Islamic theology, which provides the philosophical underpinnings for Islamic jurisprudence, subsumes the law under the divine attribute of speech [as the role of the communication of the Law through the revelation]<sup>67</sup>. [...] and it is for this reason that the law may be said to be an object, something that exists “out there,” *something to be discovered, not created or developed, by human agents* <sup>68</sup>.

Accordingly, in the making of Islamic law, it is the *delivery* of a verdict (from the Latin *verdictum*, ‘to say, i.e. to make explicit, the truth’ of *Šarī'ah*) by the Muslim jurist (as the formal finding of the prescribed ‘Law’, *ḥukm*, through the *de-scription* of the ‘right’, *ḥaqq*) that nurtures the process of discernment. And it is precisely by delimiting the morality-into-being to the specific occurrence of the ‘fact’ (that is to say, to the materialization of God's creation in the ‘real’) that the verdict of *fiqh*-law connects the eternal divine judgement to the historical human action, leading the believer to ‘perform the (revealed) Truth’ with regard to the right (*ḥaqq*) dependent on the empirical rule (*ḥukm*).

Furthermore, the conceptual overlap between the (eternal) Truth of *Šarī'ah* as *discovered* by the jurist, and the (empirical) truth of the ‘law’ of the ‘fact’ as *delivered* in the verdict, finds its epistemological unity through the *transmission* of the verdicts in each legal school (*madhhab*) (see Diagram 1), to the extent that, from a certain angle, Islamic law can be also seen as “a discipline that explores tradition, and uses tradition to discover (and limit) the meanings of the revelation”<sup>69</sup>. In other terms, the logic of understanding (*fiqh*) God's Will proceeds from the revelation to the reality through auxiliary ‘indicators’ (i.e. supplementary proofs) that derive from the perpetuation (hence, legitimacy) of a certain interpretation through the transmitted tradition of each *madhhab*. In this way, the hermeneutical *discovery* of the revelation (the transcendental/ontological *ḥukm*) blossoms into the *delivery* of a judgment (the empirical/(de)ontic *ḥukm* expressed in the verdict) about the ethical/legal status of the action whose legitimacy lies in the legal epistemology inherited through the *transmission* of *fiqh*.<sup>70</sup>

To summarise, in the making of the epistemological unity of *fiqh* as normative discipline it is the *de-scription* of the ‘law-in-the-fact’ that defines the ‘right’ as something ‘real’ and ‘true’ (*ḥaqq*) as direct *materialization* of the divine Rule (*ḥukm*) in human life. Hence, the illuminating notion of verdict, as advanced in these pages to interpret the distinctive nature of *fiqh* as specific type of law making, can reflect the finding (*discovery*) of the Rule which is then *delivered* by delimiting the human finding of the

<sup>66</sup> Wakin (1990: 33).

<sup>67</sup> Weiss (1990: 53).

<sup>68</sup> *Ibidem*: 61; italics added.

<sup>69</sup> Calder (1996: 980).

<sup>70</sup> In this sense, “*fiqh* can be... depicted as the peculiar narrative of the Muslim community through which the eternal *langue* of God's *Word* is *actualized* along the centuries, disclosing the nature of the human being as historical *parole* (i.e. as *being of the word*)” (Cattelan 2016: 383; italics in the original text).



empirical *ḥukm* to the specific occurrence of the ‘real’ (*ḥaqq*). But, correspondingly, if the practice of *fiqh*-judgement gives rise to a process of ramification of the knowledge (*furū’ al-fiqh*), it is the transmission of the verdicts along the centuries that guarantees the epistemological unity of the discourse of *fiqh* as a ‘conceptual replica of social life’ where

1. the (*discovered*) *revelation*,
2. the (*delivered*) *reality* (as assessed in the verdict)
3. and the (*transmitted*) *tradition*

“feed the discussion and exemplify the concepts”<sup>71</sup> (see back, Diagram 1).

Of course, in this logic of law making, *each* singular verdict in the atomistic flow of time reflects the legal theology of an eternal free creation by God, to the extent to which the *delivery* of the verdict ‘mirrors’ the finding of the (empirical) law (*ḥukm*) for the fact in the *real* (*ḥaqq*), with the implied casuistry that characterizes the logic of *fiqh*<sup>72</sup>. Simultaneously, it is a “centripetal fugue”<sup>73</sup> (i.e. God’s Will as communicated in the *revelation*) that *fiqh*-poliphony aspires to *discover* in the manifestation in the reality of the transcendental *ḥukm*; and the *tradition* itself, whose *transmission* along the centuries acquires in itself a primary theological function, becomes the ‘way of walking’ (this is the literal meaning of *madhhab*) the Path (*Šarī’ah*).

This explains why, coming back to the distance between Western and Islamic jurisprudence from which this study has started by commenting the idea of Islamic law,

[if] Western legal theory locates the (specific, empirical) case within the (general, abstract) norm to deduce the judgement, the logic of *fiqh* sees law as an epistemological issue, being *fiqh*-judgement an atom of what constitutes *fiqh*-knowledge, deposited in the tradition (an echoing amplification, where the human *word* reflects the divine *Word*)<sup>74</sup>.

#### 4. Conclusions. Dealing with Islamic law from a comparative perspective

This contribution has applied a law and religion approach to describe the process of law making in Islam in accordance with Islamic cosmology and legal theology. The notion of verdict has been advanced as illuminating tool to depict the discovery / search of the ‘truth’ in relation to the definition of the ‘right’ in *fiqh* law making.

The text has moved from the ‘religion of *fiqh* as the divine ‘Law’ to be discovered (never “created or developed” by human agents<sup>75</sup>: Section 2) to the delivery of verdicts as essence of the human ‘law of *fiqh*’ (Section 3), that is to say, the empirical *ḥukm* that materializes in the *reality* of the ‘right’ (*ḥaqq*) and whose understanding looks at the *revelation* through the transmitted *tradition*.

As much the proposed interpretation identifies the role of the Muslim jurist with the finding of the law for the specific occurrence (as immediate result of God’s decree in the creation) in the delivery

<sup>71</sup> Calder (1996: 981).

<sup>72</sup> Cattelan (2016: 382-383).

<sup>73</sup> *Ibidem*: 383.

<sup>74</sup> *Ibidem*: 384.

<sup>75</sup> Weiss (1990: 61).

of a verdict, it also offers the opportunity to add some final considerations on the notion of Islamic law as usually conceived in Western jurisprudence and currently applied in contemporary Muslim societies as well.

Embedded in a universe of sense which is deeply moralized as “a reality of prophets” (Geertz, as previously quoted) where a “dichotomy fact/law” does not exist anymore (Merry), the logic of *fiqh* as “conceptual replica of social life” (Calder) embodies an epistemological component that overrides practical purposes of general regulation, and radically departs, from this angle, from the idea of ‘law’ according to Western legal practice.

Within this hermeneutical perspective, both the narrative function of *fiqh* as moral knowledge and the deep-rooted casuistry that characterizes Islamic legal pluralism become the direct outcome of a legal theology where divine creation and human agency are basically the two corresponding sides of the ‘Rule/rule’ as transcendental/ontological and empirical/(de)ontic *ḥukm* (Moosa). The communication of the revelation calls for the understanding (*fiqh*) of the moral status of the action, being the reality itself the ‘occasion’ that brings the legal effect as morality-into-being (Reinhart). It is in this sense that the divine *Word* (the revealed divine Law) actualizes into the life of the Muslim believer as *being of the word* (Stelzer) through the transmitted human law of *fiqh*. Without this critical re-formulation of the Western category of ‘law’ in the light of Islamic cosmology and legal theology, the conundrum of Islamic law (bearing the complexity of the intersection between religion, divine Law and human law) cannot be fully solved in contemporary Muslim societies, where Western and Islamic jurisprudences need to be reconciled in the same normative social space, without a combined understanding of law and religion, as attempted in the present study. For this purpose, much comparative legal research is still needed, bringing serious attention to the impact of religion in the shaping of legal logic: a kind of research that will demand, prospectively, both the investigation of the Christian roots of Western law and a more comprehensive comparison between *fiqh* and the other legal traditions of the world (e.g., Hindu law, African customary law). The elaboration presented in these pages wishes to represent a little step forward towards this direction.

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Published on-line on March 28, 2024