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Legal Maxims in Islamic and Late Roman Law

Irem KURT[*]

Abstract: Legal maxims (qawāʿid) have been, especially after the contributions of Joseph Schacht to the understanding of the beginnings of Islamic Law, a popular area of research in Islamic studies. Certain scholars attempted to see Islamic legal maxims which resemble maxims of late Roman law, as indicators of the Roman origins of Islamic Law. Unfortunately there are very few comparative studies on similar maxims in both law systems, which aim to reveal the common features alongside differences to prove this assertion. This research tries to shed some light into this discussion, not only with a mere analysis of two of the most resembling maxims in both law systems, but also by comparing the terminology of al qawāʿid and al qiyās and the Roman terminus for legal maxims, named regula. Furthermore, this detailed approach aims to reveal the peculiarities of the two law systems by pointing out to their specific characters and different approaches.

Keywords: al Qawāʿid al Kulliyya, Regula, Firāsh, Periculum, Commodus, ad Damān.

İslam ve Roma Hukukunda Genel Hukuk Prensipleri

Öz: Genel hukuk prensipleri Batı'daki İslam araştırmalarında özellikle Joseph Schacht'ın İslam hukukunun kökenlerine dair iddialarından sonra sıkça ele alınmıştır. Bazı araştırmacılar Roma hukukuna benzeyen bir takım genel İslam hukuk prensiplerini, İslam hukukunun Roma hukukundan iktibas edildiği iddiasının bir göstergesi olarak değerlendirmişlerdir. Ancak bu iddiayı delillendirmek için iki hukuk sistemi arasındaki benzer kaideler detaylı bir analize tabi tutulmamıştır. Elinizdeki çalışma, bir taraftan iki hukuk sistemi arasında benzerlik bakımından en fazla göze çarpan iki kaideyi, diğer taraftan ise hukuk prensibini ifade eden kavâid ve regula kavramlarını, mukayese ederek, bu alandaki eksikliği gidermeye çalışmaktadır. Bu detaylı analiz aynı zamanda hukuk düşüncesindeki farklı yaklaşımlarını ve özelliklerini ortaya çıkararak iki hukuk sistemini birbirinden ayıran unsurlara da işaret edecektrir..

Anahtar Kelimeler: Küllî Kaide, Regula, Firaş, Periculum, Damân.

A. STATE OF THE FIELD

Legal maxims can be found in a very early stage of development of Islamic law. This sophisticated level of law-making in early Islamic jurisprudence has attracted the attention of scholars like Joseph Schacht, who tried to explain this matter, by rethinking Islamic history from a different perspective. Schacht's attempt to revise the history of Islamic law was mainly formulated in his *"The Origins of*

[*] M.A., Osnabrück University Institut für Islamische Theologie, iraam@hotmail.de.

Muhammadan Jurisprudence",[1] where he scrutinized the hadīth theory of Islamic scholars, which constituted one of the legal sources of Islamic Law. In his critics of the traditional hadīth theory, he claimed that the *ahādīth* were formulated in the second century after the hijra, to legitimate local legal practices, thus in general terms the Byzantino-Roman practice of the eastern provinces. Accordingly, the legal maxims -mostly canonized in hadith- were post formulated by scholars who gained legal knowledge from famous schools in Iraq. Schacht claims in his so-called *rhetoric thesis*, that the legal scholars in the first two centuries heard famous Roman legal maxims which circulated like "*worn-off coins*", in important centres of the eastern provinces and applied them to Islamic law. Later with the rise of orthodoxy in the third and fourth century A.H. these maxims were put in the Prophet's mouth. Schacht substantiates his hypothesis by a comparison with the Talmudic law, which experienced a similar development.[2] His contribution to the development of Islamic law affects researches in this field until today.[3]

Especially after Harald Motzki`s critics on Schacht`s hadīth theory, his rhetoric theory was replaced by other theories trying to explain the resemblances of the two law systems concerning terminology, concepts and judgments.[4] A by far daring

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1 Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford: Oxford University Press, 1979.

2 Joseph Schacht, "Foreign Elements in Ancient Islamic Law", *Journal of Comparative Legislation and International Law*, Vol. 32, Nr. 3/4, 1950, pp. 13-15 and "Droit Byzantine et droit musulman", p. 201.

3 An example for Schacht`s impact is the school of Revisionism, which emerged in the 1970`s especially with the influence of John Wansbrough´s ideas on the origins of the Qur´an (Peter Schadler, *John of Damascus and Islam: Christian Heresiology and the Intellectual Background to Earliest Christian-Muslim Relations*, Leiden: Brill, 2017, p. 145. Patricia Crone and Michael Cook, both students of Wansbrough, stated in their *Roman, Provincial and Islamic Law* that it was rather Greek and provincial law, which was recepted than Roman law. Furthermore Benjamin Jokisch defends in his *Islamic Imperial Law: Harun al Rashid`s Codification project* that the dhāhir ar riwāya of the hanafite school bases on nothing more than the Greek versions of the Corpus Iuris Civilis (for more information see: İrem Kurt, *Islam Ve Roma Hukukunda Genel Hukuk Prensiplerinin Mukayesesi*, İstanbul: Marmara Üniversitesi Sosyal Bilimler Enstitüsü, 2017 (Non Released Master Thesis).

4 Harald Motzki criticized the *e silentio* method of Schacht and developed the *isnād cum matn* method, which presents more precise and accurate information concerning date of ahādīth. See Harald Motzki, Richard Gramlich, Ulrich Marzolph, *Die Anfänge der Islamischen Jurisprudenz: Ihre Entwicklung in Mekka bis zur Mitte des 2./8. Jahrhunderts,* Stuttgart: F. Steiner Verlag, 1991.

hypothesis was suggested by Benjamin Jokisch in his *"Islamic İmperial Law: Harun Al Rashid's Codification Project"*, where he asserted that Kufan jurists like Ash Shaybānī (d. 189 A.H) and Abū Yūsuf (d. 182 A.H.) took part in a large-scale translation project of the Codex Iustinianus to Arabic. The *Kitāb al Aṣl* and other canons of the Hanafi legal school according this theory were not more than translations of parts of the Corpus Iuris Civilis. Jokisch's approach is very speculative, as there is no textual data he relies on.[5] Although his work is based solely on circumstantial evidences and should therefore be questioned, he is able to show some parallels of Byzantino-Roman law and early Islamic law, which are naked to the eye. Especially legal maxims seem to resemble each other in both law systems and should therefore be subject of a more detailed analysis, which is missing in Jokisch's research. However, the central question of such an analysis, which this work aims to outline, should not be the question whether these resemblances are indicators of a reception of Byzantino-Roman law by the Arabs. It is quite obvious that Islamic law is a product of the *Zeitgeist* of late antiquity, and therefore resembles other law systems like Byzantino-Roman or Talmudic law. Special attention should rather be paid on the idea of legal principles and the development of it within jurisprudence. After this general outline, the resembling principles should be examined not only by focusing on literal similarities but rather by focusing on meaning, usage and the special field of law they are applied on. In our opinion this kind of approach will show the special peculiarities of the developing law system of Muslims in contrast to the old, rooted and well-established law of Byzantino-Roman culture.

B. "LEGAL PRINCIPLE" IN ISLAMIC AND ROMAN LAW

The roots of the Roman legal principle, namely *regula*[6], reach back to the sacral times of Roman law. In its early times of development, Roman law was formulated by lawyers, which were in course of time called *veteres*. Classical jurists accepted

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[5] Benjamin Jokisch, *Islamic Imperial Law: Harun al Rashid`s Codification Project*, Berlin: Walter de Gruyter, 2011 and also Rudolph Peters, Book Review *in: Journal of the American Oriental Society*, Vol. 129, No 3 (July-September 2009), American Oriental Society, pp. 529-530.

[6] regula, pl. regulae. principles and maxims of Roman law. See also Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims*, Edinburgh: University Press, 1966, p. 106: *"Julian`s argument shows the strength of the old maxims. Where they were inconvenient and out of step with the trend of legal development, they could not be ignored; they demanded elaborate explanations to show that they were not applicable."*

their decisions and did not dare to change these, even if they seemed to be problematic and not applicable.[6] The normativity of these principles rooting in the sacral times of Roman law was never questioned. The norms were rather circumvented by complex commentaries or interpretations.[7] With the foundation of the Roman Republic, lawyers began to understand legal principles as descriptive. This development in republican Rome was accompanied with law finding, which was mainly based on casuistry and personal legal opinions. Law professors in the ancient Republican Rome like *Labeo* used the term *regula* for the descriptive principles which had grown more and more in number.[8]

Legal principles in Islamic law, especially those which were transmitted as *ahādīth* of the Prophet, obtain their legitimacy through the Prophet himself. The different approaches and understandings of the companions of the Prophet and their students in the forthcoming generations were transformed to legal schools called *madhāhib*, which had to legitimate their way of understanding of the divine revelation and the Sunnah of the Prophet.[9] Therefore, in addition to the canonized legal rulings (*furūʿ*), academic works dedicated to the method of legal finding (*uṣūl)* were developed in the following centuries (third and fourth centuries after the hijra). The search for the right method also guaranteed the legitimate way to expand the rulings and general statements of the divine revelation to newly emerging problems of the Muslim community. Beside the legal maxims found in the authoritative sources Qur'an and Sunnah, it was especially at this time of development that new legal principles were extracted and formulated by muslim scholars.

The Hanafi legal school centered in Kufa was the precursor of the systematization of the law by developing terminology of *furūʿ* and principles. The Casuistic method enabled the discussion of the problems that are yet to exist. The dialectic approach of the Hanafis was not only the methodic way to discuss legal problems, but also a reason to deduce principles and maxims of the law. The work

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7 Bruno Schmidlin, *Die Römischen Rechtsregeln – Versuch einer Typologie*, in: Max Kaser, Wolfgang Kunkel and Franz Wieacker, *Forschungen zum römischen Recht*, Cologne-Vienna: Böhlau Verlag, 1970, p. 57.

8 Schmidlin, Die Römischen Rechtsregeln, p. 205.

9 See also Christopher Melchert, The Formation of the Sunni Schools of Law 9th-10th centuries C.E., Leiden: Brill, 1997.

of al-Karkhī (d. 340/952) is the first academic result of this development. In his work, *al-Risāla* he reduced the Hanafite approach to Islamic law to main principles and maxims, which should summarize and systematize it.[10] Another work, written within the Hanafite legal tradition, is ad-Dabūsī's (d. 430/1039) *Taʾsīs an nadhar*.[11] In this work the approach of the hanafite tradition is compared with the approach of other law schools, by depicting the main principles the hanafite tradition is based on. Both these works are early examples of the writing of legal principles and at the same time, they imply that within the law school, the principles were regarded to be normative. It is possible to say that the *veteres* in Roman law, whose principles were considered as authoritative, can be compared with the founding jurists of the *madhhab*, whose results in law finding were collected in the form of principles.[12]

Both law systems have a certain period where casuistry was applied. So the next step further was -in both law systems - to work out legal principles, which were considered, as they relied on personal legal finding, rather descriptive than normative.

Roman law was quite heterogeneous until the Republican times. With the influence of the Greek culture, lawyers of the Republic started the golden age of Roman law, mainly by defining and systematizing the law. It was at this period that the term *kanon* (measure, straight edge) was translated from Greek to Latin as *regula* (rule, principle), what was up till then only used at philological discussions, transformed into a *terminus* for the law.[13]

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[10] In his al Risāla, Karkhī lists a number of legal principles resulted of the hanafi legal approach. The principles he lists concern both legal theory and legal judgments: general terms of the law of contract, law of procedure, ritual law (owes) and hermeneutic principles like āmm, khuṣūṣ, naṣkh and ta`wīl and further principles concerning ijtihād, `illa, ḥikma and interfering sources (ta`aruḍ). (Ali Pekcan, "İslâm Hukuku Literatüründe Fıkhın Genel Kurallarına Dair İlk Risale Kerhî'nin (ö. 340) "el-Usûl" adlı Risalesinin Çeviri ve Değerlendirilmesi", *İslamî Araştırmalar*, 2003, b: XVI, :2, pp. 293-307.)

[11] Necmettin Kızılkaya, *Hanefî Mezhebi Bağlamında İslam Hukukunda Küllî Kâideler*, İstanbul: İz Yayıncılık, 2013, pp. 146-150.

[12] See for example al Karkhī, and ad Dabūsī. These jurists count in their works both general principles concerning judgements and principles of jurisprudential method. (Pekcan, "Kerhî'nin (ö. 340) "el-Usûl" Adlı Risâlesinin Çeviri ve Değerlendirilmesi" and Yusuf Kılıç, *Ebû Zeyd ed-Debûsî'nin Te'sisu'n-Nazar Adlı Eserinin İslâm Hukuku Bakımından Ehemmiyeti*, İslâm Medeniyeti, 1982, Vol. 5, Nr. 3, pp. 45-88.)

[13] Stein, *Regula Iuris*, pp. 53-61.

There is no evidence that the term "*kanon*" was used in early Islamic jurisprudence, too. The Greek term *kanon* was solely used for the recording of taxes. This term entered into the literature of Islamic law with al Juwaynī (died 478/1085), defining law principles and maxims[15]. But the term "قانون", was not frequently used to express maxims in Islamic law. Instead, the term *al-qāʿida* was used, while the term *qānūn* remained as a term of philosophy and *kalām*[14]. However, the earliest term to express legal principles in Islamic law was *qiyās*. In the works of al Karkhī and al Dabūsī this term is used frequently to express principles of law. *"al qiyās"* derives from the verb *qāsa-yaqīsu*, which means "to measure"[15] and connotates the term *kanon*, which also means "measure, unit". C. H. Versteegh tried to explain this resemblance in his *"The Origin of the Term 'Qiyās' in Arabic Grammar"*[16]. Although the resemblance of the two terms seems very striking, it would be beyond the scope of this study to discuss a presumable relationship between these two terms. Nevertheless, the term *regula* as a phrase describing the connecting causes of a legal case *(causa coniectio)* can be compared with the term *qiyās*, describing the synthesis of several legal cases in one sentence.[17]

The question, whether principles of law should be regarded as normative or rather descriptive was discussed in the classical period of Roman law. The school of the *Sabinian*s defended the principles as descriptive, the *Proculians* upheld them to be normative. One reason for this dispute between law schools is their methodological backgrounds: the *Sabinians* were Stoics whereas the *Proculians* were Aristotelians.[18] This dispute cannot be viewed in Islamic law in this type. Yet, it is mainly accepted that maxims which are constituted by divine texts are normative. In contrary, maxims, which were formulated within the scholarship of law schools as *uṣūl* (the roots, the pillars) derived from the revelation are merely

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[14] An exception is Abū al Walīd Ibn Rushd al Ḥafīd, who uses qānūn as legal maxims, see the Introduction of his Bidāyat al mujtaḥid.

[15] Hans Wehr, edt. John Milton Cowan, *Dictionary of Modern Written Arabic*, 3rd Edition, Spoken Language Services, 1976, p. 804.

[16] C. H. M. Versteegh, "Origin Of The Term 'Qıyās' In Arabic Grammar", *Zeitschrift für Arabische Linguistik*, No. 4, Harrassowitz Publishers, 1980, pp. 7-30.

[17] For a better understanding of the early development of Islamic law see Hasan Hacak, *Atomcu Evren Anlayışının İslam Hukukuna Etkisi: Kelam-Fıkıh İlişkisine Dair Bir Analiz,* İstanbul : Ensar Neşriyat, 2007

[18] Kızılkaya, *Hanefî Mezhebi Bağlamında İslam Hukukunda Küllî Kâideler,* p. 65.

descriptive. Thus, especially principles concerning Islamic jurisprudence (*uṣūl*) were discussed amongst law schools. The normative understanding of the *Proculians* relies on Aristotelian dialectic. They were applying the method of deduction to law finding and upheld that law had to rely on principles. The impact of Aristotelian logic can be seen in Islamic law, too. Aristotelian logic had a great impact especially on the Shafi`ite and Malikite law schools after the fifth century A.H.. The *fuqahā* of these law schools applied the deductive method to law, which resulted in the rise of legal maxims literature.[19] One product of this development was the formation of five fundamental, axiomatic principles by Qādī H usayn al Marvarruzī (d. 462 A.H), which should summarize the maxims of the whole law[20]: 1. Acts are judged by the intention behind them, 2. Harm must be eliminated 3. Certainty is not overruled by doubt 4. Custom is the basis of judgment 5. Hardship begets facility.[21]

The function and role of maxims in Islamic legal thinking increased over the centuries. The terminus for maxims and principles was the term *qāʿida,* a derivative of the noun *quʿūd*, meaning "to sit down". The concept of principles, beginning with *qiyās* and *aṣl*, transformed to an axiomatic and normative understanding.[22] Therefore the term *qāʿida*, which was the terminus *per se* for legal principles, should be translated as legal "maxim". Yet it was emphasized that legal maxims are not the sole source judgment. This idea can be found in the definition of *regulae*, too: *"The law is not taken from the rule, but the rule is taken from the law"*. [23]

The *regulae* of the classical period of Roman law were considered as descriptive, Roman lawyers dreaded principles which would restrict their personal legal opinions. However, in Byzantino-Roman times the *regulae* were considered as normative. Islamic scholarship which emerged within the borders of Byzantino-Roman law, tried to establish normative principles by reducing the results of their personal legal finding to maxim-like sentences. It is very striking that the first

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[19] For more information about the interdependancy of epistemology and ontology in Islamic theology and early Islamic law, and the impact of epistemologic turns to Islamic law, see Hasan Hacak, *Atomcu Evren Anlayışının İslam Hukukuna Etkisi : Kelam-Fıkıh İlişkisine Dair Bir Analiz,* İstanbul : Ensar Neşriyat, 2007.

[20] Mustafa Baktır, "Kaide", *DIA*, XXIV, 205-210.

[21] Mustafa Baktır, "Kaide", *DIA*, XXIV, 205-210.

[22] Kızılkaya, *Hanefî Mezhebi Bağlamında İslam Hukukunda Küllî Kâideler,* p. 61.

[23] Dig. 50.17.1.

principles which were established within the Hanafite school of law were applied to one distinct cause, as it was the case with *regulae* in classical Roman law. Al Karkhī for example states in his ar Risāla:"*Question and its answer is premised on what is popularly and common accepted, not on what is rare and seldom"*. This maxim-like principle is, as al Nasafī (d. 710/1310) explains, applied on the very specific chapter of law of the vows. According to this principle, someone who vowed not to eat any eggs is supposed to not eat any eggs of birds. The eggs of fish and fishlike animals are not included. To compare, one of the most known *regulae* of classic Roman law, the *Catoniana Regula*, is applied on the law of legacy:"*What is not valid at the beginning, doesn't become valid in time."*. The Catoniana regula states that a legacy, which would have been invalid when the testator had died at the time of the execution of his will, is invalid whenever the testator dies.[24] As it can be seen, both principles are applied to one specific chapter of law. This indicates that in the beginning of both Roman and Islamic law the principles were not axiomatic maxims, but principles applied to a confined space of law.

Conclusively we should also mention that in the beginnings of Islamic Law, principles were statued to systematize the law. Thus, *regulae* in the classical period of Roman law were established for the same matters. Presumably, the Byzantino-Roman culture affected Islamic scholarship to such an extent that the defenders of a *madhhab* attempted to legitimate their legal tradition through normative principles, which did affect only one specific chapter of law. After these *madhhabs* and their approaches to law had been established through canons of both laws (*furū`)* and method (*uṣūl*) and the triumph of the Aristotelian dialectic in Islamic scholarship, Shafii jurists in particular developed axiomatic maxims, which were applicable to a wider area of Islamic law.

Given that the teaching of *regulae* in Byzantine was a basic part of the curriculum[25], it is most likely that these *regulae* were known from Islamic jurists.[26]

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[24] Ulrike Babusiaux, *Wege zur Rechtsgeschichte: Römisches Erbrecht*, utb. Publisher, 2015, p.251.

[25] Havva Karagöz, *Roma Hukuk Kuralı (Regula iuris)*, Istanbul: On Iki Levha Yayıncılık, 2010, pp. 70-72.

[26] Hallaq explains in his "*Origins and Evolution of Islamic Law*" that, given that the Islamic law emerged within the region of Syria, the influence of Byzantino- Roman law is natural. However, this does not mean, that law in Hejaz in times of the Prophet was unknown, moreover the Hejasians were *"(…thoroughly familiar with the cultures of Hira and, especially, the Syrian*

On the other hand, the development of principles to axiomatic maxims shows that Islamic legal principles were formulated in a natural process of law as such. However, some resembling principles led to the suspicion that some of these principles were received from Roman law. As there is no evidential textual data to approve this assumption, a detailed analysis of two of the most resembling maxims should clarify the discussion.

1. Pater Est Quem Iustae Nuptiae Demonstrat[27] – **الولد لصحيح الفراش و للعاهر الحجر**[28]

One main argument of the reception theories[29] of the western scholars is the legal maxim, *"Pater est quem nuptiae demonstrant"* – "The father is he, to whom belongs the marital bed", which is also in the Islamic literature known as a hadīth reported by `Urwa Ibn ay Zubayr: "الولد لصحيح الفراش و للعاهر الحجر" *"Paternity of the child goes to the (marital) bed and the fornicator gets restriction."*. In this context, Schacht is arguing this resemblance as follows: Primarily, the possible date of occurrence of this transmission can be dated to the second century after the hijra. The common link is ʿAṭāʾ b. Abī Rabāḥ, which is obviously an invention. Secondly, because of the matter of fact, that the Quran is removing the problem of the fatherhood with the requirement for women to wait their term in case of divorce (Q 2:231), this hadīth would have been redundant. A third argument is, that Aḥmad b. Ḥanbal (d. 241/855) is attesting in his Musnad that Khalif ʿUmar did not apply the hadīth. Therefore, Schacht claims that the above-mentioned principle is the Arabic version of the *nuptia regula* and an adaption.

Taking into account, that Schacht is criticizing the hadīth literature in principle, we can assume that his argumentation isn't satisfying enough. Schacht is substantiating his point of view to the hadīth literature by using the *e silentio*

Busra, which they visited regularly in their role as prominent merchants." (Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge: Cambridge University Press, 2005, p. 19.)

27 Dig. 24.5.19.

28 "The father is he, to whom belongs the marital bed and the fornicator gets restriction/ stone". The hadith can be read in two different ways. We prefer the reading above. Harald Motzki states that both readings are plausible. (Motzki, Gramlich, Marzolph, *Die Anfänge der islamischen Jurisprudenz*, p. 84).

29 Adolf von Kremer and later Joseph Schacht stated that this principle is evidential for the reception of Roman law. See in Ulrike Mitter, *Das frühislamische Patronat. Eine Studie zu den Anfängen des islamischen Rechts*, Würzburg: Ergon Verlag, 2006, pp. 49-52.

method, in which he dates the hadīths to the second century of hijra. On the contrary, as an invalidating argument against Schacht`s *e silentio* method, Harald Motzki is arguing with a more convincing theory named *isnad cum matn* analysis. Motzki, who is one of the major advocates of the *isnad cum matn analysis*, is on the one side criticizing Schacht, as we mentioned before and on the other hand, concentrating on the narration of ʿAṭāʾ b. Abī Rabāḥ, by defending the assumption, that the narration of ʿAṭāʾ b. Abī Rabāḥ is authentic and indeed from the first century of the hijra.[30] According to this, the hadīth "Paternity of the child goes to the (marital) bed" is to be dated by the time of the Prophet and is therefore authentic. The *isnād cum matn* method rules the issue, that not only the isnād (اسناد), the chain of narrators- the narrators (rāwi – راوي plural ruwāt (روات), but also the text (matn متن) is important by interpreting and analyzing the hadīth literature. Following Motzki with the *isnad cum matn* theory, who evaluates the authenticity of this hadīth, it is adjuvant to look at the wording and style of the narrator. It provides access to a more academic and current analysis and investigation method as Schacht`s *e silentio* theory. In his work *"The Origins of Islamic Jurisprudence"* Motzki investigates the narration of Aṭā bin Ebī Rabāḥ, the faqīh (فقيه) of Mecca, in the context of the hadīth: "الولد لصحيح الفراش و للعاهر الحجر", "Paternity of the child goes to the (marital) bed". In the beginning it was thought, that this hadīth wasn't narrated from one person, but it was a composed narration. Motzki shed light on it.

The first tradition that Motzki examines, is narrated by Ibn Jurayj about the child of Maysara. In this tradition, Ibn Ziyād claims paternity upon the child of Maysara from a slave woman. Another pupil of ʿAṭā, Ibn ʿUbayd b. ʿUmayr asks whether in this case physiogonomists have to decide whom the child belongs to. ʿAṭā answers by transmitting the above-mentioned *firāsh*-principle and insists that the child belongs to the master of the woman.[31] In the second tradition, Ibn Jurayj is confronting his teacher with a new case again, to find an answer. This time, after a woman has given birth, the father rejected his paternity. ʿAṭā answered and proclaimed that in this case, the husband had to utter the oath of condemnation (*liʿān*) and to give the mother the legal guardianship. Ibn Jurayj raised an objection and asked his teacher why he didn't judge according to the paternity hadīth. For

[30] See Motzki, Gramlich, Marzolph, *Die Anfänge der İslamischen Jurisprudenz***.**

[31] Motzki, Gramlich, Marzolph, *Die Anfänge der İslamischen Jurisprudenz,* p. 76.

ʿAṭā the firāsh principle mentioned in the hadīth was used to prevent possible rejections of guardianship, like it was done during the so-called Jāhiliyya.[32] In the latter case, it can be seen, that the husband expresses his doubt that his wife is fornicating. By illuminating the historical background of the hadīth, ʿAṭā is demonstrating that if there is the slightest suspicion of the husband, that his wife fornicated, he cannot only reject the child, but he also has to divorce his wife. Also, the Islamic law literature is representing the same opinion, that this principle should be applied only in such cases, in which the woman (wife) confesses her fornication or another man asserts his paternity upon the child.

Arguments for the narration of ʿAṭā can be found in some early sources such as in Mālik`s (d. 179/795) al-Muwaṭṭaʾ and ʿAbdarrazzāq's Muṣannaf. In addition to these sources, Muḥammad b. Ḥasan ash Shaybānī mentioned the *firāsh* hadīth and the practice of the Prophet Muhammad under the chapter of confessing that the born child is of an act of illegitimate intercourse, which is fornication (*zinā*). The entry there is as follows: Ṣaʿd Ibn Abī Waqqāṣ is taking the son of ʿAbdallāh bin Zam`a at his side after his brother told him at the deathbed that he had illegitimate intercourse with Ibn Zam`a`s slave and that the son of Ibn Zem`a is, in fact, his son. Abdullah bin Zem`a asserted the claim of his brother, and the case reached the Prophet Mohammad. The Prophet expressed that "Paternity of the child goes to the (marital) bed (...)" and decided upon the paternity of Ibn Zem`a. This judgment is based on the idea that, because of the matter of fact, that Ibn Zem`a is the "owner of the bed" (*ṣāḥib al firāsh*), the child is attributed to him, even if this child is a "result" of fornication. Another important aspect of this narration is that when the child took after Abū Waqqās` family, the Prophet commanded the daughter of Ibn Zem`a`s, which is at the same time the wife of the Prophet, Sawda, to wear her veil. According to the judgment the son would be the brother of Sawda, so she shouldn't have worn her veil as a precaution. The rāwī of the hadīth explains that the Prophet commanded so because the child's resemblance to Abū Waqqās` family was that striking.

By regulating the *firāsh* maxim, it is also indicated that the fornication of someone shall not be legitimized. A closer look at the practice of the Prophet shows the main intention. If someone claims right upon a child born in the marital bed of someone else, he is making public, that he has fornicated. According to this claim

[32] Motzki, Gramlich, Marzolph, *Die Anfänge der Islamischen Jurisprudenz,* p. 115.

ḥadd az-zinā would be evident. At this point of view, this maxim/ hadīth can be seen as a precaution for the punishment of zinā (حد الزنا).[33]

One of the main arguments of Schacht is the narration about `Umar al Khaṭṭāb that is narrated in al-Muwaṭṭaʾ. In this narration, two men request for assistance from `Umar al Khaṭṭāb to solve the problem of paternity and the legal guardianship. Sulayman Ibn Yasār says that this child was born before the rise of Islam. To identify the child's origin, `Umar used the *ʿilm al qiyāfa* (italic), but he did not get a result. Afterwards he asked the mother of the child who the father was. She told `Umar, that she had a relationship with one of them before she menstruated and then had a relationship with the other one; because of this she does not know who the father is. `Umar asked the child to whom he wants to go. According to Schacht, the matter of fact, that `Umar consulted an *ʿilm al qiyāfa* (physiognomy) expert shows, that this maxim is an invention because it was known among the Arabs to clarify the paternity. But this shows that Schacht did miss the correct use of this maxim. In the above mentioned ʿUmar case, two men came to Umar to judge who the father was. If one of the men were the husband or master (of a slave) the maxim would be used. But in this case, no one was the owner of the bed. According to this, the fact that `Umar did not use this maxim isn`t a sign of his unknowingness. Quite the opposite, it shows that he did know very well the usage and concept of this maxim and because of this he consulted the *`ilm al qiyāfa* expert.[34]

Schacht also ignores another narration in al Muwaṭṭaʾ. In this narration, the Prophet Mohammad said to a woman who fornicated "*There is no unlawful claiming of paternity in Islam. What was done in pre-Islamic times has been annulled. The child is attributed to the one on whose bed it is born, and the fornicator is deprived of any right.*" He explained that the da`wā principle of the *Jahiliyya* is invalid.[35] In this narration, an ancient tradition of the *Jahiliyya* is replaced by the maxim. Schacht asserts that this maxim was used in the Umayyad period for the women who transgressed the command of the `idda العدة period of waiting and had

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[33] Imām Mālik Ibn Anas, al Muvaṯṯa, trl. by M. Büyükçınar, Vecdi Akyüz, Ahmet Arpa, Durak Pusmaz, Abdullah Yücel, Istanbul: Ensar Yayıncılık, 2014, p. 486.

[34] Imām Mālik Ibn Anas, al Muvaṯṯa, *Muvatta*, p. 487, 488.

[35] Sulaymān Ibn Ash'as Ibn Ishāq al Azdī Abū Dāwūd as Sijisṯānī, *Sunanu Abū Dāwūd*, edt. Muhammad Awwāmah, Jiddah: Dāru al Qıbla li as Saqāfati al İslamiyya, 1998, Kitāb aṯ ṯalāk.

its origin in the pre-Islamic Byzantine law. But as mentioned before, this maxim was used to designate the paternity and legal guardianship, rooted a pre-Islamic practice.

This maxim was also widespread in the first period fiqh sources (2nd century A.H.). Abu Yūsuf shows in his book "Ikhtilāf Abū Hanīfa wa Ibn Abī Leylā", that Abū Hanīfa and Ibn Abī Laylā put this maxim into practice. After the message of the death of her husband reached a woman, who were waiting his "lost" *(ġāib)* husband and married and even got a child, her dead-presumed husband returned. Abū Hanīfa assigned the child to the first (lost) husband and Ibn Abī Laylā to the second. Ibn Abī Laylā considered it inappropriate to use the *firāsh* maxim in this case, as Abū Hanīfa did because in this case there does not exist fornication. The decision (ḥukm) of Abū Hanīfa is explained in Imam Muhammad`s *al Asl*: Because she got married while her husband was lost and her husband returned afterward the second marriage nikāḥ became invalid. And because the first nikāḥ (نكاح) was legitimate, the child should be assigned to the first husband. The wife should divorce the second husband and return to the first. In al Asl, the maxim itself is not used beside the narration mentioned above, but only mentioned to explain the reason of the *hukm*.

As we can see in the hadīth and the early fiqh sources the *firāsh* maxim is used by the Prophet, to ascertain the paternity in case of fornication. The matter of fact, that the Prophet used the term *firāsh*, instead of nikāh, was emphasized by jurists like al Shaybānī, who extended this ruling by understanding the term firāsh as a contract (*ʿaqd)* regarding bed sharing.

The firāsh-maxim was also used in early sources like al-Shaybānī's *al-Aṣl* and Abū Yūsuf's *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*. Because of this, the firāsh-maxim includes not only children born in a relationship in forms of nikāḥ, but also children born from a female slave (sg. *jāriya*) and from so-called *umm al walad* (lit. "mother of the child"). For example: If the owner of a slave, the so-called master, married his female slave off to his slave and if after the marriage a child was born and the master claimed that the newborn is his child, the legal guardianship is given to the slave, not to the master. [36]

[36] Abū Yūsuf, *Ikhtilāf Abū Ḥanīfa wa Ibn Abī Laylā,* edt. Abū al Vafā al Afghānī, Haydarabad: Lajnatu Ihyā al Ma`ārif an Nu`maniyya, 1358/1939, s. 183.

Ash Shaybānī mentions another example: If a servant woman bears a child, and another man claims that he had married that woman without the permission of the master and the child was born within a year after the marriage, and he shows proof of his assertion. In contrary the master of the woman shows proof that he had sexual intercourse with that woman, the question to whom the child will belong to, is according to Ash Shaybānī the man, who showed proof of the marriage contract.[37]

As we can see in the hadīth and the early fiqh sources the firāsh maxim is used by the prophet, to ascertain the paternity in case of fornication. The matter of fact, that the Prophet used the term firāsh, instead of nikāh, showed that he means any kind of *`aqd* (contract) concerning the share of bed.

The term *nuptia* in, "Pater est quem iustae nuptiae demonstrant"[38] ("The father is he who is married to the mother.") points toward a marriage. To understand the *regula*, it is necessary and inevitable to know the terms "family" and "marriage" and their usage and meaning in Roman law.

In Roman Law marriage is not a juridical or legal transaction, but a social fact (reality) which indicates juridical results. In this way, it is sufficient for a marriage that two *puberes* (adolescents) come together and claim by mutual consent to rest monogamy in a home lifelong. The quite contrary term, to handle with non-legal, long-term and not hidden relations, was called *concubatio*. For the *concubatio* it is sufficient to be in the age of *puberes* and the mutual consent. But, the born-children of a *concubatio* were not legal and couldn't inherit. As Dig. 2.4.5. says: *„pater enim is est, quae nuptiae demonstrant."* (*the father is the one indicated by marriage*). Dig. 1.5.23. gives more information about the children besides a legal marriage[39], *the sporii* or *vulgo quasit*, and says that the legal guardianship goes to the mother of the children.[40] The real, biological father is not legally bounded to take care and

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[37] Ash Shaybānī, el-As l al Ma`rûf bi al Mabsût, Tashīh: Abū al Wafā al Afghānī, Idârat al Qurân wa al Ulûm al Islamī, vol. 5, p. 54.

[38] Dig. 24.5.19.

[39] Dig. 1.5.24 quotes another important regula: "*Mater semper certa est*", the mother is always certain.

[40] Ursula Gärtner, *Brandenburger Antike Denkwerk: Kulturelle Identität – Römisches Recht*, Potsdamer Lateintage, Potsdam: Potsdam University Press, p. 138. see also Friedrich Heinrich Vering, *Geschichte und Institutionen des römischen Privatrechtes*, Mainz: Franz Kirchheim Verlag, 1870, pp. 118, 119.)

guarantee the maintenance[41], because there does not exist an *agnatio* relation, they are only *personae sui iuris*.[42]

In Roman law the principle of family does not depend on the bloodline (*cognatio)*, but *the agnatio* principle, the hegemony of the father of the house. The *patria potestas* gives the father of the house the right to sell his child to another man and also can adopt a child from another father. Another result of the *patria potestas* shows similarities to the distribution of the heritage which is based on the parentage (blood-line). According to this, the father is authorized to inherit his own and adopted children. But the upon mentioned *sporii* cannot be adopted.

With the rise of Christianity, the blood relationship being based on the *agnatio* principle lost its importance. In the imperial period of Rome, the influence of the father on his wife, as the influence on his children lost ground. With this, the impact of *agnatio* lost ground and the *cognatio* gained influence. In the imperial period, also the rigid marriage law of Augustus lost ground and the non- legal relations, the *concubatio* increased, especially with Constantine, Theodosius and Iustinian. Even if the Codex of Iustinian says about the non-legal children *Filius naturalis ventrem sequitur*[43] e.g. the natural born children are rooted by their mothers' affiliation, it was tried to legitimize these children through new methods and procedures.

Still, at the time of Augustus, the *libri naturales* (natural children) were able to inherit and be taken care of by the father. But the *adulterinii* (children of fornication) were not able to have these rights. Because of the increase of the *concubinatio*, Christian emperors tried to legalize it. After a pair living in *concubinatio* decided to marry, the born and in future will born children were classified as legitimate ones (so-called *legitimatio per subsequens matrimonium*). The legitimation, on the other hand, was possible in several ways.[44]

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41 Raimund Friedl, *Der Konkubinat im kaiserlichen Rom: von Augustus bis Septimus Severus.*, Stuttgart: Franz Steiner Verlag, 1996, p. 70-76.

42 Peter Apathy, Georg Klingenberg, Martin Pennitz, *Einführung in das römische Recht*, 6th Edition**,** Vienna: Böhlau Verlag, 2016, p. 70.

43 Cod. Iust. 11, 47, 21 §1.

44 The types of legitimatio in Justinian times were as counted: 1. *Legitimatio per subsequens matrimonium* 2. *Legitimatio per oblationem curiae* 3. *Legitimatio per rescriptum principis.* However the legitmiatio was achieved, the child's consens was needed, because he came under the patria potestas and was no longer sui iuris. See Ferdinand Mackeldey, Conrad Franz

In the regula to express the marriage, the term *nuptia* was used. *Nuptia* means the legal relation and intention to live a lifelong by mutual agreement between a man and a woman. According to this, the children will be affiliated with the father. 7 months (181 days) after the marriage, 10 months before the end of the marriage (period) children are *iustium matrimonium* - legal.[45]

The *nuptia maxim* aims to regulate the ethnic affinity of a newborn child in a "legal" marriage. To determine the blood-line and paternity of the child the mating time is important. According to this, the explained *legitimatio* practice wouldn't be possible. Iustinian counted the non-marriage children as "normal" marriage (legal) children. If the mother was in any time after the sexual relation married with the father, the child was regarded as legal- a child from marriage. Therefore, we can see that the regula was not in use. Normally, according to the *nuptia maxim*, a husband was engaged to take care of the child and take over paternity, but if the pregnancy could be negotiated, and the husband claimed that the child is not his, he was not forced to take over the paternity. We can find an example in the Digesta: Iulianus claims that if a husband is absent for a very long time and sees after his return that his wife is pregnant, it is not fair that according to the rule of the Senate that the father is regarded to protect and maintain his pregnant wife, the father takes the paternity and has to take responsibility. This maxim is written in Digesta 25.3.1. §14 and shows how the nuptial maxim was used.[46]

Iulianus also says that if a woman notifies her husband that she is pregnant, and he does not deny it, it must not be concluded from this that the child is his, although he can be compelled to support it. It would, however, be very unjust if, where a man has been absent for a long time, and having returned, finds his wife pregnant, and for this reason repudiates her, and he neglects to comply with any of the provisions of the decree of the Senate, the child should be his heir.

It is clear, that the lost husband, who was absent for a long time cannot be the biological father. According to the *regula*, he had to accept the child as his own, as it is the case with the *firāsh* principle. But the text shows that the husband has the

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Roßhirt, *Lehrbuch des heutigen römischen Rechts: Besonderer Theil*, vol. 2, Frankfurt: Heyer Verlag, 1842.

45 Gärtner, *Brandenburger Antike Denkwerk: Kulturelle Identität – Römisches Recht*, p. 138.

46 Eduard Böcking, *Abriss der Institutionen des römischen Privatrechts*, Bonn: Henry & Cohen Publishers, 1860, p. 172.

right to deny the paternity. If he does so, he has to carry the consequences. If the husband/father denies the child, the bloodline transfers to the mother.[47] In Dig. 25.2. and 25.3 it is constituted that, *"If this case is brought into court, and a decision be rendered on the point as to whether or not the woman is pregnant by her husband, the child must be recognized by the husband, whether it belongs to him, or not"*. This shows, that if the court decides that the child is from the husband, who denies it, he has to accept the child. "*If, on the other hand, the judge should decide that the child does not belong to the husband, even though it is really his, it is settled that a decision of this kind is equivalent to law.*" This shows again that the question of paternity depends on the decision of the court. As it can be seen, the general rule that the child belongs to the marital bed is not applied here.

Searching for the da`wa practice in Roman law does again not reveal any results if we look at the Byzantino-Roman law in the Syriac reception in the fourth century A.D, the Syrian-Roman Law Book. The only indicating phrase of §13 is the one, in which the husband accused his wife that she fornicated.[48] According to the Codex Iustinianus 9.9.11 (after the emperor Alexander, 226 A.D.) it was forbidden to a husband to divorce or leave his wife after the accusation of fornication. In the era of Constantine, this maxim was canceled and in order to avoid any doubt, it was allowed to start the process to prove the claim of fornication (Codex Theodosianus 9.7.2. and Codex Justinianus 9.9.29, (30)).[49] In cases like this, all the *dos* (dowry) went to the husband. The wife lost all her financial belongings. Information about the future and the consequences of the (normal marriage born) children were not given. This maxim resembles the li`ān-principle in the Islamic law. According to the *li`ān* practice, if the husband accuses his wife of fornication, he was directly divorced and separated from his wife.

As a result, it can be said that the *nuptia regula* was only applied in normal cases, where a child was born in a legal marriage. With the constitutions of Augustus, illegitimate born children could be counted as legitimate ones through the *legitimatio.* This and the examples mentioned above show that the *regula* was

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47 Adolf Berger, *Encyclopedic Dictionary Of Roman Law*, Philadelphia: The American Philosophical Society, 1953, p. 646.

48 Walter Selb, Hubert Kaufhold, *Das Syrisch-Römische Rechtsbuch,* Vienna: Austrian Academy of Sciences Press, 2002, vol. 2, p. 13 and vol. 3, p. 69.

49 Selb, Kaufhold, *Das Syrisch-Römische Rechtsbuch*, vol. 3, p. 69.

limited more and more in practice. We could not find any traces of the Jahilian da`wa practice, in Roman law, nor in its local derivatives like the Syriac-Roman law book. Perhaps this practice is rooted on tribal law, which should be examined further. Nevertheless, it can be seen that the *nuptia regula* was describing a given, normal result of the marriage contract, whereas the Islamic *firāsh* dictum was applied in special cases of fornication and claim of the child by another man.

2. Secundum Naturam Est, Commoda Cuiusque Rei Eum Sequi Quem Sequentur İncommoda - الخراج بالضمان

The Roman regula *"It is according to nature, that the one who has the disadvantage of something gets the advantage of it."*[50], resembles very strongly the Islamic principle, *"The advantage comes with the responsibility."* Based on this striking resemblance, Benjamin Jokisch states that this principle was adapted from Roman law.[51]

The Roman *regula* is one of the *regulae* in the Digest's last chapter and is applied to a vast area of legal cases. The word "*commodum*", which occurs in the *regula*, means advantage, profit, gain and benefit. "*Incommodum*" can analogically be translated as "disadvantage". In Islamic law, the word "ḍamān" means literally "to take something on oneself, to take an obligation, to guarantee something".[52] The word "kharāj" means profit, gain, and benefit. It would not be wrong to state, that the terms "advantage" and "responsibility" resemble the words "*commodum*" and "*incommodum*" literally. The striking difference is the word "ḍamān", which we preferred to translate here as "responsibility". Although it is not difficult to translate *commodum* and *incommodum*, difficult is the case of ḍamān and to determine its meaning and usage. But, if we look at the usage of the Prophet, it becomes much easier to determine the meaning of ḍamān.

The Islamic principle "*The advantage comes with the responsibility*" traces back to a hadīth from the Prophet. The hadīth, which was cited by famous hadīth scholars like Aḥmad b. Ḥanbal, at-Tirmiḏhi, Dārakutnī, Bayhākī and Ḥākim reaches back to `Āisha, who transmits that a man had bought a slave from someone, but after a certain time, he realized that the slave had a *noxum* and wanted to give

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50 Dig. 50.17.10.

51 Jokisch, *Islamic Imperial Law*, pp. 402, 403.

52 Hamza Aktan, "Damân", DIA, VIII, pp. 450-453.

him back and receive back his payment. This case was presented to the Prophet, who then gave the slave back to the seller and ordered him to give back the price the purchaser had paid. The seller expressed his exhaustion about this judgment and argued that the buyer made a profit by the labor of the slave and claimed that he had right on the profit. Thereupon the Prophet answered with "الخراج بالضمان".[53]

The hadīth gives important information about defects and obligations which are connected with the defects. The purchaser, who notices a defect of the purchased slave, has the right of return. At the same time, he is not obliged to pay the profit of the labor back, because the Prophet explains that, the owner, who carries the pecuniary liability, also has the right of profit. The word, الخراج is in this case the غلة, the labor and work of the slave. الضمان is here not only the compensation and restitution of the property to someone else, for example if the slave causes an accident. Furthermore, it also implicates the disadvantages, which affect solely the owner of the property, as for example if the slave gets ill, or even dies.[54] For this reason, I preferred to translate "ḍamān" as "responsibility".

Although there is a great resemblance between the two principles, we can see differences in their usage by comparing the Roman judgments with Islamic law. The 1st Chapter of the 21st Book of the Digests contains arrangements concerning defects of slaves. The *aedilis* initiated certain edicts, to solve conflicts concerning slaves. These edicts determine that the vendor has to inform the purchaser about existing defects. If the vendor missed to inform the purchaser and sold the slave, the purchaser had the possibility to charge the vendor with *dolus actio* (charge of fraudulent damage). Besides this, the purchaser had the right to achieve a compensation of his loss with the *actio emptii*. As the contract of purchase and sale is a contract of *bona fide*, the responsibility lies upon the vendor. He is obligated to know the defects of his goods and has to inform the purchaser. Moreover, he has also to be aware of the hidden defects of his goods.[55]

These edicts are important with regard to Islamic law. In Digests 21.1.1 the conditions of the right to return are mentioned like this:

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53 Ibn al Māja, Sunanu Ibn al Māja, hadīth nr. 2242 and Abū Dāwūd, Sunanu Abū Dāwūd, hadīth nr. 3508.

54 Ali Bûrnû Abū Hāris al Ghazzi**,** *Mevsûatu al Qavâidu al Fıkhıyya*, Beirut: Muassasatu ar Risāla, 2003, vol. 3, p. 274.

55 see Türkan Rado, *Roma Hukuku Dersleri- Borçlar Hukuku*, İstanbul: Filiz Yayıncılık, 2016.

"(...)If, however, after the sale and delivery, the value of said slave shall have been diminished by the act of the slaves of the purchaser, or of his agent; or where a female slave has had a child after the sale; or, if any accession has been made to the property growing out of the sale; or if the purchaser has obtained any profit from said property, he must restore the whole of it(...)"[56]

Obviously, in cases where the slave is returned because of defects, the purchaser is obliged to return both the costs and the profit, which he has gained from the slave. In contrast, the Prophet judged that the purchaser is not obliged to do so. According to Islamic Law then, the purchaser has not the duty to return back the gains and profit he has gained from the defect good. Furthermore, the purchaser of the slave, who caused any damage during the ownership of the purchaser, is responsible for the compensation.

As it could have been possible that these rules changed within the Eastern practice of Roman law it is important to enlighten this with the rulings stated in the Syro-Roman law book. The paragraphs §35 and §145 contain judgments concerning defects of slaves, as they contain roughly the same judgments of the Digests, solely §35 will be mentioned. Here two different types of contrasts are referred on. In the first type, the purchaser can use the slave for six months. If there are any defects like illness, madness[57], or fugitiveness he can return the slave and his costs will be compensated. This contract is identical with the Roman *bonis condicionibus* contracts. The second type is a *simplaria venditio* contract, where the purchaser has no right to return back the slave, even if he discovers defects, for the condition of such a contract does not include the right of return. The only exception is madness. So, if the slave is fugitive and has committed robbery, according to the first type of contract the purchaser returns him back to the purchaser, after having caught the fugitive slave. The purchaser is then held responsible for the damage the slave has caused. In summary, it must be said that the Syro-Roman Law Book contains no different rules from the Digests. In this case it is quite identical with Iustinian Law.

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[56] Translation: Samuel P. Scott, *The Roman Civil Law*: https://droitromain.univ-grenoble-alpes.fr/.

[57] The commentators of the Syro-Roman Law Book state that madness should be understood as epilepsy. (Selb, Kaufhold, *Das Syrisch Römische Rechtsbuch*, vol.3, p. 96).

This textual data shows that the principle's "الخراج بالضمان" roots cannot be found in Roman practice. On the contrary, the principle lays down that the vendor has no right to claim any profit, nor has he to compensate any damages caused by the slave. If we follow the idea of resemblance, it must even be said that the Prophet changed the established understanding of the community. Presumably, the exhausted reaction of the purchaser, mentioned in the hadīth, bases on the circumstance that Byzantino-Roman legal practice, in some kind, was also well-known in the Hejaz.[58]

"الخراج بالضمان" is also applied to renting in Islamic Law. If the rented animal dies, the price of the renting has to be paid, but no compensation is needed because the tenant is not the proprietor of the animal, he is solely permitted to use it. On the other hand, the renter is the proprietor of the animal and receives the غلة (working power) of it. Therefore, he carries the "ḍamān", so the responsibility for his property. To express this peculiarity of Islamic law, another principle *"Price and Compensation do not come along together"* was coined: the price paying tenant does not compensate, the renter pays not the price and he is not responsible for compensation.

The Roman principle *"It is according to nature, that the one who has the disadvantage of something gets the advantage of it."*, which is mentioned in the Digests 50.17.10, lays down who has to pay the costs for the court trial, in the case of a dissidence concerning the renting of a dispositum. Someone who has taken a good for loan, pledges the good. Digest 13.6.5 §12 describes what kind of court proceedings can be upheld if the loaner of the good does not pay the dispositum back to its owner. According to the Roman regula, the costs for the court trial lay by the loaner. This was considered more lawful because the loaner gained profit by the good.

The commodum regula is applied in other cases, too. Although these cannot be associated with the kharāj dictum, it is important to mention these in order to show that the regula has a wider area of application within the Roman law, as it is the case with the kharāj dictum. Some other examples can be given on contracts concerning privity and share. In Digests 17.9.9 the general conditions and types of share contracts are laid down. If there were no further agreements the profits of a

[58] Selb, Kaufhold, *Das Syrisch-Römische Rechtsbuch*, pp. 60, 61, explanations in vol. 3, p. 96.

partnership will be shared equally. An agreement where the profit should be shared unequally is only valid in some kind of contracts and under specific conditions. Cassius, for example defends that a contract, where the counterparties share the profit equally, but one of the counterparties has no liability to damage is lawful, although this would have been contradictory to the regula *"It is according to nature, that the one who has the disadvantage of something gets the advantage of it."*. On the contrary, Sabinus considers this kind of contract only valid, if the partner, who cares no liability of damage, is obliged to put more work to the partnership. Thus in some cases the work a partner puts in a contract can be more valuable than the invested capital. Here Sabinus' opinion seems to approve the regula.

In Digesta 17.2.29 §2 it is laid down that the leonine contract is not lawful. The ancient Greek contract of leonine, "*so called from the old fable of the lion, who carried of everything"*[59], is a contract, where one of the counterparties gains profit, and the other one has the damage liability. This kind of contract is not regarded lawful, as *"It is according nature, that the one who has the disadvantage of something gets the advantage of it."*

The regula is also applied to laws concerning marriage. The Roman woman has to bring dowry to her marriage. However, the gains of this *dos* belong to the husband. This is constituted in Digesta 23.3.7 as follows: *"Equity demands that the profits of a dowry shall belong to the husband, for, as he sustains the burdens of matrimony, it is but just that he should receive the profits."*. This practice is again justified by the *commoda regula*. For as the husband is held to fulfill the financial obligations of a marriage *(onera matrimonii)*, he has the right to make use of the gainings of the *dos*.[60]

A derivative of the regula "*Secundum naturam est, commoda cuiusque rei eum sequi quem sequentur incommoda*" is mentioned in Gaius' Institutiones 3.23.1., and seems to be interesting in comparison to Islamic law. Here it is applied to a specific field of the *emptio* contract. The derivative of the regula is as follows: "*commodum eius esse debet, cuius periculum est.*", translated as: "who has the advantage, has the periculum." As it can be seen the word *incommoda*, is here replaced by the term

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[59] Kenneth Reid, Reinhard Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations*, Oxford: Oxford University Press, 2000, p. 163.

[60] Arne Duncker, *Gleichheit und Ungleichheit in der Ehe: persönliche Stellung von Frau und Mann im Recht der ehelichen Lebensgemeinschaft*, Köln-Weimar: Böhlau Verlag, 2003, p.884.

periculum. *Periculum* is translated as risk. Risk, is here the damage "*which has occurred between the appearance and fulfillment of an obligation, and could not be imputed to the obliged, by reasons he cannot be charged of*(...)"[61]. In the Roman contract of *emptio*, the good which was not yet delivered to the purchaser after the declaration of intention, cannot be held as his property. Both parties are obligated: the purchaser has to pay the price, the vendor has to deliver the good. Yet, the ownership is constituted by another transaction. The subject of the *emptio* is pecuniary debt, the good has to be from the class of *species* and therefor it cannot be demanded when it is destructed or lost. Nevertheless, the purchaser still has to pay the price.

In Institutiones 3.23.3 this case is constituted as follows: "*As soon as the contract of sale is concluded – that is, as we have said, as soon as the price is agreed upon, if the contract is not in writing – the thing sold is immediately at the risk of the purchaser, even though it has not yet been delivered to him. Accordingly, if a slave dies, or is injured in any part of his body, or if a house is either totally or partially burnt down, or if a piece of land is wholly or partially swept away by a river flood, or is reduced in acreage by an inundation, or made of less value by a storm blowing down some of its trees, the loss falls on the purchaser, who must pay the price even though he has not got what he purchased. The vendor is not responsible and does not suffer for anything not due to any design or fault of his own.*"[62]

If there were any increases of the object before delivery, the question to whom these increases will belong to is explained further: "*If, however, after the purchase of a piece of land, it receives an increase by alluvion, it is the purchaser who profits thereby: for the profit ought to belong to him who also bears the risk.*" Obviously, in Roman law the vendor is not obliged by a destruction without any fault. The *periculum* lies upon the purchaser. As he is the one who bears the risk *(periculum),* he is also the one who receives the profit of the non-delivered good.

In Islamic Law, the contract of sale (*aqd-al bay'*) is a *real contract*. After the consensus ad idem has come into being, the ownership is transferred at the same time. The contract of sale is in its nature clearly different from the Roman *emptio*. Furthermore, the contract of sale is in almost every ancient oriental culture treated

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61 Turgut Akıntürk, *Satım Akdinde Hasar Sorumluluğunun İntikali*, Ankara: Ankara University Law Faculty Press, 1966, p. 24.

62 See J. B. Moyle**,** *The Institutes of Justinian***,** 5th ed., Oxford: Clarendon Press, 1913.

as a real contract.[63] In contrary, the Roman emptio contract is not transferring the ownership. The derivative principle "*periculus est emptoris*" is not further explained in Roman texts. Specialists of Pandect Law have discussed this discrepancy by developing theories, which should explain this exemption of defects liability in Roman Law.[64]

The same case, as we have explained for Roman law, is treated differently in Islamic law. The purchaser takes no risk for a property which was not yet delivered to him. The vendor, as the *mālik al-yad* of the property, has the occupation of the property by real authorization. For this reason, he cannot demand the price of the subject until he has delivered it. If there were any increases before delivery, the profit lies by the purchaser. Essentially this also bears some problems with it, as the principle "الخراج بالضمان" states differently. Indeed, the principle states, that *"the advantage comes with the responsibility".* The vendor, who carries the responsibility for the good, which was destructed before delivery without his guilt, should receive the profit by increase of it. This matter of fact is clearly a logical result of a real contract, as the ownership transfers with the *consensus ad idem*.

Ibn Nujaym tries to explain this discrepancy in his al Ashbah wa al Naḍẖāir. He states that profit and usage come with ownership. However, after delivery, usage and profit is given in return of ownership and compensation. According to Ibn Nujaym, the principle al-kharāj biḍḍamān is only applied after delivery, and therefore is in this case not relevant.[65] Kharāj is not only advantage, it also implies ownership. When advantage and ownership come together, responsibility and compensation are occurring, too. The vendor has the occupation of the property, but as he has no ownership he is not permitted of advantage, in other words usage. As the purchaser has the ownership of the good, the vendor is liable for any destruct by his fault. But if there is no fault upon the vendor by the destruct of the good, he

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63 Ziya Umur, *Roma Hukuku Ders Notları*, Istanbul: Beta Verlag, p. 355, 356.

64 The most accepted theory is the "Veräusserungstheorie" of Emil Kuntze. He explains that *"after the conclusion of the conctract the subject of the contract is transferred; not de facto, but it is no longer in the estate of the vendor, it is in the estate of the purchaser. This is considered as so, because the contract comprises a disposition of the subject. As the subject devolves from the estate of the vendor to the estate of the purchaser, it is necessary that the purchaser has the liability.".* Akıntürk, *Satım Akdinde Hasar Sorumluluğunun İntikali,* p. 99.

65 Zaynuddīn Ibn Ibrahīm Ibn Muh ammad Ibn Nujaym, *al Ashbah wa an Naḍẖāir*, Beirut: Dār al Kutub al `Ilmiyya, 1999, p. 167.

has no right to consideration. Contradictory to Roman law, the purchaser is not obliged to pay any consideration for a good he has not received.

Both law systems have different approaches to the liability by damages before delivery. The differences are rooted in the various characters of sale contracts and the transferring of ownership. As it can be seen, the principle *"the advantage comes with the responsibility"* is not applied in Islamic law, whereas in Roman law the derivative of the *commoda* principle is applied in this special cases. However, the Roman *periculum* derivative was discussed by pandect lawyers: Although the ownership does not transfer with the contract himself, an obligative relationship is considered. Furthermore, the purchaser has to fulfill the payment although he has not received the subject of the contract.

C. CONCLUSION

The analysis of the general understanding of principles and their place within the history of the two law systems has shown, that the fertile ground for legal principles is causative thinking and personal legal reasoning. Classical Roman jurists and early, especially Hanafite Islamic lawyer`s methods and approaches to law seem similar: Both preferred personal legal reasoning and examined legal problems within the causative method. The rulings based on such an understanding of lawmaking cannot be named as maxims. The terminus "maxim" implicates that the ruling is irrevocable, generally valid and overarching. But as we have shown these rulings were applied to just one special area of law and should, therefore, be named as principles. One example of such an early Roman principle is the famous *Catoniana Regula*. The ruling al- kharāj bi-d-ḍamān, which we have examined as an early Islamic principle based on a prophetic tradition, is again another example for a principle applied to a specific area of law.

Jurists of Classical Roman law dreaded principles which could restrict legal reasoning. For this reason, principles and rulings, which were formulated at this time, were regarded as descriptive. The rule was nothing more than a *causa coniectio*, a summary of what was essential for the legal reasoning in this special case. Later in the Byzantine empire, *regulae* were part of the curriculum of officials, who had to learn the law, which sources had swelled to vast masses of literature, and apply them to cases. This lead to the consequence, that the *regulae* were considered as normative. The question whether early Islamic scholars regarded principles of Islamic law descriptive or normative, is not so easy to answer.

However, it is obvious, that the first literature about legal principles was written by the Hanafite law school, in a time where scholars of different law schools tried to defend their own arguments and approaches to the law. The idea to lay down principles and rulings in order to constitute and legitimate their own approach to law can be denoted as normative. This intention ought not surprise in light of the Late Imperial Roman law, which was beyond any doubt strongly influent in the area.

The earliest term to express legal principles in Islamic law, was *al-qiyās*. In the works of al Karkhī and ad Dabūsī this term is used frequently to express principles of law. "Al qiyās" derives from the verb "قیس\قاس", "to measure"[69] and connotates the term *kanon*, which means "measure, unit". Although the resemblance of the two terms seems very striking, it would be beyond the scope of this study to discuss a presumable relationship between these two terms. Nevertheless, the term *regula*, as a sentence describing the connecting causes of a legal case *(causa coniectio)*, can be compared with the term *qiyās*, describing the synthesis of several legal cases in one sentence.

The detailed comparison of the principles *"Pater est quem iustae nuptiae demonstrat"* and "al waladu li saḥīḥil firāsh", has shown that these two principles are literally nearly the same.

Our analysis has shown that some theories saw in similarity an adoption of the Roman *regula* by Muslim jurists. But we could see that this conclusion is due to the lack of understanding the Islamic principle correctly. The Islamic firāsh dictum concerns those cases, where fornication during a marital contract resulted with a child, and the fornicator claims right upon him. The *ahadīth* show that in these cases the claim of the fornicator should not be heard, even if the child obviously biologically belongs to him: the child belongs to the marital bed.

In contrast, the Roman *nuptiae regula* lays down a natural consequence of a legal marriage: the child born within the marriage is affiliated to the husband. It even can be said that the *firāsh* principle is emphasizing the former idea of the *nuptial regula* by constituting that the affiliation of children born as a product of fornication, cannot be taken over that easily as it had been established by some Late Roman legislations (e.g by *legitimatio per subsequens matrimonium)*.

The Islamic principle "The advantage comes with the responsibility." traces back to a hadīth from the Prophet, concerning defects and the obligations which are connected with defects. The purchaser, who notices a defect of the purchased slave, has the right of return. At the same time, he is not obliged to pay the profit of the labor back because the Prophet explains that the owner who carries the pecuniary liability also has the right of profit.

Many differences can be seen comparing the Roman judgments concerning defects with Islamic law. As the contract of purchase and sale is a contract of *bona fide*, the responsibility lies upon the vendor. He is obligated to know the defects of his goods and has to inform the purchaser. In contrast, the Prophet judged that the purchaser is not obliged to do so. According to Islamic Law, the purchaser does not have the duty to return back the gains and profit he has gained from the defective good. This is formulated by the principle *"The advantage comes with the responsibility"*. Furthermore, the purchaser of the slave, who caused any damage during the ownership of the purchaser, is responsible for the compensation. The Syro-Roman Law Book, an eastern manuscript commenting on the Imperial Constitutions, contains no different rules from the Digests. In this case it is quite identical with Iustinian Law.

The analysis of the *"periculum est emptoris"* derivative of the *commodum regula*, has shown that both law systems have different approaches to the liability of damages before delivery. The differences are rooted in the various characters of sale contracts and the transferring of ownership. As it can be seen, the principle *"The advantage comes with the responsibility"* is not applied in Islamic law, whereas in Roman law the derivative of the commoda principle is applied in these special cases. According to Muslim jurists the Prophetic traditions cannot be applied to cases, where before the delivery damage occurred without fault. This shows that Muslim jurists did not easily copy particular judgments and regulations of Roman Law. On the contrary, they merged a coherent system of contracts.

The assertion that Islamic law is nothing more than a reception of the Late Antique Law predominated by Roman Law, is long obsolete. Nevertheless, the circumstances in which Islamic law emerged was imbued with terminology and ideas of Late Antiquity. Similar to the divine revelation, which discusses predominant ideas of its audience and puts them into a new Qur'anic context, the idea of justice and law is put in a new context, too. The prophetic traditions, which

we examined in this work, constitute important innovations to well-known and rooted ideas predominated by the Byzantine law, which later were taken up by Muslim jurists in order to systematize a new concept of law. This early Islamic law should be seen as an original product of scholarship, which is predestinated in Late Antique terms but is genuine in its peculiarities.

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