

ADAPTING DIVINE LAW TO CHANGE: THE  
EXPERIENCE OF THE ROMAN CATHOLIC CHURCH  
(WITH SOME REFERENCE TO JEWISH AND  
ISLAMIC LAW)

*Silvio Ferrari\**

I. RELIGIOUS LEGAL SYSTEMS AND CHANGES IN LAW

[O]nce an injunction has achieved the status of a divine commandment, it rises out of the circle of alterable conventions into the rank of sanctity. Henceforth, the regulations enjoined by the religion are regarded, like the arrangements of the cosmos as a whole, as eternally valid—susceptible of interpretation, but not of alteration, unless the god himself reveals a new commandment.<sup>1</sup>

This text of Weber's, where considerations are formulated that other scholars had already put forward,<sup>2</sup> has had a great influence in spreading the idea that legal systems based on a divine revelation are systems that are substantially incapable of change. The same idea resurfaces not only in Kelsen,<sup>3</sup> but also in scholars belonging to juridical schools of thought that are far removed from juridical formalism. Lawrence Friedman classifies the religious legal systems among those that "have a closed set of premises and deny any principle of innovation." The impossibility of introducing new premises into a legal system founded on a holy text prevents the development of a juridical reasoning suited to changing social conditions and inevitably leads to resorting "heavily to casuistry, legalism, legal fiction, and a luxuriant growth of reasoning by analogy."<sup>4</sup>

---

\* Professor of Canon Law and Church-State relations at the Universities of Milan and Leuven.

<sup>1</sup> MAX WEBER, *ECONOMY AND SOCIETY* 577 (Guenther Roth & Claus Wittich eds., 1978) (1914).

<sup>2</sup> Of all these, suffice it to remember HENRY MAINE, *ANCIENT LAW* 83 (London, Murray, 1906) (1861)

<sup>3</sup> HANS KELSEN, *PURE THEORY OF LAW* 197-98 (Max Knight trans., 2d ed. 1967) (1934).

<sup>4</sup> LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM, A SOCIAL SCIENCE PERSPECTIVE* 239 (1975) (Jewish and Islamic law are taken as examples of these closed legal systems). Friedman's classification (and Weber's, which is similar) is criticized in John Makdisi, *Formal Rationality in Islamic Law and the Common Law*, 34 *CLEV. ST. L. REV.* 97 (1985-86).

This is not the place to assess the foundation, which is sometimes very complex, of all these theories. Suffice it to say that they appear to some extent to be contradicted by reality. If a legal system survives for as long as it responds to the requirements of the social body that it regulates and if this social body is in constant evolution, it in fact becomes problematic to explain the multi-millennial survival of religious legal systems<sup>5</sup> such as Jewish, Islamic and Canon law. For the very fact that they are static and immutable, these religious legal systems should have been overturned ages ago by the social transformations that have taken place within the respective communities of reference. It is therefore an absolutely inevitable conclusion that some form of change and dynamism is not extraneous to these systems.

This conclusion is confirmed by the observation of the history of Jewish, Canon and Islamic law. First of all, the rules of divine law change for the simple fact that they are included in a vaster legal system which is to a large extent constituted by man-made law. The rules of divine law are therefore inevitably broken down and put together again within a legal discourse that is open to the influxes of history (because, at least in part, the rules of divine law are the work of man) and, even though these rules remain formally unchanged, they acquire new meanings.<sup>6</sup> Besides this initial observation of a general nature, it is possible that the human legislator or interpreter can modify a rule of divine law without interfering with it, but instead by simply altering the laws that ensure its application. The teachings on the death penalty in Jewish law offer a particularly clear example of this technique: the restrictions introduced by the rabbinic authorities have in fact rendered it impossible to apply this punishment even in those cases where it is explicitly sanctioned by the Bible, the text that manifests the divine will. Indeed, the death penalty may only be carried out if two witnesses warn the guilty party immediately before the crime is committed that it is punishable with the death penalty whereupon the guilty party answers that, even though he was aware of this fact, he intends in any case to carry out this act. The crime must also be carried out immediately after the warning given by the two witnesses. Moreover, the death penalty may only be inflicted if at least one judge of the tribunal has declared himself in favor of the defendant's acquittal (because in the presence of a unanimous verdict of conviction it would be possible to think that the tribunal had some prejudice against the accused).<sup>7</sup> Thus, the Biblical

---

<sup>5</sup> On the meaning of the expression "religious legal systems" see RELIGION, LAW AND TRADITION, COMPARATIVE STUDIES IN RELIGIOUS LAW (Andrew Huxley ed., 2002).

<sup>6</sup> See in this sense Wael B. Hallaq, A HISTORY OF ISLAMIC LEGAL THEORIES ch. 4, at 125 (1997).

<sup>7</sup> See Elliott N. Dorff & Arthur Rosett, A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW, 224-25 (1998) (rabbinic authorities "interpreted the death penalty out of existence, and they intended that result and realized the issues involved fully").

law that sanctions the death penalty is neither abrogated nor modified, but through the introduction of this series of requirements, it has become practically inapplicable.

In other cases (which are more numerous) the modification of the rule of divine law is the result of a variation of its interpretation. For example, the loan with interest was forbidden by mediaeval Canon lawyers as it clashed with both revealed divine law and with natural divine law.<sup>8</sup> The economic transformations that took place at the beginning of the modern age stimulated a different consideration of this prohibition and set in motion an interpretative process that led in practice to the admission that the loan with interest was permissible except when the interest was excessive.<sup>9</sup> This conclusion was reached without formally modifying the previous prohibition (which Pope Benedict XIV was able to reiterate in general terms in 1745), but instead by identifying a fairly vast series of reasons and situations in which it is not applied.<sup>10</sup>

The two cases now mentioned (the death penalty and payment with interest) are linked by the fact that the original law—as established in the holy text or, in the second case, in the authoritative declaration that traces it to divine law—remains written in the “law book” but loses any efficacy. The divine legislator had intended to punish certain crimes with death and forbid loans with interest. However, by the legislative and/or interpretative route, both objectives have become unattainable. Formally, a law is still in force; substantially it has been abrogated.

The fact that some parts of divine law have changed in the course of history does not yet constitute proof that all divine law is liable to change: a close look shows that there are divine laws that, during the long vicissitudes of the Jewish, Christian and Muslim faiths, have remained substantially unaltered. Nevertheless the observation that some transformations have been possible<sup>11</sup> appears to support those scholars who prefer to speak of the rigidity—rather than the immutability—of divine law:<sup>12</sup> the latter is an element that is less subject to change than other parts of the three legal systems considered here, but it is not an immutable element.

---

<sup>8</sup> See JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* 11-81 (1957).

<sup>9</sup> See ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 181-94 (1988).

<sup>10</sup> For this evolution see *id*

<sup>11</sup> For other examples of the changing of rules of divine law, besides those cited in the text, see Helmuth Pree, *The Divine and the Human of the Ius Divinum*, in *IN DIVERSITATE UNITAS* 23, 25 (R. Torfs, ed., 1997); see also J.N.D. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* 19 (1959); Elliot Dorff, *Judaism as a Religious Legal System*, 29 *HASTINGS L.J.* 1331, 1340-41 (1977-78); GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 1-4 (1953).

<sup>12</sup> See Salvatore Berlingò, *Diritto divino e diritto umano nella Chiesa*, in *IL DIRITTO ECCLESIASTICO* 53 (1995).

## II. DIVINE LAW AND HUMAN LAW IN THE CANON LAW SYSTEM

In the Canon law system, the issue of changing divine law is strictly linked to the question of its juridical nature.

Canon law doctrine has traditionally understood revealed divine law to be a set of rules established by God and obtainable directly from the Holy Scriptures. More recently this formulation has been abandoned and most Canon law experts agree with the statement that divine law is composed of values, principles, indications, and directives<sup>13</sup> that, even though they are law (at least in the broader meaning), they are not yet legal rules: “ius divinum . . . is in itself not law.”<sup>14</sup> A human intervention is necessary in order for these values and principles to become rules capable of operating and interacting with the rules made by man. This human intervention may be conceived and named in various ways (for example in terms of positivization, canonization, formalization, concretization, formal reception of divine law, etc.), but it always possesses the characteristics of its historical time. Indeed, on the one hand the “knowledge of divine law is not fixed and unchangeable but it is achieved through a progressive investigation to which historical facts and experiences are no strangers.”<sup>15</sup> On the other hand, the articulation of divine law and its translation into rules must take into account the conditions of the communities at which the law is directed, which are always different.<sup>16</sup>

This dialectic between revealed law and its historical translation responds to that logic of incarnation that has distinguished the Christian religion from the very beginning. On the more specific ground of the articulation between divine law and human law, that logic opens the way towards the distinction between an immutable content and a changeable formulation of divine law, which is the fruit both of a more profound knowledge of God’s will and of its translation into forms suited to every historical moment and geographical sphere. This is the key for explaining the variations that have taken place in time and space in the identification of the rules of divine law made by the ecclesiastical authorities.<sup>17</sup> What was considered a rule of divine law yesterday is no longer regarded to be so today, and what is defined as such in the code of the Roman Catholic Church is not in that of the Eastern Catholic

---

<sup>13</sup> See Pree, *supra* note 11, at 39; Gaetano Lo Castro, *La dimensione “umana” del diritto divino*, in *DIRITTO DIVINO E LEGISLAZIONE UMANA* 65 (A. Filipponio & R. Coppola eds., 1998).

<sup>14</sup> See Pree, *supra* note 11, at 39.

<sup>15</sup> GIORGIO FELICIANI, *LE BASI DEL DIRITTO CANONICO* 65 (1983); see also Castro, *supra* note 13, at 40.

<sup>16</sup> See Remigiusz Sobanski, *Immutabilità e storicità del diritto della Chiesa: diritto divino e diritto umano*, 9 *IUS ECCLESIAE* 19, 27-28 (1997) (“what was valid yesterday does not cease to be valid today, but requires to be interpreted by the new situation and adapted to it”).

<sup>17</sup> For some examples of these variations see Pree, *supra* note 11, at 25.

Churches because no normative formulation of divine law, as it is the work of man, “can ever expect to be perfect and exhaustive.”<sup>18</sup> The immutability of divine law, in the normative formulations in which it is understood by man, is not absolute as there is no “keen dividing-line” separating divine law and human law, between which instead there runs a set of “fluid transitions.”<sup>19</sup> If one accepts the principle that the Church creates law in a way that is “faithful to its mission and always listening to God’s will,” then also human law should also be considered “indirectly” divine.<sup>20</sup>

This conclusion poses a question, however: how much does divine law depend on our (human) capacity of knowledge and legal formalization? If the knowledge and implementation of divine law are always fallible, in so much as they are human, how is it possible to avoid formalizing in a law something that in reality is not divine law? And in the case of different and conflicting translations into law of what is considered to be divine law, how should the choice be made among them?

These questions show some analogies in the approach to divine law that characterize Jewish law and Canon law: but the answer that is provided reveals all the differences. Throughout the centuries in the Roman Catholic Church increasing importance has been given to the Pope’s teaching and to that of the ecumenical council which intervenes to pour the wealth of divine law into human legal moulds: in relation to man the Pope’s teaching is therefore “the root, or better, the living and working fulcrum of divine law as the precept, command and legal rule.”<sup>21</sup> Here there is a difference compared to the Jewish and Islamic systems. This is not because the latter lack instruments for the authoritative determination of the concrete contents of divine law but because—besides presenting different characteristics from the hierarchical and centralized ones which mark the Canon law system—these instruments are based on interpretation rather than on legislation.<sup>22</sup>

---

<sup>18</sup> Sobanski, *supra* note 16, at 32; *see also* Berlingò, *supra* note 12, at 51. According to René David and John E.C. Brierley, the fact that Canon divine law is not the word of God, but rather the word of God mediated by man, allows ecclesiastical authorities “to make changes to improve or adapt it to particular circumstances of time and place” more easily than Islamic divine law. This last is “an integral part of Islamic religion and of the revelation that it represents. Consequently, no authority in the world is qualified to change it.” RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 464 (1985).

<sup>19</sup> Pree, *supra* note 11, at 40.

<sup>20</sup> *See* Sobanski, *supra* note 16, at 32.

<sup>21</sup> VINCENZO DEL GIUDICE, *NOZIONI DI DIRITTO CANONICO* 18 (1953) (all translations provided by author).

<sup>22</sup> *See* Joseph P. Schultz, *Max Weber and the Sociological Development of Jewish Law*, *DINÉ ISR.*, 1991-92, at 71, 81 (“[T]he road to legal development and rationalization in Judaism and Islam was characterized more by exegesis, commentary and the activities of responding jurists than by the deliberate enactment of decrees and laws,” which is what instead happened in the law

### III. THE PATHS OF CHANGE: (CANON) LEGISLATION AND (JEWISH AND ISLAMIC) INTERPRETATION

The consequences of the difference indicated at the end of the previous paragraph may be illustrated by analyzing the institutional context in which the three laws were produced.

In the Canon law system the problem of interpreting and integrating divine law in order to adapt it to the changing needs of the Christian community, was largely dealt with through legislative paths. This statement does not mean—as is obvious to anyone who has an even approximate knowledge of the Roman Catholic Church legal system—that a doctrinal and jurisprudential formulation of Canon law is lacking. On the contrary, both the one and the other have known periods of great development and have contributed to a large extent towards giving shape to Western juridical thought. But overall, and in particular since the Council of Trent, Canon law has been a product of the legislative process. What distinguishes the Canon law system from Jewish and Islamic law is that since the earliest days of Christianity an authority has existed, first at the local level and then at the universal one, with the power to set binding rules for the entire community. This power exercised by the ecumenical council, and later on the Pope for the universal Church, and by the particular councils and the bishops for the local Churches sometimes acting alone and sometimes working more or less pacifically together with other subjects. The importance that the canon collections—that is the collections of council canons, papal decrees and episcopal statutes—played in the early development of Canon law, and the significance that the codification has had in its most recent evolution, are the demonstration of this. Council rules and papal decrees constitute the basic material on which Graziano, the great canon lawyer of the twelfth century, conducted his work of systemic interpretation and the remaining parts of the *Corpus Iuris Canonici* are made up of collections of Papal decretals, proof of the centrality of the legislative activity of the Popes even in those centuries when the contribution of the doctrine was most vigorous. Without detracting anything from the importance of the work of the decretists and of the decretalists in the medieval period, nor from the manual and treatise writers in modern times, the element that distinguishes the development of Canon law is the continuity of legal output<sup>23</sup> by the Popes, by the

---

of the Roman Catholic Church.)

<sup>23</sup> This element is underlined, in contrast to the development of Jewish law, by Ze'ev W. Falk, according to whom the absence of a legislative and administrative production comparable to that of the Roman Catholic Church leaves open only the path of doctrinal interpretation and consequently shifts "[t]he focus of Judaism . . . in the past rather than in the future, in *lege lata* rather than in *lege ferenda*." Ze'ev W. Falk, *Jewish Law and Medieval Canon Law*, in JEWISH

councils and, particularly from the Council of Trent onwards, by the organizations of the Roman Curia. To a great extent this was a consequence of the pyramidal and strongly centralized organization that was a feature of the Roman Catholic Church for most of its history and which has become accentuated since the beginning of the modern period. On the one hand, in the fifteenth century, “the defeat of conciliarism and the restoration of the primacy of the Roman seat transformed the Pope from supreme legislator into virtually only legislator,” determining a “fall in authority” of the Graziano Decree, of the council decrees and of the synods . . . let alone of custom.”<sup>24</sup> On the other, a century later, the Pope’s prohibition to publish commentaries of the Council of Trent canons<sup>25</sup> was an invitation “to consider the law as virtually the only source of Canon law,” provoking a “scission between the organs of production and the Canon science” and diminishing “the creative role of jurisprudence.”<sup>26</sup>

In both the Jewish world and the Islamic one, institutions have existed which have enjoyed a certain legislative power, but their impact on the development of the two legal systems has been incomparably inferior. Both Jewish law and Islamic law are laws of doctrinal production.<sup>27</sup> The source of law *par excellence* is the interpretation of the scholar and not the enactment of rules by the legislator: the same care with which, in the Christian world, the collections of legislative texts were compiled was devoted, in the Jewish world, to the collection of the *responsa* with which the sages have interpreted the law. In the Muslim world the emergence of a new problem “entraînera non point la promulgation d’une loi, mais un jugement de conformité ou de non conformité avec la sharī’a,” as the latter is not “oeuvre de légistes proprement dits, mais de juristes.”<sup>28</sup> In these two systems the central

---

LAW IN LEGAL HISTORY AND THE MODERN WORLD 78, 85 (Bernard S. Jackson ed., 1980).

<sup>24</sup> CARLO FANTAPPIÉ, INTRODUZIONE STORICA AL DIRITTO CANONICO 161 (1999).

<sup>25</sup> Pio IV reserved to the Popes (through the Congregazione del Concilio) the power to interpret the decrees of the Council of Trent. *See id.* at 181. This is a prohibition that other legislators (such as Justinian) had already issued: the modesty of the results obtained by these prohibitions does not eliminate the fact that they reveal a precise concept of the subordination of interpretation to legislation.

<sup>26</sup> FANTAPPIÉ, *supra* note 24, at 186-87. Paolo Prodi underlines in more general terms that “the absolute prohibition of glosses, commentaries and also of an interpretative jurisprudence of the Council decrees imposed by Pio IV” leads to “the distortion of Canon law as a science” and to its estrangement “from the science of law.” PAOLO PRODI, UNA STORIA DELLA GIUSTIZIA 280 (2000).

<sup>27</sup> *See* Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihād*, 26 AM. J. COMP. L. 199, 201 (1977-78); Noel Coulson, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 9 (1969); Falk, *supra* note 23; Ze’ev Falk, *Jewish Law*, in AN INTRODUCTION TO LEGAL SYSTEMS 30 (John D.M. Derrett, ed., 1968)

<sup>28</sup> LOUIS GARDET, L’ISLAM: RELIGION ET COMMUNAUTÉ 288-89, (1967), which reconnects this attitude to the fact that the law, as the expression of divine will, may be interpreted but not modified by man; *see also* HALLAQ, *supra* note 6, at 153-54. The importance of the doctrinal element is reflected in the elevated social status recognized to the scholar: in the rabbinic

position does not belong to the legislator but rather to the expert in law, whose authority does not derive from the office held (as in the case of the Pope or bishop) but from popular recognition of his moral and intellectual stature.<sup>29</sup>

Three examples well illustrate the different role played by the legislator and by the interpreter in Jewish, Canon and Islamic law.

The first of these regards the order in which each legal system prioritizes the sources of the human production of law. Canon law puts the law in the first place, followed by custom and by the administrative act (whose essential quality, at least according to the accepted system in the code of Canon law, is precisely its subordination to the law).<sup>30</sup> Instead the law is not numbered among the human sources of production of Islamic law, which are limited to consensus (by the community and by learned men) and to analogy. In the Jewish system the main place is held by interpretation,<sup>31</sup> followed by legislation (which comes into play when it is impossible to solve a problem through interpretative means) and then by custom.<sup>32</sup>

Another example of the differing importance given to interpretation or to legislation is provided by the role played by codification in the Jewish, Canon and Islamic systems. Each legal system contains a multiplicity of private or partial codifications, which are not binding even though sometimes they are very authoritative. But only Canon law possesses—although this has been true for less than a century and not without residual perplexities and resistance<sup>33</sup>—a code that binds all the faithful, which is characterized by the “ideology of juridical completeness,” which in Merryman’s opinion is the distinguishing feature of modern codifications in *civil law* countries.<sup>34</sup>

tradition, marriage to a scholar was the highest to which a woman could aspire. 8 THE JEWISH ENCYCLOPEDIA *Marriage Laws* 347 (1912).

<sup>29</sup> Haim H. Cohn, *Secularization of Divine Law*, in JEWISH LAW IN ANCIENT AND MODERN ISRAEL 1, 23 (1971).

<sup>30</sup> See 1983 CODE c.7-95.

<sup>31</sup> It is considered “the first legal source, in point of time as well as importance, for the development of Jewish law.” 1 MENACHEM ELON, JEWISH LAW, HISTORY, SOURCES, PRINCIPLES 275 (Bernard Auerbach & Melvin J. Sykes trans., 1994); see also Falk, *Jewish Law*, *supra* note 27, at 36.

<sup>32</sup> Besides two other minor sources, *ma’aseh* (which presents some analogies to legal precedent) and *sevarah* (juridical reasoning). See 2 ELON, *supra* note 31, at 945-1014.

<sup>33</sup> It is interesting to note that some of the perplexities shown on the occasion of the codification of Canon law were expressed also in relation to the possibility of codifying the *shari’a* and to the alterations that it would undergo in the course of this operation: see Bernard Botiveau, *Loi islamique et droit dans les sociétés arabes*, 305-06, KARTHALA-IREMAM (1993); ROBERTA ALUFFI BECK-PECCOZ, LA MODERNIZZAZIONE DEL DIRITTO DI FAMIGLIA NEI PAESI ARABI 44 (1990).

<sup>34</sup> JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION ch. 5 (1969). See 1917 CODE c.6 and the declaration by which, in the same year, the Congregazione dei Seminari defined the code “*authenticum et unicum juris canonici fontem*.” EMILE JOMBART, MANUEL DE DROIT CANON 24 (1958).

The reasons for this peculiarity are many,<sup>35</sup> but an important one is the presence of a legislator who is hierarchically super-ordained above the entire community. The binding efficacy of the code of Canon law does not depend on its authoritativeness, but on the fact that it has been promulgated by an authority endowed with the power to make binding laws for the community of believers:<sup>36</sup> the code is “the highest expression of the legislative monopoly” of the Pope.<sup>37</sup>

The different weight attributed to interpretation and to legislation in Canon law on the one hand and in Jewish and Islamic law on the other is in the end confirmed by the development that the institution of authentic interpretation by the legislator has had in the first of these systems. In order to solve those cases in which the laws leave open an interpretative doubt, Canon law entrusts the legislator with the task of providing a binding interpretation of the law that he himself has made.<sup>38</sup> There is no corresponding mechanism in the other two legal systems, which are inclined to leave to the interpreter full autonomy of choice among the solutions that from time to time appear preferable to him. This different approach to the problem of the doubtful cases underlies a different consideration of the elements of unity and variety within each legal system. The assumption implicit in the authentic interpretation of the legislator is that the dubious case may always find one—and only one—legally correct answer, which everyone is obliged to follow. In the same situation the Jewish system and the Islamic system appear to be much less worried about guaranteeing the uniformity of application of the law and admit the possibility that there are different solutions—all equally correct from the legal point of view—to the same problem: this makes it possible for incompatible laws which are equally binding to coexist in the same system.<sup>39</sup>

---

<sup>35</sup> For an examination of some of these, with reference to the (unsuccessful) codification of Jewish law, see M. Chigier, *Codification of Jewish Law*, JEWISH L. ANN., 1979, at 3, 28-31; see also Hanina Ben-Menahem, *Postscript: The Judicial Process and the Nature of Jewish Law*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 421, 430 (N.S. Hecht et al. eds., 1996).

<sup>36</sup> It is significant that, with reference to Jewish law, Chigier believes that “no final code of law can be produced, at least not until a proper *Sanhedrin* with full authoritative powers could be set up.” Chigier, *supra* note 35, at 23.

<sup>37</sup> FANTAPPIÉ, *supra* note 24, at 251.

<sup>38</sup> See CARLO MARIA POLVANI, AUTHENTIC INTERPRETATION IN CANON LAW, REFLECTIONS ON A DISTINCTIVELY CANONICAL INSTITUTION (1999).

<sup>39</sup> See Hanina Ben Menahem, *Is There Always One Uniquely Correct Answer to a Legal Question in the Talmud?*, in 6 THE JEWISH LAW ANNUAL 164 (Inst. of Jewish Law ed., 1987)

## CONCLUDING REMARKS

Throughout their history, Jewish Law, Canon Law and Islamic Law have had to deal with a similar problem: a fundamental law that is immutable because of its divine origin, but must however be completed and adapted to changing circumstances by a human authority. On the one hand, there is the need to respect the commandment that establishes that nothing should be added or taken away from God's law.<sup>40</sup> On the other hand, there is the need to provide suitable solutions to problems that are not dealt with (at least, not explicitly) by the divine law, or which have been dealt with in terms that are too general or synthetic to allow the extrapolation of a univocal and sufficiently concrete rule, or which have been solved in terms that are no longer acceptable in a given historical moment for the community of believers. Divine law is not, therefore, sufficient, unless it is interpreted and integrated by human law.

For this reason, it is not possible to agree with statements of the type "[l]e droit [hébraïque] est 'donné' par Dieu à son peuple. . . . Le droit est dès lors immuable ; seul Dieu peut le modifier, idée qu'on retrouve dans le droit canonique et dans le droit musulman."<sup>41</sup> The problem is presented badly in these terms and thus leads to conclusions that are not confirmed by the facts. Indeed, historical analysis shows that divine law is not really immutable in any of the three legal systems considered. In different forms and by various routes, divine law has changed with the changing of historical times and periods: what divine law used to allow has become forbidden (like polygamy in Jewish law) and what used to be forbidden is now permitted (like loans with interest in Canon law).

The examination carried out in the previous pages does not make it possible to find a univocal model of change in the three legal systems considered in this paper. Faced with the problem of permitting a reasonable degree of evolution within a divine legal system that is (theoretically) immutable, Jewish and Islamic law have developed prevalently through interpretation by scholars and through that interpretation's reception in the community by means of a slow and complex process of consensus building.<sup>42</sup> This process tends to allow

---

<sup>40</sup> See Deuteronomy 4:2. For Jewish law, see Haim H. Cohn, *Legal Change in Unchangeable Law: The Talmudical Pattern*, in LEGAL CHANGE, ESSAYS IN HONOUR OF JULIUS STONE 10, 19 (A.R. Blackshield ed., 1983); Haim H. Cohn, *Introduction*, in JEWISH LAW IN ANCIENT AND MODERN ISRAEL vii (1971). An identical imperative is valid also for Canon law and Islamic law.

<sup>41</sup> JOHN GILISSEN, INTRODUCTION HISTORIQUE AU DROIT 69 (1979). In the same sense, for Islamic law, see ANDERSON, *supra* note 11, at 3.

<sup>42</sup> See Bernard S. Jackson, *The Prospects for Codification or Restatement of Jewish Law: A Personal Summation*, 2 JEWISH L. ANN. 180, 184 (1979). For a lively description of the process of formation of consensus in classical Islam see George Makdisi, *Magisterium and Academic*

the legal system to evolve freely, allowing the coexistence of different and even contradictory solutions for a long period of time (until consensus focuses on one of them),<sup>43</sup> and it is (at least in theory) open to participation by the entire community of believers. Medieval Canon law was not entirely extraneous to this model of development. The dialectics between “auctoritates” and “dicta” that forms the fundamental structure of the *Decretum* of Graziano was determined by the attempt to identify a point of consensus among the various options coexisting within a system that was inevitably contradictory because it had developed through the undifferentiated inclusion of legal sources that differed in their hierarchy, dating and area of enforcement. But from the modern age onwards, the contribution of the doctrine (which in any case has never reached the predominance that characterizes the Jewish and Islamic legal systems) has become impoverished. The already mentioned prohibition to comment on the canons of the Council of Trent marks the prevalence of mechanisms aimed at guaranteeing the subordination of the work of the doctrine to the will of the legislator. This is confirmed by the papal brief *Emendationem Decretorum*, which in 1582 forbade “interpretamenta adiungere” to the Roman edition of the *Corpus Iuris Canonici*. It is further confirmed by the *motu proprio* of September 15, 1917, with which Benedict XV limited the authentic interpretation of the laws contained in the new code to a special committee of experts presided over by a cardinal. Finally, it is confirmed by the frequency that the interpretative laws were resorted to after 1917, by means of which the legislator decreed the authentic interpretation of the laws he himself had previously enacted.<sup>44</sup> Therefore, from this period onwards Canon law evolved prevalently through the intervention of the legislator, who ensures the uniformity of the law by identifying the solution deemed most suited to the community’s requirements. The community’s participation in the law-making process diminishes and becomes increasingly mediated by the legislator. In its turn, the contribution by judges and scholars becomes less intense with the consequence that “the Code, once promulgated,

---

*Freedom in Classical Islam and Medieval Christianity*, in ISLAMIC LAW AND JURISPRUDENCE 121-23 (Nicholas Heer ed., 1990). The analogies with the corresponding process in the Jewish context are underlined in Gregory C. Kozlowski, *When the “Way” Becomes the “Law”*: Modern States and the Transformation of Halakhah and Sharī‘a, in STUDIES IN ISLAMIC AND JUDAIC TRADITIONS II 97, 102-03 (William M. Brinner & Stephen D. Ricks eds., 1989).

<sup>43</sup> See *supra* note 42 for Jewish law. For Islamic law, see MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 191 (1991). Generally speaking, it has been stressed that the legal systems that develop through interpretation (instead of legislation) tend to present a broader degree of inner diversity: in these systems “[t]he opinions of the jurists are not law. It is their acceptance that makes law. Thus, there is wide scope for differing opinions.” Alan Watson & Khaled Abou El Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 AM. J. COMP. L. 1, 3 (2000).

<sup>44</sup> See 1983 CODE c.16-17; 1917 CODE c.16-17.

contrary to what had happened with classical Canon law, did not receive a doctrinal and jurisprudential implementation, but it remained controlled in its interpretation and application by the criteria dictated by the central bodies of the ecclesiastical administration.”<sup>45</sup>

One may be tempted to summarize these differences between Jewish law, Canon Law and Islamic law using Schacht’s distinction between analytical legal systems and analogical ones.<sup>46</sup> Canon law has inherited the analytical method which aims at the “creation of logically organized legal norms in an ascending order” from Roman law;<sup>47</sup> Islamic law (and, one may add, Jewish law) is instead characterized by an analogical method of organization of the juridical subject, founded on parataxis and association.<sup>48</sup> Elements in favor of this distinction are not lacking—for instance the development of the casuist method in Jewish and Islamic law.<sup>49</sup> Another example is the great reorganization of the sources of Canon law carried out at the beginning of the seventeenth century by Francisco Suarez in light of the notion of God as legislator. This notion allows laws to be logically arranged according to a vertical hierarchical organization;<sup>50</sup> however, it is always a good idea to take such general statements with a pinch of salt.

In conclusion, there are significant differences (even without exaggerating their importance) between a model of juridical development based on interpretation and another founded on legislation.<sup>51</sup> The interpreter, contrary to the legislator, must necessarily base interpretation on the laws of reference, whose contents and context condition the interpretative work: this is the reason why the resort to

---

<sup>45</sup> PEDRO LOMBARDIA, *LEZIONI DI DIRITTO CANONICO* 35 (1985).

<sup>46</sup> See JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 208 (1964).

<sup>47</sup> Joseph Schacht, *Law and the State: Islamic Religious Law*, in *THE LEGACY OF ISLAM* 397 (Joseph Schacht & C.E. Bosworth eds., 1974); see also Pierre Legendre, *L’inscription du droit canon dans la théologie: Remarques sur la Seconde Scolastique*, in *PROCEEDINGS OF THE FIFTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW* 443, 444 (Stephan Kuttner & Kenneth Pennington eds., 1980) (“le droit romain . . . paganisa l’Eglise latine”). The rationality intrinsic to Roman law acts in the sense of secularizing Canon law, supplying it with logical structures and methodological categories obtained more from reason than from divine revelation.

<sup>48</sup> See SCHACHT, *supra* note 46.

<sup>49</sup> Which Schacht relates to the analogical character of Islamic law. Schacht, *supra* note 47; see also Baber Johansen, *Casuistry: Between Legal Concept and Social Praxis*, 2 *ISLAMIC L. & SOC’Y* 135, 156 (1995).

<sup>50</sup> “Le thème de Dieu-législateur permet à Suarez d’exposer que tout le droit procède de Dieu, par degrés successifs et par emboîtement des sources dans le système. Si la loi éternelle est en Dieu, le principe d’autorité se trouve ainsi fondé, par les implications mêmes de la référence, en chaque sous-système qui s’y rapporte et s’y accroche. Indirectement mais logiquement, toutes les législations, toutes les jurisprudences et toutes les productions doctorales se trouvent divinement garanties.” Legendre, *supra* note 47, at 447.

<sup>51</sup> See Watson, *supra* note 43. It is significant that the authors cite—as examples of legal systems whose production is prevalently interpretative (and not legislative)—Roman law, Jewish law and Islamic law, but make no mention of Canon law.

analogy<sup>52</sup> and to the *fictio iuris* is more frequent in a system characterized by the predominance of the exegetic activity. It is true that in a system centered on divine law the differences between these two models diminish, but not to the point of disappearing altogether. In principle, one model is useful for a socio-religious structure designed as a network, in which authority is distributed in various points of the system, while the other is more consistent with a pyramidal institution, where authority is concentrated in one single point. In their turn, these different forms of community organization influence the way law is produced: one model appears to be more flexible, the other (the Canon one) more rigid, but, at least generally speaking, faster at adapting itself to the changing of historical and social conditions.<sup>53</sup>

---

<sup>52</sup> Patrick Glenn considers that “[a]nalogical reasoning or qyas is also fundamental and explicit in traditions which seek to limit, subtly, judicial creativity (as in talmudic, islamic and common laws).” H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD, SUSTAINABLE DIVERSITY IN LAW* 321 (2000). In reality, recourse to analogy in Jewish and Islamic law is determined by the need to ensure the evolution of the legal system and, at the same time, to hold firm the fundamental assumptions on which it is based. These fundamental assumptions, as they are of divine origin, cannot be modified but can be extended to analogous cases to those already regulated. In that sense the analogy is an instrument of “judicial creativity,” albeit within a horizon preordained by divine revelation.

<sup>53</sup> In any case, it is opportune to assess these interpretative schemes carefully as sometimes potentialities present in one model are destined to remain as such and are not able, for various reasons, to become reality. The flexibility that is written into the genetic code of Jewish and Islamic law more clearly than into Canon law has remained largely sacrificed by the difficulty that these two legal systems have encountered in their confrontation with modernity and by the stiffening of tradition that resulted.