Legal Comparability and Cultural Identity: The Case of Legal Reasoning in Jewish and Islamic Traditions

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1. Introduction

1.1 Fruits and Religions

Comparative studies of cultures, religions or praxis involve much more than applying a method. They are not just about confronting similarities and underlining differences. Behind such projects is the belief that a comparative perspective would provide both a better understanding of the compared systems and contribute knowledge that would not otherwise be attained. Nevertheless, the nature of the 'additional knowledge,' and the extent to which such knowledge is a unique outcome of the comparative study, are still to be explained. Furthermore, comparative projects also run the risk of being held hostage to biased paradigms, simplistic preconceptions, preoccupations with self-understanding and even unconscious commitments to a political agenda. A comparativist should be alert to hidden traps along the way and anticipate stumbling across them throughout her study.

A comparativist should also be simultaneously mindful of both the inducements of the project and the comparability[1] of the subject matters. In the context of comparing legal systems, those problems commence with two inquiries: (1) what curiosities and premises are motivating the comparison; and (2) what type of justifications, preconditions, constraints and limitations apply to such a comparison? *A fortiori*, if we accept the conventional jurisprudential assumption that the law, as a unique social-political phenomenon, has universal characteristics, then comparing legal systems, either diachronically or synchronically, is like comparing fruits.[2] The following discussion will address these questions by referring to the foundations of legal reasoning in both Jewish and Islamic jurisprudential thought. Following our study, we will offer some general reflections on the relatedness of Jewish and Islamic legal systems and their comparability.

1.2 Provoked Comparison

The comparison of Jewish and Islamic legal traditions has attracted scholars since the very early stages of Oriental studies in Western academies.[3] The Jewish-Islamic comparative perspective has also played a major role in various areas of Islamic studies and consequently shaped the leading scholarly paradigms. Nevertheless, only recently have scholars began to demonstrate sensitivity to the methodologies of these comparative studies.

The intellectual motives that have typically guided such comparative projects can be classified into three distinct categories. The first seeks to discover or locate influences; the order of influence, or other consequential exchanges such as the borrowings or adoptions of ideas between the two legal systems. Underlying the exploration of influences, however, are often aspirations to claim originality or to demonstrate how later ideas and praxis were derived from earlier sources. Such a comparative approach, even when undertaken *bona fide*, is not free of suspicion concerning its objectivity, viz, that it serves agendas that celebrate the originality and thus the superiority of the source over its descendants. In the case of Islamic studies, such a conception has often been adopted by those who view of the formative

period of Islam as best understood by reference to Jewish, Christian and other environmental influences upon the Prophet Muhammad and his believers.[4] Such a conception is explicitly evident in the work that is considered the cornerstone of modern Oriental scholarship – A. Geiger's (1810-1874) *Was hat Mohammed aus dem Judenthume aufgenommen?* This pioneering study, and many others like it, illustrates the prevalence of the vocabulary of 'influence' and 'borrowing' in supporting political and ideological efforts to reinvent the image of Jews and their civic conditions in modern Europe.[5] However, tracing the influences of the Jewish legal tradition on the Islamic one is not always asymmetrical. Alongside the efforts to situate Islam as a daughter-religion[6] against the Judeo-Christian backdrop, many studies concerning early medieval Rabbinic literature are motivated by a desire to demonstrate the considerable impact of Islamic law and legal thinking on Jewish legal literature, either Rabbinic or Karaite, of that period.[7] Generally speaking, the ideological motives for exploring influences and for seeking original sources were obviously related to the 19th century philological zeitgeist, the diachronic focus on historical developments and the endeavor to reconstruct the 'original', either the text or the author's intention.[8]

A second motive is related to the nostalgic image of the scholastic environment in which Jewish thinkers and jurists jointly collaborated with their Islamic counterparts. Inspired by the historical image of the 'Golden Age' in which medieval Jewish learning centers in Iraq, Iran, the Maghreb and Andalusia were highly respected and coexisted peacefully under Islamic regimes, the aim of such a perspective is to reaffirm such dignified historical realities and perhaps even encourage similar visions in the present time.[9] Pastoral accounts of this type are very common in descriptions of medieval philosophy and mysticism, in which those subjects are portrayed as identity-blinded disciplines with the capacity to transcend divisive elements and religious borders. Affected by the spirit of the European Enlightenment, these disciplines were taken as a common foundation for universal reflections of a higher order and as a means to bridge the particularities of each religion. The extent to which such collaborations truly took place, or rather have been projected by modern scholars, should be examined in relation to each case independently. Against this background, the discussion below indicates that collaborative milieus shared legal, as well as theologico-legal perceptions. As we shall see, alongside the kindred theological principles underlying both legal systems, Jewish and Islamic jurists often felt they were participating in the very same projects. Hence, the distinctive positive contents of the two legal systems did not stop them from developing unified conceptual language and similar self-understanding. However, this perspective implicitly presumes a political vision as well. By highlighting images of collaboration and shared knowledge, the relatedness and common ground between both communities are stressed by ignoring the hierarchical relations as an essential component.[10]

Contrary to the previous motives, the third aim is to increase sensitivity towards essential differences within the compared legal systems and to

underline the peculiarities of each. As such, comparison serves as a methodological tool by which particular features of each legal system are revealed. The comparative perspective makes it easier to observe latent and marginal features. A better understanding of both legal systems is achievable through a conceptual analysis of their notions, institutions and practical solutions. While the previous motives focused on the common ground between the two systems, the current comparative perspective, sometimes described as 'new comparativism',[11] seeks to develop self-understanding and to increase awareness of their essential variations. Such a perspective is indifferent as to whether an actual encounter between the traditions occurred. The comparative method is likely to be an imaginary set-up by which a certain legal system is more clearly reflected. In that respect a comparative perspective might be evaluated as a kind of thought experiment.

In fact, referring to actual encounters and common ground is entirely justified when addressing medieval Jewish and Islamic jurisprudential thought. Moreover, since actual interactions between Jews and Muslims took place on various stages, both deliberately and unconsciously, it would be wrong to avoid descriptions of influence or borrowing. Even a strong commitment to a critical postcolonial approach should not *a priori* avoid the vocabulary of influence. Such a restriction would artificially limit the investigational scope and thus be unjustified.

Against the above approaches, our following analysis will refer to jurisprudential consciousness as the object of our comparative study and as its source of justification (henceforth: comparative jurisprudence). We will concentrate on the conscious ideas, principles, concepts, beliefs and reasoning that underlie the legal institutions and doctrines. More precisely, we will examine the jurists' self-understanding and the ways it reflects the relationship between Jewish and Islamic legal systems.[12]

The comparative jurisprudence approach not only favors jurisprudence as an appropriate lens for comparing legal systems, but also defines jurisprudence with a focus on consciousness – i.e. on the agent's internal point of view. In contrast with the common conceptions of law, by either naturalists or positivists, it proposes to consider the perceptions of the law as relevant factors. In terms of historical observations of Jewish and Islamic legal traditions, the organizing questions would go beyond influences or borrowing to inquire how the jurists, judges or law-makers understood their engagements with the corresponding legal system.[13]

1.3 Making Jewish and Islamic Laws Comparable

Many of the comparative studies of Jewish-Islamic legal traditions are largely led by curiosity about influences and borrowings, and are not necessarily troubled by wider questions of comparability. In fact, the comparison of Jewish and Islamic legal systems can be justified on various grounds – historical and jurisprudential on the one hand, and perceptional on the other hand.

Historically, the existence of medieval Jewry under Islamic political and cultural domination provided cultural and intellectual encounters and interactions of scholars of both milieus.[14] The sharing of a common

language, cultural codes and habits naturally served as a vehicle for exchanges of legal doctrines, institutions and perceptions. In that respect, a comparison of both legal systems is anticipated on factual grounds and part of the effort to explore past realities. From a jurisprudential point of view, the comparability of Jewish and Islamic legal systems is justifiable because of similar theological and structural apparatuses. In a way, both legal systems are committed to 'religious legalism.' In contrast with antinomian religiosity, often ascribed to the theology of St. Paul, both Jewish and Islamic mainstreams are law-centered religions, i.e. religions that acknowledge the subordination to the law as the most meaningful expressions of religious life.[15] Hence in both theology was essentially intertwined in legal theory.[16] Consequently, the implementation of the divine/earthly distinction within a legal system, according to which the law as the articulation of divine imperatives is also subject to human manipulation, invited a dualist conceptualization of the law. Therefore, both systems are structured in various dualistic fashions, either as a dual stratum (vertical dualism) or as a bipolar scheme (horizontal dualism), which provides coherent meaning to the seemingly oxymoronic idea of 'divine law subject to human reasoning.'

Against the historical and jurisprudential understandings for comparing Jewish and Islamic laws, their comparability could also be reasoned in reference to the self-understanding of the jurists who acted within these legal systems. Indeed, throughout the ninth to the twelfth centuries, Jewish jurists were largely inspired by Islamic jurists, their literature, doctrines and institutions. The extent to which this inspiration was acknowledged or covered by their rhetoric is an interesting question that has much to do with the aim of presenting the Jewish legal legacy as ancient and purely transmitted. But even when the analogies to Islamic law are not emphasized, the Jewish references to a similar legal vocabulary indicate the acknowledgment in a comparative perspective. Therefore, the comparability of Jewish and Islamic law systems also rests on the comparative consciousness of the Jewish jurists when they reflected on their own system.

2. Legal Reasoning: Structure and Theology

It follows that Islamic Law everywhere strives to go back to direct the pronouncements of the founder, thus veritably developing a strictly historical method, while both Talmudic and Canon Law seek to make their points by means, not of historical fact-finding, but of logical deduction (logischer Ableitung). For deduction is subconsciously determined by the goal of the deduction, that is to say the present, and therefore it gives contemporary power over the past. Investigation, on the other hand, makes the present dependent on the past. Even in this seemingly pure world of law, then, one can still recognize the difference between the commandment to love and the obedience to law.

Franz Rosenzweig[17]

Interestingly, Rosenzweig observes legal reasoning as a typological differentiator between the three monotheistic legal systems – Islamic, Talmudic[18] and Canon law. He portrays two types of confronting legal theories: on the one hand, Islamic law is based on *nostalgic jurisprudence*, is highly committed to historical facts,[19] and accordingly celebrates obedience to law as the supreme value. On the other hand, Talmudic and Canon law, as future-oriented systems, are based on *deductive reasoning*, much less constrained by the law and hence emphasize the virtue of love as the ultimate divine commandment. Rozenzweig's observations are, however, peculiar and incompatible with common scholarly accounts on both Jewish and Islamic legal systems. First, against the view of mainstream Rabbinic theology as legalist by nature, he describes Jewish law in Christian and antinomian terms as an expression of the ultimate commandment to love. Second, and perhaps even more irreconcilable with our usual understanding, is his presentation of Islamic law in opposition to the use of deductive reasoning. While one can deny viewing Jewish law as based on a future-oriented jurisprudence, it is much more difficult to agree with Rosenzweig's observation that Islamic law is not deductive. In fact, his position is a total denial of the fourth root Sunni jurisprudence, which is the jurist's independent reasoning – *qiyas* or *ijtihād*. Being freed from Judeo-Christian idealism,[20] we will focus on the significance of legal reasoning in medieval Rabbinic jurisprudence through a comparison to its role in Islamic jurisprudence.

Generally, Rabbinic jurisprudence in the Middle Ages may be examined in reference to three axes. The first one pertains to the relationship between Talmudic and post-Talmudic reflections on legal concepts. One focus of post-Talmudic efforts was to reconcile and harmonize Talmudic and post-Talmudic rulings. The second axis illustrates the complex relationships between a rationalism that celebrates human reasoning as an essential component of any legal activity, and traditionalism, which insists on taking the law as an outcome of divine revelation and therefore opposes reliance on human reasoning in legal matters. The third axis is the Rabbinate-Karaite[21] polemic, which reached its climax in the first half of the tenth century.

There is some evidence to support the view that legal reasoning was indeed a controversial topic in the Rabbinate-Karaite polemics,[22] though our analysis suggests a revision of this view and hence its moderation. On the

other hand, legal reasoning was at the heart of the rationalist-traditionalist tension, to which Jewish legal historians have paid very little attention.[23]

2.1 The Qiyas (Legal Analogy)

The Arabic term *qiyas* (قياس) in its legal sense can refer, in various contexts, to any of the three legal concepts – judicial analogy, general deduction or syllogism.[24] Legal *qiyas* is at times considered the archetype of all forms of legal argumentation.[25] In particular, it indicates the various types of argumentations that legal scholars use in their independent reasoning – *ijtihād* (اجتهاد),[26] and for this reason it occupied a central place in the *uṣūl al-fiqh* literature.[27] Following Shafi'ī's[28] discussion, *qiyas* revolve around the fundamental typology of (1) cause-based *qiyas* and (2) resemblance-based *qiyas*. Cause-based *qiyas* is a means for extending an existing norm to cases which where is no explicit instruction or precedent in the known law. Accordingly, the expansion of the law is based on an existing causal component (cause, reason or meaning) shared by both the existing law and the new case.[29] Resemblance-based qiyas, on the other hand, is based on the isomorphic resemblance of the two cases.[30] These two types of *qiyas* thus illustrate distinct associations between an existing law and a new case: while in cause-based *qiyas* a shared element associates the two cases, in resemblance-based *qiyas* the isomorphic likeness allows their association. That is, cause-based *qiyas* connects the two cases by means of a third factor - the underlying cause, while resemblance-based *qiyas* connects the two to one another intrinsically.

2.2 Epistemology and Legal Theology

There are two people in the same state and under the same king, living two lives and under two jurisdictions, clergy and laity, spiritual and carnal, sacerdotium and regnum.

Stephen of Tournai[31]

The identification of the law with the 'Word of God' is indeed a central principle for both Judaism and Islam. Consequently, a great degree of correlation between legal propositions and theological principles is anticipated. From the very outset, Medieval Jewish and Islamic laws emphasized the transparent relationship between the positive contents of the law and the perception of God as the ultimate legislator. Thus, in many respects, knowing the law and applying it correctly are equivalent to the reception of divine revelation. As such, legal epistemology is reliant upon its theological assumptions, so that the epistemological prepositions are mixed together with the theological claims about the nature of God and His relation to the believers. This aspect singles out the uniqueness of these legal systems in that the source of legitimacy in Jewish and Islamic laws is epistemological rather than institutional. Due to the association of legal theology and epistemology, many of the debates about legal reasoning are associated with theological discussions about the nature of human reasoning from a theological point of view: is legal reasoning essentially no more than an interpreting faculty, or is it, alternatively, an autonomous source of knowledge?[32] To illustrate the dependency of epistemology on theology and

its implications on the theoretical structure of the law, we shall refer to a metaphor that is commonly mentioned in Islamic jurisprudential discussion to support legal reasoning.

2.3 Orientating the Sacred Place

The example commonly brought to justify legal reasoning and the multiplicity of opinions among jurists is the dilemma of finding the direction of prayer – the *qiblah* – for believers who cannot visually locate Mecca.[33] While the obligation of facing Mecca applies to every Muslim believer with no temporal or spatial limitations, performing this duty might involve certain practical difficulties when Mecca is beyond the believer's sight. In that case, the worshipper must make a special effort and use his own judgmental faculties in order to determine the correct direction.[34] The traveler who seeks the direction of Mecca needs available signs by which he can find the proper direction. [35] In that respect, these circumstances exemplify both the epistemological problem and its solution. Determining the correct direction illustrates the ascertainment of the right answer, and the traveler's predicament is analogous to the confusions that may beset the jurist who seeks the right answer for the case that confronts her. This metaphor concretizes the idea that, since the objective law is not always known to the believers, the place at which certainty ends is the point of departure for the jurist's independent reasoning. Legal reasoning in this sense is not the jurist's privilege, but rather a mandatory religious duty under conditions of insufficient knowledge. From this metaphor we can derive the following presumptive approaches, which are not entirely epistemological principles or theological postulations; they present a combined matrix in which the epistemological dimension is an inherent component of legal theology.

1. Metaphysical realism: The first approach relates to the metaphysical dimension of legal norms. It assumes that legal answers are characterized by 'strong objectivity.'[36] In other words, it asserts that the metaphysical existence of a legal norm is independent of human ability to conceive it. According to this principle, every legal question has a definite answer; there is a relevant answer for every possible normative state of affairs. A specific case for which there is seemingly no existing law is nothing but a cognitive blindness and not a limitation of the law itself.[37] The incorporation of realist metaphysics within the context of revealed law implies that the divine law reflects God's concern with every possible set of earthly circumstances. For that reason, the religious value of the law is not exhausted by the subordination to the word of God, but primarily in the fact that through the law God reveals his concrete intentions about the world. As such, legal knowledge that uncovers God's will is of no lesser value than theological knowledge that reveals God's nature and his guiding principles.[38]

2. Incomplete revelation and limited legal knowledge: Despite the above, the law known through revelation does not include the rulings for all possible circumstances. Hence, this entails the distinction between the law known by revelation, i.e. the law inscribed in the *Qur'ān* or revealed in the *Sunna* (henceforth: the *revealed law*), and the law derived from it (henceforth: the *derivative law*). This distinction acknowledges the

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structured limitation of legal knowledge. Therefore, the part of the law that is not known by revelation is concealed and hidden from human eyes, just as the holy mosque and the city of Mecca are indiscernible to the remote traveler. Legal knowledge therefore is first obtained through revelation and thence derived by legal reasoning (*ijtihād*), interpretation (*tawil*), and analogy (*qiyas*). Similarly, this premise makes it clear that legal reasoning expresses the religious virtue of human efforts in discovering the implicit word of God.

3. Gnostic gist:[39] The third approach is related to the previous two. It asserts that notwithstanding the incompleteness of revelation and the restrictions of legal knowledge, God in His goodness would not leave his believers in doubt and confusion. To this end, He conceals within the revealed law hints and traces without which the believers cannot discover the correct legal answers. This theological stance reemphasizes the juxtaposition of epistemology and theology.[40] It concretizes the idea that God's grace is translated to epistemological and methodological aid.[41] Thus, the theoretical justification of legal reasoning is in fact a combination of skeptical epistemology and gnostic theology. Legal reasoning is therefore no more than a structured component of the Divine law that is designed to include human reasoning as an interpretative tool.

These three approaches illustrate that religious legalism is inherently linked to a dual-stratum structure or the division of the entire body of law into two categories: (1) the law known through explicit revelation; and (2) the implicit, derivative law known through the jurists' intellectual efforts that captures the dialectic notion of divine law in human hands. Legal norms of the first category are transparent and knowable to the entire community of believers, certain, and therefore indisputable. Conversely, propositions of the second category are subject to a wide range of interpretations. Therefore they are not only disputable but epistemologically at best only plausible. The dual-stratum structure also projects far-reaching sociological implications. It decisively supports the privileged status of the legal experts. In terms of sociological theory, such a structure provides the preconditions for the necessity of clerical expertise. Put differently, this structure represents the endeavor to reserve legal exegesis for an exclusive group of experts.

3. Rabbinic Attitudes towards Legal Reasoning

Generally, Jewish medieval jurists did embrace legal reasoning as a legitimate means in applying religious legal norms. In what follows we will first describe rabbinic criticism of legal reasoning and then the rabbinic embracement of legal reasoning. Among Jewish medieval thinkers, only two are known to us as opponents of the use of legal reasoning – the head of the Suraian academy in the first half of the ninth century, Sa'adya b. Yosef Gaon (882-942 CE) and the Spanish physician, poet and philosopher Yehudah Halevi (1075-1141 CE). We will portray Sa'adya's arguments against the use of the *qiyas*.[42] Traditionally, scholars who have dealt with his objection to the *qiyas* have tended to view his stance as deriving from the heated debates he had with the Karaite and from his endeavors to defend traditionalism.[43] Sa'adya condemns the Karaite enthusiasm with the *qiyas* as resulting from secondary rather than from substantive considerations.[44] Accordingly, he suggests that the Karaite's stance is caused by their mistaken response to the incompleteness of the revealed law and consequently the bound legal knowledge – "The reason that stimulated the opponents [=Karaites] to believe in intellectual capacity (al-ra'y) and analogy (qiyas), is that they found things which required knowledge whether permitted or forbidden, and which are not written in the Torah, and likewise [matters which their] quantities and qualities are inexplicit."[45] Subsequently Sa'adya also notes the gnostic assumption: "Nevertheless, they know that it is impossible to say of the Creator, may He be exalted and praised, that he left the people perplexed. On the contrary, there is no doubt that He placed before them that which could lead them to their quest."[46] Yet it is still doubtful whether these quotations reflect Sa'adya's principled objection to *qiyas*. Unlike the above polemic context, in a treatise dedicated to jurisprudential analysis Sa'adya expands the discussion of the *qiyas*, from which discussion emerges a deeper and richer picture of his objections. According to our proposed reading, his objection to application of judicial analogy derives from his rationalistic theology, and not from the debate with the Karaites.

As a rationalist, Sa'adya is also concerned with the limitations of rational methods in order to fully respect the independency of reasoning. Paradoxically then his objection to the *qiyas* is the result of his rationalistic insistence. The gist of this paradox is the acknowledgment of reason as a valid source of religious knowledge on the one hand, while acknowledging the fundamental identification of the law with the revealed Word of God on the other. This dialectic invites the heuristic distinction between legal norms which are acquired by reason – rational laws (Ar. *'aqliyyāt*, Heb. *sikhliyot*) – and those given through revelation – revelational laws (Ar. *sam'iyyāt*, Heb. *shimi'yot*).[47] Sa'adya limits *qiyas* only to rational laws and denies its relevance for revelational laws. Hence paradoxically his keen insistence on the validity of human reasoning as source of religious knowledge ultimately reduces the applicability of rational faculties in the framework of religious law. This being so, Sa'adya's legal theory presents a new perspective on the conceptual meaning of judicial analogy.

3.1 Holistic Jurisprudence and the Intelligibility of the Divine Law

Sa'adya's legal theory is primarily an organic one. In this world view, in which "no things have existence except by way of combination," the internal relations among the components of the divine law are not contingent, and in practice they determine the possible manipulations within the law. The legal theory that Sa'adya presents in the beginning of Kitāb Tahsil Ashar'i' Asama'iyah[48] (henceforth: K*itab Tahsil*) Sa'adya describes the internal relations within the law by ontological categories - substance and accident - by which he characterizes the relationship between the general rules and particular cases.[49]

From viewing the relationship between the whole and its particulars as essential, Sa'adya derives the principle of 'unity of knowledge' or, in his words, "the source of wisdom is one"[50] or "the root of knowledge is one".[51] The significance of this principle may be seen on two levels. First, knowing the substance as a whole entails knowledge of the substance's appearances or accidents. Second, the same essential relations between the whole and its particulars also exist between the subject of knowledge and the modes of its cognition: "And that which we said regarding substance and accident also applies to the things that are apprehended by the senses. Each one of them is apprehended by the same sense by which its totality is apprehended. There is no sound which is not apprehended by the sense of hearing, nor any color that is not apprehended through the sense of sight."[52] This being so, the relation between substance and accidents is the relation between the whole and its parts, and therefore poses a three-fold correlation between the *subjects* of knowledge, the *status* of knowledge and the *modes* of cognition.[53] This correlation between the metaphysical core of the law and its epistemological modes leads Sa'adya to examine the justification for judicial analogy against the background of the distinction between the rational and the revelational laws.

As mentioned above, Sa'adya establishes his legal theory on the distinction between rational and revelational laws.[54] The basis of this distinction lies in the idea that the intelligibility of the rational laws is absolutely independent, whereas knowledge of the revelational laws depends on revelation. This distinction apparently touches the very heart of the Sa'adianic attitude towards legal reasoning. Thus, the negation of the *qiyas* is an outcome of exhausting the epistemological implications of the distinction between rational and revealed laws. In that respect, Sa'adya's objection to the use of *qiyas* with regard to revelational laws strengthens the metaphysical weight of the rational/revelational distinction. Sa'adya's reflections upon the rational/revelational distinction suggest that its source lies in the fact that different kinds of legal knowledge apply to different kinds of laws. That is to say, the distinction is not the result of the limitations of human ability to comprehend the laws, but rather of a substantive distinctiveness of the rational laws from those that are revealed. Thus when defining the jurists' rational activities, such as exegesis (*tawil*), analogy (*qiyas*), and personal preferences (*istihsan*), attention should be paid to the metaphysical set-up of rational and revelational laws and its

application should therefore be limited to the rational laws. Sa'adya disapprovingly portrays the application of revelational laws to new cases by *ijtihād* or *qiyas* as separating the particulars from their holistic structure. Applying exegesis to the revelational laws is represented as an arbitrary method that substitutes the original study. For this reason, the multiplicity of opinions and schools do not enjoy the same legitimacy that is granted them in the dual-stratum model.

3.2 Against the Dual-Stratum Paradigm

From Sa'adya's statements in *Kitab Tahsil,* we know that this treatise originally contained ten arguments against the use of *qiyas*.[55] Unfortunately, the extant manuscript contains only three of those ten arguments,[56] and they reflect the rhetorical transition from negating *qiyas* on theoretical grounds to indicating the weaknesses of the theories that justify it. In fact, Sa'adya's objection to legal reasoning can be understood as a criticism of the distinction between revealed and derivative laws (the dual-stratum paradigm), which should be substituted by a generic, bipolar distinction between rational and revelational laws. Below, we shall briefly summarize Sa'sdya's arguments against the dual-stratum paradigm.

Normative Differentiation: Sa'adya argues that from the revealed/derivative distinction one needs to derive implications regarding the decisiveness of the different laws. Accordingly, the revealed/derivative distinction should entail different levels of severity vis-à-vis cases of violating the laws. That is, since derivative laws attained by analogies are no more than human attempts to discover the correct answer, it would be inappropriate to treat the violations of laws equivalently. It makes no sense to punish a person who violates a derivative-law prohibition as harshly as a person who violates a revealed-law prohibition. In particular, Sa'adya claims that, in order to be consistent with the dual-stratum paradigm, it is not justified to impose severe penalties, such as capital punishment, on violations of derivative laws, the validity of which are only probable.

Justification of Controversy: A further weakness of the dual-stratum paradigm is what might be referred to as 'the ease of justification of controversy.' Returning to the metaphor of seeking the right direction of prayer, multiplicity of opinions is expected and hence justified.[57] However, according to Sa'adya, an *a priori* justification of controversies with regard to derivative law confuses between an *ante factum* justification and a *post factum* acceptance of the multiplicity of opinions. Since the derivative law is neither more nor lessthan an attempt to find the right answer, one must tolerate the differences of opinion as a necessary evil, but not as something justified *ab initio.*

Master–Disciple Relations: Another argument against the dual-stratum paradigm pertains to the social structure, which is liable to be upset in its wake. Justifying judicial analogy in practice implies acceptance of the personal legal reasoning of each legal scholar in its own right.[58] Consequently, the hierarchical status of the master in relation to the disciple is likely to be upset. Sa'adya refers in that respect to the botanical metaphor of roots and branches in order to reflect the didactic relationship between mentor and student, thereby pointing out that a legal theory that justifies

legal reasoning unravels the established relationships between mentor and disciple.

The analysis of Sa'adya is a response to the classical Sunni theory of legal reasoning and demonstrates the extent to which medieval Jewish jurisprudential thought naturally took part in the legal discourse of that time. His criticism of the dual-stratum paradigm is not based on Biblical verses or principles peculiar to Jewish thought, but rather on general philosophical arguments that could equally be made by an Islamic jurist. Indeed, jurisprudence for Sa'adya is a formal discipline that transcends the particular content of each religion, and therefore allows a shared terminology and conceptual vocabulary. In the discussion below, we will focus on modes of borrowing by which Jewish jurists favored Islamic jurisprudential concepts above traditional categories of Jewish law.

4. Legal Reasoning and Judicial Error

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.

Rudolf Jhering[59]

Despite Sa'adya's opposition to legal reasoning, the similarities between the Islamic theories of legal reasoning and the Jewish theories are salient. Moreover, as shown above, even Sa'adya's criticism is expressed within the Islamic jurisprudential discourse as a view of an insider.

Indeed, the dual-stratum structure also suggests a new perspective on the phenomenon of judicial error. Erring in reference to legal norms of the first category, principally defined as revealed norms, would simply be considered a deviation from the existing and obligatory laws. On the other hand, with regard to the second category, which encompasses all derivative propositions, it would be difficult to identify valid criteria as to what precisely is a true proposition and what is an erroneous one. If legal reasoning itself is responding to the ingrained limited knowledge of the law, how can we indubitably identify the correct proposition and distinguish it from the erroneous one?[60]

Thus, even though it entails a realistic metaphysics as discussed above and presumes right answer to every legal problem, creating a legal norm by legal reasoning is not measured in terms of deviation from the 'right' answer. Likewise it ascribes a different religious evaluation to the phenomenon of judicial error. Indeed, in the Sunni legal tradition, a special religious virtue is given to the jurist's very process of legal reasoning. Accordingly, the scholars' *ijtihād* is appraised independently as to the results of these endeavors.[61] Hence, *ijtihād* is also measured as a religious deed by which the believer's obedience is tested.

The religious value of a mistaken judgment is well-articulated in the famous tradition that states "He who is mistaken in his personal judgment deserves reward, while he who judges correctly deserves a double reward".[62] In that respect, another aspect of the reliance on legal epistemology and theology is reflected: judicial error derived by means of *ijtihād* is not only tolerated, but also enjoys a positive reward since the very quest for the word of God itself is a desirable norm. In fact, the dual-stratum paradigm enables the possibility of judicial error and its being a test of religious obedience. A further expression of this meaning can be seen in the words of Abu Hamd al-Ghazali (d. 1111 CE), when he explained the problem of judicial error in relation to this dualistic structure with the analogy to alms-giving:[63]

… Everything that depends on an effort of personal interpretation is of this sort. For example, for legal almsgiving the recipient may be poor in the personal judgment of the donor, whereas secretly he is wealthy. This mistake is not sinful because it was based on conjecture. … In this way the prophet and religious leaders were forced to refer the faithful to personal interpretation, despite the risk of error. The prophet – peace be upon him – said, 'I judge by appearances, it is God who looks after what is hidden.'

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This means, 'I judge according to general opinion taken from fallible witnesses, though they may be mistaken.' If the prophets themselves were not immune to error in matters of personal judgment, how much more so ourselves?

Ghazali argues against viewing the instructions of the Imam as the ultimate solution to the problem of the incorporated restricted legal knowledge, and instead advocates the *ijtihād* as the preferable method. For him, *ijtihād* explicitly derives from the fundamental nature of legal knowledge as partly revealed. Hence, fallibility is a substantive and essential feature of the divine law itself. In that respect, alms-giving perfectly exemplifies the shift from the result of the ruling to the preceding intention – "since he is not punished, except in accordance with what he thought."

4.1 The Talmudic Typology of Judicial Errors, Sherira b. Hanina and Moses Maimonides

Medieval Rabbinic theory of judicial error should be understood against the background of the Talmudic reflections on this phenomenon. The Talmud suggests the distinction between two types of judicial errors: (1) a tolerable error, termed a discretional error (*ta'ut beshikul hada'at*) and which should not be reversed if occurred, as opposed to (2) error regarding the explicit teaching of the sages (*ta'ut bedevar mishnah*), which should be reversed and is considered a cause for compensation if it caused damage.[64] The casuistic definitions of these categories underline the scholastic perception of the law, according to which the law is identified with the teachings of the sages. Hence, adjudication is perceived as no more than a declaration of the existing law; and accordingly, a deviation from the sages' teachings is intolerable and thus must be reversed and is subject to compensational remedies.[65] On the other hand, when a judge deviates from those teachings that are not explicitly fixed, but only determined by second-order principles, his error is tolerable and his decision remains.

Although the account of Sherira b. Hanina[66] on judicial error is based on the Talmudic typology of tolerable and intolerable errors, the meaning that he ascribes to these categories reflects a remarkable departure from the Talmudic meanings and a deep absorption of the Islamic theory of *qiyas* into Jewish jurisprudence. In that respect, Sherira's embracement of Islamic jurisprudential concepts completely modifies the traditional setting of the law and the meaning of legal reasoning. Consequently, he provides innovative accounts of what the law is, what adjudication is, and what judicial error concerns. Following the conceptual vocabulary of the law, he departs from the scholastic perception of the law and instead favors the objectivist notion of law combined of roots and branches. Judicial reasoning, accordingly, is about drawing analogical linkages between roots and branches.

Moreover, Sherira not only adopts Islamic theory of legal reasoning in preference to the Talmudic one, but he also introduces a conceptual development by suggesting a typology of judicial errors:[67]

In one of these two things judges err: either this legal case has a root, [which has] a tradition or ruling, and this judge did not know it has some

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resemblance [to that root], and [instead he] analogizes it to a different root – by that he errs in *dvar mishnah*.

Or else, [when] this case is definitely a branch that has nothing in similar with, and that judge analogizes it to a root, which is not similar and has nothing in common with – by that he errs in *shikul hada'at*.

This typology of judicial errors clearly ignores the Talmudic notion of error as a deviation from, or contradiction of, the teachings of the sages. For Sherira, judicial error is the failure to draw analogical links between roots and branches. The difference between tolerable and intolerable errors is therefore articulated according to the botanic metaphor and the relations of roots and branches. By viewing judicial error as a fallacy of analogical reasoning, Sherira expresses a position that seeks to impose constraints on its use and therefore to limit the range of legal solutions that may thereby be obtained. Not only does he reject the view of analogical reasoning as that of the jurist's personal preference, but he also proposes a new approach according to which executing judicial analogy requires substantive correlations between the root and its branches. Such an attitude towards legal reasoning supports the use of judicial analogy, but also limits the range of possible outcomes. In fact, Sherira aspires to constitute conceptual criteria to distinguish between valid and erroneous analogies.[68] Perhaps such a perception is best understood as an objectivist approach.[69] Accordingly, the jurist who carries out judicial analogy has to be aware of the potential and existing resemblances and not contradict them. For Sherira, judicial analogy is perhaps the most important tool for the jurists. We can summarize Sherira's position as a keen endeavor to provide relevant meaning to the Talmudic typology of judicial error in accordance with the Islamic theory of *qiyas*. Such relevancy is possible with an objectivist attitude that allows the peculiar juxtaposition of 'erroneous analogy.'

The great medieval thinker and jurist Moses Maimonides (1135-1204 CE) was also aware of the tension between the notion of error and analogy, though he took a different position on this problem. As a typical rationalist, in theology and in law, Maimonides supported the use of *qiyas*. When dealing with the Talmudic typology of judicial errors, he displays much sensitivity with regard to the wide range of possibilities that can be achieved by embracing legal reasoning. His approach to this issue expresses a sophisticated combination of fundamentalism[70] on the one hand, and reductionism on the other. Let us then see his interpretation to the Talmudic categories of judicial error:[71]

First, I will explain that judicial error may occur in one of two things, either with reference to [authoritative] transmitted text, as he forgot the language or he didn't learn it, and this is called an error in *dvar mishnah*. And the second, when he errs in a thing depended on analogy; as if the thing is possible as he stated, nevertheless the [common] practice contradicts it, and this is called an error in *shikul hadaat*.

Like Sherira, Maimonides too adopts the dual-stratum paradigm by identifying the Talmudic categories with the distinction between *nass*[72] and *qiyas*. Unlike Sherira, at least *prima facie*, he is still loyal to the essence of the Talmudic typology; he preserves the notion of judicial error as a

departure from an authorized norm. However, his definitions of the different circumstances are not in precise reference to the scholastic perception of the law. Yet he maintains the distinction between deviation from a fixed authorized norm and deviation from a norm that is fixed on the base of secondary principles. In that respect, Maimonides fairly appears as a fundamentalist, consistent with the Talmudic approach. Against this impression, however, his reductionism is revealed when he immediately proceeds to insert 'legal reasoning' into the category of *ta'ut beshikul hada'at*, and further when he historicizes the Talmudic typology:

[And] this was [relevant] before the editing of the Talmud, but in our times the possibility of this occurring has diminished, for if one issues a ruling, and we find the opposing view in the Talmud, then he errs in *dvar mishnah*; and if we do not find the opposing view, and his inferences seems probable according to the inferences of the divine law, although there are reasons against his ruling it is impossible to determine his [= the judge's] error, for his analogy is possible.

Firstly, Maimonides reduces the distinction between the two errors to modal terms – propositions from the transmitted text are necessary truths, their epistemological status is certain and absolute, and thus rendering any deviation is impermissible and intolerable; whereas propositions based on legal reasoning are only possibly true, their epistemological status is probable, and therefore error regarding such statements is not to be reversed. Secondly, by contextualizing the Talmudic typology in a limited historical framework, Maimonides eliminates the possibility of discretional error (*ta'ut beshikul hada'at*), and in fact abolishes the relevancy of the typology of judicial errors to post-Talmudic legal rulings.[73]

Compared to Sherira's absorption of the *qiyas* theory, legal reasoning for Maimonides widens the range of possible discretion. To that extent, Maimonides understands analogical reasoning as rhetorical means rather than logical tool. The canonization of the Talmud is for him a watershed moment in Jewish legal history,[74] a crucial event to the legitimacy of legal reasoning. Accordingly, rulings of post-Talmudic laws by analogical reasoning are not likely to be erroneous because "it is impossible to determine his [=the judge's] error, for his analogy is possible". That, of course, reduces the Talmudic typology as only one type of error is possible – deciding against an explicit ruling in the Talmud. This illustrates the Maimonidean fundamentalist-reductionist nexus: limiting the possibility of judicial errors to the Talmudic material in fact elevates the Talmud to the level of revealed law (*nass*) while at the same time also annulling the possibility of judicial errors regarding post-Talmudic cases. This being the case, whereas Sherira stresses restrictions in order to limit the range of possible analogies and rules out laws based upon erroneous analogies, Maimonides denies the very possibility of post-Talmudic judicial errors by viewing the sealing of the Talmud as an opening moment for nearly unrestricted judicial reasoning.[75]

5. Concluding Reflections: Comparability and Identity

… more importantly, to the historian of religion, chasing origins is of doubtful value because locating a "source" tells us next to nothing about why Muslims bothered with it. Rather than asking: Where did it come from? It is more fruitful to ask: What is it about this question that fascinated Muslim controversialists? And one might also ask: What aspects of Islam itself made this an interesting question?

Kevin Reinhart[76]

The above accounts make the case for comparing legal reasoning in Jewish and Islamic laws, and for asserting that the prevailing role of legal reasoning in medieval Rabbinic legal thought should be understood accordingly. In that regard, our analysis supports the 'comparative jurisprudence' thesis according to which a jurisprudential analysis utilizes better understanding of distinct legal praxes. Indeed, by referring to the jurists' constitutive imagination we comprehend the inherency of the dualistic conceptualization to religious legalism, and the variety of Rabbinic attitudes towards the legitimization of *qiyas* and its limits. While Sherira adopts the semantic inventory of the *qiyas* in preference to the Talmudic typology of judicial errors, Maimonides aims to harmonize the Islamic theory of the *qiyas* with the Talmudic categories, and consequently reduces the Talmudic distinction (*devar mishnah* /*shiqul ha-da'at*) to the Islamic one (*nass*/*qiyas*). By focusing on legal theory we remapped the Rabbinical stances on the use of *qiyas*. Against a well-recognized stream of Rabbinical jurists who celebrated the use of *qiyas* as a significant component of any judgment and lawmaking, Sa'adya limits its relevancy only to rational laws. Also, in jurisprudential terms, we observed the consistency of a rationalistic worldview and the objection to the *qiyas* (Sa'adya) and conversely the traditionalist commitment and the embracement of legal reasoning (Sherira).[77]

All this indicates that the above-examined jurists not only were well-acquainted with Islamic jurisprudence, but also represent a comparative consciousness, i.e. awareness of the comparability of both legal systems. Accordingly, the comparison of Jewish and Islamic legal theories from an etic perspective is justified by the comparative consciousness at the emic level.[78] Additionally, our analysis teaches that the modes which a jurist uses to view a legal system as comparable and comparison as a cognitive procedure are crucial to understand his perspective. To comprehend better the nature of the comparative consciousness we suggest the distinction between two comparative attitudes – *substantiating comparison* and *incorporating comparison*. The first views comparison as a means to confirm the uniqueness of the compared object by underlining the differences between the objects. Thus, the aim of comparison is to reveal the peculiar aspects of the compared objects. Conversely, incorporating comparison is taken as a tool to establish or to expose cross-references between the compared objects.

These distinctive attitudes can be demonstrated through two different accounts on the hybrid background of the Judeo-Arabic literature. Those

accounts are provided by two inspiring Jewish thinkers who lived in two distinct historical and cultural contexts – the medieval Spanish writer Moses Ibn Ezra (1055-1140 CE) and the modern Zionist poet Hayim Nachman Bialik (1873-1934 CE).

H. N. Bialik, committed to a strong nationalist view, pugnaciously condemns all literary expressions of Jewish thoughts in languages other than Hebrew. In fact, presenting Jewish ideas in languages other than Hebrew is, for him, not only alien to the Jewish *volksgiest*, but rather a betrayal – an act of apostasy that threatens the nation's very existence. Accordingly, Bialik refers to historical evidence that refutes such linguistic loyalty as rare exceptions. The three counterexamples are: (1) the Alexandrian Jewry, represented by Philo (20 BCE – 50 CE), which integrated Second Temple Jewish traditions with Hellenic cultural and intellectual values; (2) the medieval Judeo-Arabic literature; and (3) the modern Jewish Enlightenment, represented by the German Jewish philosopher Moses Mendelssohn (1729-1786 CE), who saw in the political emancipation an invitation for a genuine integration into the European culture. While denouncing the intentional ideal of cultural integration advocated by the Jewish Enlightenment (the *Haskalah*), the cultural hybridity of ancient Jewish Hellenism and medieval Jewish Arabism is described as exceptional and marginal; historical mistakes or mere responses to communicational needs of the masses.[79] Obviously Bialik explicitly embraces the nationalist worldview according to which language and law are not only outcomes of national history but also derivations of its very nature. In that respect, Bialik reflects a Zionist conviction that the two national enterprises – the revival of the Hebrew language and the parallel attempts to revitalize the Halakhic heritage to become a modern state law – manifest the essential nature of the nation. Consequently, Jewish jurisprudence was taken as self-defining project, in which the comparative perspective helped to particularize Jewish law as rooted in the nation's soul. With such a monothetic approach the compared objects are viewed as elements of a wider holistic framework that stands as the collective identity. Therefore, comparative law is a process of reconfirming national separatist identity and mainly about stressing differences vis-à-vis other national legal systems.

In contrast, the medieval courtier Moses ibn Ezra provides a different account of himself and his entourage as conscious assimilators into the Arabic culture. In his view his Jewish identity is absolutely consistent with the hybrid consciousness of Judo-Arabic writers:

… since our monarchy was revoked and our people spread [all over] and the nations inherited us and the sects enslaved us, we followed their patterns, lived their lives, pursued their virtues, spoke their language and tracked them and all their ways. As written: *But they mingled with the nations and learned their practices.*[80] And later on said: *so that the holy race has intermingled with the peoples of the lands,*[81] apart from matters of law and religion. And because of the exile and the changes of natural climates, the master of necessity has brought us to be like them.

In an elegant style, Ibn Ezra neutralizes criticism of the Israelites' assimilation among the Canaanites and the intermingling of the exiled Jews

with indigenous peoples. Instead he proposes viewing their acculturations as natural and necessary processes. Therefore we have here two contradicting views as to the medieval jurists' state-of-mind: The modern separatist disapproval of writing in the *lingua franca* and imitating foreign patterns, and the medieval acknowledgment that deep integration into the vernaculars is unavoidable and hence not viewed negatively. Obviously, as a matter of method, we believe that when trying to comprehend the relation of Halakhah to a foreign legal system through its jurisprudence, self-accounts and their state-of-mind should be preferred to later and external interpretations.[82]

For Sa'adya, whether to approve the *qiyas* or not is an epistemological question that is dependent on the metaphysics of the divine law. The Sa'adyian phenomenology of the divine law is indeed an original jurisprudence. In that sense, one may perhaps speak of two basic models - vertical versus horizontal - on whose basis the different legal theories are formulated. According to the horizontal model, and consistent with the synthetic approach to the sources of religious knowledge, the basic division of religious law is into rational norms and revealed norms. This approach assigns reasoning and intellectual activity an equal status to that of revelation. The vertical model, however, is the dual-layered paradigm in which legal reasoning occupies a secondary place *vis-à-vis* the knowledge known through revelation.[83]

In the light of the above analysis, we can refer back to the theoretical justification of Jewish and Islamic legal systems. It appears that the comparability of Jewish and Islamic laws stands apart from the rationale of comparative law or comparative jurisprudence in general. Comparison as an activity in legal studies proceeds from generalizations and not the other way around. It requires a certain amount of "idealism," as there is human intentionality built into the law as social-cultural phenomena. Legal concepts are thus recognizable by humans and as such expressed by language. A sharable legal language presupposes a more or less shared view of the implementation of the law, and entails communicability because of the generality of the concepts. In that respect, Jewish and Islamic legal traditions are not only comparable from an etic perspective, but also from an emic perspective. Their comparability is justified and even to be expected, because the actors in these systems, during the Middle Ages, saw these systems as comparable, and shaped their legal thought out of this observation. Regarding Jewish and Islamic jurisprudence, the internal point of view, is not only a methodological tool that enables the comparison of these systems, but rather a comparative perspective in its own right. Comparison of Jewish and Islamic laws is therefore not only plausible, but in fact a necessary starting point for a proper understanding of their development in the Middle Ages.

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Notes

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1 We distinguish between 'comparability' and 'commensurability.' While commensurability, as used by legal economists and choice theorists, denotes the proposition that all options or choices can be compared by reference to an external ranking scale, comparability is gained due to an isomorphous relation between the two systems with no reference to an external scale or scaling procedure. See: Jeanne L Schroeder, "Apples and Oranges: The Commensurability Debate in Legal Scholarship" in *Cardozo Law School, Public Law Paper No. 48* (2002). pp. 2-7.

2 Contrary to the popular adage, apples and oranges are in fact comparable. While apples and spaceships, for example, or apples and liberal values, are much more distinct and thus much less comparable, there is a lot of sense in comparing the two fruits in terms of their price, sweetness, color, weight, nutritional value and so on. On the necessity to presume the existence of 'universals' for a comparative project see: Jeppe Sinding Jensen, "Universals, General Terms and the Comparative Study of Religion," *Numen* 48 (2001).

3 See: Edward W. Said, *Orientalism* (New York: Pantheon Books, 1978); Martin S. Kramer, *The Jewish Discovery of Islam: Studies in Honor of Bernard Lewis* (Tel Aviv: Moshe Dayan Center for Middle Eastern and African Studies, Tel Aviv University, 1999), pp. 1-48.

4 See: Patricia Crone and M. A. Cook, *Hagarism: The Making of the Islamic World* (Cambridge, New York: Cambridge University Press, 1977).

5 See: Aaron W. Hughes, "The Golden Age of Muslim Spain: Religious Identity and the Invention of a Tradition in Modern Jewish Studies," *Historicizing 'tradition' in the study of religion* (2005), pp. 51-74; Susannah Heschel, "How the Jews Invented Jesus and Muhammed: Christianity and Islam in the Work of Abraham Geiger," *Ethical monotheism, past and present: essays in honor of Wendell S. Dietrich, Brown Judaic studies, no. 329* (2001), pp. 49-73; Michael E. Pregill, "The Hebrew Bible and the Quran: The Problem of the Jewish 'Influence' on Islam," *Religion Compass* 1, no. 6 (2007), pp. 1-17.

6 See: "The Mothering Principle in the Comparison of Religions" in: Thomas A. Idinopulos, Brian C. Wilson, and James Constantine Hanges, *Comparing Religions: Possibilities and Perils?*, Numen Book Series. Studies in the History of Religions, (Leiden, Boston: Brill, 2006), pp. 51-58.

7 See: S. D. Goitein, "Interplay of Jewish and Islamic Laws," in *Jewish Law in Legal History and the Modern World*, ed. Bernard S Jackson (Leiden). pp. 61-77; J. L. Kraemer, "The Influence of Islamic Law on Maimonides: The Case of the Five Qualifications," *Te'udah (Heb.)* 10 (1996), 225-244. Libson observes opposite directions of influence in the formative period of Islam and the from the tenth century on, see: G. Libson, "Interaction between Islamic Law and Jewish Law During the Middle Ages" (paper presented at the Law in multicultural societies: proceedings of the IALL meeting, Jerusalem, July 21-26, 1985, Jerusalem, 1989).

8 The philological method illustrates 'external epistemology' according to which the validity of textual content is determined with reference to the history of the text's transmission and the reconstruction of its originality.

9 See: Aaron W. Hughes, *Situating Islam: The Past and Future of an Academic Discipline*, Religion in Culture (London, Oakville, CT: Equinox Pub, 2007); Mark R.

Cohen, *Under Crescent and Cross: The Jews in the Middle Ages* (Princeton: Princeton University Press, 2008).

10 Steven M. Wasserstrom, *Between Muslim and Jew: The Problem of Symbiosis under Early Islam* (Princeton: Princeton University Press, 1995), contrasts the notion of 'cultural borrowing' with that of 'creative symbiosis' and advocates the latter. Hava Lazarus-Yafeh, *Intertwined Worlds: Medieval Islam and Bible Criticism* (Princeton: Princeton University Press, 1992), takes on a similar comparative project though rejects the aversion of the language of borrowing. Other attractive and meaningful metaphors are of 'confluence of rivers' – Jaroslav Stetkevych, "The Confluence of Arabic and Hebrew Literature," *Journal of Near Eastern Studies* 32, no. 1/2 (1973), 'crosspollination' – Lenn Evan Goodman, *Jewish and Islamic Philosophy: Crosspollinations in the Classic Age* (Edinburgh: Edinburgh University Press, 1999). or 'whirlpool effect' – Sarah Stroumsa, *Maimonides in His World: Portrait of a Mediterranean Thinker* (Princeton, N.J.: Princeton University Press, 2009), xiv.

11 See: Marsha A. Hewitt, "How New Is The "New Comparativism"? Difference, Dialectics, and World-Making," *Method & Theory in the Study of Religion* 8 (1996), Luther H. Martin, "The New Comparativism in the Study of Religion: A Symposium," *Method & Theory in the Study of Religion* 8 (1996), William E. Paden, "Elements of a New Comparativism1," *Method & Theory in the Study of Religion* 8 (1996), E. Thomas Lawson, "Theory and the New Comparativism, Old and New," *Method & Theory in the Study of Religion* 8 (1996). Also see Robert A. Segal, "Classification and Comparison in the Study of Religion: The Work of Jonathan Z. Smith," *J Am Acad Relig* 73, no. 4 (2005), who ascribes such approach to Jonathan Z. Smith.

12 This approach is manifested in Ewald's 'comparative law as comparative jurisprudence' thesis. Accordingly, a comparative study of legal systems should not focus merely on contextual data, nor on textual similarities and dissimilarities, but rather on the conceptual self-understanding of the participants in legal theory and praxis. This thesis suggests viewing jurisprudence as the pivotal mean by which an accurate understanding of foreign legal system is to be achieved. The object of legal comparative studies therefore is neither the 'law in books' nor the 'law in action', but rather the 'law in the minds' – the consciousness of the jurists' in particular legal reality. See: William Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?," *University of Pennsylvania Law Review* 143, no. 6 (1995), idem, "Comparative Jurisprudence (II): The Logic of Legal Transplants," *The American Journal of Comparative Law* 43, no. 4 (1995).

13 *For a legal system to be comparable it must fulfill a dialectic relation – it must be simultaneously unified and plural*. Catherine Valcke, "Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems," *The American Journal of Comparative Law* 52, no. 3 (2004), p. 721.

14 A description of Jewish attendances in Muslim intellectual assemblies – *majlis* – is reported by one of the visitors: "At the first meeting there were present not only people of various [Islamic] sects, but also unbelievers, Magians, materialists, atheists, Jews and Christians, in short, unbelievers of all kinds. Each group had its own leader, whose task it was to defend its views, and every time one of the leaders entered the room, his followers rose to their feet and remained standing until he took his seat. In the meanwhile, the hall had become overcrowded with people. One of the unbelievers rose and said to the assembly: we are meeting here for a discussion. Its conditions are known to all. You, Muslims, are not allowed to argue from your books and prophetic traditions since we deny both. Everybody, therefore, has to limit himself to rational arguments. The whole assembly applauded these words. So you can imagine . . . that after these words I decided to withdraw. They proposed to me that I should attend another meeting in a different hall, but I found the same calamity there." (First quoted by R. Dozy, *JA* 2 (1853), p. 93. The translation is from A. Altmann's introduction to Sa'adya Gaon, *The Book of Doctrines and Beliefs* (Oxford: East and West Library, 1946), p. 13.

15 Obviously, it is associated with common identification of the Law with the 'Word of God', the image of God as an omnipotent sovereign and legislator and the metaphor of the

law as the 'right path.' Indeed, the Hebrew term *Halakhah* (הלכה) derives from the root of motion (*ha.la.kh*, lit. went) and the Arabic terms *Sira* and *Shari'a* mean 'path' or 'way' to go within. However, for various trends in the Jewish Law tradition Halakah is not necessarily associated with social order, but rather with morality or spiritual achievements. See: Menachem Lorberbaum, *Politics and the Limits of Law: Secularizing the Political in Medieval Jewish Thought* (Stanford (Calif.): Stanford university press, 2001). In fact, treating *Halakhah* and *Shari'a* as legal systems is already a reductionist projection of alien notions. See: G. C. Kozlowsky, "When the 'Way' Becomes the 'Law': Modern States and the Transformation of *Halakhah* and *Shari'a*," *Studies in Islamic and Judaic traditions II: papers presented at the Institute for Islamic-Jewish Studies, Center for Judaic Studies, University of Denver* (1989), pp. 97-112.

16 Although Islamic scholasticism used to distinguish between the two reflective disciplines – *usul al-dín* (= theoretical theology, lit. the roots of the faith/religion) and *uṣūl al-fiqh* (= legal theory, lit. the roots of the law) – theological presumptions are indispensably considered within the jurisprudential discussions. On its parallels in the western legal traditions, see: Gill R. Evans, *Law and Theology in the Middle Ages* (New York: Routledge, 2002), pp. 1-5, 27-46.

17 Franz Rosenzweig, *The Star of Redemption* (Notre Dame, IN.: Notre Dame Press, 1985), pp. 216-217.

18 Talmudic literature consist collections of laws, traditions and scholastic discussions presented as commentaries on the *Mishnah* (early third century), the Palestinian Talmud (early forth century) and the Babylonian Talmud (mid fifth century).

19 See: William A. Graham, "Traditionalism in Islam: An Essay in Interpretation," *Journal of Interdisciplinary History* 23, no. 3 (1993). "… the soil of Islam nourished the first real historical interest since antiquity, a really and truly scientific interest in the modern sense, without any ulterior 'philosophy of history'. "; Rosenzweig, *The Star of Redemption*, p. 225.

20 For the reconstruction of Judeo-Christian theology Rosenzweig (*The Star of Redemption*, p. 166) dismantles the *Quranic* ethos about the heavenly book (*Umm al-Kitāb*) – a prototype of the *Quran* – of which Jews and Christians are considered its early possessors. This ethos underlines the theological commonality of the three Abrahamic religions as repositories of the holy scriptures, and consequently endows Jews and Christians with a special status as the "people of the book." See: George Vajda, "Ahl al-Kitāb," *Encyclopedia of Islam*, (Second Edition).

21 Rabbinic Judaism is a predominant stream within the post temple Judaism viewing the Oral Law as eminent part of the divine law, the sole authorized interpretation of the scripture and this equivalent to scriptural revelation. Karaite Judaism is characterized by its recognition of the Biblical scriptures as the sole authoritative source and consequently the rejection of Rabbinic Judaism and the authority of the Oral Law. Its intellectual flourishing was mainly between the ninth and eleventh centuries CE. See: Fred Astren, *Karaite Judaism and Historical Understanding* (Columbia, S.C.: University of South Carolina Press, 2004).

22 See: Aviram Ravitsky, "Talmudic Methodology and Aristotelian Logic: David Ibn Bilia's Commentary on the Thirteen Hermeneutic Principles," *Jewish Quarterly Review* 99, no. 2 (2009), p. 186.

23 The debate about the authority of human reasoning divided the Islamic world into two camps – traditionalists (*ahl al-hadith*) and rationalists (*ahl al-ra'y*). Islamic legal historiographies often describe this tension as the background for the growth of jurisprudence as an autonomous discipline and its literary form of the *uṣūl al-fiqh*. Notwithstanding, such a debate did not divide the Jewish intellectual world in the period, although the conceptual apparatus that was shaped by Islamic jurists did underlie the Rabbinic attitudes to the question of legal reasoning.

24 It probably originated in ancient Hebrew, but its assimilation within the Arabic language began at an early period and its general meaning preceded the legal one. Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), pp.

99-100, identifies the origins of the Islamic *qiyas* in the Hebrew term *hekesh* (היקש), based on the Aramaic root *n.k.sh* which means to 'hit together'. Further parallels between the Islamic doctrine and the Greco-Roman legal-logical terminology have also been drawn (M. G. Carter, "Analogical and Syllogistic Reasoning in Grammar and Law," in *Islam: Essays on Scripture, Thought, and Society: A Festschrift in Honour of Anthony H. Johns, Islamic Philosophy, Theology, and Science, V. 28*, ed. Peter G. Riddell, Tony Street, and Anthony H. Johns (Leiden, New York: Brill, 1997).). For a refutation of the Hebrew and Greek influence on the *qiyas* see A. Hasan, "The Definition of Qiyas in Islamic Jurisprudence," *Islamic Studies* 19, no. 1 (1980), pp. 1-28.

25 Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl Al-Fiqh* (Cambridge, New York: Cambridge University Press, 1997), p. 83.

26 The conceptual connection between *qiyas* and *ijtihad* is evident in the *uṣūl al-fiqh* writings that blur the difference between the two terms. See: Joseph E. Lowry, *Early Islamic Legal Theory: The Risala of Muhammad Ibn Idris Al-Shafi`I* (Leiden, Boston: Brill, 2007), pp. 142-163; Morris Zucker, "Fragments from *Kitāb Tahsil Ashar'i' Asama'iyah* to Sa'adya Gaon," *Tarbitz* 41 (1972), p. 380, n. 27. On Ghazali's discussion on this topic in: Hasan, "The Definition of Qiyas in Islamic Jurisprudence.", p. 5.

27 In earlier contexts the *qiyas* signified legal analogy alone, though later it also served as a synonym for philosophical syllogism in general. One should not confuse between the two terms; Legal *qiyas* is a technique for expanding the revealed law—a finite body of knowledge—to respond to new circumstances, whereas the syllogistic *qiyas* validates the logic of this technique without deriving any new conclusion. The two types of *qiyas* therefore exclude one another; Syllogistic *qiyas* does not create new propositions, whereas legal *qiyas*, on the contrary, does not prove its own logic. Legal *qiyas* is operative and as such produces legal norms, while syllogistic *qiyas* is methodological, justifying arguments that have been placed forward.

28 Imam Muhammad ibn Idrīs al-Shafi'i (767-820 CE) was a highly profound jurist whose writings and teachings eventually created the Shafi'i school, one of the four canonical schools in the Sunni legal tradition. Traditionally considered the founder of Islamic jurisprudence, his pioneering *Risala* is still acknowledged as one of the earliest accounts of legal reasoning, which influenced later discussions on these matters.

29 To Shafi'ī, the cause-based *qiyas* is defined as follows: "…when God or His Messenger forbids a thing by means of an explicit text [manṣūṣan, منصوصا], or makes it licit, for a particular policy reason [ma'nā, معنى]. If we find something which is covered by that reason in a matter for which neither a passage from the Book nor a Sunna has provided an explicit rule for precisely that thing, then we could make it licit or forbid it, because it is covered by the reason for making [the earlier thing] licit or forbidden." (*Risala*, ¶ 124). See Lowry's discussions on these paragraphs p. 149-155. According to the Hanafi School, only this type of *qiyas* is justified. See: Aron Zysow, "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory" (Ph.D., Harvard University, 1984), p. 329).

30 According to Shafi'ī, this type of *qiyas* is when "… we find something to resemble one thing [that has been forbidden or made licit] or another thing, and we can find nothing that resembles it more than one of those two things. Then, we would bring it into a certain relation with one of the [two] things that best resemble it." (*Risala*, ¶ 124).

31 Herbert Kalb, *Studien Zur Summa Stephans Von Tournai* (Innsbruck: Universitätsverlag Wagner, 1983).

32 *Note* 23.

33 Following the Jewish custom of facing the site of the temple in Jerusalem during worship, Muhammad instructed his followers to turn their faces at prayer-time towards Mecca. The *Quranic* verse pertaining to this obligation refers primarily to those outside of the city and who find themselves in remote places – "And wherever you may go out, you

shall turn your face towards the holy mosque, and wherever you may be, turn your faces towards it" (*Quran* 2: 150). *Risala*, ¶ 1377-1391.

34 According to Jewish law, in similar circumstances the believer is not obliged to face the temple but to direct his heart towards God. See: *Tosefta, Berachot*, 3: 14.

35 Moreover, just as the heavenly signs – given by God – are the means for the worshipper to orient himself, so too does the jurist rely on God-given proofs – His signs and hints – to determine the correct answer: "And [Allah] marks and sign-posts; and by the stars (men) guide themselves" (*Quran* 16: 16).

36 The terms 'metaphysical realism' and 'strong objectivism' are taken from the description of legal epistemology by Coleman and Leiter, see: Jules L. Coleman and Brian Leiter, "Determinancy, Objectivity, and Authority," in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford, New York: Clarendon Press, Oxford University Press, 1995), p. 248.

37 "There is, for everything which befalls a Muslim, a binding rule, or, by means of pursuing the correct answer in regard thereto, some extant indication. He [= the Muslim] must, if there is a rule concerning that specific thing, follow it. If there is no such rule, then one seeks the indication, by pursuing the correct answer in regard thereto by means of *ijtihād. ijtihād* is, in turn, *qiyas*." (*Risala*, ¶ 1326); Lowry, *Early Islamic Legal Theory: The Risala of Muhammad Ibn Idris Al-Shafi`i*, p. 145.

38 [For Shafi'i] "all events have the resolution in God's law; all knowledge is therefore knowledge of God's law." Norman Calder, "Ikhtilâf and Ijmâ' in Shâfi'î's Risâla," *Studia Islamica*, no. 58 (1983), p. 70.

39 We use the term "Gnostic" here in its literal sense derived from the Greek word γνῶσις, which means "knowledge". This usage is of course distinct from the historical meaning of Gnosis denoting the first century's religious movements, which held dualistic worldviews.

40 Shafi'i (*Risala*, ¶ 69) highlights this principle basing it on a verse from the *Quran* – "Does man think that he will be left uncontrolled, [without purpose]?" (*Quran* 75:36).

41 Shafi'i' explains that God's guidance comes about through two distinct channels, paralleling the revealed/derivative distinction – "[God] guided them [= the believers] to the truth by means of plain texts and by means of inferential indications." *Risala*, ¶ 1445; Lowry, *Early Islamic Legal Theory: The Risala of Muhammad Ibn Idris Al- Shafi`i*, p. 245. Elsewhere he states that God's guidance pertains to every possible state-of-affairs. *Risala*, ¶ 20. Also see: Calder, "Ikhtilâf and Ijmâ' in Shâfi'î's Risâla.", p. 55; George Makdisi, "The Juridical Theology of Shâfi'î: Origins and Significance of Uṣūl Al-Fiqh," *Studia Islamica*, no. 59 (1984), p. 41.

42 Diana Lobel, *Between Mysticism and Philosophy: Sufi Language of Religious Experience in Judah Ha-Levi's Kuzari*, Suny Series in Jewish Philosophy (Albany, N.Y.: State University of New York Press, 2000), pp. 59-65.

43 On the view of tradition as a valid and reliable source of knowledge see: Shlomo Pines, "A Study of the Impact of Indian, Mainly Buddhist, Thought on Some Aspects of Kalam Doctrines," *Jerusalem studies in Arabic and Islam* 17 (1994), pp. 182-203.

44 Celebrating the *qiyas*, to Sa'adya, enable the Karaites to elude the binding nature of the tradition – "therefore they [= the Karaites] adopted the belief in *qiyas*, because of [their] desire to save [themselves] trouble and acknowledging the validity of the tradition, and [therefore] they said: the *qiyas* suffice us, and [truly] there is no transmitted tradition from the prophet" (quoted in: Abu Ya'qub Al Qirqisani, *Kitāb al-Anwār wal-Marāqib: Code of Karaite Law*, ed. Leon Nemoy (N Y: The Alexander Kohut Memorial Foundation, 1939), II, 9:1). Accordingly, both Sa'adya and the Karaites, perceive the equilibrium of *qiyas* and tradition.

45 Ibid., II, 9:1.

46 Ibid. The controversy between Sa'adya and the Karaites is thus presented in terms of their different responses to the gnostic circumstances; while Sa'adya sees the *Mishnah* and the *Talmud* as the guiding hints that God implanted within reality to instruct His believers, the Karaites hold fast to analogy as "the guide that God established to guide his servants in which is not [explicit] in the Book." Ibid.

47 In fact, the tradition of rationalizing the Divine laws starts in the Second Temple Hellenistic literature, such as the *Letter of Aristeas*, *IV Maccabees,* and the Philonic thought. In that respect, Sa'adya's distinction, inspired by the *Mu'tazilite* typology of the laws, is not only reviving a rationalist theology, but also is an innovative endeavor to establish a legal theory based on this distinction.

48 Note 26.

49 Sa'adya's reference to Aristotelian categories follows Al-Farabi's (870-950 CE) holistic metaphysics. It stresses the correlation between the attributes of the laws and their intelligibility. Ontologically, it pertains to the transition, to use Sa'adya's language, from the 'natural-state-of-affairs' (*halo al-asia al-tibya)* to the "legal-state-of-affairs" (*hal al-amor al-sharriya*). Therefore, knowledge of the particulars is achieved through the comprehension of their totality, since the totality itself is defined by the particulars that comprise it. Therefore, the holistic metaphysics of the law derive directly from Sa'adya's understanding the substance as a totality, and it is that which dictates the possibility of apprehension of accidents or particulars.

50 *Kitab Tahsil*, p. 387, r. 9.

51 *Kitab Tahsil*, p. 388, r. 17.

52 *Kitab Tahsil*, p. 388, r. 14.

53 While Sa'adya does not elaborate on this in *Kitab Tahsil,* he articulates the underlying theological background of this holistic perception in his introduction to *Commentary on the Torah*. Holism is expressed by the principle that "no things have existence except by way of combination" (כלהא לֹא תתֹבת אלֹא בתאליף). He also deals there with the relationship between primary-sensory knowledge and secondary-rational knowledge. Accordingly, sensorial perceptions are analyzed by the intellect as parts of a combined object, and as such the analysis promises the comprehension of the essence. See: "Introduction to the Commentary on the Torah," Gaôn Sa'adya, *Sa'adya Gaon Commentary to Genesis (Perûshê Rav Sa'adya Gaôn Leberêsît) (Heb.)*, ed. Morris Zucker (New York: The Jewish Theological Seminary of America, 1984), pp. 167-169.

54 This distinction as initially considered a Sa'adian novelty by which he bridged two religious doctrines – rationalism (*Mu'tazilah*) and authoritarianism (*Ashari'a*). See: A. Altman, "The Division of the Commandments for Sa'adya Gaon," in *The Book of Rav Sa'adya Gaon (Heb.)* (Jerusalem: Harav Kok Institute, 1943), pp 658-673. Others took it as a synthetic reading of the Aristotelian concept of 'belief' with the Stoic concept of 'consent.' See: Harry Austryn Wolfson, "The Double Faith Theory in Clement, Saadia, Averroes and St. Thomas, and Its Origin in Aristotle and the Stoics," *The Jewish Quarterly Review* 33, no. 2 (1942), pp. 213-264. With the discovery of *Mu'tazilites*' writings over the course of the years it became evident that this distinction preceded Sa'adya. A similar conclusion reached by H. Ben-Shammai, "The Division of the Commandments and the Concept of Wisdom in R. Sa'adya Gaon's Thought," *Tarbitz (Heb.)* 41 (1972), pp. 170-182.

55 *Kitab Tahsil*, p. 394, n. 101.

56 The seventh (r. 71- 75), the eighth (r. 75-84) and the tenth (r. 92-100) arguments.

57 The justification of controversies was a crucial topic among medieval Jewish jurists. Controversies allegedly indicate the incoherency of Rabbinic tradition and as such were subject criticism and apologetics. See: M. Halbertal, "Sefer Ha-Mitzvot of Maimonides – His Architecture of Halakhah and Theory of Interpretation," *Tarbitz (Heb.)* 59 (1992), pp. 457-480.

58 Indeed, Maimonides, who embraced the *qiyas* and saw it as the main mode for the development of the entire body of the Jewish Law, points to the connection between legal reasoning and the elimination of master-disciple hierarchies – "And you should know that prophecy is not effective in investigating and commenting on the Torah and in deriving branches [= new norms] by the thirteen principles [of inference], but whatever Joshua and Pinchas [= the disciples of Moses] can infer in matters of investigation and analogy, Rav Ashi and Ravinah [= the sealer of the Babylonian Talmud, i.e. 5th CE] can do so." Moses

Maimonides, *F. Roser (Trans.) Maimonides' Introduction to His Commentary on the Mishnah,* (Northvale, N.J.: Jason Aronson, 1995).

59 Rudolf von Jhering, *Geist Des Römischen Rechts Auf Den Verschiedenen Stufen Seiner Entwicklung* (Basel: B. Schwabe, 1953), p 8-9.

60 Indeed, against the Shī'i insistence that the imam's *ijtihād* is free from error and hence could carry certain knowledge, Sunni legal theory acknowledge the fallibility of the jurist.

61 "[It is] that in respect of which God has imposed on His creation the obligation to perform ijtihād in order to seek it out. He tests their obedience in regard to ijtihād just as He tests their obedience in regard to the other things He has imposed on them." (*Risala*, ¶ 59).

62 *Risala*, ¶ 1409.

63 *Ghazzali,* Deliverance from Error and Mystical Union with the Almighty (Al-Munqidh Min Al-Dalal) *ed. George F. McLean and Rif`at. Nurshif Abd al-Rahim (trans.), Cultural Heritage and Contemporary Change, V. 2 (Washington, D.C.: Council for Research in Values and Philosophy, 2001), pp. 85-86.*

64 "R. Shesheth said in R. Assi's name: If he erred in *dvar mishnah*, the decision is reversed; if he erred in *shikul hada'at*, the decision may not be reversed." (*Babylonian Talmud, Sanhedrin,* 33a).

65 "Ravina asked R Ashi: Is this also the case if he erred regarding a teaching of R. Hiyya or R. Oshaia? Yes, said he. And even in a dictum of Rab and Samuel? Yes, he answered. Even in a law stated by you and me? He retorted, Are we then reed cutters in the bog? How are we to understand the term: *shikul hada'at*? — R. Papa answered: If, for example, two *Tannaim* [= sages of the *Mishnah*] or *Amoraim* [= sages of the Talmud] are in opposition, and it has not been explicitly settled with whom the law rests, but he [the judge] happened to rule according to the opinion of one of them, whilst the general practice; follows the other, — this is a case of [an error] in *shikul hada'at*." (*idem*).

66 Born around 900 CE and died around 1000 CE. He served as the head of the Babylonian yeshiva at *Pumbedita,* which was relocated to Baghdad towards the end of the ninth century.

67 Sherira Gaon, *Otsar Ha-Geonim Le-Masekhet Sanhedrin (Heb.)*, ed. Zwi Taubes (Jerusalem: H. Vagshal, 1980)*, pp. 25-26.

68 Sherira's insights can be compared to those of Sayf al-din al-Amidi (d. 1233 CE). For Amidi, the resemblance between two analogized cases is anticipated due to its preexistence and not the aftermath the jurist's deliberation. By that, he situates the *qiyas* outside of the sphere of intellectual activity of the jurists. See: Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), pp. 552-553.

69 It seems that 'roots' and 'branches' in Sherira's vocabulary carry slightly different denotations from their usual meanings in the *uṣūl al-fiqh* literature. They do not refer to the principles and their particular derivations, but rather stand for two types of resemblances. A 'root' is a legal norm where the potential similarities, subject to further analogies, are fixed in advance. Therefore, failure to construe the *ab initio* similarities is an intolerable judicial error. A 'branch' is a legal norm where the potential resemblances are not prefixed. Analogy drawn from this norm is not undermining preexisting resemblances and thus tolerable.

70 The fundamentalist character of Maimonides was recently emphasized by Stroumsa, *Maimonides in His World: Portrait of a Mediterranean Thinker*, pp. 53-85.

71 Maimonides, *Commentary on the Mishnah, Bekhorot*, 4, 4.

72 The word *nass* or *nusūs* generally means fundamental text or script. In Islamic legal theory it refers to the revelational law that includes the *Quran* and the *Hadīth*. As a result they both classified as *nass*. See: Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh*, p. 7.

73 Maimonides' approach can be compared the dogmatic-reductionism taken by his contemporary Issac b. Abba Mari (1122-1193) who also eliminates the possibility of discretional error, though without preserving the Talmudic definitions: "How are [the circumstances of] *shikul hada'at* like? As if two *Amoraim* are mutually opposing, and *sugia*

deshma'ta [= a tradition on that matter], corresponds to the [other] one; it is not [considered] an error for whoever follows the practice of one can do so, and whoever follows the practice of the other can do so." Isaac b. Abba Mari, `*Itur Sofrim: (Sefer Ha-*`*Itur)* 3vols. (New York: 1956), pp. 157-158.

74 The jurisprudential significance of historical events is also illustrated by a parallel conception in the Sunni legal theory, according to which the "gates of *ijtihād*" were "closed" in the 10th century. On the meaning of this phrase see: Wael B. Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies* 16, no. 1 (1984), 3-41.

75 Maimonides' fundamentalist-reductionist approach is also apparent in his attitude towards the problem of transmission. On that topic he claims that Rabbinic law indeed relies on a continuous transmission traced back to Moses at Sinai, however the continuous chain of transmission (*isnad*) had vanished when the Talmud has sealed and therefore post-Talmudic law is not based on a transmission any longer. See: Joseph E. David, "Critical Transmission in Early Medieval Rabbinic Thought (Heb.)," in *New Studies in the Philosophy of the Halakhah, Jerusalem Studies in Jewish Thought*, eds. A. Ravitzky and A. Roznak (Jerusalem: Magnes Press, 2008), pp. 345-385.

76 A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought*, Suny Series in Middle Eastern Studies (Albany: State University of New York Press, 1995), p. 10.

77 This point has been emphasized by scholars who linked Shafi'i's traditionalism and legal theory. See: Calder, "Ikhtilâf and Ijmâ' in Shâfi'î's Risâla.", p. 72; George Makdisi, "The Significance of the Sunni Schools of Law in Islamic Religious History," *International Journal of Middle East Studies* 10, no. 1 (1979), p. 12.

78 The etic/emic distinction suggests two perspectives in the study of a society's cultural systems, parallel to the two perspectives used in linguistics studies. Accordingly, the emic perspective focuses on the intrinsic cultural distinctions that are meaningful to the members of a given society. Thus, the native members of a culture are the sole judges of the validity of an emic description, just as the native speakers of a language are the sole judges of the accuracy of a phonemic identification. The etic perspective relies upon the extrinsic concepts and categories that have meaning for scientific observers.

79 "The national betrayal launched not with the weakening of religion and the decline of faith, but rather with the neglect of language: and the [sages] of Alexandria, which left no remnant in the nation, will prove. Thousands of Jews, which apostatized during the middle-ages, they were all, firstly neglectors of the language, and by that they become nationally annihilated … The endeavors of medieval authors to write in vernaculars should not be counted. These were only practical attempts by which the sages only meant to elucidate the people their opinions in a spoken language. Their main teachings were written in Hebrew, and [indeed] Arabic as literary expression was an exception. From the time of Ben Menachem [= Moses Mendelssohn] and onwards, the adaptation has been formed as a method, because of the immense thirst for emancipation. The writers wanted to show the world their (human) worth – and so the vast danger had begun" (H. N. Bialik, "On *Nation* and *Language*" (Moscow, 1917)).

80 *Psalms*, 106: 35.

81 *Ezra*, 9: 2.

82 On the scholarly biases of Jewish historians towards assimilation and essentialism, see: Funkenstein Amos, "The Dialectics of Assimilation," *Jewish Social Studies,* 1/2 (1995), pp. 1-14.

83 Calder, "Ikhtilâf and Ijmâ' in Shâfi'î's Risâla.", p. 70, mention that Shafi'i ignores this distinction as part of his critical approach towards the *Mutazali* theology. See: John E. Wansbrough, *The Sectarian Milieu: Content and Composition of Islamic Salvation History*, London Oriental Series (Oxford, New York: Oxford University Press, 1978), pp. 110-113.