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The Role of Islamic Legislation in Enriching Legal Theories and Laws

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Abstract

This study aims to highlight the cognitive superiority of Islamic legislation in establishing many legal principles and theories, and to demonstrate the distinctive features of Islamic legislation compared to positive laws, reaching a level of perfection. The study also presented examples of jurisprudential theories that contributed to enriching many legal principles and theories, such as: the theory of abuse of right, the theory of emergency circumstances, the theory of liability for shortcomings, and the responsibility of non-discrimination. Furthermore, the research showed the extent of the influence of Islamic jurisprudence on both modern and ancient Western laws, as well as Arab legal codes.

Keywords: *Islamic Legislation, Cognitive Enrichment, Theories, Law.*

Introduction

Undoubtedly, Islamic jurisprudence is considered a wealth generated by the sources of Islamic legislation. It, in turn, serves as a source among the legal codes, both Arab and international. This is what the research seeks to highlight by demonstrating the imprints of Islamic jurisprudence on the level of Arab and international laws. However, it is important to note that this emphasis does not imply identical legislative phrases, but rather the emphasis lies in the agreement on the philosophy of legislation (Fernández-González et al., 2022; Safrida et al., 2023).

First: Research Problem

Islamic jurisprudence, with its flexibility, has managed to keep pace with all the developments of life, its circumstances, and its contemporary issues. Scholars have expressed the ability of legislative sources to adapt, be present, renew. However, the worthy question for mention, discussion, and research is :

How did Islamic jurisprudence manage to influence the legislative systems in both Arab and Western contexts? Where are its most significant imprints in codification and legislation ?

Second: Research Objectives

To understand the capabilities of Islamic legislation and the extent of its scope in both codification and regulation.

1. To highlight the impact of Islamic legislation on Arab and Western legal codes.
2. To shed light on the jurisprudential relations with non-Muslims and acknowledge the openness of Islamic legislation, its capabilities, and the extent of its influence on laws.
3. To distinguish the characteristics that set Islamic legislation apart from positive laws.

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Third: Research Methodology

The researchers employed the following methods to achieve the research results:

1. Inductive method by tracking specific provisions in international laws that demonstrate legislative agreement with the influence of Islamic jurisprudence.
2. Comparative analytical method through the researchers' analysis of some of these cited provisions, emphasizing the relationship of influence and mutual influence between them.

Fourth: Research Plan

Chapter One: Definition of Islamic Legislation, its Characteristics, and its Impact on Legal Thought

Section One: Concept of Islamic Legislation and its Characteristics

- Subsection One: Defining Islamic Legislation
- Subsection Two: Characteristics that Distinguish Islamic Legislation from Positive Laws

Chapter Two: Key Jurisprudential Theories Contributing to Cognitive Enrichment of Legal Thought
Section One: Concept of Jurisprudential Theory and its Role in Jurisprudence and Law

- Subsection One: Understanding Jurisprudential Theories
- Subsection Two: Examples of Principles and Theories Derived from Islamic Jurisprudence
- First: Theory of Abuse of Right
- Second: Theory of Emergency Circumstances
- Third: Theory of Liability for Shortcomings and Non-Discrimination

Chapter Three: Influence of Islamic Jurisprudence on Ancient and Modern Western Legislations
Section One: Influence of Islamic Jurisprudence on Canon Law and Byzantine Laws
Section Two: Legislative Systems Recognized in the West
Section Three: Impact of Maliki Jurisprudence on Western Legislation
Section Four: Influence of French Commercial Terminology on Jurisprudential Legislation
Chapter Four: Influence of Islamic Legislation on Arab Legal Codes

Conclusion

Results

Chapter One

Definition of Islamic Legislation, Its Characteristics, and Its Impact on Legal Thought.

Section One: The Concept of Islamic Legislation and Its Characteristics

Legislation: Derived from the root to legislate, emphasized with a double originating from) "(Shari'a) which means the source of water. It is derived from the religious term(Shari'a) which refers to what God has legislated in religion and commanded to be followed.[1] .

In terminology, legislation is defined as "a set of commands, prohibitions, and rules established by an individual or a group, selected by those in authority to be referred to and followed, guiding life according to them ".[2] .

1 Dictionary of Language Standards, 262/3articles (Sharia), Lisan al-Arab, 176/8articles (Sharia.(
2 Islamic Jurisprudence, Muhammad Salam Madkour, p. .8

In linguistic terms, "fiqh" means understanding and knowledge of something. It is said, "So-and-so was granted understanding in religion," meaning they were granted understanding in it.[1] .

Legally, "fiqh" is the knowledge of practical Sharia rulings acquired from their detailed evidences[2] . Islamic jurisprudential rulings encompassing branches of positive laws:

1. Family Law: These are the regulations governing family matters, including marriage, divorce, financial support, custody, and related issues, now commonly referred to as Personal Status Laws.
2. Commercial and Civil Transactions: These are now known as Civil or Commercial Law.
3. Criminal Law, Penalties, and Limits: In legal terms, this is referred to as Criminal Law.
4. Judicial Procedures and Testimonies: In legal terms, this is known as Procedural Law.
4. Sharia Political Rulings: In legal terms, this is Constitutional Law.
5. International Rulings: In legal terms, this is International Law.

Section two: Characteristics that Distinguish Islamic Legislation from Positive Laws.

It is worth noting that Islamic legislation distinguishes itself from positive laws and regulatory systems through a set of features and characteristics, including the following:

First: Integration of Religious Consideration and Judicial Consideration. Sharia distinguishes between the religious consideration and the judicial consideration in matters of transactions. An act may be deemed valid judicially based on its outward form, but it may be prohibited religiously based on the true nature of this act and the resulting spiritual consequences. This aspect of religious consideration is absent in positive laws and regulatory systems. For instance, the return of a divorced woman with the intention of causing harm. In this case, the return is valid if it meets its conditions, but it is considered forbidden if the intention is to cause harm.

Secondly: Combining Voluntary Self-Obligation and External Compulsion. Islamic Sharia combines voluntary self-obligation and external compulsion in the following way:

-Voluntary Self-Obligation: This pertains to faith in Allah, love for Him, and belief that everything that comes from Him is for the good and righteousness. Thus, Sharia becomes a religious commitment before being a societal one. The individual is accountable to their conscience. This leads to principles that prohibit circumventing the Sharia and rules related to intention and purpose in legislation.

As for external compulsion, Islam has established two sources of obligation to adhere to its rulings and laws:

First: Ethical Authority of the Community - through the enjoining of what is right and the forbidding of what is wrong.

Second: Compulsion from Authority - represented by the authority of the guardian and the authority of the state, along with its legislative, executive, and judicial institutions and means.

Third: Association of Islamic Legislation with Posthumous Reckoning:

Islamic jurisprudence has addressed the concept of religious obligation for any matter, determining whether it is permissible (halal) or forbidden (haram). Scholars have discussed whether its positive legal rulings are valid or invalid, and whether a certain action should be executed or not. This aspect is not found in positive laws and regulatory systems.

[1] Lisan al-Arab, 841/5, Taj al-Arous, .456/63
[2] Al-Mustasfa by Al-Ghazali, vol. 1, p. 5, Al-Mahsool by Al-Razi, .80/1

Chapter Two

Key Jurisprudential Theories Contributing to the Cognitive Enrichment of Legal Thought.

Section one: The Concept of Jurisprudential Theory and its Role in Jurisprudence and Law

The term "theory" in language is derived from the word) "نظر" nazar), which encompasses various meanings, including knowledge acquired after examination. This meaning forms the basis for the concept of theory in terminology[1]

In terminology, Dr. Ya'qub Al-Bahsain states, "It seems that the general use of the term 'theory,' whether in exact sciences or humanities, refers to a set of opinions used to interpret certain facts.[2] ".

So, a theory is a general concept that forms an objective legal system, encompassing specific details distributed across various branches of jurisprudence.[3] .

Section two : Examples of Principles and Theories Derived from Islamic Jurisprudence

Firstly: Theory of Abuse of Right

Definition of the Theory: Abuse of right refers to the unjustified exercise of a right. It is assumed that a right is legitimate and permissible to use. However, if a person uses their right in an illegitimate manner or behaves in an unconventional way regarding their right, this falls under the category of issues related to the abuse of right. For instance, ownership is not an absolute right; it is restricted when it causes harm to others. Therefore, if the exercise of a right leads to significant harm to others as a result of using that right, the one causing the harm is held responsible.[4] .

One of the associated principles with this theory, as established by the scholars, is the principle: "A person's exercise of their right is valid as long as it does not cause harm to others." This means that a property owner is free to dispose of their property as long as it does not cause excessive and obvious harm to others. They derived various implications from this principle, such as: if someone waters their crops and the water causes damage to their neighbor's land, or if their watering leads to the destruction of crops or buildings, it is considered permissible as long as they water in the usual amount that the land can typically tolerate. However, if they water in excess of what the land can tolerate, they are not protected by this principle (Derince, 2022; Huraish et al., 2023).

Second: Theory of Emergency Circumstances

The theory of emergency circumstances is based on the idea of assisting a contracting party who has suffered a significant economic imbalance in their contract that may lead them to ruin. Its aim is to achieve justice in contracts.

This theory originates from the principle of justice, which dictates relieving the debtor from the burden of performance due to an unforeseen emergency that was not anticipated at the time of contract formation ،[5].If an unexpected incident occurs at the time of contract execution, making the performance of the obligation burdensome and threatening significant loss, it is permissible for the judge to intervene to amend the commitment and allocate the consequences between the two parties. This is explicitly stated in laws such as the Egyptian Civil Code, which states that "if exceptional and general events occur

1 Lisan al-Arab 990/2, Taj al-Arous .245/14
2 Jurisprudential rules, Yaqoub Al-Bahasin, p. .144
3 Islamic jurisprudence and its evidence, Heba Al-Zuhaili, .7/4
4 Previous reference .3229/4
5 The theory of emergency circumstances by Dr. Al-Tirmanini, p. .106

that could not have been anticipated, and as a result, the execution of the contractual commitment becomes burdensome for the debtor to the extent that it threatens him with significant loss, the judge may, based on the circumstances and after weighing the interests of both parties, adjust the burdensome commitment to a reasonable level. Any agreement to the contrary is deemed void ‹[1] ".The Islamic jurisprudence was the first to establish the consideration of the theory of emergency circumstances. Scholars explicitly stated, for example, that a pandemic affecting a person is considered in its entirety [2] . And that calamities are foreseeable, and whatever a calamity destroys of crops falls under the seller's guarantee.[3] .

Third: Theory of Shortcoming Liability and Non-Discrimination Liability

Civil laws have adopted the principle of non-discrimination liability for unlawful acts that cause harm to others. This aligns with the principles of Islamic Sharia, which require compensating for material harm, even if the element of fault, one of the essential elements of shortcoming liability in civil responsibility, is not present. This is evident in the theory of bearing consequences, which does not establish liability based on the idea of fault but rather takes into consideration the principle of "the gain is commensurate with the harm.[4]".

So, error and forgetfulness are not excuses for damaging property. The scholars have stated that the wrongdoer is liable[5] .

Section Three: The Influence of Islamic Jurisprudence on Ancient and Modern Western Legislations

Before I highlight the reality of influence and impact between Islamic jurisprudence and Western laws, I would like to start by discussing the historical reasons that led to this influence, especially the Islamic conquest of Al-Andalus. This was not just a military occupation; rather, it was a fusion and amalgamation of European Roman civilization with Andalusian civilization. The establishment of urban centers, the strengthening of trade relations, and the promotion of arts, culture, and inventions played a significant role. Pope Sylvester II, of French origin, played a crucial role in transferring Arabic sciences to Europe, particularly since he studied in Islamic schools in Cordoba[6] and then at the University of Al Quaraouiyine in Fez [7].

Furthermore, the Islamic conquest of Constantinople by the Ottomans and their vast expansion into various territories played a crucial role in spreading laws related to transactions and trade. This was because it became the constitution of the Ottoman state in matters of transactions.

Topic One: The Influence of Islamic Jurisprudence on Ecloga and Byzantine Laws

The Byzantine Ecloga laws demonstrated that the influence of Islamic jurisprudence was not merely a product of legal schools, but had much earlier roots. The theories outlined in the Ecloga, enacted by Leo III, showed a clear influence of Islamic jurisprudential principles. This influence can be attributed to Leo III's constant interaction with Muslims in the city of Marash, as well as his correspondence with the Caliph Umar ibn Abd al-Aziz. Many historians have affirmed this influence.

Historian Mansi, during one of the sessions of the religious council held in the city of Nicaea in the year 171 AH (787 CE), stated that Bishop John declared that the policies of Leo the Isaurian were nothing

[1] Muhammad Azmi Al-Bakri, Encyclopedia of Jurisprudence and Judiciary in the New Civil Law, second volume, p. 511.
[2] The Precious Jewels Contract by Ibn Shas .737/2
[3] Al-Mughni by Ibn Qudamah, .86/4
[4] Al-Waseet by Al-Sanhouri, p. ..63
[5] Al-Thakhira, p. .318/8
[6] Tawfiq Sultan Al-Yuzbeki, Arab civilization in Andalusia and its impact on Europe, Al-Rafidain Journal of Arts, no. 13, p. 9
[7] Ragheb Al-Sarjani, What did Muslims give to the world, Iqra Foundation, 2nd edition, 1430AH/ 2009AD, vol. 1, p. .209

more than the fruits of the seeds sown in his heart by the ignorant Caliph Yazid ibn Muawiya. Leo responded to him due to his own intellectual weakness and ignorance of the teachings of his religion [1]. In another instance, Masini says: "The laws enacted by Leo are inspired by Eastern Islamic customs [2]".

As for Theophanes, he states: "All the evil deeds of Leo arose from his association with Muslims. Therefore, he became an apostate and was deprived of the mercy of the Church[3]".

One of the most prominent influences seen in the Ecloga is their replacement of the death penalty for theft with the amputation of limbs.

Historian Hartmann, in his book "Government and Administration," states: "The collection of Ecloga issued by Leo III was inspired by Islamic jurisprudence in implementing the punishment of amputation of limbs for thieves instead of execution, as he found it to be more just[4]".

Furthermore, the Ecloga was also influenced by laws regarding family, inheritance, and property, particularly those related to women. Before the Ecloga, Byzantine women lacked legal capacity and were treated akin to children and the mentally impaired. However, due to Leo's influence by Islamic jurisprudence, he granted them equality with men in terms of property ownership, trade, travel, inheritance, wills, gifts, and consenting to marriage[5] .

Topic one : Western Legal Systems

Western societies have known legal regulations and customs governing relationships among individuals and between individuals and other nations. Examples of these legal systems include the Code of Hammurabi (1728 BC) and Roman law (450 BC), which underwent historical developments and became the foundation of Western laws.

Looking at the French civil law, which is still in use today and is known as the Napoleonic Code, we can see its influence from the principles and customs prominent in the Maliki school of thought. This influence is a result of extensive interactions during the period when France and other European countries were under Islamic rule for 800 years. This Islamic influence extended to public and private transactions, politics, judiciary, trade, and the economy.

Topic two : Influence of Maliki Jurisprudence on French Legislation

We found that the French Civil Law, in Article 1156, adheres to the theory of intent in contracts, stating, "It is necessary to interpret contracts based on the original intent of the contracting parties, without being limited to the meanings of the words used in the contract document and taking them at face value." This is the same interpretation as the jurisprudential principle that the focus in contracts is on meanings rather than words and structures[6] ..

Furthermore, we find that French law has also incorporated a similar provision regarding absence. Article 115 of the French Civil Law states: "If a person disappears from his place of residence and his whereabouts are unknown for four years, those who have a right or interest may bring their claims to the section court to obtain a judgment of absence against him. This is referred to as recognized absence ".

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[1] Mansi, j,d sacorrum comiliorum novas et emplissia collectio , vol. li cvince 1770

[2]Zaeid , H. F. ., Saihood , A. G. ., Yusur , M. K. ., Yasir , N. K., & Hassooni , H. A. . (2023). Analysis of the topics of sports talk shows on Iraqi satellite channels: The Captain's Program in Al-Iraqiya Sports Channel as a model. SPORT TK-EuroAmerican Journal of Sport Sciences, 12, 17. https://doi.org/10.6018/sportk.563561

[3]Haider Falah Zaeid ،Ammar Taher Mohammed . Political Contents on the Electronic Websites of Iraqi Satellite Channels. Review of International Geographical Education p712-720-. (Doi: 10.48047/rigeo.11.12.68)720.

[4] Hartman: government and administration c.m.h 1967

[5] Abdul Wahab Al-Qurashi, The influence of Islamic jurisprudence on the Byzantine Eclogue laws, Islamic University, No. 6, No. 44, 2020AD.

[6] Arabization of the French Civil Code 258/1, Legislative Comparisons

[1]And this is the same duration as mentioned in the Maliki jurisprudence books. It is stated in Maliki jurisprudence that the missing person is one whose whereabouts are unknown, and there is no information about him. In the case of a missing woman, she has the right to present her case to the judge. It is deferred for four years, after which it is treated as a case of death[2]..

As for the influence of Islamic jurisprudence on economic legislation,this is evident in the chapters [3] related to companies. We have observed that French law categorizes companies in the same manner as Islamic jurisprudence does, dividing them into "partnership of capital" and "partnership of labor." This was affirmed by Dr. Oktaf Beel in his book on companies and division in the Maliki school, where he stated: "Maliki companies are built on trust contracts, which is also practiced in France[4]".

As for the field of international humanitarian law, Muslim scholars established nationality laws. It has been reported by Al-Nawawi that whoever resides in a town for four years is considered affiliated with it. Al-Marrakushi also discussed the conditions for obtaining nationality according to Islamic jurisprudence [5] .And this is what legal codes in Europe and America have opted for, as they have also established the same duration of residence for obtaining nationality.[6] .

The field of comparisons between the influence of Islamic legislation on Western laws is significant and cannot be exhaustively enumerated. We may also consider the impact of Islamic legislation on some general legislative principles, such as the principle of non-retroactivity of laws. This principle is also stated in French law in Article 2, which states: "Provisions of laws shall not apply to facts and events except for the future, from the date of their declaration, and shall not apply to similar facts." This is the same principle enshrined in Islamic jurisprudence: "A legal ruling is not established except after proclamation[7] ".

It is not surprising that French law has been influenced by the Maliki school of thought, especially since, as stated by the eminent scholar Seydou: "The Maliki school of thought is the one that captures our attention due to our close ties with Arab Africans. The French government entrusted Dr. Beiroun with the task of translating Khalil's book on jurisprudence into French.[8]".

Topic three: Influence of French Commercial Terminology by Jurisprudential Legislation

Many of the terms related to commercial law systems in the Middle Ages were transferred through Mediterranean trade movements. These terms were integrated into French commercial law. An example of this is the term... (please provide the specific term you'd like to mention" .(Mohatra" is an Arabic word that means "risk" and it refers to the practice of circumventing interest by means of a double sale. As for the term "cheque," it is derived from the Arabic word "صك" which means a written document. Meanwhile, the word "Aval" is a distorted French term derived from the Arabic word "حوالة" which means the transfer of debts.[9] .

Chapter Four: The Influence of Islamic Legislation on Arab Legal Codes

Our examination of Arab legal codes reveals that in most of them, Islamic Sharia is recognized as a source to which judges may refer. However, these codes differ in the hierarchy they assign to Sharia among other sources.

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[1] Arabization of French Civil Law 31/1

[2] bn Abd al-Barr, Al-Kafi fi Jurisprudence of the People of Medina, edited by Muhammad Ahmad Ould Madik Al-Mauritani, Al-Riyadh Al-Hadithah Library, 2nd edition, 1400AH / 1980AD, vol. 2, p. 567

3 French Civil Code Section 1838/1835

[4] Abdul Aziz bin Abdullah, Maliki jurisprudence teacher, Dar Al-Gharb Al-Islami, 1st edition, 1403AH / 1983AD, p. 42

[5] Al-Abbas bin Ibrahim Al-Marrakshi, Notable People Who Became Marrakesh and Disappears from Notable People, Dar Al-Ghawas, 2nd edition, 1993AD, vol. 1, p. .150

[6] Arabization of French Civil Law 160/1

[7] Ibn Taymiyyah, Al-Fatawa Al-Kubra, 1st edition, 1408AH / 1987AD, edited by Muhammad Abdul Qadir.

[8] Ragheb Al-Sarjani, What did Muslims give to the world, vol. 2, p. 706

[9] Iyad Ali Suleiman Al-Arish, The Impact of Islamic Jurisprudence on the Laws of Non-Muslim Sects in Muslim Countries, Journal of Scientific Research in Arts, No. 20, Part 1, p. 535

For instance, Egyptian Civil Law No. 131/1984 states in its article that in the absence of a legislative text, the judge may apply customary law. If this is not available, then the principles of Islamic Sharia shall be applied. If still unavailable, then the principles of natural law and justice shall prevail. As for the Algerian Civil Law issued by Decree No. 58/75 on September 26, 1975, it states that in the absence of a legislative text, the judge shall rule in accordance with the principles of Islamic Sharia. If this is not available, then the judge shall rule based on customary law.

On the other hand, the Jordanian Civil Law No. 34/1976 states that if the court does not find a provision in this law, it shall rule according to the Islamic jurisprudential rulings that are most in line with the provisions of this law. If none are found, then the principles of Sharia shall be applied. Following the same path, the civil laws of Kuwait (Law No. 67/1982), the UAE (Law No. 5/1985), and Qatar (Law No. 22/2004) have also incorporated similar provisions.[1].

Conclusion

This research has revealed some aspects of the influence of Islamic jurisprudence on both Arab and Western laws. The significance of this influence goes beyond describing the civilizational and historical roles of Islamic legislation and the legal heritage of Muslims, which have demonstrated excellence, diversity, and maturity.

While the legal output of Muslims in the Middle Ages was based on foundational, interpretative, and purposive codes, Europe was still living in the primitiveness of its laws. As a result of the conquests, Western laws were influenced by Islamic legislation, finding in it solutions to social and economic challenges.

Results

- Islamic legislation demonstrated cognitive precedence in many legal principles and theories.
- The influence of Islamic jurisprudence on the early formation of Western civil laws has been established.
- Islamic legislation distinguishes itself from many positivist laws through features such as integrating religious considerations with judicial considerations, combining self-commitment with voluntariness, and recognizing both external obligation and considering the consequential punishment for actions and behaviors.

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