

**The accuracy of the literacy theory claims  
in the context of the medieval Arab-Muslim culture.  
Development of *qadiship* as an implication  
of the dissemination of writing and literacy**

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The article is devoted to the application of the literacy theory in the historical studies. The key issue is to verify the accuracy of the literacy theorists' claims with reference to the medieval Arab-Muslim culture. The point of reference is the development of the judgeship (*qadiship*). Basing on the analysis of this process the article traces the schemes of transformations which occur – according to the literacy theorists – in the context of the institutional dimension of culture under the influence of writing. The application of the theoretical model of the mutual relations of orality and literacy to the specific socio-cultural reality (i.e. from the first years of Islam to the middle of the ninth century, when the *qadiship* reached its maturity structurally and functionally) allows to track out “the logic of writing”. The identity of the judgeship was constructed on the basis of a perception of the world formed by the literate communicative order. In other words, the development of the office itself was attained as a result of the gradual textualisation of culture, including the legal culture and the law itself. However, co-occurrence of orality, determined by the manuscript character of the medieval Arab-Muslim culture as well as the dominant world-view factors causing specific values to penetrate into social practice, made the potential for change (carried by writing) manifest itself in a limited extent in the very operation of the institution of *qadi*.

Middle Ages; 4<sup>th</sup>-9<sup>th</sup> Centuries; Arab-Muslim world; literacy theory; Arabic script; textualisation; *qadi*; Islamic law.

### 1. Introduction

The article aims at the application of the literacy theory to the historical studies within the framework of the classical Arab-Muslim culture. The theory of literacy emerged in the 1960s at the Toronto University as a result of research in the modes of communication from the perspective of their influence upon culture<sup>1</sup>. From the very beginning, research on the influence of the systems of communication was conducted in the context of various schol-

<sup>1</sup> For further details see Blondheim, Watson, *The Toronto School*.

arly disciplines: classical philology, anthropology, literary criticism, theory of communication, where the researchers determined the path of the development of the communication-related concepts of culture.

Generally speaking, the literacy theory treats writing as a technology which is able to influence a man, thus engendering fundamental changes in culture<sup>2</sup>. Writing, being a medium of the word, a medium different in reference to speech, establishes a separate discourse (a literary discourse), which – by using new forms of the organisation of utterance – is able to introduce changes both in the ways of thinking as well as the forms of the organisation of the society. Therefore the changes in an oral culture which occur after the culture adopts writing refer both to the mental and the institutional dimension (legal, political, economic, religious institutions). In other words, the dominant system of communication is capable of changing the model of culture in both dimensions<sup>3</sup>.

The literacy theory, due to the gradual broadening of the fields of research, was subsequently re-evaluated. Some of its creators observed that the change of cognitive processes and content under the influence of writing does not occur always in an automatic manner and to the same degree. As David Olson put it, «technological determinism» does not apply here<sup>4</sup>. Culture (or subculture) has at its disposal a specific array of factors which influence writing and literacy and which determine the extent to which the possibilities of writing will be exploited<sup>5</sup>.

Over the course of time the literacy theory has been utilised in other scholarly disciplines such as linguistics, psychology and history<sup>6</sup>. Especially the historical studies showed that there are statements of the literacy theorists which are open to interpretation. When an oral culture adopts writing, this culture acquires a mixed nature, whereby the mutual relations of orality and literacy assume various configurations in the particular contexts, areas and historical periods. In other words, the transition from orality to complete literacy constitutes a process which proceeds at different rates according to a culture; sometimes communication-related transitionality is a mark of a culture throughout a greater part of its history. And it is the establishment of the mutual relations of orality and literacy as well as its consequences for culture (at the institutional and mental level) that requires in-depth research

<sup>2</sup> Among the principal formulators of the literacy theory are Harold Innis, Marshall McLuhan, Eric Havelock, Walter Ong, Jack Goody and a bit later David Olson.

<sup>3</sup> For a more comprehensive treatment see Godlewski, *Antropologia pisma*, pp. 42-63; Godlewski, *Slowo - pismo - sztuka słowa*, pp. 145-176; Mencwel, *Wyobrażenia antropologiczne*, pp. 25-106.

<sup>4</sup> Brockmeier, Olson, *Introduction*, p. 8; Olson, *The World on Paper*, p. 38.

<sup>5</sup> Ong, *Orality and Literacy*, p. 171; Ong, *Writing is a Technology*, pp. 35-36; cf. Stock, *The Implications of Literacy*, p. 12 *passim*.

<sup>6</sup> A critical overview of the research conducted in reference to the influence of systems of communication upon culture ranging from classical philologists to cultural psychologists may be consulted in Jahandarie, *Spoken and Written Discourse*.

conducted in a historical perspective. Thus, a bipolar arrangement of communicative systems performs the function of an ideal model (this model is not empirical in nature) which may serve as an instrument of a description of a specific culture, at a specific stage of its development, and to enable the establishment of the communicative dominants and their mutual relations which obtain in it.

To the best of my knowledge, heretofore the interpretation of the classical Arab-Muslim culture through the perspective of the literacy theory was not engaged in the context of Arabic studies except an attempt to re-evaluate the Arabic literary history by Shawkat M. Toorawa (2005) and to determine the relation between the oral and the written message in the transmission of broadly conceived knowledge by Gregor Schoeler (2006, 2011)<sup>7</sup>. The theory of literacy has been utilised almost exclusively in historical research in Western European Middle Ages<sup>8</sup>.

Thus, in this article the point of reference is the classical Arab-Muslim culture. It is a distant culture not only in terms of social, legal, religious or political realities but also of the nature of the Arabic script. The realisations of an endeavour associated with a holistic description of the classical Arab-Muslim culture, even at a particular stage of its development, is impossible. Hence the microsocial extent of the present project: the development of the classical judgeship (*qadiship*<sup>9</sup>) from the perspective of the literacy theory.

The decision to focus on *qadiship* stems from the fact that historical character of research provides us first of all with evidence related to the institutional dimension of culture. Within the confines of the state institutions, the position of the judgeship in the Islamic world has never been marginal. *Qadi* i.e. a Muslim judge was a representative of the authorities, for it was the caliph who appointed directly or indirectly the judge in the principal cities, also determining the limits of his jurisdiction. As Nahed Samour put it, the *qadi* «belonged to the realm of the state in which law was binding, enforceable and final»<sup>10</sup>. Thus, he vaulted into prominence in the society from the early period of the development of the office. Until the nineteenth century his office was one

<sup>7</sup> There appeared also three research works devoted to a linguistic analysis of pre-Islamic poetry and the Qur'an (Bannister, *An Oral-Formulaic Study*; Monroe, *Oral Composition*; Zwettler, *Oral Tradition*). However, the authors based their research almost exclusively on the theory of "the oral formularic composition", which preceded the theory of literacy and whose foundations were established by Milliam Parry, and which was developed by Albert Lord. The application of this theory in the research in pre-Islamic poetry is a source of reservations, firstly due to the fact that poetry functioned in the oral form for a long time (in many variants) and it was written down only when Arab philologists developed the standard form of classical Arabic.

<sup>8</sup> Two progenitors of communication research within the framework of history are Michael T. Clanchy and Brian Stock; for more bibliographical information see Jahandarie, *Spoken and Written Discourse*, pp. 199-262.

<sup>9</sup> In this article the ALA-LC transcription is used, with the exception of those Arabic terms, which are long rooted in the English language and/or widely recognized in the scholarly discourse (then the simplified transcription rules are applied).

<sup>10</sup> Samour, *A Critique of Adjudication*, p. 51.

of the three principal offices of social control in the world of Islam, apart from the police and the office of *hisba* (which controlled, among other things, the trade-, services- and crafts-related activities in the public sphere of the city). Moreover, the system of the activities of the *qadi* was a significant social institution due to the very nature of the law. Being a divine law, it constituted a part of Muslim faith, and its transgression constituted a sin (in the *sharia* the law and morality are substantially interwoven). It was an all-embracing law which was binding on all Muslims, which covered each aspect of life and behaviour of a man, regulating the relations between people and determining the attitude and behaviour of man in reference to God. The fulfilment of the legal regulations ensured a reward in temporal and future life. Thus, the recognition of the divine provenance of law affected the rising authority of the judge.

Focusing on the institutional dimension of culture, I would like to verify whether historical evidence concerning the development of the *qadiship* (the issue which is well elaborated in the scientific discourse) justifies the literacy theorists' statements. I carry my considerations in a diachronic order until about the middle of the third/the middle of the ninth century,<sup>11</sup> when the judgeship attained its maturity in the context of its structure and function.

The article consists of three parts. The first part contains a brief introduction to the history of the Arabic script<sup>12</sup>. The second part contains a brief description of the organisation of law<sup>13</sup> in the pre-Islamic Arabia until the Prophet Muhammad's death. When I use the term "pre-Islamic Arabia" I refer to the community of northern Arabs, the majority of whom were nomads, and to the not numerous representatives of settled and semi-settled population, who inhabited the central regions of the Arab Peninsula, as well as its northern areas. It was this community and these lands that saw the birth of Islam, and the pre-Islamic patterns of culture did not fade away along with the appearance of the Prophet Muhammad, but they were some of the constitutive elements of the nascent Arab-Muslim culture<sup>14</sup>. The third part of the article is an answer to the question whether "the logic of writing" indicated by the

<sup>11</sup> The article adopts the following sequence of the provision of dates: the first date represents the Muslim lunar calendar (Anno Hegirae), whereas the second date follows the European model (Anno Domini).

<sup>12</sup> This part was developed on the basis of a review article: Prochwicz-Studnicka, *The Formation and the Development*, pp. 53-91.

<sup>13</sup> The term "the organisation of law" is conventional in nature and is used here to denote the assortment of methods in which the customary ["customary" as in "customary law"] rules of conduct in pre-Islamic Arabia were implemented and sanctioned amid debates and conflicts. Therefore the point is not about presenting an in-depth description of customary law and the reasons of its establishment, but about the indication of the *quasi*-institutions which enabled the execution of this law.

<sup>14</sup> Sources which provide information about the pre-Islamic period cover mainly poetry, genealogies, *ayyām al-'arab* (*Days of the Arabs*) stories and proverbs. The memory of their origins which date back to the fifth century AD determines the more remote part of the chronological range of the period in question. They circulated in the oral tradition and began to be written down and commented upon only since the second/eighth century, therefore from a Muslim perspective. Even though in the scholarly discourse one discusses the problem of the authenticity

literacy theorists can be traceable at the particular stages of the development of the *qadiship* (obviously, this development was not a result of writing in the strict meaning of the term but an implication of the interaction of writing with social structures and practices). When I speak about the dissemination of writing, I take into consideration only the communities of intellectual elites, in which reading and writing skills were basically prevalent. Hence, such terms as the “visible influence of writing”, “writing as a communication dominant” etc. refer to qualitative instead of a quantitative aspects. The development of *qadiship* is presented in relation with the elements of the development of Muslim law, because these processes were intertwined and they intersected with each other.

## 2. *The Arabic script*

Northern Arabs, both settled and nomadic representatives, used above all the Proto-Arabic language (Ancient North Arabian, ANA), i.e. Proto-Arabic dialects which were occasionally written by means of the South Arabian alphabet which functioned in a number of variants<sup>15</sup> and the Old Arabic language, i.e. Old Arabic dialects which varied at the local level. Very little information about the early stage of the development of the Arabic language has been preserved. The first extant inscriptions, which bear the marks of this language, date back to the late first century BC, although this language must have been used slightly earlier<sup>16</sup>. It seems that until the turn of the sixth century AD Old Arabic dialects were used basically only in the spoken form. However, there could have been cases that a text was written in an Old Arabic dialect. In such a case one used a Nabataean variety of the Aramaic script instead of the South Arabian script. Therefore the system of writing which was used by the Nabataeans gave rise to the Arabic script. The transition from the Nabataean to the Arabic script was a complex process, and its reconstruction is not completely possible due to the lack of source data<sup>17</sup>. It is assumed that the period between the fourth and sixth centuries AD was crucial for the development of the Arabic script, even though the improvement of the writing and the introduction of orthographical rules happened subsequently.

of these materials, they constitute practically the sole source of knowledge about pre-Islamic culture.

<sup>15</sup> Gruendler, *Arabic Alphabet*, p. 148. The scarcity of the inscriptional material which covers mainly (first) names and genealogies precludes the reconstruction of ANA.

<sup>16</sup> Macdonald, *Reflections on the Linguistic Map*, pp. 48-49.

<sup>17</sup> For a more comprehensive discussion of the extant inscriptions in the Nabataean alphabet with the elements of the Arabic alphabet and in the script which (most likely) represents a transitional phase between the Nabataean and Arabic alphabets see Bellamy, *A New Reading*, pp. 31-51; Bellamy, *Two Pre-Islamic Arabic Inscriptions*, pp. 370-378; Macdonald, *Literacy*, p. 98; Macdonald, *Reflections on the Linguistic Map*, p. 76, footnote 171; Shahid, *Byzantium and the Arabs*, pp. 117-124; Testen, *On the Arabic*, pp. 281-292.

It is also not clear which paths were taken by the Nabatean script to reach the Arabian Peninsula. There are two main hypotheses: one indicates the caravan route which linked Mecca with Syria, and therefore it perceives the *spiritus movens* of the development of writing in the trade contacts of the Arabs (mainly of the Meccan Arabs) and the Nabataeans. The second hypothesis indicates Mesopotamia and Al-Ḥīra of the Lakhmids as a centre which proved crucial for the development of writing<sup>18</sup>. Even though the question of the direction in which writing made its way to these people, the so-called Syrian or the Iraqi path, is open to debate, some researchers emphasise the role of the Christian communities in the development of Arabic writing, and especially the role of Christian missionaries<sup>19</sup>, who may have initiated or accelerated the process of the development of the Nabataean script and the process of the adaptation of this script to the native language of the Christian Arabs<sup>20</sup>.

As it is difficult to reconstruct the process of the development of the Arabic script in the pre-Islamic period and in the first two centuries of Islam, it is thus likewise difficult to provide an unambiguous answer about the extent to which the Arabic script may have been used by the northern Arabs, before the advent of Islam, to write the Old Arabic language. In Arabic sources, *inter alia* in pre-Islamic poetry, in the biography of the Prophet Muhammad<sup>21</sup>, in the Qur'an or in the early historiographical works<sup>22</sup> one may perceive mentions or references that indicate familiarity with the script among the pre-Islamic northern Arabs. According to Ibn an-Nadīm (d. 385/995), caliph Al-Ma'mūn's (197-218/813-833) library was supposed to hold a parchment which informed about a debt of a certain Ḥimyarite from Sana to the tune of 1.000 silver coins contracted from the grandfather of the Prophet Muhammad, 'Abd al-Muṭṭalib<sup>23</sup>.

According to a Muslim tradition, it was already during the Prophet's lifetime that the fragments of the revelation were written on palm leaves, bones, fragments of skin or flat stones. The Qur'an itself enumerates various accessories associated with the act of writing: *qalam*, *raqq*, *qirtās*, *sijill*, *lawḥ*, *ṣuḥuf*, *zūbur*, *midād* etc.<sup>24</sup>. Some of the crucial words which appear in the Qur'an are based on the *k-t-b* root. Obviously, not all uses of words based on this root refer to a written record in the literal sense of the term, but they are featured

<sup>18</sup> Bellamy, *The Arabic Alphabet*, pp. 100-101.

<sup>19</sup> Kościelniak, *Chrześcijańskie piśmiennictwo*, p. 338.

<sup>20</sup> Christians began to arrive to the Arab Peninsula starting from the second century, Griffith, *Christians and Christianity*, pp. 307-310; Osman, *Pre-Islamic Arab Converts*, pp. 67-80 (especially 75-76).

<sup>21</sup> Poetry began to be written down and treated by Arab philologists since the second/eighth century; the earliest biography (whose original version has not been preserved) was probably written approximately at that time.

<sup>22</sup> These sources are mentioned by Jones, *The Word Made Visible*, pp. 1-16 and Schoeler, *The Genesis*, pp. 16-17.

<sup>23</sup> *The Fihrist of al-Nadīm*, p. 9.

<sup>24</sup> See Kassis, *Concordance to the Quran*, s.v.

in many places<sup>25</sup>. Also the Prophet's biography provides examples of the use of writing. Ibn Hishām (d. ca. 218/833) placed therein the text of the Constitution of Medina (*Kitāb min Muḥammad an-nabī*)<sup>26</sup>, which is a contract concluded between the Prophet Muhammad and the inhabitants of Medina: *muhājirs*, *anṣārs* and Jews. The Constitution was supposed to determine their mutual rights and obligations. The Prophet's biography is also a source of information about the letters that he used to write<sup>27</sup>. Finally, the peace treaty of Al-Ḥudaybiyya (6/628), under which the right of the Muslims to make pilgrimage to Mecca and to conduct activities beyond Mecca was asserted, was also fashioned in a written form<sup>28</sup>.

Even if not all documents mentioned in Arab sources actually existed, mentioning them in the pre-Islamic context indicates not only an awareness of the existence of writing but also the capability of using it in certain communities and in certain situations. Those who were specialised in the use of writing used them for practical purposes, associated with certain elements of day-to-day life (e.g. in trade transactions, in political contracts, and correspondence). One conjectures that the relative skill in the use of writing the pre-Islamic dialects was peculiar above all to centres based in cities, although its scale had to be extremely limited in terms of quantity. Such use of writing could exist without a well-developed system of writing<sup>29</sup>.

Although the question whether the pre-Islamic poetry was at least partially put into writing or existed exclusively in an oral form is open to discussion<sup>30</sup>, it is generally assumed that recitation was the regular method of its dissemination and that the transmission of cultural content occurred generally in oral form. In oral culture words not only conveyed a message, but they were a means of performing actions. Hence, also those who were capable of using words occupied a special position in the society; this skill imparted to them power, charisma and respect. The most notable example of oral output was poetry associated above all with a nomadic community; it not only constituted an instrument in a struggle, but it also constituted the identity of the group, encapsulating the tradition and the memory of previous generations<sup>31</sup>.

<sup>25</sup> Ibidem, s.v. *k-t-b*; for a more comprehensive discussion see Jones, *Orality and Writing*, pp. 591-593 and Jones, *The Word Made Visible*, pp. 7-15.

<sup>26</sup> Ibn Hishām's version is not the only extant version, see Lecker, *The «Constitution of Medina»*, pp. 5-26.

<sup>27</sup> Jones, *The Word Made Visible*, pp. 5-7. If we assume that the Prophet Muhammad was illiterate one should assume that writing was performed by a person who was capable of writing.

<sup>28</sup> Jones, *The Word Made Visible*, p. 7; Schoeler, *The Genesis*, p. 17.

<sup>29</sup> Goody, *The Logic of Writing*, p. 95.

<sup>30</sup> Sezgin, *Geschichte*, pp. 14-22, has forced a thesis that many of the ancient poems were put in writing by the poets themselves or by the transmitters. The oldest etymology of the word *mu'allaqāt* (i.e. a collection of the most celebrated pre-Islamic poems) claims that the poems were embroidered on cloth with golden threads and hung (*'allaqa*) on the walls of the Ka'ba. However, since the end of the nineteenth century this view has been rejected, Lecomte, *Al-Mu'allaqāt*, 254.

<sup>31</sup> Jones, *Orality and Writing*, p. 591; Jones, *The Word Made Visible*, pp. 3-4; Macdonald, *Ancient Arabia*, pp. 21-22; Schoeler, *The Genesis*, p. 19.



As far as the first two centuries of Islam are concerned (the seventh and eighth centuries) there are no complete monuments of writing; the earliest ones, with papyrus, parchment and paper as the writing surface, date back to the first half of the third/ninth century. Only single documents written on papyrus and parchment, as well as fragments of longer texts, including especially the Qur'an, and single stone inscriptions were preserved<sup>32</sup>. The analysis of these materials indicates the probable bi-directional development of the Arabic script since the earliest period (where a *quasi*-cursive script was used for practical purposes, whereas a more monumental script was used as a memory aid for a culture transmitted orally)<sup>33</sup>. This non-uniform script, whose form was still defective, came to be known as the Hijazi script (*khaṭṭ ḥijāzī*). It is assumed that the gradual standardisation resulted in the appearance of the so-called Kufic script (*khaṭṭ kūfī*). The term "Hijazi" covered a number of different varieties of monumental script, with a dominance of angular, non-rounded line of letters. The Kufic script was used in the Umayyad period (41-132/661-750) and in the first centuries of Abbasid rule (132-656/750-1258), especially to write down the Qur'anic text: in this context the script continued to be commonly used until the fourth/tenth century. This script was used to fashion inscriptions on coins as well as monumental architectonic inscriptions which served a clearly ornamental function. In architecture the Kufic script went out of common use in the fifth and sixth/eleventh and twelfth centuries. The name of the variety of writing is a reference to the garrison town of Kufa, which was established in 17/638, which constituted, in the early period of Islam, one of the major intellectual centres of the caliphate. The further development of the writing, especially of the writing applied on papyri, was supported by the decision of one of the Umayyad caliphs to introduce the Arabic language to the chancellery of the caliphate in the second half of the first/the turn of the eighth century. The development of the clerk script, of the so-called cursive script (*khaṭṭ naskhī*, *naskh*, literally "transcribing", "copying") went on toward the accomplishment of clear links between letters, limited spaces between groups of letters and above all their smooth and rounded shape<sup>34</sup>.

### 3. *The organisation of law before Islam*

#### 3.1. *Pre-Islamic Arabia until 622*

The pre-Islamic Arabia was not a region which was separate in terms of culture. The presence of a trade route linking South Arabia with the Medi-

<sup>32</sup> An inventory of the earliest monuments of the Arabic script is presented in Ragheb, *Les premiers documents arabes*, pp. 679-726. The earliest graffiti are discussed in Imbert, *L'Islam des pierres*, pp. 57-78.

<sup>33</sup> Jones, *Orality and Writing*, p. 591; Jones, *The Word Made Visible*, pp. 3-4.

<sup>34</sup> Grob, *Documentary Arabic Private and Business Letters*, pp. 161-168.

terranean world, going along the western coast of the Arab Peninsula made the transmission of cultural content occur along with the trade<sup>35</sup>. Ideas were exchanged also within the Peninsula, above all due to the presence of Jewish communities in the south and in Al-Hijaz, as well as Christian communities: in the south and the outer edges and most likely in the central parts of the Peninsula<sup>36</sup>. At that time Arabia constituted an integral part of the culture of the Middle East<sup>37</sup>, due to this also the existing law was a part of the broader context of Middle Eastern culture. Although the dispersed and poorly diversified northern Arabs admittedly did not know the concept of central authority, and did not develop an administration or institutions which controlled and exercised the binding norms of behaviour, they were aware of the law construed as a collection of rules of behaviour whose violation could produce a reaction on the part of the community. These rules were not consistent and clearly formulated, but they referred to the mutual rights and obligations of each member of the tribe<sup>38</sup>. It can be said that there were two groups of rules; one was more adapted to the necessities of settled life, the other one – to the nomadic life, although, for example, the *lex talions* (*tha'r*) and blood-money (*diyya*) applied both to nomads and settled Arabs<sup>39</sup>. Its roots lay in ancient Mesopotamia, where its existence is attested as early as in the Old Babylonian period<sup>40</sup>. Similarly, trade contacts entailed the use of relatively stable rules of purchase-selling, which applied also to the nomads who engaged in trade. Contracts and agreements which were used in transactions were based on commercial traditions which most likely resorted to solutions practiced both in Babylonia and Assyria<sup>41</sup>.

In a situation of conflict the tribal solidarity, based on the promptness to collaboration, came into play, and it manifested itself in the form of the *lex talionis* or the exacting of blood-money. Under the *lex talionis* system the point was not about the exacting of punishment in the contemporary sense of the word but about the restoring of the honour of a group. Honour was the expression of the strength and the capability for defence; the restoring of honour was identical with the reconstruction of social respect. By deciding against the exacting of bloody revenge one faced the risk of disgrace. Therefore in some situations one did not accept blood-money as a solution, which constituted an alternative means of settling a dispute<sup>42</sup>.

<sup>35</sup> Hoyland, *Arabia and the Arabs*, p. 108.

<sup>36</sup> Gil, *Jews in Islamic Countries*, pp. 8-9; Kościelniak, *XX wieków chrześcijaństwa*, pp. 79-121; Paret, *Mohammed und der Koran*, p. 12; see also *supra*, footnote 20.

<sup>37</sup> Hallaq, *The Origins and Evolution*, pp. 25-26.

<sup>38</sup> Goody, *The Power of the Written Tradition*, p. 25; Kurczewski, *Prawo prymitywne*, pp. 9-10; Merkelbach, *Znaczenie pieniądza*, p. 74.

<sup>39</sup> Hallaq, *The Origins and Evolution*, p. 18.

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

<sup>41</sup> *Ibidem*, pp. 18, 23.

<sup>42</sup> Donner, *The Early Islamic Conquests*, p. 40; Hoyland, *Arabia and the Arabs*, pp. 113-114; Rodinson, *Muhammad*, p. 19.

When someone who was guilty of murder was unknown, one made reference to a collective oath (*qasāma*). This was an “accusatory action” which enabled the establishment of the identity of those who were guilty of murder<sup>43</sup>. This oath was sworn not only in the case when blood was shed, but also, in a broader context, in order to establish certain facts which were important from the perspective of the interests of the community. Fifty members of a tribe were obliged to swear a collective oath<sup>44</sup>.

The settling of conflicts could also happen by peaceful means in the form of arbitration. Arbitrage was a staple of the communal life of the Arabs. The word *ḥakam* (pl. *ḥukkām*) was used to refer to an arbiter. From the perspective of the “organisation of the law” in pre-Islamic Arabia and the subsequent evolution of this function toward the function of the *qadī* the figure of the arbiter is crucial. According to the majority of Arab lexicographers, the main idea which is carried by the root *ḥ-k-m* is associated with “restraining”, “withholding” and “preventing”. The first meaning of the verb *ḥakama* is “to prevent someone from acting in a corrupt manner or from wrongdoing”. This “restraining/preventing” may have referred to [restraining] injustice, ignorance or foolishness, hence the meaning of the word *ḥikma* is “justice”, “knowledge”, “forbearance”, respectively. The noun *ḥakama* used metaphorically, could indicate the social status of a person. According to the Arab lexicographers, the word was used already in the pre-Islamic<sup>45</sup> period in the sense of “rank”, “value”, “dignity”. If we refer to the semantic range of the root *ḥ-k-m* one may therefore suppose that *ḥakam* was not only the one who put an end to inappropriate behaviour but also the one who distinguished himself by his status, who enjoyed respect and who, probably, represented wisdom<sup>46</sup>.

Arbiters engaged in the settling of intra-tribal controversies in a situation when an agreement between the parties involved could not be reached without the intermediation of a third party. They also settled conflicts between tribes, usually when the *lex talionis* which was applied for too long weakened both parties and it failed to produce the desired result. Arbitrage was not an office, it was also not appointed permanently as a function, but it functioned as a privilege which was enjoyed by people at an advanced age, people who were characterised by honesty and integrity. The arbiter was chosen by both sides of the conflict and he was obliged to hear both parties. The parties were not obliged to follow the solution which was put forward by the arbiter. The arbiter’s decision could not be binding, for at that time there was no legal system which could have been represented by the arbiter. Therefore the arbiter, before he engaged

<sup>43</sup> Peters, *Murder in Khaybar*, pp. 139-140.

<sup>44</sup> For a more comprehensive treatment see *ibidem*, p. 140; Crone, *Jahili and Jewish Law*, pp. 158-159.

<sup>45</sup> Lane, *Arabic-English Lexicon*, s.v. *ḥakama*, *ḥakam*, *ḥākim*, *ḥikma*, *ḥakama*; Yaman, *Prophetic Niche*, pp. 13-15.

<sup>46</sup> According to some researchers, initially the Arab root *ḥ-k-m* may have not carried the idea of “wisdom”, but the idea was borrowed in the course of time from other Semitic languages, Yaman, *Prophetic Niche*, pp. 9-10.

the task of arbitrage, usually invited the sides of the conflict to make an oath which ensured the acceptance of the solution which was suggested<sup>47</sup>.

The rejection of the solutions put forward by the arbiter, as it seems, did not happen frequently, not only due to the respect he enjoyed and his neutral attitude toward the case. As he based his decision on custom, the rejection of the solution which he put forward was tantamount to the violation of the traditional order, which, especially in the conservative oral culture, did not undergo rapid transformations. Secondly, making recourse to arbitrage was motivated not so much by the seeking of justice but it resulted from a practical need: to put an end to family or tribal feuds, the problem of leadership, the right to use water and pasture grounds, inheritance-related matters etc. Muslim tradition provides at least two instances of arbitrage, which was engaged by the Prophet Muhammad<sup>48</sup>.

### 3.2. *The Medina period of Muhammad's activities*

The prophecy-related and political activities of the Prophet Muhammad occurred in the period of about twenty years starting from *ca.* 610, although in the context of the law and the developing *qadiship* the Medina period (1-11/622-632) seems to be crucial. When Muhammad's attempts to find a place for the new developing community eventually ended in emigration (*hijra*) to Medina, he assumed yet another role. Apart from being a prophet, he became an organiser and leader of a community (*umma*), a reformer, politician and military commander.

Therefore, the relations between tribes were based mainly on the dominance of some tribes over other tribes. As he was developing the *umma*, Muhammad began to foster a spirit of community in their members. The spirit of solidarity was based on one ideology: Islam (even if at that time it was more political than religious in nature). The *umma* had little to do with the previous confederations and military alliances, it became primary in reference to the tribe, and departure from it was more difficult, for the relations in the new community acquired a moral dimension. The Prophet was not interested in abandoning the customary law which was used at that time. It was deeply rooted in the tradition of northern Arabs, Muhammad himself was formed by this tradition. Hence, even though some customs were clearly condemned by the Prophet, a great number of the regulations of customary laws were preserved. An expression of this attitude may be represented by the previously mentioned Constitution of Medina, based on the customary law which was used at that time (only the problems which theretofore were not regulated were in the hands of God and Muhammad)<sup>49</sup>.

<sup>47</sup> Baamir, *Shari'a Law*, pp. 45-46; Donner, *The Early Islamic Conquests*, p. 40. Tyan, *Hakam*, p. 72.

<sup>48</sup> *Life of Muhammad*, p. 86; see also Baamir, *Shari'a Law*, p. 47; Rodinson, *Muhammad*, pp. 55-56.

<sup>49</sup> Danecki, *Arabowie*, p. 129.

In a similar fashion, many of the customary laws which were used at that time appeared in the Qur'an (although obviously also new laws were incorporated, many of them being of Judaic provenance). In the course of time they were re-worked in legal discourse, particularised and incorporated into the structure of the *sharia*, as for example the previously mentioned *lex talionis* and blood-money, collective oath and arbitration. The verses which appeared in the Medina period abound with allusions and references to specific situations and events, as well as recommendations of legal nature, for Muhammad had to settle disputes as they happened, and to make decisions in reference to various matters of political and social nature which were pertinent to the *umma*<sup>50</sup>.

If we make recourse to contemporary terminology, we may say that the Prophet exercised the legislative, executive and judicial authority in the *umma*. He was a religious and a political leader. He arrived in Medina as an arbiter and he maintained this function throughout the entire Medina period, settling disputes and reducing misunderstanding. Hence, also his *quasi*-judicial activities are rendered in the Qur'an above all by means of the verb *ḥakama* and its derivatives (e.g. 4:105; 5:42, 48, 59; 24:48, 51)<sup>51</sup>. The difference between the organisation of the law used in the pre-Islamic period and in the period of the Prophet's activities in Medina was a consequence of the development of the *umma* and it consisted in the concentration of the competences of religious and political leadership in the hands of one man. The law represented in the Qur'an transcended the customary law which was used at that time in the sense that it seemed a separate law, the law of the *umma*. Secondly, it was the law of God, whose representative was Muhammad. He was believed by his followers to be supported by the absolute divine authority<sup>52</sup>. Hence, the image of his attitudes and decisions (shaped by the Muslim tradition) became the basis of the model of an ideal *qadī*<sup>53</sup>.

#### 4. *The development of classical qadiship in the context of the development of writing and literacy*

##### 4.1. *The first stage: the writing down of the Qur'an*

The impulse for the development of judgeship was provided by garrison towns<sup>54</sup>. When the Arabs set off from the Arab Peninsula and began a series of conquests, the Middle Eastern centres which existed for centuries, such

<sup>50</sup> *Ibidem*, p. 100; Hallaq, *The Origins and Evolution*, p. 22.

<sup>51</sup> In the Qur'an the verb *qaḏā* appears predominantly in the context of the orders and decrees of God, see Kassis, *Concordance to the Quran*, s.v. *ḥ-k-m* and *q-ḏ-y*.

<sup>52</sup> Hallaq, *The Origins and Evolution*, p. 25.

<sup>53</sup> Masud, Peters, Powers, *Qāḏīs and their Courts*, p. 7.

<sup>54</sup> Muhammad was supposed to appoint *qadīs* in the areas which he subjugated (especially to Yemen), but it seems that they performed the function of governors there, Hallaq, *The Origins and Evolution*, p. 34.

as Damascus, Jerusalem, Ctesiphon or Alexandria, were incorporated into the empire which was being developed. These cities maintained their *status quo* in terms of the administration and social functioning. The Arab army did not settle in them but mostly in the newly-established garrison towns. The first towns of this kind were: Basra established in 14/636, Kufa in 17/638 and Fustat in Egypt, founded in 21/642. These towns were inhabited not only by soldiers but also by their families with all of their belongings. The first caliphs were supposed to appoint *qadis* for such towns: *qadis* whom one should refer with the term proto-*qadis*<sup>55</sup> due to the embryonic nature of the office. The first appointed proto-*qadis* were supposed to be recruited from among the pre-Islamic arbiters. Initially, the scope of the authorisation of the proto-*qadis* was broad and it went a long way beyond the functions of arbitrage: they covered many administrative functions. The proto-*qadis* could simultaneously perform the function of a tax collector (*āmil*) and a military governor (*amīr*) of a garrison town (initially he was above all a military commander). In many cases the proto-*qadi* assumed the extra-military obligations of an *amīr*: the leading of a collective prayer, the collection of a land tax (*kharāj*), the distribution of a cash payment among the soldiers derived from *spolia*<sup>56</sup>. He could also stand in for him in case he was absent (apart from situations in which one person performed the function both an *amīr* and a *qadi*)<sup>57</sup>. He could also perform the function of the chief of police (*shurṭa*), having in his charge the maintenance of public order, having the possibility to initiate “judicial proceedings” (the authorisation of a *qadi* as well as this of a pre-Islamic arbiter covered the prosecution of cases only at the request of the aggrieved party). Proto-*qadis* also assumed the obligations of *arīfs* – military or finance officials, whose particular duties and prerogatives varied according to the period and the place, and they could involve the managing of the estates of orphans, the management of blood-money, enforcing proper behaviour at a bazaar, or the distribution of cash payments to the soldiers – which geared with the function of an *amīr*<sup>58</sup>. Some proto-*qadis* were also preachers (*qāṣṣ*, pl. *quṣṣāṣ*). A preacher could provide instruction in a mosque outside the time appointed for common Friday prayer, where the sermon (*khuṭba*) was usually delivered by a military governor of the town. The *quṣṣāṣ* were admittedly an instrument of the propaganda of the authorities of that time, but they were more than that. They made public recitations of the Qur’an, they often led prayers, they explained the Qur’an, they familiarised the nascent society with religious knowledge by making reference to edifying examples drawn from prophets and Qur’anic stories (since the late first/seventh century also the sunna of the Prophet). Most likely the recruitment of early preachers to the office of the proto-*qadi* was a result of the fact that they represented a certain

<sup>55</sup> This term was suggested by Hallaq, *The Origins and Evolution*, p. 35 *passim*.

<sup>56</sup> Bligh-Abramsky, *The Judiciary (Qāḍīs)*, pp. 44-45.

<sup>57</sup> *Ibidem*, p. 49; Hallaq, *The Origins and Evolution*, p. 37.

<sup>58</sup> Bligh-Abramsky, *The Judiciary (Qāḍīs)*, p. 48; Hallaq, *The Origins and Evolution*, p. 37.

standard of religious knowledge, including familiarity with the *corpus juris* of the Qur'an<sup>59</sup>.

The wide scope of the responsibility of the proto-*qadi* at the early stage of his appointment corresponds with the accepted term *qāḍī*, for the root *q-ḍ-y* carries the idea of “completing”, “accomplishing”, “deciding”, “decreeing”. It seems that it is more appropriate than the term *ḥakam*, whose use – despite its connotations – was limited to the situation of a dispute<sup>60</sup>, whereas in the case of a proto-*qadi* arbitration was merely one of many duties.

Despite the fact that the scope of the activities of a proto-*qadi* theoretically involved the whole province, in the initial period his jurisdiction did not go beyond the boundaries of a garrison town and urban and agricultural centres in Al-Hijāz. These were the only areas which were under actual control of the caliphs. Even court cases which were engaged by the proto-*qadi* were limited by the nature of a given centre. In garrison towns the dynamics of the socio-economic development was subordinated to military purposes. The most common problems which occurred in the communities of garrison towns in the first decades after the establishment of the latter were associated with the division of the spoils, the right to inherit them, family feuds or the estate of orphans<sup>61</sup>.

Such a wide array of the duties of the proto-*qadi* (from a modern perspective we may even speak about the contamination of the functions which were performed) was the case approximately until the late first/the early eighth century, and it clearly corresponded with the models of activity peculiar to a culture represented by dominant orality. The new religious ideology initiated by the Prophet Muhammad entailed the need to write down the Qur'an. Therefore, why did it not automatically release the culture-making potential of writing?

Muslim tradition indicates that few fragments of the revelation existed in the written form when the Prophet was still alive. The presence of holy writings in Christian and Jewish communities in the Arab Peninsula could exert a certain psychological pressure upon the nascent Muslim community (*umma*) to write down the revelations received by Muhammad. However, the lack of tradition of writing down texts due to the oral nature of culture caused that at that time the revelation functioned almost exclusively in oral transmission. After the Prophet's death the need to preserve its content appeared. The reasons for this state of affairs should be perceived, on the one hand, in the risk of the distortion of Muhammad's message, which could bring about

<sup>59</sup> Initially preachers operated privately; the first official appointment was made by caliph Mu'āwiya ca. 41/661, charging him with the task of “damning the enemies of Islam” after the morning prayer and the explanation of the Qur'an after the Friday prayer, Bligh-Abramsky, *The Judiciary (Qāḍīs)*, p. 47; Hallaq, *The Origins and Evolution*, p. 39.

<sup>60</sup> Bligh-Abramsky, *The Judiciary (Qāḍīs)*, p. 43; see also Lane, *Arabic-English Lexicon*, s.v. *q-ḍ-y*.

<sup>61</sup> Hallaq, *The Origins and Evolution*, pp. 197-198; Masud, Peters, Powers, *Qāḍīs and their Courts*, p. 9.

the disintegration of the *umma*, and on the other hand, in the risk of the loss of the text of the revelation due to the death of the reliable carriers from the Prophet's closest associates, incurred in military campaigns. According to a Muslim tradition the work associated with the Qur'anic text was supervised by the Prophet's former secretary, Zayd Ibn Thābit (d. ca. 42-56/662-675) appointed by the third Rightly Guided Caliph 'Uthmān (23-35/644-656). The canonical version of the Qur'an was supposed to be based on the first compilation which at that time was in the possession of Ḥafṣa (d. ca. 45/665), the daughter of the second Rightly Guided Caliph, 'Umar (13-23/634-644). Apart from this collection, in the period between Muhammad's death and 'Uthmān's recension there existed at least four other collections of the Qur'an. One of them was in the possession of the renowned reciter, Ubayy ibn Ka'b (d. ca 19/640 - 32/653). Not a single manuscript or part of it has come down to us, but on the basis of the later sources it can be assumed that these four were independent collections of Revelation<sup>62</sup>.

The work to establish the canonical version of the Qur'an took five years to complete, in 30/650. The copies of the Qur'an were supposed to be sent to the main cities of the caliphate at that time: Medina, Mecca, Kufa, Basra and Damascus. The writing down of the Qur'an happened extremely quickly, in less than twenty years after Muhammad's death. The conventional dating of the Qur'anic text (i.e. its uniform consonantal skeleton, *rasm*) or at least a very considerable portion of it to 30/650 is supported by some researches partially on the basis of the results radiocarbon dating method<sup>63</sup>. Some other adduce an evidence in support of the hypothesis on a late seventh-century closure of the *rasm*<sup>64</sup>.

Regardless of these nonunanimous opinions the Qur'an was in fact the first book that was written in Arabic<sup>65</sup>. An explanation should be given here to the sunna of the Prophet or tradition of the Prophet. The Qur'an emerged in closed form and as such could not satisfy the legal and theological needs of the growing Islamic community. Thus, due to Muhammad's unchallengeable authority the revelation was extended to include his words and actions related to specific situations. Deliberate collections of such reports (*hadiths*) did not appear until in the last quarter of the first/eighth century. Finally, the sunna of the Prophet Muhammad took shape of the redacted and arranged

<sup>62</sup> Nöldeke *et al.*, *The History*, pp. 235 ff.

<sup>63</sup> See e.g. Sinai, *The Qur'an*, pp. 45-47, who points out *inter alia* the radiocarbon dating of a parchment folio of the Grand Mosque of Sana's Qur'anic palimpsest, of early Qur'anic manuscript consisting of seventy-seven leaves kept now at the Tübingen University Library, of the Qur'anic manuscript fragments of which are owned by the Berlin State Library.

<sup>64</sup> See e.g. von Bothmer, Ohlig, Puin, *Neue Wege*, pp. 33-46; Sadeghi, Bergmann, *The Codex*, pp. 343-436; Sadeghi, Goudarzi, *Ṣan'ā' I*, pp. 1-129. Additionally on the basis of the research in the parchment manuscripts of the Qur'an found in the Grand Mosque in Sana in the 1970s, as well as in the few monuments of writing (receipts, coins, inscriptions) a hypothesis that shifted the time of the fixing of the final version of the Qur'an to the third/ninth century was formulated.

<sup>65</sup> Walther, *Kleine Geschichte*, p. 22.



systematically collections of the reports in the third/ninth century. It not only implemented the rules of the Quran but also grew to be a source of dogmas and laws. Although some of the Prophet's companions and successors made individual notes of the reports to serve as mnemonic aids, putting traditions into writing was undoubtedly spontaneous and unsystematic action since the *hadiths* were originally intended to be passed on orally<sup>66</sup>.

Continuing the subject, the written record of the Qur'an (as well as – in all likelihood – individual notes of the *hadiths*) considering the standard of the familiarity with the Arabic script and the extent of the development of its graphic form, was defective; it was rather akin to a stenographic record. The writing down of the Qur'an in a community with well-established traditions of memorisation initially had the form of a memory aid, hence the impact of this written record was practically non-existent. Therefore also the rudiments of social and political-religious organisations in the nascent caliphate (including the proto-*qadiship*) continued to be bound up with an oral basis. Just as at the level of the mind, the oral sensibility strove to link and combine things, just as at the institutional level it did not distinguish the particular systemic elements<sup>67</sup>. In the nascent Arab-Muslim culture the functions which were performed and the models of activity or behaviour continued to be adjusted to specific social situations and they were not autonomous in nature.

As far as the law was concerned, the situation was similar: during the three quarters of the first/until the end of the seventh century the Muslim law practically did not exist as a science (only with its gradual development the term *fiqh* was applied to indicate the science of law). The Rightly Guided Caliphs (11-41/632-661) and the first Umayyads (41-132/661-750) performed the role of legislators and they settled the cases as they occurred. The proto-*qadis* had a certain freedom to formulate *quasi*-jurudical rulings. The basis for decisions had to do with the solutions which were featured in the Qur'an, the customary law of that time and the sunna of the ancestors (which underwent successive changes) and individual opinion (*ra'y*)<sup>68</sup>. The material on which the proto-*qadis* based their rulings did not constitute a law *par excellence*, but it was adapted by them to specific situations. Thus the proto-*qadis* made an important contribution to the development of the legal doctrine of Islam<sup>69</sup>.

<sup>66</sup> Schoeler, *The Genesis*, pp. 40-41; Schoeler, *Recording*, p. 93 *passim*; see also below, footnote 83.

<sup>67</sup> See e.g. Godlewski, *Wstęp do wydanja polskiego*, p. 21; Ong, *Writing is a Technology*, pp. 36-37.

<sup>68</sup> Crone, Hinds, *God's Caliph*, pp. 54-55; Hallaq, *The Origins and Evolution*, p. 196.

<sup>69</sup> Masud, Peters, Powers, *Qādīs and their Courts*, p. 11. For example, during the making of a decision on the basis of an individual opinion, one took into account the decisions which had been made in similar cases. Thus the concept of legal analogy (*qiyās*) was supposed to arise. The generally accepted view on the application of a specific course of action also began to be taken into account. However, in this period it is still difficult to speak about the concept of consensus (*ijmā'*) separate from the practice of the sunna, Prochwicz-Studnicka, *Usul al-fiqh*, p. 16.

#### 4.2. *The second stage: an introduction of the Arabic language to the administration of the caliphate*

In the late first/the early eighth century the proto-*qadiship* gradually began to change its nature, developing toward professionalisation. This was a time when garrison towns began to transform into more and more complex structures which represented multi-level social, political and economic relations. These changes also began to happen in structures of the previously seized urban centres due to the influx of Arabs to these centres and the entering into various relations with the local population. At that time the proto-*qadis* began to be appointed also to these cities (Alexandria, Homs and Rayy were the first ones)<sup>70</sup>. Sulaymān b. ‘Abd al-Malik (96-99/714-717) seems to be the first caliph who began to appoint judges personally<sup>71</sup> (during the period of the first Umayyads, most likely with the exception of the rule of Mu‘āwiya, it was the city governor who was responsible for appointing the proto-*qadi*)<sup>72</sup>. The policy of depriving the governors of the prerogatives associated with the appointing of judges was testimony to the growing centralisation of the authority. This process contributed to the gradual specialisation of the functions of the proto-*qadis* and changes in terms of their duties. For some time they still performed other duties (tribal arbitration, financial administration, preaching- and police-related duties), although the settling of disputes came increasingly manifestly to the fore.

It is the same period which saw the development of the law as a science: ca. 80-120/700-740 in the main cities of the empire, Medina, Mecca, Kufa, Basra, Damascus and Fustat there emerged a community of independent scholars who specialised in studies in the legal-religious and legal-ethical problems, on which (proto-)*qadis* in turn based their inquiry. In many cases they themselves were recruited from the same community<sup>73</sup>. The collaboration of the judges with scholars became closer due to the fact that the former, as they engaged increasingly in complex cases, stimulated by the social and economic development, could not do without this “repository of intellectual resources”. It was at that time that the first, non-formalised ancient schools of law were developed. In the pursuit of legal solutions they used the *corpus juris* of the Qur’an on a broad scale, but not only that. Reasoning and individual opinion (*ra’y*) constituted an integral part of “the living tradition of the school”, to use Joseph Schacht’s term. This tradition came to acquire a normative nature and to constitute a model in the legal procedure. It was

<sup>70</sup> Masud, Peters, Powers, *Qādīs and their Courts*, p. 10.

<sup>71</sup> Hallaq, *The Origins and Evolution*, pp. 38, 57-58.

<sup>72</sup> On the basis of source data it is impossible to determine whether during the period of the Rightly Guided Caliphs the ruler sent arbiters (*hakams*) to garrison towns or whether proto-*qadis* were appointed there, Hallaq, *The Origins and Evolution*, p. 37; Masud, Peters, Powers, *Qādīs and their Courts*, p. 8.

<sup>73</sup> Schoeler, *The Genesis*, pp. 62-63, 66.

expressed by the consensus of the majority of the scholars who represented a given centre of law<sup>74</sup>.

In the course of time the ideology which forced the superiority of the Prophet Muhammad's tradition over the "the living tradition of the school" became increasingly more manifest. The practice of *ṭalab al-'ilm* ("seeking knowledge"<sup>75</sup>) began to gain currency, and the reasoning and individual opinion (*ra'y*) lost their rank as a legitimate instrument in the making of legal decisions<sup>76</sup>. The traditionalistic opinion which established the dominance of the tradition of the Prophet eventually prevailed. The ancient schools of law began to transform into the so-called classical schools (*madhhab*, pl. *madhāhib*: literally a way, mode, manner of acting or conduct). They developed a common interpretative approach to law, which prompted one to perceive it as an entity systematically interpreted from the Qur'an and the sunna of the Prophet (even though this direction of the development was not tantamount to the complete victory of traditionalism)<sup>77</sup>. In the course of this process one may discern a transfer of the legislative activity from judges upon lawyers. Earlier on, in the formative period, despite the collaboration of judges with independent scholars, the law was made mainly in court of law, where the *qadis* enjoyed a certain degree of freedom of making decisions (in many cases relying on solutions based on custom, hence *inter alia* the presence of customary law in *sharia*)<sup>78</sup>. As it was stated by Ahmed Fekry Ibrahim<sup>79</sup>, along with the development of the classical schools, the law «was transformed into a socio-intellectual enterprise that was articulated by author-jurists outside the courtroom but in dialogic interaction with court practice».

What set in motion the changes in terms of the functioning of the judgeship (and the development of the law) at the end of the first/in the early eighth century? What was the role of writing in this respect? In order to seek an answer to these questions one is prompted to examine the process of the Arabisation of the empire, for it is the administrative area which initiated changes in the manner of communication of that time, i.e. a transition from a culture with a dominance of orality to an oral-literary culture, whose influence covered *qadiship* and the law. Obviously it should be remembered that the writing down of the Qur'an (even though it did not change itself the com-

<sup>74</sup> Schacht, *An Introduction*, p. 29 *passim*; Prochwicz-Studnicka, *Usul al-fiqh*, p. 16.

<sup>75</sup> In the sense of the precedents featured in the developing tradition of the Prophet.

<sup>76</sup> Hallaq, *A History of Islamic Legal Theories*, p. 15; Hallaq, *The Origins and Evolution*, pp. 52-53; Schacht, *An Introduction*, p. 35. In the mid-second/eighth century the *ra'y* was basically understood in two ways – as arbitrary reasoning dictated by practical concerns and as reasoning based on a written text and dictated by practical concerns. Gradually the first type came to be replaced by the second one, where the starting point became (apart from the Qur'an) the sunna of the Prophet. In the third/ninth century the term *ra'y* was replaced by the terms *qiyās* and *ijtihād* which referred at that time to various forms of systematic reasoning based on the Qur'an and the sunna of the Prophet, Hallaq, *A History of Islamic Legal Theories*, p. 19.

<sup>77</sup> Prochwicz-Studnicka, *Usul al-fiqh*, p. 17.

<sup>78</sup> Ibrahim, *Pragmatism in Islamic Law*, pp. 23, 34.

<sup>79</sup> *Ibidem*, p. 23.

munication-related *status quo*) provided an impulse to the development of an early form of scholarly discourse, for which the Qur'an constituted both a starting point and a point of reference<sup>80</sup>: for as, on the one hand, the Arabic language theretofore did not feature a norm, on the one hand, the majority of Muslim people originated from other linguistic and cultural areas, the first "treatments" began to be developed, and they were devoted to the grammar and the vocabulary of the Qur'an<sup>81</sup>. This «first ever book written in Arabic» since the time it was written down – according to a Muslim tradition – was not subject to change. Many of its fragments were obscure, it did not provide answers to many questions which arose in the context of the development of the ideology of the caliphate. Hence Qur'anic exegesis<sup>82</sup> also began to be developed relatively early, followed by legal-theological discourse. However, one should bear in mind that for at least half a century since the Qur'an was written down, the scholarly discourse and the transmission of knowledge was conducted almost exclusively in oral form. Taking into consideration the *hadiths* themselves, until more or less the third /ninth century there was the prevalence of the opinion that the Qur'an should be the only book which was written down and the opposition to the writing down of tradition was strong enough to put pressure on scholars not to use written records at least publicly<sup>83</sup>. Even though writing was used, a final form wasn't imparted to works (not only to the *hadiths*). The "books" functioned mainly as private notes for one's personal use, and comprehensive but informal written notes were developed for example for the purpose of lectures. These notes (in the Hijazi script) at least until the mid-second/eighth century served as memory aids. Therefore these books were not by any means actual manuscript books. It is most likely due to the cultural stability that the initiation of the processes of the interiorisation of writing proceeded very slowly<sup>84</sup>. Suffice it to say that until the late second/eighth century it was not perceived as an instrument

<sup>80</sup> At the level of changes in terms of religious ideology one may discern that if the Qur'an had not been written down, if the Book had not existed, Islam would remain a particular religion, associated with a specific geographical and ethnic area, and therefore a religion closed to conversion, open to change. It would not acquire universalistic features and it would not determine autonomous boundaries for the religious doctrine and religious practices, see Goody, *The Logic of Writing*, p. 1 *passim*.

<sup>81</sup> Arabic tradition locates the beginnings of Arabic linguistics at the second half of the first/seventh century and associates it with the figure of Abū al-Aswad ad-Du'ālī (d. ca. 69/688), although the first work of unquestionable authenticity, *Al-Kitāb*, was released only by Sibawayhi (d. ca. 180/796), Bohas, Guillaume, Kouloughli, *The Arabic Linguistic Tradition*, p. 1; Versteegh, *Landmarks*, pp. 2-3, 29-30.

<sup>82</sup> The first commentary was supposed to be developed in the second half of the first/seventh century, and its author was supposed to be Ibn 'Abbās (d. ca. 68/686), a cousin of the Prophet. This commentary was preserved to our times only in the quotations provided by subsequent exegetes, Schoeler, *The Genesis*, pp. 45-47.

<sup>83</sup> The exhausting treatment of can be found in Cook, *The Opponents*, pp. 437-530; see also Schoeler, *Recording*, pp. 89-107 (the possible reasons for the opposition to the writing down of *hadiths* pp. 105-107).

<sup>84</sup> The Greek term *hypomnēma* is used in reference to them by Schoeler, *The Genesis*, pp. 49, 54 *passim* and Schoeler, *The Transmission*, p. 46 *passim*.

of the dissemination of cultural content<sup>85</sup>. Writing which functioned as an *aide-mémoire* therefore contributed, paradoxically, to the solidification of the existing oral-audial communication-related traditions<sup>86</sup>.

As we return to the argument concerning the Arabisation of the empire as the fundamental reason for the communication-related changes in culture, the crucial decision in this context was associated with the introduction – what was mentioned at the beginning of the article – of the Arabic language in the administration of the caliphate<sup>87</sup> in the place of Greek and Middle Persian, performed by the Umayyad caliph ‘Abd al-Malik (65-86/685-705)<sup>88</sup>. The administrative (cursive) script, in contradistinction to the script featured in the early forms of the Qur’anic text and in the inscriptions of the monumental Kufi script, enabled one to write relatively quickly; it was also more legible. It is difficult to trace the development of the particular variants of this script; one assumes that the impulse had to be provided by the central areas of the caliphate and owing to the efficient administrative (including postage) infrastructure, the solutions which were adopted there were transferred further<sup>89</sup>. Despite the scarcity of extant administrative textual monuments dating back from that period, the subsequent sources recall their rapidly growing numbers<sup>90</sup>.

The Arabisation of the administration of the caliphate signified the development of an Arabic-language community of secretaries/scribes/writers (*kātib*, pl. *kuttāb*). The first secretaries employed in the chancellery (*diwān ar-rasā’il*) were not ethnic Arabs but representatives of the conquered peoples. They originated from a community which was associated with the Byzantine or Persian system of bureaucracy for generations. Therefore they were familiar with the tradition in terms of the organisation and administration, and the Arabic language and script were familiar to them. Shawkat M. Toorawa<sup>91</sup> wrote the following:

<sup>85</sup> Schoeler, *The Relationship*, pp. 121-122.

<sup>86</sup> Goody, Watt, *The Consequences*, p. 45.

<sup>87</sup> Initially the Byzantine and the Persian models of the system of bureaucracy theretofore functioned in the lands which were incorporated to the nascent Arab-Muslim empire due to a series of conquests. The Arabs eventually opted for the Persian model, which was codified in the course of time.

<sup>88</sup> Obviously, the nascent caliphate adopted many organisational structures of the state and law from the conquered peoples. The political systems of the state, including the public administration, as well as the elements of the legal and economic order were subject to foreign influence. Moreover, the Arabic culture also adopted many ideas and values from the Greek, Persian and Indian traditions. However, one should bear in mind that these structures and the cultural traditions which were elaborated in the course of centuries in the Near East were based on the culture of writing and they were formed by it.

<sup>89</sup> Sijpesteijn, *Palaeography*, p. 518.

<sup>90</sup> Toorawa, *Ibn Abī Ṭāhir Ṭayfūr*, p. 8. One of the early extant official documents – Arabic-language or Arabic- and Greek-language papyri – originate from a local Umayyad chancellery of the period of Qurra Ibn Sharīk, a governor of Egypt (90-96/709-714). They were discovered in 1902 in Upper Egypt in a village, Kūm Ishqāw, which was known as Aphrodito in antiquity. For a more comprehensive treatment see Abott, *The Qurrah Papyri*.

<sup>91</sup> Toorawa, *Ibn Abī Ṭāhir Ṭayfūr*, p. 8.

With the new organizational models – letters, formularies, and the attendant exigencies of the page, and of sequenced pages – came new meanings and new sets of meanings. Administrative activity acted as a bridge between oral activity and textual activity, and as a mirror of the changes occasioned by the importance of the written record. Records become more detailed (e.g. in revenue collection), the kind of information recorded more varied (e.g. budgets, land-grants, notary documents), and the qualifications for secretaryship (*kitābah*, lit. writing) more “literate”. The growth of the secretarial class (...) and in the number of writers also resulted in an explosion of writing, by them and for them, especially administrative manuals of right secretaryship.

The court secretaries not only ran the chancellery according to the Persian model but they also promoted the Persian model of culture (through adaptations and translations from the Middle Persian language). They originated the chancellery style in the writing of letters, which soon became to be treated as literary works. In the course of time they entered the canon of ornamental prose. In terms of the content which was engaged they paved the way for the development of the mirrors of rulers, and consequently for the development of the *adab* literature<sup>92</sup>. The works which were written by court secretaries, were intended to be read: they had the form of actual books. Initially the circle of readers was limited to the caliph’s court<sup>93</sup>.

Within the framework of the interest of the caliphs in the history of the revelation, Ibn Ishāq (d. 150/767), who was considered an authority on the problems of the life of the Prophet Muhammad, was asked by the Abbasid Al-Manṣūr (136-158/754-775) to write, for his son, the subsequent caliph Al-Mahdī (158-169/775-785), a work with the title *Al-kitāb al-kabīr* covering the history of the world from Adam until the period in which he lived. The work was supposed to consist of three parts. No part has been preserved in its original form, but the recensions of its fragments survived mostly in his students’ works (or works of the students of his students). One of the most important recension is *Sirat rasūl Allāh* by Ibn Hishām (d. 218/834). Mainly on the basis of its analysis Gregor Schoeler<sup>94</sup> claimed the following:

It is well thought out, it is divided into chapters, and events are arranged in chronological order, without precluding classification based on genealogical or practical considerations when the need arises. Ibn Ishāq frequently prefaces the different reports relating to a particular event with preliminary remarks summarizing and dating the information he provides.

<sup>92</sup> Abū al-‘Alā’ Sālīm (*fl.* the second/eighth century), a secretary of the Umayyads is considered as a likely precursor of the epistolary art. He was the mentor of ‘Abd al-Ḥamid al-Kātib (d. 132/750), most likely a man of Persian descent, an author of many epistolographical works (*rasā’il*), including theoretical guides associated with the art of writing letters intended for secretaries and advice intended for the ruler. Another secretary of Persian descent who made a significant contribution to the development of Arabic prose was Ibn al-Muqaffā’ (d. ca. 139/756), Bosworth, *The Persian Impact*, pp. 487-491; Latham, *The Beginnings*, pp. 154-179; Marsham, *Rituals of Islamic Monarchy*, p. 161.

<sup>93</sup> Schoeler, *The Genesis*, pp. 58-59.

<sup>94</sup> *Ibidem*, p. 61.

This was supposed to be an actual book (Greek: *syngramma*), i.e. a consciously composed work intended to be read, not a memory aid used during public lectures. However, this was still a work which at that time did not leave the palace walls but remained in the collections of the library of the caliph<sup>95</sup>. However, not much time elapsed and the influence of the literary culture being developed at the court began to be perceptible in the works (functioning still in oral circulation) by the ulama: in the historical, philological, exegetical and legal material which was developed around the middle of the second/eighth century (preserved in the quotations in subsequent works) one may observe a new solution i.e. a thematic arrangement (*taṣnīf*) and an adaptation of the *risāla* form, i.e. a “letter” intended to an individual addressee. Among the earliest extant (!) work of this kind the theological *Risāla fī-l-qadar* by Ḥasan al-Baṣrī (d. 110/728) or the legal *Kitāb al-Kharāj* by Abū Yūsuf (d. 182/798) can be mentioned<sup>96</sup>. Until the end of the second/eighth century the circum-Qur’anic fields of study saw the development of more systematised works in the form of *risāla*, not a “book”, which was probably associated with the still ambivalent attitude toward writing as a means of communication with a broader audience<sup>97</sup>: «It would seem that, until the end of the eighth century, a text composed as an instance of personal communication was more easily accepted than one composed as a book from the very start and intended for a wider audience»<sup>98</sup>.

It is clear that with the introduction of the Arabic language in the administration of the caliphate not only accelerated the development of the still defective form of the Arabic script in its practical varieties but also the development of literacy and, consequently, writing-based culture. Owing to writing, the message was gradually decontextualised, and it especially came to be liberated from the personal and situational context. The text became (at least partially) an element of external reality, it required interpretation. The reading of the text increased the analytical capabilities of the mind, enabling critical reflection<sup>99</sup>. The liberation of the message from the personal and the situational context fosters, according to an idea formulated by Grzegorz Godlewski<sup>100</sup>:

<sup>95</sup> *Ibidem*, p. 63. At a slightly earlier period there were collections of “literature” (of pre-Islamic poetry, relations about conquests, the life of the Prophet etc.) commissioned by the rulers. They functioned in individual copies, exclusively *ad usum privatum*, they were usually transcribed by court writers on the basis of oral transmission, Schoeler, *The Genesis*, pp. 49, 54-56.

<sup>96</sup> *Ibidem*, pp. 63-64.

<sup>97</sup> Toorawa, *Ibn Abī Ṭāhir Ṭayfūr*, pp. 20-24.

<sup>98</sup> Schoeler, *The Genesis*, p. 64.

<sup>99</sup> See Goody, *The Logic of Writing*, p. 129; Ong, *Orality and Literacy*, pp. 83, 134, 152.

<sup>100</sup> Godlewski, *Wstęp do wydania polskiego*, p. 21. Jack Goody also points out the application of graphical representations such as tables, listings, indices and registers, which owing to the liberation of the mind from the context of the linearity of the utterance enable the creation of new forms of the organisation of reality, and, along with them, the development of new mental structures. At the institutional level they condition *inter alia* the development of the system of the administration of the treasury, including the tax system, the conduct of long-distance trade,

the appropriate principles of the construction of an utterance, enabling it to carry the bulk of the information-based message, and – on the side of the recipient, the principles of its understanding, exclusively on the basis of a graphical notation of a verbal sequence. The product of these principles is the universalisation of the utterance, achieved owing to the use of conceptual and abstract notions and by linking them into relations established by the categories of formal logic. [...] Decontextualisation creates above all new methods of thinking, reasoning, learning about things, but it also leads to radical changes at the institutional level.

The underpinnings of the centralisation of the authority, even though the latter is conditioned by many factors, also included the “separating” and “distanting” function of writing operating at many levels<sup>101</sup>. The process of the centralisation of authority entailed the development of administration understood as communities which directed various activities of social nature. The communities which were at least partially textualised saw the separation of groups which were capable of supervising and directing distinct social activities<sup>102</sup>. This was the manner in which the community of *qadis* was formed, which successively acquired more and more definite boundaries for their functions, a more emphatic and unambiguous nature in its structure. And this is an evident sign of “the logic of writing”.

#### 4.3. *The third stage: the further shift in balance between orality and literacy*

It can be said that the appointing of judges by caliphs and the narrowing down of the scope of their duties were tantamount to a beginning of the development of an independent judicature. This happened around the middle of the third/the middle of the ninth century: *qadiship* along with the system of the judicial proceedings acquired its complete form, and the doctrines of the judge, the witnesses, the oaths and evidence etc. became a part of the *adab al-qāḍī* literature and to *fiqh* textbooks. This period also saw the complete formation of the schools of law in terms of the doctrine. The methodology of the law and its interpretation acquired its complete form a few decades later. The differences between the schools resulted above all from a different evaluation of the sources of law and the method of the derivation of rules. Mature schools were aware of the methodological and substantive difference. Moreover, the affiliation of the lawyer and a judge with a given school was basically permanent, in contradistinction to the formative period. Each school, finally, constructed its notion of the authority whose focus became a person who from then on was referred to as the founder of a school<sup>103</sup>.

the development of banking, the system of archiving. See Goody, *The Domestication*, especially chapters 5-8.

<sup>101</sup> Ong, *Writing is a Technology*, pp. 36-37.

<sup>102</sup> *Ibidem*, p. 40; Merkelbach, *Znaczenie pismozdania*, p. 75.

<sup>103</sup> Hallaq, *The Origins and Evolution*, pp. 155-158.



And even though the classical law did not attain the level of complete universalisation of rules and it was casuistic in nature, it was formalised nevertheless: one determined its sources and methods of legal reasoning. The complexity of the legal institutions, including the prosecution-related institutions, as well as the procedures of activity increased. The internal organisation of the court was transformed. In the classical doctrine of law, as well as in practice the *qadi* remained a central figure of the office. Appointed by the caliph to serve in a given province, he had a number of urban centres and adjacent areas under his jurisdiction<sup>104</sup>. He appointed his representatives (*nā'ib*, pl. *nuwwāb*) and he allotted a specific area which was under their jurisdiction or, in a given area a few judges operated each of whom had a specific set of cases (associated with inheritance, marriage, debt etc.)<sup>105</sup>. Along with the development of cities and their territorial expansion the number of *qadis* also increased<sup>106</sup>.

The court was an extension of his function and personality of the judge, although it featured its proper and permanent staff. The latter comprised collaborators of various kind (*a'wān*), among whom a great number was constituted by educated specialists who represented the indispensable skill of writing. Among these specialists there was the writer (*kātib*)<sup>107</sup>. Even though Arabic sources claim that this practice was applied as early as since the 50s of the first/70s of the seventh century<sup>108</sup>, considering the then state of the development of writing and the range of its application it seems unlikely, especially as far as regular and particular written records are concerned. It is likely that the practice of recording cases (and producing written records of transactions) was introduced on the basis of the existing judiciary solutions in

<sup>104</sup> An important decision in the policy whose purpose was to subordinate the offices which functioned in the particular provinces to the central authority was associated with the establishment of the office of the chief *qadi*, *qāḍī al-quḍāt*. Initially this was exclusively a title of honour, which was granted by caliph Hārūn ar-Rashīd (170-193/786-809) to the judge of Baghdad in recognition of his contribution to the administration of justice in the capital. However, it was still the caliph (since the end of the third/ninth century – the vizier) who appointed the judge for the principal city of the province. The *qāḍī al-quḍāt* could present the candidates to the office and perform the role of an advisor. It was only after the fourth/tenth century that the supreme judge acquired the prerogative of independent appointing of *qadis* of provinces and of recalling them, thus attaining a greater extent of independence and an enhanced social standing. The criterion of the selection of judges in provinces became associated above all with loyalty to the court and promptness to carry out the policy of the caliph. In the majority of cases, the *qadis* were recruited from the community associated with the court in Baghdad, Blich-Abramsky, *The Judiciary (Qāḍīs)*, pp. 56-57; Masud, Peters, Powers, *Qāḍīs and their Courts*, p. 13; Schacht, *An Introduction*, pp. 50-51.

<sup>105</sup> Hallaq, *The Impossible State*, p. 129, footnote no. 107; Hallaq, *The Origins and Evolution*, p. 80; Masud, Peters, Powers, *Qāḍīs and their Courts*, pp. 10, 12.

<sup>106</sup> Hallaq, *The Impossible State*, p. 129, footnote no. 128.

<sup>107</sup> A court of law writer should not be confused with a private notary (*shurūḥī*). In contradistinction to a court of law writer, *shurūḥī* developed legal documents for private parties who engaged in specific trade operations, concluded contracts, transactions between one another etc. He was remunerated by individual clients and he operated out of court, Hallaq, *The Origins and Evolution*, p. 92.

<sup>108</sup> *Ibidem*, p. 59.

the conquered lands. The number of scribes depended on the size of the office and the number of cases which were submitted<sup>109</sup>.

Specialists in the field of law (*faqīhs*/judges, *muftīs*/jurisconsults) were also associated with the court. It is not certain whether they were regularly present when the *qadi* worked. Consulting cases with lawyers on the initiative of a judge was the norm already since around the middle of the second/eighth century<sup>110</sup> (both *qadis* and *muftīs* belonged to the same milieu of *faqīhs*, not infrequently the *qadi* himself was a *muftī*). Advice was usually issued in writing. A jurisconsult familiarised himself with the case by means of the documentation which was appended by the *qadi* to the request. Therefore he did not establish the facts and he did not issue a ruling: these were the tasks of the *qadi*. The *muftī* merely issued a *fatwā*. It was general in nature, it could be used in similar cases. A *fatwā* was not binding, but the ruling of a *qadi* was binding for the parties involved<sup>111</sup>. Depending on the methods of legal reasoning the opinions formulated by the *muftīs* could differ. The judge, if he consulted more than one jurisconsult, was free to choose a solution<sup>112</sup>.

An important function in the court was performed by witnesses (*shuhūd* 'adl). The witnesses attested all kinds of transactions which were engaged in the court. The office was assumed by people who enjoyed social trust<sup>113</sup>. In the end of the second/in the early ninth century all documents, including the decisions of the judge, were attested by at least two witnesses. They were also obliged to participate in court proceedings as underwriters of the appropriate (i.e. legal) course of all judicial activities<sup>114</sup>.

Among the collaborators of the *qadi* there was also the *qassām* (lit. "the one who divides/distributes"). He was engaged in the division of the property among the inheritors or among the parties to a dispute. It was also for this reason that this position was assumed by people who were skilled in the art of arithmetic. It is difficult to establish the period in which the judges were relieved of the obligation to divide property personally and the obligation was transferred to the people who were his inferiors<sup>115</sup>.

It is evident that the functioning of *qadiship* in its mature form engaged specialists and required them be capable of writing. Moreover, most likely

<sup>109</sup> Jany, *Judging*, p. 95; Halllaq, *The «qāḍī's dīwān (sijill)»*, p. 423.

<sup>110</sup> Hallaqa, *The Origins and Evolution*, p. 89. The consulting of cases began slightly earlier, along with the development of the community of specialists in the terms of the nascent science of law.

<sup>111</sup> Samour, *A Critique of Adjudication*, p. 55.

<sup>112</sup> Such was the case when a capital offense was involved. Then the judge consulted the opinion of the muftis from other centres, Jany, *Judging*, p. 134; see also Samour, *A Critique of Adjudication*, p. 55.

<sup>113</sup> Hallaqa, *The Origins and Evolution*, p. 86; Masud, Peters, Powers, *Qāḍīs and their Courts*, p. 21.

<sup>114</sup> Hallaqa, *The Origins and Evolution*, p. 88.

<sup>115</sup> *Ibidem*, p. 91. According to one of the prominent Arab historians, Abū 'Umar al-Kindī (d. 350/961), by the second/eighth century a full court staff emerged, Samour, *A Critique of Adjudication*, p. 47, footnote 2.

since the end of the second/the early ninth century the judicial archive assumed its final form, which means that previously the *qadis* could also have a certain documentation at their disposal<sup>116</sup>. The most important collections included the following: *maghādir* and *sijillāt*. The former referred to documents of two kinds: 1) statements provided by the witness in reference to the legal effects of a given activity (e.g. of buying, of selling), 2) the written records of cases which the parties put before the judge and which had to be initialled by the judge. The term *sijillāt* referred to the listing of the content of the *maghādir* along with the body of judicial decisions (*ḥukm*, pl. *aḥkām*) which were made in a given case. Moreover, the *dīwān al-qāḍī* could also include the lists of witnesses in court proceedings, the lists of the administrators of *waqfs*, the lists of *waqfs* themselves, of the employees of the foundations and their salaries, the lists of benefits for female divorcees, of the cases involving orphans, *sukuk* (contracts, donations, pledges etc.), the lists of bequests, the copies of the correspondence exchanged with other *qadis*<sup>117</sup>.

Is it true that the autonomous, specialised and complex system of the judicature may be considered testimony of further shift in balance between orality and literacy, or even a considerable textualisation of culture? In other words, to what extent the culture of the third/ninth century was a culture of writing, what were the standard of literacy at that time?

Apart from the ambivalence toward written records which continued to prevail, the Arabic script expanded its range and it came to be used on a greater scale in the process of the copying of manuscripts. It became a means of transmitting and storing knowledge and, in a broader context, of disseminating cultural content. In the course of time the number of readers increased. Not only poets and men of letters became readers, but also merchants engaged in long-distance trade, landowners, judges, lawyers etc. Without doubt this process was fostered by cognitive curiosity and the fondness for knowledge. However, the invaluable support for this inclinations was associated with the introduction of paper as a writing material. Plants such as hemp, flax, ramie (*Boehmeria nivea*), i.e. plants which were common in the Middle East, were appropriate for the production of paper. In contradistinction to papyrus, which was only available in the Nile Valley, as well as parchment, whose production was limited by economic concerns, paper was a widely available and cheap material. Moreover, pigments and ink were better absorbed by paper. Finally, it was a more appropriate material for the development of codices than papyrus and parchment. It was already in the second/eighth century that the first paper workshops were supposed to be established in Baghdad. Their presence was attested in Damascus, Hama and Tripoli in the third/ninth century. The domestic production in Cairo was initiated in the century that followed<sup>118</sup>.

<sup>116</sup> Hallaq, *The «qāḍī's dīwān (sijill)»*, pp. 423, 432-433.

<sup>117</sup> Hallaq, *The Origins and Evolution*, pp. 93-94; Hallaq, *The «qāḍī's dīwān (sijill)»*, pp. 420-421.

<sup>118</sup> Bloom, *Paper before print*, pp. 42-45; Loveday, *Islamic Paper*, pp. 10-15, 18-19, 23.

The period of *ca.* the middle of the third/the middle of the ninth century was marked by advanced applications of writing. According to the idea expressed by Shawkat M. Toorawa<sup>119</sup>: «by the middle of the third/ninth century, the written word, though it admittedly directly affected a small number of people, was nevertheless widely adopted as a basis for discussions of cultural activity and as a standard of cultural progress», and Franz Rosenthal<sup>120</sup> who discussed the relation between Classical Islam to books used a telling title of Old Testament provenance: «Of Making Many Books There Is No End».

This period saw the efflorescence of culture and civilisation (cultural change was accompanied by significant political, economic, technology-related and social change); the new reality was marked by interest in the surrounding world, progressing urbanisation, the increase of prosperity, the refinement of the culture of life, although also by the growing rift between the social communities). This was the period of the so-called Golden Age of Arab-Muslim literature, scholarship, and art. This happened owing to the fact that the Arabs based themselves on the robust foundation of the spiritual unity of Islam and the relative hegemony of the Arab element, and at the same time owing to the assimilation and the utilisation of the heritage of the conquered peoples. It was mainly the Persians who entered the Arab world with their own civilisation-related awareness, experience and literary traditions. It is sufficient to indicate the vibrant functioning of a vast number of private and public libraries which were also the centres of the copying and preservation of manuscripts, teaching, meetings and discussion<sup>121</sup>.

Despite the discernible reliance of the classical Arab-Muslim culture on writing one should remember that this culture remained a manuscript culture, i.e. the culture in which the complete dominance of writing was impossible to be attained. For many centuries the classical Arab-Muslim culture was marked by communication-related transitionality. In a textual environment numerous customs and methods of communication associated with orality continued to thrive: the culture continued to favour oral-aural forms of transmission of content, and thus the content-makers and the users of culture (of subcultures) belonged to the same community of memory by the internalisation of the texts which were developed. Memorisation and oral transmission constituted a deeply rooted tradition in the Arab community. Cultural emphasis on the memorisation of the Qur'an, the sunna of the Prophet, of the poetry, proverbs and anecdotal material in the intellectual circles was pervasive. In the field of scholarship and education (especially the education which developed around multiaspectual studies in the Qur'an) the basic model of

<sup>119</sup> Toorawa, *Ibn Abī Tāhir Tayfūr*, p. 11.

<sup>120</sup> Rosenthal, *Of Making Many Books There Is No End*, pp. 1066-1087.

<sup>121</sup> The Bayt al-Ḥikma library in Baghdad, which is associated with the names of two Abbasid caliphs, Hārūn ar-Rashīd and Al-Ma'mūn (198-217/813-833), which housed works which were mainly devoted to philosophy and the exact sciences, was one of the first institutions of scholarship, open to the elites of the scholars, as well as a centre of translation-related activities.

the transmission of content until the end of the pre-modern period was associated with listening, and the direct contact of the teacher and the student was the basic principle which governed the process of education. A similar situation was the case in reference to literary salons (*mujālasāt*), which since the middle of the second/ninth century became a prestigious institution which were frequented by poets, writers and the enthusiasts of a life of culture<sup>122</sup>. The medieval Arab-Muslim culture, being a manuscript culture, could not generate a book which could be furnished with media which conveyed the complete illocutionary value, a completely autonomous message constructed according to principles completely different from living speech<sup>123</sup>.

However, it was not only the preference for oral-aural forms of conveying content that caused writing to modify to a limited extent the style of communication and thus also the manner of thinking and acting<sup>124</sup>. The complexity of the problem prompts one to examine, among other things, the dominant world-view-related religious valorisation which caused specific values to penetrate into social practice, and thus the potential for change which was carried by writing was concretised to the extent and at the rate that were peculiar to this culture. In this context I refer to the role of traditionalism as a mental attitude according to which emphasis was placed on transmission instead of innovation, collective awareness, acceptance of hierarchic structure and the vision of man's freedom. Among other factors of the resistance against writing I would mention incomplete phoneticity of the Arabic script, and most probably the direction of writing<sup>125</sup>. This problem remains outside the scope of the article. I would like only to indicate that the consonantal nature of the Arabic script and its direction of writing (from the right to the left) could have influenced the privileged position of the right hemisphere in the process of reading. Firstly, it is claimed that the vocalic alphabet (a completely phonetic one) privileged the activity of the left cerebral hemisphere due to the fact that reading consists in the sequential recognition of letters, syllables and words. In turn, in order to read an Arabic text, the reader has to supplement the «written consonants» with the «oral vowels»<sup>126</sup>, that is he or she has to supplement the text with an aural component by taking into account not only the sequence of the consonants but also the contextual order of the words. Such a strategy enables the choice of the correct interpretation from among many potential ones. Secondly, there are premises to claim that in the process of reading texts from the right to the left, better perception occurs in the left visual field (in the cerebral cortex centre) which is better correlated with the right hemisphere. We may

<sup>122</sup> Ali, *Arabic Literary Salons*, p. 38.

<sup>123</sup> Riesman, *The Oral Tradition*, p. 424.

<sup>124</sup> The greatest decontextualisational potential was brought by printing, *ibidem*, pp. 423-424.

<sup>125</sup> These problems, as well as the identification of cultural factors which solidified the position of orality and which could hinder the capability of writing to transform reality require further research.

<sup>126</sup> de Kerckhove, *Critical Brain Processes*, p. 401; see also Ong, *Orality and Literacy*, pp. 28, 88.

suppose that during the classical period of the development of culture the consonantal Arabic alphabet could engage in the processing of the written matter the right hemisphere to a considerable degree (along with the development of literacy this regularity could have been subject to a slow – although never complete – change in favour of the left hemisphere). Thus the Arabic script did not influence that efficiently the forms of thinking as the completely phonetic alphabet written from the left to the right and it contributed to the limiting of the range of the interiorisation of writing<sup>127</sup>.

Getting back to the subject, in the stable and conservative Arab-Muslim culture which preferred oral-aural models, decontextualisation was merely partial. Therefore, we may see that the institution of *qadi* constituted a space in which orality and literacy clashed. This clash occurred at the “external” level of communicative activities (i.e. the realisation of specific communicative practices in the activities of a judge), and at the level of the “internal” structure of the institution, conceived of as a structure and the mutual relations of the particular elements in court proceedings. For example, the establishment of material fact was not the main purpose of a lawsuit. The fundamental value was represented by compromise and amicable settlement of a case. Facts did not play a crucial role in a lawsuit. Justice was pursued on the basis of an assessment of persons rather than facts – the criteria of evaluation which were applied by the judge were subjective. The interpretation of facts was limited. The oral testimony of the witnesses was a priority. Finally, a crucial role was played by an oral oath.

## 5. Conclusion

An answer to the question posed at the beginning of the text should be affirmative. The “the logic of writing” expounded by the literacy theorists, which emphasizes potential of this medium to transform the particular segments of culture can be traceable at the particular stages of the development of the *qadiship*:

1. A new religious ideology lay at the very foundations of the change of the system of communication in the Arab society and its culture. Initially the influence of «the first ever book written in Arabic» reinforced the existing communication-related order. In an institutional perspective this was reflected in the wide scope of responsibility, the variety of the functions which were held as specific social situations arose and the lack of autonomy. However, at the same time it can be easily discerned that the writing down of the Qur’an was a turning point for the history of culture and society. The emergence of the Qur’an in the written form entailed a development of scholarly discourse which used writing, although initially as an aid to memory.

<sup>127</sup> Skoyles, *Right Hemisphere Literacy*, pp. 363-380, especially pp. 373-374.

2. The actual impulse to the development of writing, and, consequently, literacy, was provided by the introduction of the Arabic language to the administration of the caliphate and the development of culture in the court of the caliph. The influence of this culture at some point transcended the boundaries of the court. The development of writing intensified, and the familiarity with it very quickly became common among the political and religious elites. The use of writing influenced the emerging legal culture, it “forced” its formalisation. It also liberated the authority from the situation and personal context directing the processes of the centralisation. At this time the *qadis* were gradually relieved of their administrative functions in favour of legal ones. The office itself underwent increasingly greater professionalisation and autonomisation.
3. The so-called Golden Age saw the efflorescence of culture and civilisation. Writing was being more and more widely adopted as a basis for dissemination of broadly conceived culture. The number of manuscripts as well as the number of readers increased considerably. This was a period of a significant shift in balance between orality and literacy and even more of the partially textualised manner of thinking. The complete formation of the schools of law and the judicature took place. The functioning of *qadiship* in its mature form engaged specialists who had their own procedures and a corpus of written tradition<sup>128</sup>. Written notes, correspondence, registers featured in the activities of a *qadi* influenced the nature and the structure of the office, and they also partially influenced the manner of the court proceedings.

The identity of *qadiship* was constructed on the perception of a world formed by the literacy communicative order. It may be classified within practices to which Grzegorz Godlewski refers to as «practices intermediated by writing», i.e. ones that go «beyond the acts of creating and receiving written utterances»<sup>129</sup>. Nevertheless, “court of law culture” was marked by communication-related transitionality. In the classical Arab-Muslim culture the oral discourse did not arise manifestly within the framework of conventions established by the written text but in a parallel manner to it. Thus, medieval Arab-Muslim mentality was for a long time based more on audition than vision (the act of reading was rather oral and collective). It stemmed from the manuscript character of the culture as well as cultural norms and values which, by being practised socially, could have limited the influence of writing upon the mode of thinking and acting. That is why the very operation of the institution of *qadi* (not the process of its development) constituted a space in which orality and literacy clashed.

<sup>128</sup> Goody, *The Logic of Writing*, pp. 142-144; Goody, *The Power of the Written Tradition*, pp. 24-25.

<sup>129</sup> Godlewski, *Antropologia pisma*, p. 57.

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