Why Did Islamic Medieval Institutions *Become* so Different from Western Medieval Institutions?

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This paper attempts to answer the question of why Islamic medieval institutions became so different from their Western counterparts. It is divided into three sections. The first discusses the significance of comparing institutions from this perspective and the patterns that can be found in doing so. The second section describes the methodology that has been followed in this research and sets aside other possible approaches, particularly those espoused by the New Institutional Economics. The third section seeks to answer the main question: it is argued that differences in institutional shaping emerge from the divergent paths taken by power and authority in Islamic social formation, which was confronted with an irresolvable dilemma between temporal rule and religious legitimacy. This separation emerged, in the final analysis, from a distinctive polity that was based on the control of tax and increasingly detached itself from forms of religious authority that sprang from the Muslim community.

Why institutions need to be compared

One of the main contrasts between Islamic and Western social formations is the very different shape that institutions took in them. There are countless examples that support this claim. Take the case of the religious institutional configuration: throughout what we now term Medieval Europe, the Christian Church adopted an institutional layout based on bishoprics, religious orders, councils, or the papacy, which are totally absent in the structural configuration of Islam as an organized religion. The same holds true for forms of territorial rule that became institutionalized throughout the Middle Ages, such as duchies, counties and shires, baronies and the innumerable forms of institutional framing that assumed the configuration of power in the West and had no clear equivalent in Islamic lands, where the terms of socio-political rule are always more difficult to grasp. Urban institutions also illustrate the point: albeit Islam is usually considered a »civilization of cities«, there are no equivalents to the urban medieval communes, *signorias*, burghs or *concejos* whose powerful institutional profiles embody the strength of the collective action that implemented them.

Therefore, it seems that there is a pattern here; a pattern that shows Western Medieval institutions as more recognizable, more prominent, more assertive than their Islamic counterparts. Obviously, this does not mean that Islamic institutions did not exist: there was no central religious organization, but religious dogma and rituals were consistently shared by a huge number of believers; socio-political institutions were somehow foggy, but coercion was

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exerted in Islamic social formations; town or city halls were never built, but Medieval Islamic cities expanded and worked successfully, integrating large populations. So, institutions certainly did exist in Islamic societies. The challenging issue is that they seem to have been consistently different from the ones we find in the Medieval West.[1]

The distinctive shape of institutions in these societies entails a whole variety of issues that are rarely raised, but become especially relevant when they are analyzed from a comparative perspective. A good example is the preservation of institutional memories in the form of written documents. One of the reasons why most medievalists are not archaeologists is because the Medieval West produced an increasing amount of religious and lay institutions, which kept their own documentary records. The conservation of texts helped to create an institutional self-consciousness that claimed the preservation of the past as a useful resource for the present.[2] Monastic cartularies, chancery records and royal archives were fed by documents which were produced, archived and preserved within the distinctive boundaries of these institutions because their binding or referential nature was deemed relevant for their social reproduction and continuity.

For some reason, Islamic medieval societies yielded institutions which were not as eager or less effective at preserving their documents as religious bodies, administrations or households did in the Latin West. Yet recent scholarship has proved beyond any doubt that from a very early stage Islamic societies produced large amounts of documents with strong legal, political and social value[3]. It has also been convincingly argued that institutions such as the Fatimid court or the Mamlūk chancery not only issued documents, but also kept copies of them in their own archives. Moreover, multi-generational documentary collections were not unknown among Muslim merchant families of thirteenth century Egypt.[4] Therefore, archival practice was not unknown in the *dār al-islām*, but the paucity of surviving documentary material from these societies is particularly striking when compared not only with the contemporary Latin West, but also with the later Ottoman Empire.[5]

It has been suggested that political and social unrest in the medieval Near East and North Africa may be an explanation for this dearth of written records, as new dynasties or rulers sought to destroy the legitimacy of their predecessors by inflicting »archival violence« against their textual memory.[6] People were required to ask for new documents from the new sovereigns »since the privileges the documents confirmed rested on the relationship between individual rulers and their subjects and were not automatically transferred by legacy«.[7]

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1   This article embraces a broad comparative analysis between Medieval Western and Islamic social formations. The latter should be identified with the formation prevailing in the territories of the *dār al-islām* i.e. the »the abode of Islam«, the area inhabited by Muslims where Islamic law ruled without disputation. The West refers to areas which had formerly been part of the Western Roman Empire and to those affected by their medieval expansion. Although by no means satisfactory – both realms were far from being homogeneous – this distinction is practical for the aim of this paper. It should be noted that Byzantium is not included in either of these areas: for reasons that will become apparent in this paper from an institutional point of view I tend to consider it as a middle ground between Islamic and Westerm formations.

2   Melville, Institutionnalité médièvale, 255.

3   Sijpesteijn, Archival Mind in Early Islamic Egypt, 166.

4   Rustow, Petition to a Woman, 3; Bauden, Recovery of Mamluk Chancery, 75-76; Guo, *Commerce, Culture, and Community*, 10-25.

5   Stern, *Fatimid Decrees*, 4; Manzano, Introduction, xxvi.

6   El-Leithy, Living Documents, Dying Archives, 427-429, rightly criticizes the views held by Chamberlain, *Knowledge and Social Practice*, 11-18.

7   Rustow, Petition to a Woman, 18.

This interpretation makes sense and to some extent explains the scarcity of preserved medieval documents. However, what is at stake here is an institutional practice which seems to differ from the Latin West, where changes of dynasties or successions might have fostered the necessity of confirming previous documents, but did not usually entail such a degree of »archival violence«. This may well be a symptom of the high value of written documents »as signifiers of political sovereignty«, but the fact that »even at the peaceful accession of an heir, the old documents lost their value and one had to petition the new ruler for the old privileges«, indicates that political power adopted a distinctive institutional practice in Islamic lands.[8] In this sense, it is also significant that »Christian and Jewish institutions have turned out to be among of the best sources of original documents from the Islamic Middle Ages«.[9] The intriguing question remains as to why this was the case.

Tracking their distinctive textual records is only one of the many fruitful approaches that may yield a comparative study of those social artifacts we call institutions. Comparative history, though, is always a hazardous field. Both similarities and differences can easily be overstated, and there is always the possibility of mistaking as parallel certain historical processes that respond to quite different conditions, thus considering as underlying causes what in fact are only social symptoms. This is why this paper is divided into three sections: the first sets the premises of the research by making clear what is (and what is not) our methodological approach for the comparative study of medieval institutions; the second shows this comparative approach at work in connection with processes of institutionalization in both Islam and Christendom; and the third proposes a working hypothesis in answer to the question that frames the title of this paper.

How institutions need to be compared

The different shaping of Western and Islamic institutions has not attracted too much attention from historians, but it has been the subject of a great deal of discussion by scholars of the so-called New Institutional Economics. This school follows the ideas of Douglass North, who argued that Western institutions were key actors in economic development, as they managed to clarify property rights and contractual obligations, thus helping to reduce transaction costs.[10] This line of research has been continued by authors such as Avner Greif and Timur Kuran. The former defines institutions as »systems of social factors that conjointly generate a regularity of behavior« based on the cognitive, coordinative, informational and normative aspects that make up the behavioural contents of institutions. Greif considers that »institutions are the engine of history« and this is exemplified by late Medieval European commercial expansion, which was fostered by self-governing corporations established by individuals who were unrelated by blood, but were able to create impersonal rules that regulated their activities, thereby reducing uncertainty.[11]

Other scholars have followed these ideas by referring to »European institutional exceptionalism«. Lisa Blaydes and Eric Chaney relate it to the emergence of feudalism, which forced sovereigns »to enter into forms of consensual rule with their local elite«. This resulted in the emergence of political institutions that favored constraints on the power of rulers. The main consequence was the decentralization of power, which paradoxically entailed a growth of

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8   El-Leithy, Living Documents, Dying Archives, 431.

9   Rustow, Petition to a Woman, 24.

10   North, Institutions and Economic Growth, 1325.

11   Greif, *Institutions and the Path*, 30, 399.

political stability in Western Europe as revolt was »less enticing for the sovereign rivals« because they had »more to lose from an unsuccessful rebellion (and less to gain from a successful one)«. These authors claim that this can be effectively measured and compared with the more uncertain situation in medieval Islamic polities, where the provision of military service by foreign soldiers with no roots in local communities accounted for a centralized state apparatus in which competition for power was stiff and rebellions rife.[12] Jan Luitten Van Zanden, Eltjo Buringh and Maarten Borsker have singled out medieval Western parliaments as the main institution to constrain the actions of kings. The emergence of these political assemblies in twelfth century southern Europe was rapidly replicated in other Western lands, but it is significant that they never extended to the East. In the early modern period parliaments gained importance in the British Isles, the Netherlands and Sweden, where »power was not concentrated in one person, but spread over different power-holders and social groups, such as the church, the nobility, and the cities«.[13] This occurred at the crucial juncture of the economic expansion of these regions, which these authors think was positively affected by that institutional development.

Timur Kuran has taken these arguments one step further by arguing that the West produced »self-undermining and ultimately self-transforming« institutions, whereas »the corresponding institutional complex in the Middle East proved generally self-enforcing, if not self-reinforcing«. According to Kuran, the peculiar institutional shaping of Islamic societies was not particularly problematic within the economic structures of the pre-modern period and even fostered trade exchanges throughout the High Middle Ages. However, it showed its drawbacks when it was confronted with the Western forms of economic organization that emerged during the modern era and were much more dynamic than their Islamic counterparts. A whole variety of Islamic institutions contributed to the Middle East's slip into stagnation: some of them were traceable to the early period, some of them took longer to develop. One of them, for instance, was the Islamic inheritance system, whose Qur'anic rules for the bequeathing of testamentary portions to children, spouses, parents and siblings allowed the fragmentation of wealth and discouraged the formation of durable commercial partnerships. This was also the case with the *waqf* system, a form of trust which was established by endowing income-producing property to provide a service in perpetuity, but whose rigidity »depressed the already low need to develop more advanced commercial organizations«. Kuran also implies that the concept of corporation was alien to Islamic law, which only gave legal standing to individuals, thus preventing the emergence of economic organizations with a legal entity.[14]

Criticisms of these views stress the idea that they subordinate historical interpretation to the teleological perspective that considers »economic development« as the main objective of any society in the past. Authors such as Jack Goldstone are right when they point out how inadequate it is »to build world history around a single long-term trend described as *the rise of the West*«.[15] Long-term processes are examined from the confident perspective of their final outcome and the uncertainties that surrounded historical agents in their own times are subsumed under a sort of »manifest destiny« conception that pervades the bulk of the narrative.

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12 Blaydes and Chaney, Feudal Revolution and Europe's Rise, 24.

13 Van Zanden *et al.*, Rise and Decline, 846.

14 Kuran, *Long Divergence*, 36, 283.

15 Goldstone, Trend or Cycles?, 106.

Insufficient empirical evidence can also be singled out as another weakness of these explanations, as they subordinate the complex social and economic variables of historical dynamics to the abstract models that are the subject of the comparative enquiry.[16] In terms of the analysis of the evidence, these approaches introduce a methodological bias, as institutions are used as proxies of a social or economic rationality that is always defined in Eurocentric terms. Institutions are invoked because »market laws« do not always work properly and economic interpretations need another set of variables to buttress the idea that the Western path to capitalism was paved on the track of indisputable rationality.[17] Symptoms are taken as explanations and social conflicts are regarded as epiphenomena of a collective action that was always guided by the »neutral« mechanisms of rational choice.

The critique of the approach taken by the New Institutional Economics shows that while it is methodologically unsound to start any comparative discussion on institutions from the premise of failure or success, efficiency vs. inefficiency, the idea that there is a pattern in the different institutional configuration in East and West still holds. Any definition of institutions conceives of them as structures or processes performed by social regularities. However, these regularities do not simply flow from an addition of individual rational behaviors. They are the outcome of power struggles among multiple actors who shape institutions as arenas of social conflict and dispute. This was perfectly explained by Michel Foucault more than thirty years ago when he suggested »that one must analyze institutions from the standpoint of power relations, rather than vice versa, and that the fundamental point of anchorage of the relationships, even if they are embodied and crystallized in an institution, is to be found outside the institution«.[18] When broader socio-normative power relations are taken into account, their institutional *crystallization* reveals certain regularities that allow for a comparative anlaysis, as it will become clear in the final sections of this paper.

Such analysis requires, though, a clear identification of what exactly we mean when we refer to »institutions«. In this connection, eclecticism is always a methodological advantage. This is why Jacques Revel's distinction between three different meanings of institutions is particularly useful:

I) The more technical and restricted sense, which is prevalent in legal history, considers institutions as »legal-political entities«.

II) A broader view includes any organization, which works regularly in society according to implicit and explicit rules, and responds to a specific collective demand (the family, the school, the trade unions).

III) A very wide use refers to any form of social organization which bundles values, rules or models of relations or behaviors based on mutual expectations.[19]

As Gadi Algazi has noted, historians tend to feel more comfortable with the narrower understanding of what an institution is, whereas for comparative purposes »we may find ourselves using the same term to refer to perhaps related but still radically different phenomena«. This is certainly a serious problem. And the methodological answer for such problem, as Algazi also points out, can only be pragmatic: to switch definitions at will and, particularly,

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16   Shatzmiller, Economic Performance and Economic Growth, 140.

17   Narotzky and Manzano, The Ḥisba, the Muḥtasib, 33-34.

18   Foucault, Subject and Power, 791.

19   Revel, Institution et le social, 64. Also relevant Scott, *Institutions and Organizations*, 48-55, quoted by Humfress, Institutionalisation between Theory and Practice, 21-24.

to describe institutional shaping or behaviour in terms of social processes. Following this approach, a fruitful discussion on institutions will not deal with them as well-established, essential entities, but rather as institutionalization processes in which »a significant part of the process happens ex post facto, as messy past realities are endowed with new meanings, as improvised practices are formalized and regularized, in ways that may not have been possible within their actual, contingent contexts«.[20] This is crucial. The following discussion tries to uncover how the conflictual making of institutions gives form to norms and practices that stem from power relations. By focusing on the performative aspect of this process, I will try to identify the boundaries created by the social regularities which are behind institutions. How this process takes place in Islamic and Western social formations is fundamentally what our project *Power and Institutions in Medieval Islam and Christendom (PIMIC)* is about.

What institutions need to be compared: codification as a case study

Processes of institutionalization of legal entities provide excellent cases for comparison between different social formations. Legal entities are concrete, are complex and are also historical, which makes them perfect subjects for a sort of analysis that, as we will see, very much resembles the peeling of an epistemological onion, whose successive layers hide gross misconceptions. I will illustrate this by focusing on the institution of legal codification, meaning by this the making of authoritative and written legal traditions. This discussion, which is based on recent scholarship on this topic, examines some issues concerning the shaping of codification in medieval societies.

A first look at codification brings an undeniable, yet superficial assessment: state codification was unknown in the Islamic social formation, whereas in Christian medieval societies (including Byzantium) kings and emperors did codify the law. Caliphs never issued a legal code or a set of laws, whereas Christian sovereigns, including the Roman popes, promulgated legislation under a great variety of forms and purposes. Departing from this premise, it would be tempting to follow Max Weber's characterization of Islamic rulings as not based on codified, systematic and therefore »rational« law, but rather on the arbitrary and ad-hoc elements that shaped the personal rulings of those who were in charge of administering justice: the famous *qāḍī justice*[21] which »knows no rational rules of decision« because judges resort to common sense and expediency instead of conforming either to the letter of the codified law or to »the rational procedure of evidence« introduced by the state.[22]

This view is misleading. In the first place, codification of the law was not the rule in medieval societies, but rather the exception. Roman law had originally »developed as a non-codified system« and it was only as late as 438 AD when what we could properly term a ›state‹ codification was officially promulgated in the form of the *Codex Theodosianus*. The *Codex* included relevant imperial legislation, but not the legal opinions by the *iuris periti*, experts of high repute whose legal intepretations enjoyed a similar status to the normative texts issued by the legislator in the Roman legal system. The promulgation of these legal opinions as imperial law had to wait until 533 and the emperor Justinian's *Digest*. The following year Justinian issued (a second edition of) his own authoritative collection of imperial consti-

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20 Algazi, Comparing Medieval Institutions, 6, 12; Melville, Institutionnalité médiévale, 244.

21 The Arabic transliteration follows the guidelines of UNGEGN (United Nations Group of Experts on Geographical Names (1972), cf. http://www.eki.ee/wgrs/rom1_ar.pdf (retrieved 10 June 2015).

22 Weber, *Economy and Society*, 976-980. A critique of Weber's concept of rationality (»a chimaera made up, like most chimaeras, of real features in unreal combination«) in Crone, Weber, Islamic Law, and the Rise of Capitalism, 251.

tutions: the *Codex Justinianus*. This codification seems to herald the entry to a territory of legal certainty. Previous sources of imperial legislation were explicitly abrogated. New laws, issued after 534 AD, continued to be promulgated and were collected together (unofficially) as the so-called *Novellae Constitutiones*. However, as B. Stolte has shown, this was not the point of arrival, but rather that of departure for a complex process of elaboration undertaken by Byzantine jurists who wrote Greek interpretations on the (predominately) Latin texts of the *Corpus*. These translations, summaries and commentaries were widely used in teaching, thus serving as intermediaries between the Justinianic texts and their users in courts. »In theory the original texts remained binding. In practice, however, this role was soon taken over by intermediaries«.[23] The result was that the Justinianic codification was never cancelled, but became a kind of storehouse »from which system, method, terminology, rules and teaching material could be and were taken«.[24] E. Conte and M. Ryan express the same idea when they stress that »the force of the codification resided to a great extent in the activity of the schools, in learned exegesis of the sort that Justinian had sought to preempt and the authority of the school was a direct result of authority of that codification«.[25] This may explain why after Justinian there was no other attempt to produce a wholly new legal codification in the Byzantine Empire. The institutional making of authoritative texts in Byzantium was, therefore, a mixture of imperial ideals, scholarly traditions and legal practices.

It is significant that almost no early medieval western ruler issued a codification on such scale – a puzzling exception being the Visigothic *Liber Iudicum*. Carolingian capitularies were not conceived as a legislative corpus, but were rather expressions of royal will, »whose grounds of normativity shifted from case to case«, something that may explain why the collections of capitularies were made on private initiative.[26] Probably, it was not by chance that the rediscovery and rearrangement of the Justinianic *Corpus Iuris* in the West coincided with the Gregorian reform, which emphasized the power of the popes. If there was anything in the West that resembled the Justinianic codification it was the compilation of canon law by Gratian in his *Decretum* in the middle of the twelfth century, which was followed by the compilation of papal decretals few decades later. But these were not neat and tidy codifications, as shown by the different recensions of the *Decretum* and the fact that official collections of papal decretals coexisted with other collections compiled on private initiative. The former stemmed from papal authority, although their purpose was not to supplant existing texts, nor is there any evidence showing that these »official« collections were more authoritative than those compiled by private initiative. Their role as institutionalized items of legal codification »was not solely an outcome of legislative activity by the popes, but also of academic attention (...) It was this aspic of academic commentary, of comparison, contrast, resolution and disputation which enhanced institutional continuity«.[27]

Therefore, when we deal with medieval codification we need to get rid of our contemporary ideas, which are significantly moulded by our own institutional conceptions.[28] Originally, codification was not a routine practice associated with royal or imperial sovereignty.

23 Stolte, Codification in Byzantium, 64.

24 Stolte, Codification in Byzantium, 73.

25 Conte and Ryan, Codification in the Western Middle Ages, 83.

26 Conte and Ryan, Codification in the Western Middle Ages, 78.

27 Conte and Ryan, Codification in the Western Middle Ages, 79, 90-91.

28 Humfress, Institutionalisation between Theory and Practice, 17.

It was exceptional. The process by virtue of which it became the basis of a particular legal system involved not only the enforcement of political power; it also brought in the authority that stemmed from the activities of legal academics, lawyers and judges. This legal community was responsible for turning codified law into a recognizable set of social regularities, which included teachings and learnings, procedures and enactments. Exegesis and commentary »encouraged a continuing engagement with the same ideas and arguments across generations (...) and quickly privileged received opinion as a force in argument«.[29] How and by whom this legal argument was enacted and enforced depended on particular circumstances and on the concrete balances of power at each particular juncture, but what is relevant for this discussion is that in Byzantium and the Latin West the early configuration of this institution was the result of a number of social interactions, which included political power as one among other participants.

The results, though, were very different. By the early fourteenth century the work of western lawyers, judges and students of law in Italy was producing standard legal works, such as the well-known manuals on the normative aspects regarding fiefs known as the *Libri Feudorum* or *Consuetudines Feudorum*, which contained descriptions on how litigation should be conducted.[30] Nothing of the sort happened in Byzantium, where the high level of abstraction achieved by the Western *ius commune* in the later Middle Ages was never attained. Stolte argues that the absence of independent cities in the empire is a possible explanation for a divergence that may reflect, in the last analysis, the lack of power of Byzantine legal professionals in the face of the imperial administration. Stolte, though, also toys with an alluring idea: Byzantium was the necessary »heir« of Roman law, a *hereditas* that had to be accepted as a whole with no possibility of rejecting parts of it; the West was a legatee of Roman law, meaning that parts of the classical heritage could be rejected whereas others were accepted, and this is exactly what happened from the end of the eleventh century onwards, when portions of the Roman tradition were incorporated into Western legal systems once their potential to speak to contemporary concerns and events had been recognised.[31]

As a consequence, by the thirteenth century some western rulers were able to promulgate legal codes of considerable scope and ambition. In 1231 the emperor Frederick II issued the *Liber Augustalis* for the kingdom of Sicily, while a few years later in Castile Alfonso X published the so-called *Siete Partidas*. By then some aspects had taken a very peculiar twist. The latter code included, for instance, some dispositions regarding the organization of the *studia generalia*, the schools that provided the teaching of different disciplines, among them decretals and laws. According to this law, each studium had to be authorized by the king, the emperor or the pope.[32] Moreover, the *Partidas* stated the obligation for all *studia* to have bookshops (*estaciones*) which stored books that were »true in text and gloss« (*verdaderos de testo e de glosa*) so that students could lease them to make their own books or correct those they already had. These bookshops had to be authorized by the rector of the *studium*, who was required to examine books and make sure that they were »good, legible and true« (*buenos,*

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29 Conte and Ryan, Codification in the Western Middle Ages, 94.

30 Conte and Ryan, Codification in the Western Middle Ages, 91.

31 Stolte, Codification in Byzantium, 73-74.

32 *Partida II, Titulo XXXI, ley I,* »Estudio es ayuntamiento de maestros e de escolares que es fecho en algun lugar con voluntad e entendimiento de aprender saberes (...); e este estudio debe establescido por mandado de Papa o de Emperador, o del Rey«.

e legibles, e verdaderos); if they were not, the bookshops could not be approved unless their books were amended.[33] By the middle of the thirteenth century, therefore, the academic activities of intellectual engagement, which were an essential part of the process of codification, had become regulated in an institutional framework – the *studia* – which depended on the authorization of political power and whose intellectual contents – *buenos libros, e legibles, e verdaderos de testo, e de glosa* – were closely scrutinized. The social interactions that were producing authoritative texts were beginning to be effectively controlled by power and I would suggest that this trend was specific to the Latin West.

What about Islamic medieval codification? In this case the common view holds that there is no question of legislation issued by a government.[34] The main sources of Islamic law are the Qur'an and the *sunna* of the Prophet as reflected in the *ḥadīth*-s, the traditions verified by chains of trustworthy transmitters, which report the teachings, deeds and sayings of the Prophet Muhammad. These *ḥadīth*-s were collected and discussed by specialists, the *'ulamā'*, who widely debated their transmission, authenticity and normative contents. *Ḥadīth*-s were eventually collected in the form of *muṣannaf* (classified) works throughout the ninth/third century. Six of these compilations came to be regarded as more authoritative than others: namely, the *Ṣaḥīḥ* by al-Bukhārī (d. 870/256), the *Ṣaḥīḥ* by Muslim b. al-Ḥajjāj (875/261), and the works by Abū Daʿūd, al-Tirmidhī, al-Nasā'ī and Ibn Māja. All in all they make up the Six Books that have enjoyed almost universal recognition as the accepted corpus of traditions in Sunni Islam.[35]

Therefore, Islamic law emerged as a jurists' law, created by private specialists who were independent from the government, at least in principle. As J. Schacht remarked, »legal science, and not the state, plays the part of a legislator, and scholarly handbooks have the force of law«.[36] Moreover, Schacht considered most of the *ḥadīth* corpus as the result of the activities of legal scholars, who managed to confer authority to their rulings by projecting back to the Prophet what had originally been local practices at the main centres of Islamic learning. Although some may disagree with this part of Schacht's arguments, the overwhelming scholarly character of the elaboration of Islamic law is unquestionable. As a matter of fact, what we are seeing here is exactly the same process of scholarly commentary, comparison, contrast, resolution and disputation that Conte and Ryan saw developing in Italy from the end of the eleventh century onwards. The only difference is that this happened at a much earlier date in the *dār al-islām* and that, in theory, the state was not involved in this process. But the »aspic of academic commentary, comparison, contrast, resolution and disputation which enhanced institutional continuity« was exactly the same.

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33 *Partida II, Título XXXI, ley xi,* »Estacionarios ha menester que aya en todo estudio general, para ser complido, que tenga en sus estaciones, buenos libros, e legibles, e verdaderos de testo, e de glosa, que los loguen a los escolares para fazer por ellos los libros de nuevo, o para emendar los que tovieren escritos. E tal tienda o estación como ésta, non la debe ninguno tener, sin otorgamiento del rector del estudio. E el rector, ante que le dé licencia para esto, debe fazer esaminar primeramente los libros de aquel que devía tener la estación, para saber si son buenos, e legibles, e verdaderos. E aquel que fallare que non tiene tales libros, no le debe consentir que sea estacionario, nin logue a los escolares los libros, a menos de ser bien emendados primeramente«.

34 Jokisch, *Islamic Imperial Law*, however, has challenged this view as he argues that classical Islamic law was originally conceived as an imperial law drafted »on the drawing board by a couple of state jurists in Baghdad« under the instructions of caliph Hārūn al-Rashīd (786-809/170-193). I find this view extremely stimulating, although it has been recently criticized by specialists and, therefore, in the following discussion I will stick to the traditional interpretation.

35 Robson, Ḥadīth.

36 J. Schacht, Introduction to Islamic Law, 5, quoted by Fierro, Codifying the Law, 99.

To make things even more interesting, Maribel Fierro has shown that the notion of the codification of law was not alien to some Islamic rulers. The scholar Ibn al-Muqaffaʻ (d. 756/139) advised the Abbasid caliph al-Manṣūr (754-775/136-158) to prepare a collection of norms and opinions of scholars based on his decision »according to the inspiration«. This shows an early social milieu – Ibn al-Muqaffaʻ was of Iranian origins – in which the possibility of a caliph issuing decrees based on his religious authority had not been totally discarded yet. Later Sunni caliphs would not even have dared to consider such possibility, but this was not the case of the Ismāʻīlī branch of Shiʻism, which established the so-called Fatimid caliphate in north Africa and later in Egypt during the tenth/fourth century. Based on the idea that as *imām*-s they had been divinely appointed and were infallible, the third Fatimid caliph, al-Manṣūr (946-953/334-341), issued a religious compilation »which was probably the first official Fatimid code«. A few years later, his successor caliph al-Muʻizz (953-975/341-365) ordered the famous al-Qāḍī al-Nuʻmān to compose a work called *Daʻāʼ im al-islām* (The Supports of Islam), which was an attempt to systematize aspects related to the roots of law and the Ismāʻīlī traditions. The book was composed by al-Nuʻmān, and caliph al-Muʻizz revised it, rejected what he thought was unsound and corrected its final contents.[37]

Therefore, codification was not an alien concept in the Islamicate social formation. Certain compilations of *ḥadīth* enjoyed a quasi-canonical status, as a result of the relentless work of scholars who performed the social regularities that created the Islamic schools of law. But also, as we have just seen, early Sunni caliphs and later Fatimids were obliquely tempted to adopt quasi-Justinianic ways, which demonstrates that codification fostered by the central goverment was always a possibility. That this possibility never became a feature of most of Islamic Medieval polities brings us again to the central question.

Why Islamic medieval institutions became so different from Western Medieval institutions

The answer that I want to propose for this question perhaps is not the only possible one, but I think it brings us to the right way of understanding the whole issue. It arises from two propositions: the first points to the separation between power and authority that emerged at an early and critical stage in the Islamic polity; the second deals with the distinctive notion of community that emerged as a result of this and helped to shape the self-definition of Muslim societies and the making of the social regularities that performed processes of institutionalization in early Islam.

a) The divergent paths of power and authority in early Islam

I have mentioned above the proposal that Ibn al-Muqaffaʻ made to the first Abbasid caliph in the middle of the eighth/beginning of the third H. century concerning the possibility of promulgating some sort of religious legislation. One century later even such a timid project would have been unthinkable in Sunni Islam – although not in the Ismāʻīlī branch of Shiʻism, as we have seen – because caliphs had ceased to claim the overarching religious authority that once had tinted their office.

The historical process is well known. The early ʻAbbāsid caliphate was a crucial period in the definition of the notions of power and authority within the Islamic Sunni polity. Early ninth/second century Baghdad witnessed a bitter theological dispute over the issue of the createdness of the Qurʼan, in which religious scholars supported the divine essence of the revealed text and strongly disputed the idea that it had been created by God, an opinion held

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37 Fierro, Codifying the Law, 103-112.

by the so-called Muʿtazilites, who were supported by most of the early ʿAbbāsid caliphs and particularly by al-Maʾmūn (813-833/198-218). On top of this was the question of man's responsibility for his acts and his power of choice between good and evil, an issue which was advocated by the Muʿtazilites and also strongly denied by religious scholars, who considered this view on free will a limitation upon the power of God.[38]

The fierce rivalry that confronted both sides found expression in some bitter exchanges. Particularly revealing are the comments by caliph al-Maʾmūn in the letters in which he announced the establishment of the *miḥna*, a sort of tribunal which he set up in order to impose his views on the createdness of the Qurʾan. The caliph attacked those religious scholars who were seduced by the ignorance of the masses and made a fallacious link between themselves and the *sunna*, making themselves out to be »the people of truth, religion and unity«. Al-Maʾmūn explicitly disdained ordinary people who were uncapable of leading themselves and were in the hands of incapable guides: a contemptous view that was the opposite of the »sunnite communitarian spirit«.[39]

The struggle ended with the defeat of the caliphs – the *miḥna* was abolished fifteen years after al-Maʾmūn's death – and the uncontested supremacy of scholars regarding authority on dogma. The victory of the religious establishment was so complete that later Sunni caliphs had their sway seriously curtailed and had no role in the doctrinal definition of Islam: the bulk of religious authority was in the hands of the *ʿulamāʾ*, scholars who based their social standing on the monopoly of knowledge and drew their prestige from recognition by their peers. The emergence of scholarly networks across the increasing political divisions within the *dār al-islām* tended to reinforce a religious authority which, unlike temporal rule, knew no other boundaries than those of the Muslim community, the *umma*, itself. The result was the development of an ideal notion of authority that resided in the Muslim community, the *umma*, a comprehensive social body shaped by shared religious beliefs with no traces of inequality or special privileges among its ranks. The unfolding of political events confirmed that the *umma* was not politically bound up with its nominal rulers, the caliphs, as significant parts of the community became increasingly detached from their political rule.[40] What really cemented the unity of the *umma* was the acceptance of the religious law, the *sharīʿa*, the supremacy of which extended throughout the whole *dār al-islām*. As a matter of fact, »it was to the *sharīʿa*, not to the *imām* or the caliph, that the believer owed its allegiance«.[41]

The Muslim *umma* was considered by Islamic theodicy as the final and definitive community, which culminated salvation history. There had been other communities in the past, but as recipient of the message of the Prophet, the unity of the *umma* was quintessential to the contents of his revelation. This was further strengthened by the famous *ḥadīth*: »Truly, my *umma* will never agree together on an error«, which was always mentioned as the main justification for the prevalence of »consensus« (*ijmāʿ*) as a source of law. This consensus was the result of the activities of the *ʿulamāʾ*, who claimed the monopoly of the authority that sprang from the community.[42] In addition, the peculiar chains of transmission of knowledge among them were a token of the basic agreement that defined the Islamic *umma* despite the existence of political boundaries.

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38 Crone and Hinds, *God's Caliph*, 92-99.

39 Sourdel, Politique religieuse, 44; Hynds, Miḥna.

40 Lapidus, Separation of State and Religion, 383; Narotzky and Manzano, The Ḥisba, the Muḥtasib, 36-37.

41 Lambton, *State and Government*, 14.

42 Narotzky and Manzano, The Ḥisba, the Muḥtasib, 35.

As guardians of the understanding of the Revelation, as compilers or interpreters of traditions, as makers of the Islamic legal system, or even as models of pious behaviour, religious scholars consolidated a social ascendancy that ideally presented itself as stemming from the community with no dependence on political power. Obviously, such independence was not always real (as shown, for instance, by the appointment of chief *qāḍīs* by the rulers) but what is relevant here is the self representation of this class, the ideal identity of a group whose members frequently fashioned themselves as moral antagonists of the sovereigns. Rejection of any interaction with political power was illustrated by countless stories showing *'ulamā'* refusing their appointment as *qāḍī*, lambasting the luxury of the powerful, or sailing with dignity in a sea of corruption, as epitomized by the case of the religious scholar who would not even accept an invitation by a governor to spend a social evening with him, because, as he explained, »were anyone to see me visiting you, he would presume that I was seeking the vanities and goods of this world and would revile me«.[43]

The historical narrative that supported these claims insisted that only the first four caliphs who succeeded the prophet Muḥammad – the so-called *rāshidūn* or orthodox caliphs – had truly held the prerogatives of the imamate, whereas later caliphs had corrupted their power by turning it into worldly kingship (*mulk*). The long term result was that the sunni *'ulamā'* »did not admit the existence of the state as an institution on its own right and considered the emergence of a temporal state as a separate institution to be a usurpation due to the intrusion of elements of corruption into the community«.[44] What was at stake here was the dilemma of an empire rapidly built upon the high expectations of a salvational creed and routinely ruled under the low practices of human government. Certainly, religious legitimacy was always an essential part in the configuration of power, but this legitimacy was not so much a quality of power itself as the result of moral approval by the religious establishment. Based on a strongly hierarchical and basically secular structure, power in Islamic polities always faced a deficit of legitimacy, a permanent tension with the non-hierarchical authority of the *umma* represented by the *'ulamā'*, who appealed directly to the Qur'an and the Sunna of the Prophet as a basis for their legal, political or moral judgments.[45]

This tension may explain the widespread tendency of medieval Islamic rulers to build *ex-novo* palatine cities away from their former capitals, where the grip of the religious establishment was always very strong. Although the practice of founding cities by sovereigns went back to ancient times, noteworthy is the number and geographical extension of these new cities, which combined courtly, bureaucratic and military functions with the typical elements of Islamic urban milieus, like markets, mosques, baths or artisan activities. However, the design of these cities was always determined by the predominance of the »palace« that housed the bureaucratic, military and courtly apparatus, which was made up of a complex network of social ties, political relations, legitimising practices and public representations. One of the most spectacular examples of this trend is the complex of Sāmarrā', where the Abbasid caliph al-Mu'taṣim (d. 842/227), attempted to move his capital away from Baghdad. Similar cases include the Buwayhid palatine complex of Fanā Khusraw in Fars, the Ghaznavid site of Lashkar i-Bāzār, in modern day Afghanistan, the Aghlabid palatine cities of al-'Abbāsiyya and

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43 The anecdote refers to Sa'd b. Mas'ūd, one of the group of ten scholars sent by caliph 'Umar b. 'Abd al-'Azīz to teach law in Qayrawān, and it is reproduced by the eleventh/fifth century scholar al-Mālikī, *Riyāḍ al-Nufūs fī ṭabaqat 'ulamā' al-Qayrawān wa Ifrīqiya*, ed. H. Mu'nis, 68; it is quoted by Coulson, Doctrine and Practice, 213.

44 Lambton, *State and Government*, 17.

45 Narotzky and Manzano, The Ḥisba, the Muḥtasib, 37-38.

Raqqā near Qayrawān, or the Umayyad city of Madīnat al-Zahrāʿ near Cordoba, among many others. All of these cities were founded between the second/ninth and the fifth/eleventh centuries and all of them seem to fit into the model of »disembedded capitals«, i.e. capitals created by rulers seeking to found a new power base in a conscious policy of breaking away from existing institutions and patterns of authority.[46]

The diverging paths between power and authority in Islamic polities widened in the course of time. Caliphal rule became more and more temporal in the context of increasingly complex societies, while new forms of government loosely related to the Caliphate emerged at a later stage in the fragmented political landscape of the *dār al-islām*. As political power was clad with illegal taxes, iniquitous administrators, brutal militaries and profligate rulers, the moral authority of the community remained unscathed in theory, and this favoured a vision in which the state »was regarded as a merely transient phenomenon, and although possessed of temporal power, lacking any intrinsic authority of its own«.[47]

It is my contention that the state's deficit of authority and the community's lack of power were a decisive factor in the peculiar configuration of Islamic institutions. Social regularities which gave rise to institutions were always constrained either by the lack of legitimacy of rulers, or by the absence of coercive tools on the part of the community. This deficit of power or authority marked institutional shaping in the *dār al-islām*: institutions that emanated from political, administrative or social power were based, at best, on *de facto* political, administrative or social praxis; at worst, on practices that incorporated highly disruptive elements, like violence (including archival violence); those that derived from authority were rooted, at best, on moral principles, on the values that held together the community, on the consensus that was advocated by the *ʿulamāʾ*; at worst, on religious interpretations that were open to controversy and, therefore, to sectarianism. This is why Islamic medieval institutions usually look less recognizable, less prominent, less assertive than their European counterparts to western eyes moulded on institutional models where such deficit rarely occurred.

In contrast, western medieval institutions were characterized by a blend of authority and power, whose balance varied enormously depending on time and place, but which was always present in their historical shaping. In my opinion, this mixture of power and authority was caused by the emergence in the west of »land-based, and potentially localized, polities« as opposed to the tax-based polities that were prevalent in the *dār al-islām*.[48] In pre-capitalist societies land was always a difficult asset to manage. Its localized exploitation implied tight and continuous control not only over the territory, but also over the people who lived and worked on it. Land-based polities required social regularities, which had as one of their main objectives the creation of forms of legitimate action that could replace the exertion of continuous and localised violence. And this is where authority increasingly met power throughout the western Middle Ages. When facing such a complex resource as land (and the people who lived and worked on it) power was powerless without the unfettered backing of authority. Marc Bloch expressed this with striking clarity when he stated that the feudal system »extended and consolidated these methods whereby men exploited men, and combining inextricably the right to the revenues from the land with the right to *exercise authority*, it fashioned from all this the true manor of medieval times.«[49]

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46 Joffe, Disembedded Capitals, 551-552, 568; Airlie, Palace Complex, 263-264.

47 Gibb, Heritage of Islam, I, 12-13, quoted by Lambton, *State and Government*, 17.

48 The distinction between land-based and tax-based polities follows Wickam, *Framing the Early Middle Ages*, 60-61, 144-150.

49 Bloch, *Feudal Society*, 2, 443.

In contrast to the land-based polities, tax states could be run on power resulting from a combination of coercion, administrative control, and collaboration or identification of the wealthy and locally powerful with government officials. Authority was not an indispensable asset here, because in any case most of the taxes raised by the Islamic states were blatantly illegal from the point of view of religious orthodoxy. The wealthy and locally powerful were legitimized by their partnership with the central government, and as for the administrative control, it only required an experienced bureaucracy. Authority resided elsewhere: in the circles of *'ulamā'* who devoted their lives to study legal and religious disciplines and whose loathing of the impious fiscal practices of the government contributed to increase their social standing, as they could weave their own identity, which portrayed an ideal (but not always real) independence from the state.

The different political cultures that emerged from land-based and tax-based social formations help to explain the different shapes that their institutions took. The increasing divergence between authority and power in the Islamic social formation produced institutions which lacked either of these ingredients in their constitution and definition. As a consequence, contenders for social and political dominion always had a limited range of tools at their disposal. The only exceptions were those cases in which movements of religious reform had a political programme that sought to seize power with the backing of authority. Medieval sectarian movements such as the Fatimids, the Almoravids or the Almohads proposed radical reshuffles of existing orders with new model armies and legitimacies. Their inability to change in a significant way the institutional landscapes they encountered is a token of their strenghth. The final section of this paper deals with one element of this institutional landscape.

b) The making of an Islamic institution: the case of the ḥisba

My work with Susana Narotzky, a social anthropologist, has allowed us to show that some peculiar components of the social regularities that sprang from the *umma* affected the shape of institutions attached to the community and were consistent with the terms of its self-definition.[50] This is the case of the *ḥisba*, a central element in Islam, which basically means the obligation that every Muslim has to enforce Good and to do anything to prevent Evil in everyday life, performing the mandate of »commanding the Good and forbidding the Evil«.[51]

This general moral principle became attached to a particular office, the so-called *muḥtasib*, which is documented in Baghdad for the first time during the rule of al-Ma'mūn, a caliph who, as we have seen above, was particularly hostile to the religious authority of the *'ulama'*. The duties of the *muḥtasib* included traditional functions of the market inspector, which were not very different from those held by urban officials called *aediles* and *agoranomoi* in classical times: the accuracy of measures in the market place, the quality of goods sold, fairness in exchange or the physical maintenance of the market environment in terms of hygiene and construction norms. In Byzantium, the *Book of the Eparch*, composed in the tenth century, followed this trend and regulated production standards and exchange norms regarding the activities of notaries, money-lenders, bakers, perfumers, butchers, etc.[52]

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50   What follows is a summary of Narotzky and Manzano, The Ḥisba, the Muḥtasib, 38-54.

51   Cook, *Commanding Right*, 9-10.

52   It is interesting, however, that it has a short proemium in which emperor Leo VI (886-912) remarks God's giving of the Tables of the Law as a means to foster fairness in human transactions and to prevent the supremacy of the powerful upon the weak.

The so-called *ṣāḥib al-sūq* had already existed in early Islam; the functions of the *muḥta-sib* were probably not very different from these predecessors. But in the ninth/second century the office of the *muḥtasib* included not only the duties of market inspection; it also incorporated the obligations of the *ḥisba*, such as making sure that men went to prayer, abstained from alcohol, and refrained from usury, and that women behaved with modesty. The *muḥtasib* was in charge of the markets, but he had also the duty of »commanding the Good and forbidding the Evil«, so that private morality determined public practices.

This aspect of the office was underlined by *ḥisba* treaties written in this period, like the one by a certain Yaḥyā b. ʿUmar (828-901/213-289) who had been born in al-Andalus, but spent most of his life in Qayrawān and compiled a number of responses to consultations he had received on the *ḥisba*. The questions addressed to Yaḥyā b. ʿUmar showed the mixed character of the institution as they touched issues such as the legality of fixing prices for bakers and other food merchants along with the appropriateness of attending parties with people playing musical instruments or of women entering baths or crying at funerals. Lack of observation of any of these rules could result in the expulsion of wrongdoers from the market.[53] Later treaties of *ḥisba* made it clear that the institutional framework of the office addressed the personal responsibility of each individual toward the community under the law of God. And again it has to be stressed the idea that the *umma* extended seamlessly throughout the whole *dār al-islām*.

The ideal of the *ḥisba* was, therefore, to embed into the economic issues of the market the moral aspects of human behaviour. This is where the *muḥtasib* played a decisive role as he was entrusted with the surveillance of the morality of social transactions. The idea was to channel economic practices into the framework of the general well-being of the *umma*, which was, in the last analysis, from where the legitimacy of the *muḥtasib* stemmed. This helps to explain the casuistic approach of the *ḥisba*, which failed to produce rigid institutional frameworks, as its main aim was to incorporate the holy tradition into everyday life and was continuously transforming its practical value. Flexibility of contract and economic behaviour were therefore linked to the enactment of moral practices that defined the identity of the person as a member of the community, of the *umma*.

These values of the *umma* have striking similarities with the concept of »moral economy« as defined by E.P. Thompson in his explanation of the logic of the food riots in eighteenth-century England. Thompson described a set of reciprocal obligations and responsibilities embedded in a ›paternalist‹, patron-client economy that could be at odds with the effects of increasingly open markets and free trade.[54] Contrary to the demise of the moral economy in the West, it is possible to see how enduring and peculiar the Islamic moral economy has been in the fact that it has become institutionalised in the *ḥisba*. This institution has been able to accommodate flexibility while preserving (some say as a mere fiction) an inalienable moral core. The ideal objective pursued by the *ḥisba* produced form, binding the individual and the community in a simultaneous search for wellbeing. In our work, Nartozki and I concluded that in the long term, the resilience of the moral economy instituted by the *ḥisba*, produced different possible articulations of economic development from those in the west, up to the present day.

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53 Garciá Gómez, Ordenanzas del Zoco, 270, 274, 276, 277, 281, 296.

54 Thompson, Moral Economy, 134-136.

Conclusions

Institutions are excellent tools for comparative analysis. The social regularities that perform them produce certain patterns that can be contrasted among different social formations. The textual record left by institutions mentioned above is only one of these patterns, which might also include systems of governance, forms of transmission of knowledge, or even material remains attached to specific institutions. In all these cases it is possible to identify common elements that take different forms because of marked differences in their institutional shaping.

Comparative analysis, however, may be hindered by approaches that seek to highlight the role of institutions as makers of the unique road to western modernity. The New Institutional Economics' school has succeded in identifying the powerful social impact of institutions, but the results of its work have been hindered by its obsession to stress ahistorical categories like failure or success, or efficiency and inefficiency in its analysis of institutional development. This is why our approach tries to stress the conflictual making of institutions as a result of power relations emerging in the Islamic and western social formations.

When this approach is tested regarding a particular case study such as codification, the results are extremely interesting. Modern institutional perceptions have to be abandoned when confronted with historical evidence that shows a high degree of interaction (and dispute) between different actors, such as political power, scholars and judges, whose work on legal commentary, comparison, resolution and disputation was pivotal in the making of institutional continuity. Crucially, these activities can be similarly documented in the Latin West, in Byzantium and in the *dār al-islām*. But their outcome was very different in each case: by the end of the thirteenth century social interactions were producing authoritative legal texts in the west, but there are clear signs that political power had started to control their contents. Byzantine imperial codification did not foster this development; it just provided a system, terminology and rules with no further known legal elaborations. Codification was not an alien concept to the Islamic social formation, but it was the compilation of knowledge that was mainly produced in this institutional process, as a result of which the authority of scholars, who had engaged on legal commentary, resolution and disputation, became reinforced.

Why was this the case? My thesis is that the institutions that emerged in the *dār al-islām* always had a deficit either of power or of authority, as a result of the manifest divergence between these two notions within the Islamic polity from the early ninth/second century onwards. Institutions that emanated from political or social power were based on a *de facto* praxis that was enough to levy resources, but had no authority as it was consistently denied by holders of legitimacy: scholars and men of religion who could claim their role as custodians of the religious legacy enshrined in moral principles. In contrast, the Medieval West produced institutions, which combined varying degrees of power and authority notwithstanding their character or origins. This was the result of the institutional *crystallization* of social relations which, in the last analysis, were always land-based and localized and, therefore, needed a combination of power and legitimacy to enforce their rule successfully. The result was that the community became stronger in the *dār al-islām* and was able to perform distinctive institutions like the ḥisba, which enshrined principles of moral economy that have proved extremely resilient up to the present day.

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