CHAPTER 2

Institutionalisation between Theory and Practice
Comparative Approaches to Medieval Islamic and Late Roman Law

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It soon became obvious that early medieval law, even the law of ancient Greece, had much more in common with many non-Western systems than the law of the modern West. The West's highly significant differentiation came as a result of cultural choices made in the period between the eleventh and thirteenth centuries which saw the revival of academic legal analysis for the first time since the end of the Roman Empire.¹

1 Questioning Assumptions

Contemporary theorists working on institutions and processes of institutionalisation range across an incredible array of disciplinary boundaries including economics, sociology, anthropology, law, history, political science, psychology and myriad branches of organisational and business studies. Virtually all of these contemporary scholars, however, either implicitly or explicitly, build upon the work of key nineteenth- and early twentieth-century social theorists, historians and legal scholars – for example Otto von Gierke (1841–1921), Émile Durkheim (1858–1917), Georg Simmel (1858–1918), Max Weber (1864–1920) and Alfred Schütz (1899–1959). Each of these foundational late nineteenth- and early twentieth-century thinkers was engaged, in turn, with the ancient and medieval past, but their shared concern, in so far as they had one, was their present. More specifically, von Gierke, Durkheim, Weber etc. were each interested in accounting for the highly developed forms of “rationalised” social life, which they variously identified as operating within their own relatively recently industrialised societies: von Gierke and Weber with respect to the structure of the German state and other corporate associations, and Durkheim in relation to industrialised society in France. In other words, the theories of these foundational late nineteenth- and early twentieth-century thinkers built upon a shared idea of “the West’s highly significant differentiation”

(to borrow a phrase from the opening quotation above). The West was “highly differentiated” in terms of space: societies outside Europe and North America had not developed the same forms of “rationalised” social life in the late nineteenth/early twentieth centuries. It was also “highly differentiated” in terms of time: past societies were qualitatively different, in particular in terms of the relationship between economic, social and legal structures. Some nineteenth- and early twentieth-century theorists explained this in “evolutionary” developmental terms; others, like Weber, sought analytical historical explanations.

A central question underlying this volume asks: “why did certain sorts of institutionalisation and institutional continuity come to characterise government and society in Christendom by the later middle ages, but not the Islamic world, whereas the reverse might have been predicted on the basis of the early medieval situation?” My initial response to this question is to suggest that certain sorts of institutionalisation and institutional continuity have come to characterise late medieval Christendom for us today because these were precisely the sorts of institutionalisation and institutional continuity emphasised within the rationalising, “systems-building” perspectives of virtually all the foundational nineteenth- and early twentieth-century European scholarship referred to above. For example, since at least the early nineteenth century, professional legal historians have painstakingly “identified,” “reconstructed” and classified “Roman” legal institutions, including formal patterns of academic juristic thought – institutions which many legal historians now take to be “natural” and self-evident (again, as implied in the opening quotation above). Whereas comparable attempts to “identify” and “reconstruct” a field of early Islamic legal institutions seems, in general, to be strikingly recent. This last point can be illustrated using three examples, each taken from current historical scholarship on what is sometimes termed the “middle period” of Islamic legal history (i.e., c. 1000–1600 CE).

Our first example comes from a 2010 article by Marina Rustow, entitled “A petition to a woman at the Fatimid court (413–414 AH/1022–1023 CE).” Rustow opens her article with a discussion of S.M. Stern’s 1964 volume, Fātimid Decrees: Original Documents from the Fātimid Chancery:

S.M. Stern once lamented the number of extant Fatimid chancery documents as “pitifully small” compared to the thousands of state documents that have survived from the same period in Latin Europe … Stern’s lament on the paucity of authentic documentary material is but one variation on a theme commonly sounded in medieval Near Eastern studies: the paucity of surviving documents. The term of comparison is usually either