Max Weber's Comparative and Historical Sociology of Law. Extending the Legal Paradigm: A Prolegomenon

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Abstract: The recently established *Complete Collection of Max Weber's Writings* [the *Max Weber Gesamtausgabe*] resulted in a new orientation to Weber's *Sociology of Law*, now known as the *Developmental Conditions of the Law.* This retitling of Weber's work-in-progress stresses the *developmental* intent of Weber's study which holds the project together. Another reading of that work suggests four different levels of legal change embedded in Weber's text and with the possibility of outlining a research program, enhanced by more recent historical studies, that prepares the way for comparing the developmental trajectories of European, Islamic, Chinese, and Russian law in appropriate time periods. This is the first installment of such a study.

Keywords: Max Weber; comparative legal studies; Islamic law; European legal revolution

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Part I

Max Weber's essays in the sociology of law are widely known to be exceedingly challenging, often containing elements of "incomprehensibleness", and yet "a grand design for the interpretation of modernity" [*Gephart 2015: 13*]. More challenging, the essays have been declared to be a "vast hodgepodge of ideas", containing both "general and historical analyses" and "the most abstract conceptual scheme, all thrown together in a random fashion", which "do not in other words, constitute a *work*" [*Kronman 1983: 2*].[1] Despite such deprecatory comments, I suggest that Weber's Sociology of Law, now known as *The Developmental Conditions of the Law* [*Treiber 2012*] remains the most insightful and unique exploration of the comparative and historical sociology of law that we have. I do not dismiss Harold Berman's critique of Weber in his "False Premises" essay [*Berman 1987*] nor his critique of Weber as a legal historian [*Berman – Reid 2000*]. Berman remains Weber's most important and constructive critic insofar as the historical facts are concerned [*Berman 1983, 2003*]. Whatever flaws one can find in Weber's *Developmental Conditions*, the fact remains that there are no frameworks available in American sociology of law predicated on both a comparative and historical approach such as Weber pioneered [*Wikipedia*; *Deflem 2008*; *Tamanaha 2020*].

In this essay, I shall sketch such a program that would allow us to extend Weber's project by carrying out an objective comparison of four legal traditions, the European, the Islamic,

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1 Soon after this a German scholar wrote that in Weber's Sociology of Law "the style is miserable and the statement obscure". And despite his training and greatness, Weber "thoroughly misjudged the law and jurisprudence of his time" [*Rehbinder 1987: 127*].

Chinese and Russian. For this purpose, my focus is on Weber's essays and their recasting rather than the voluminous literature that has grown up around Weber's work.

Apart from the extraordinary detail that Weber's essays provide on this subject, two aspects of Weber's approach to legal development stand out. The first is that it is based on world-historical or global foundations. As Weber proceeded he sought to provide examples of various forms of legal development from the oldest and most primitive to the most advanced and modern, from around the world. It does appear, however, that in the early chapters Weber's discussion is almost wholly focused on European legal history. Its analysis implies a form of universal development, into which examples from preliterate peoples were incorporated in order to suggest early forms of juridic development. In the fifth chapter of the *Developmental Conditions,* Weber diverges somewhat from that pattern by bringing in what he calls "theocratic and secular law" that includes brief sketches of Indian, Islamic, Chinese, Persian, Jewish and Canon law. These are only brief vignettes (except for Canon law) and do not probe to the very different fundamental assumptions that undergird the non-European systems.

It is also true that sometime before the end of 1913 Weber moved away from the sociological study of law by turning his attention to the major world religions – Confucianism, Hinduism and Buddhism, Judaism, Islam and Christianity – and this resulted in the reorganization of Weber's whole system of thought. As Weber told his publisher on December 30, 1913, he had worked out a "complete theory" concerning the major forms of social groupings to the economy: from the family and household to the enterprise, the kingroup, the ethnic community, religion (encompassing all the major religions of the world …) [as cited in *Schluchter 1999: 60*] and so on.

According to Schluchter these studies comprised a "voluminous manuscript" focused on the religions mentioned, including Islam, which were later published in the *Archiv für Sozialwissenschaft und Sozialpolitik* in 1915 and thereafter. (The part on Islam, however, was apparently lost.) In any event, after 1913/14 and because of the beginning of the war, Weber put these essays on the sociology of law in his desk drawer and did not return to them thereafter. This was because Weber's interest now shifted to the study of "the economic ethic of the world religions" [*Schluchter 2017, 2005, 2023*] which like his many other projects, remained unfinished at his untimely death in 1920 [*Mommsen 2005*].

The second outstanding feature of Weber's *Rechtssoziologie* is that he surmised that the Western legal system had undergone a profound developmental process that he conceptualized as *rationalization and systemization* [*Weber 1978: 655f.*; *MWG I/22-3: 301*]. This was the process of making all the elements of a legal system more concise, logically and systematically ordered around basic legal principles. This was largely based on his study of European law, especially Roman and Canon law, that he had been studying since the early days of his legal training. These studies extended from early Roman law through the various changes from Republican and then Imperial Roman law, followed by the great synthesis of the Canon law in the 12th and 13th centuries [*Berman 1983: 100–224, 225–254*; *Wieacker 1998*]. This was followed by the 19th century codification movement that gave the world the Code Napoleon (1806) [*Weber 1978: 839–859*; *MWG I/22-3: 552*].

A pattern of theoretical reform in law based on the history of Roman law was also suggested by Rudolph Jhering (1888: 334–388) that was adopted by Weber [*Gephart 2010: 301 n78*; *Treiber 2020: 25*]. On the other hand, when in 1913 or a year or so earlier, he began

to explore the great world religions mentioned above, he realized that the legal systems embedded in them did not follow the European pattern, but he never got the chance to spell out those developmental differences.

It is also significant that during a crucial time in Weber's own intellectual development, the period of 1911–12, he discovered the rationalization process in the West applied not only to law, but to many other aspects of the human endeavor, especially, e.g., to music (but also to art, architecture, politics, science, etc.) as he pointed out in his "Prefatory Remarks to the *Collected Essays in the Sociology of Religion*" [*Weber 2004*].

A third result of Weber's pioneering work in the sociology of law, and despite the unfinished nature of his project, there is a sense in which Weber's essays on this subject give us a rough outline of a research program, a variety of indicators that, with amplification, could be used to compare contrasting legal systems, not just on the basis of rationalization as Treiber [*2020*] undertook to illustrate. There is a sense in which the real test of Weber's legal sociology rests upon a well-crafted comparison between the development of European law (Roman to Canon law and then the Code Napoleon) and the broader and deeper study of Islamic and Chinese law. For one of the criticisms of Weber's essays in sociology of law is that he never "analyses these systems on their own terms" [*Berman – Reid 2000: 231*].

We know that Weber had a keen interest in both Islamic and Chinese law (and made frequent references to Russian law[2]) and that he did look into them further after putting aside his legal studies. Whatever Weber found out later about Islamic law, we have only scattered hints (in his *Sociology of Religion* and elsewhere) [*Weber 1963*]. His study of Confucianism, misleadingly titled the *Religion of China* [*Weber 1951*; *Schluchter 2013*] contains several more insightful comments on Chinese law that were connected to his earlier essays on this subject. Given all that, there remains the task of looking more fully into these other legal systems in comparison to the European, especially the Chinese, Islamic and the Russian.

Because their fundamental assumptions were not the same as in the European tradition, it requires us to reformulate our basic conceptual markers of what a legal system entails. For example "lawyers" (advocates in the European sense) were missing in both classical Islamic and Chinese law. In Islamic law, judges (*qadis*) decide actual cases but not the law. Their decisions apply only to the two parties in litigation, are not publicly recorded, while it is the mission of the legal scholar (*mufti*) to decide what the law is [*Masud – Messick – Powers 1996*; *Powers 2002*]. A closer look at those two systems will give us a better understanding of how various elements of alternative legal systems were actually constructed and what other basic assumptions were built into them. Furthermore, there is ample material suggesting a quite different image of what a "prophetic" and "sacred law" looks like in its origins and early formative period.

As further background to this discussion, it is well to remind readers that when the modern European legal system coalesced and defined the nature of *modern* legal systems, the Continental *Civil Law* tradition and the Anglo *Common Law* tradition came to dominate the global scene. Outside of those two traditions in the new world order, we find, as

[2] Weber's comments of Russian law and society have been both strongly criticized [*Pipes 1955*] and warmly praised [*Hildermeier 2015*].

noted above, three influential non-European legal systems and these were the Islamic, Chinese and Russian. Their influence on international legal thought remains, though greatly diminished.

We may also note that currently there is a rise of autocracies around the world [*Applebaum 2024*]. It would be useful to consider in particular the elements of political and *legal autonomy* present or absent in those systems and their possible contribution to establishing constitutional democracy. That sort of historical retrospective in a Weberian spirit should be useful for understanding both Weber's concept of legal rationalization and our present condition when constitutionalism and democracy are being challenged in new ways.[3] From that perspective alone, it would be useful to examine the historical roots of these other 8essays.

The Gesamtausgabe (Max Weber's Complete Collection)

Thanks to the outstanding efforts of all the scholars involved with creating the *Complete Collection of Max Weber's* writings, the *Max Weber Gesamtausgabe* [*hereafter MWG*] and Weber's volume on law in particular [*MWG I/22-3 2010*] that began in 1984 [*Hanke – Hübinger – Schwentker 1984*; *Whimster 2012: 7–12*], a great deal of new light has been cast on the large and small details of Weber's incomplete projects. Because these complete editions of all of Weber's writings (totaling 47 volumes) [*Schluchter 2020: v*] are now preserved in their original German with variorum additions, along with voluminous new editorial commentary, these new resources need to be consulted, along with the English translations.

At the same time, it must be remembered that in the case of Weber's contribution to the sociology of law, this was a posthumous publication based on the assembly of unfinished texts that were part of his estate papers, and most likely unrevised and incomplete [*MWG I/22-3 2010: 135–159, 182–188*; *Schluchter 2005, 2023*]. In addition, it was Marianne Weber who identified and published together these essays for the first time in the first edition of *Economy and Society* [*Weber 1922*] that we now recognize as Weber's contribution to the Sociology of Law.

Since the beginning of the project to create a Complete Edition of all of Weber's writings, a great deal of effort has been expended in the attempt to determine just when Weber wrote various parts of *Economy and Society,* especially his legal chapters. It is now understood that Weber's volume on law (*Recht*) [*MWG I/22-3 2010*] is composed of two texts: "The Economy and the Orders", and "The Developmental Conditions of the Law". The latter manuscript appears in eight "paragraphs" or "sections" that were translated into English by Max Rheinstein and Ed Shils [*Weber 1954*]. (I shall refer to these units as "chapters" following the English tradition.) Later these essays were incorporated into the English edition of *Economy and Society* edited by Guenther Roth and Klaus Wittich [*Weber 1978: 311–338, 641–900*].

[3] That is, if Applebaum is correct, a group of autocratic national actors now exist across the world who actively aid one another for the purpose of undermining the international world order and democracy. However, Harold Berman already sensed "a crisis in the Western legal system" one in which there was "a confrontation with non-Western civilizations".

The exact dates of composition of these essays remain unknown so that scholars working on this aspect of Weber's writing are only able to narrow the time periods down to three-four-year intervals [*Gephart 2010: 135ff.*; *Schluchter 2005, 2023*; *Treiber 2020: 1–8*]. The conclusion is that Weber worked on his legal texts mainly in the period from 1911 to possibly 1914 [*Schluchter 2023: 21ff.*; *Gephart 2010: 182–187*; *Treiber 2020: 6–8*]. The resulting manuscript, however, was put aside because of the start of World War I. Very little if any work on the essays occurred in the postwar period [*Schluchter 2023: 81–89*].

A major change in our understanding of Weber's essays on the sociology of law has been the retitling of them as *The Developmental Conditions of the Law* noted earlier. This in my view [now see *Treiber 2020*], represents a significant change in the underlying assumptions of what Weber intended when he began writing these essays, and is an entirely missing perspective, for example, in Kronman's [*1983*] assessment and that of other earlier critics. With regard to issues of dating and composition of his essays, and for present purposes, I shall provide only marginal comments on the important editorial details that brought us to this new understanding, for I am interested here primarily in the larger contours of Weber's *comparative and historical the sociology of law* and how some of its baseline anchoring and assumptions can be transformed into an ongoing research program.

Weber's Developmental Conditions of Law

Today's perspective on the sociology of law would automatically consider both the effects of law on society and society's effects on law. The latter would explore the role of key actors or social groups in the development of law, or on the role that key actors might play in the juridic process.[4] Weber cast a wide net because he was interested in the earliest formations of law and the developmental process of legal evolution along with the particular ways by which new legal rules arise. He was interested in the ways in which ancient and traditional law were transformed into the central structure of what we today think of as modernity. Still more evident was Weber's interest in the connections between legal and economic development.

Because of the extraordinary complexity of Weber's texts, especially the fact that he was often writing as a lawyer and legal scholar, and was attempting to compare legal systems and traditions from all over the world and from ancient to modern times, it has been challenging to identify the overriding aims in Weber's texts, apart from the clear indications that the process of rationalization in law was a major theme. With a view to constructing a comparative framework, I suggest that another reading of Weber's legal essays reveals four different perspectives on legal change. The *first* of these I shall call his micro approach of legal change that he set out in his early chapters of the *Developmental Conditions*.

A *second* perspective which is far more widely known concerns the *rationalization and systematization process* that applied both to European law and Western culture broadly. This theme was part of the very early introduction of Weber's writings to the American audience when Talcott Parsons (in 1930) translated *The Protestant Ethic and the Spirit*

[4] There is now a whole subdivision of scholarship working under the heading of *Law and Society* with a journal using that name. Also see Tamanaha [*2020*].

of Capitalism (1904–05) into English [*Weber 1930/1958*] and placed Weber's "Prefatory Remarks" to his *Collected Essays in the Sociology of Religion* as the *Introduction* to the *Protestant Ethic.* But those prefatory comments represent a much later period in Weber's intellectual development. Today the assumption of the rationalization process as a major driver of legal development is understood by virtually all students of Weber's *Sociology of Law* and his writings more broadly [*Schluchter 1981, 1989, 2023*; *Swedberg 2005: 225–228*; *Kalberg 2012*; *Gephart 2015*; *Ford 2022*; most recently *Treiber 2020*] and many others.

The *third* perspective on broad legal change posits a *four-stage* model that begins with the appearance of legal edicts proffered by a charismatic leader or law prophet; next is the "empirical creation of law through cautelary [empirical, case by case] jurisprudence"; followed by "the imposition of law by secular or theocratic powers"; and then "the systematic elaboration of law and professional administration of justice" by legally trained scholars [*Weber 1978: 882 / MWG I/22-3: 617f.*]. This latter phase seems to be specific to European law, above all the connection between the rise of the universities and the emergence of university- trained legal scholars which did not appear in the Islamic culture[5] or China [*Huff 2017*], nor Russia before the early 19th century [*Wortman 1976*].

A *fourth* pattern of legal development that Weber was laying out in the second chapter of the *Developmental Condition*s entails a complex set of legal innovations, starting in a primordial period of status relations, followed by a medieval period of innovation, that was driven by market forces and economic development. This resulted in the widespread use of *purposive contracts* (voluntary contracts) and the fictive juridical instrument of the corporation, a truly unique European legal innovation. Though Weber discusses these issues in considerable detail [*Weber 1978: 668–729*; *MWG I/22-3: 309ff.*] he did not articulate the larger picture that comes out of his extraordinary legal-historical analysis that has only been set out by Harold J. Berman in the mid-nineteen-eighties [*Berman 1983*]. This latter set of developments is rarely discussed in connection with Weber, though he deserves credit for pushing our historical understanding of European development in that direction. I will set out these ideas in a later section.

Although Weber's writings on the sociology of law are conventionally traced to Weber's scathing critique (1907) of the writings of the legal scholar, Rudolph Stammler, *The Historical Materialist Conception of Economics and Law: A Socio-philosophical Investigation* [*Weber 1977*], it is important to remember that Weber was trained in law, first at Heidelberg and then at Berlin where he received a law degree in 1886 [*Dilcher 2008*; *Kaesler 1988*]. Due to his completion of both a qualifying dissertation and a second thesis called a Habilitation, Weber qualified to teach both German and Roman law [*Dilcher 2008*; *Borchard 2002: 152*] which he did for a short period of time.

His dissertation was titled, *On the History of Commercial Partnerships in the Middle Ages* [*Weber 2003*], completed in 1889. This means that from his early training Weber was interested in the history and development of legal concepts *as well as* the role of law in political and economic development. Due to his sagacity as an historical researcher, he

[5] The critical point here is that the institutions of higher education in the Islamic world, *madrasas,* were not legally autonomous entities. They were specifically dedicated to the study of Islamic religious sciences, not broad knowledge, did not teach Greek philosophy nor the sciences generally. The masters of the madrasas were Islamic legal scholars, but were not trained as lawyers in the Western sense (did not "defend clients") but were dedicated to defending the Sharia, Islamic religious law [*Makdisi 1981*; *Berkey 1992*; *Chamberlain 1994*].

discovered in the historical records of southern Europe in the medieval period the invention of the legal form of the business "firm" (or enterprise) that resulted from the formal separation of the household from business activity. For various economic reasons, as well as technical legal issues, the household which was a business unit in the medieval period, fell apart and this happened simultaneously with the development of new legal understandings, the creation of a "commercial register", and so on.

This separation of the household from the business enterprise entailed creating a separate fund from which all business-related expenses (and not family expenses) were to be paid. This separation was (in Weber's view) an indispensable step on the way to modern capitalism and has been termed a "revolutionary" development in cultural history [*Swedberg 1998: 41*]. This reshaping of the household enterprise also entailed the legal assumption that the partners in the firm took equal responsibility for all debts incurred by the partners. They were *solidary* in legal responsibility for the enterprise [*Ford 2022: 37*].

Despite the fact that Weber's highly regarded mentor and teacher, Levin Goldschmidt, believed that the legal innovations they had both uncovered in the medieval era were the product of "universal" business needs and practices, Weber disputed that conclusion and was ready to debate his teacher on that issue [*Dilcher 2008: 169ff.*]. Eventually after a great deal of additional research Weber reached the conclusion that neither Roman, Islamic, Indian nor Chinese law developed such legal conceptions [*Weber 1978: 375ff.*; *Weber 1927: 205–207, 225ff.*]. In effect, legal scholars in those civilizations did not invent the legal concept of the business firm separate from the family nor the associated legal structures essential to the rise of modern capitalism. It is for such reasons that one can see why Weber's unique dissertation in the history of law and economics proved to be a "prelude to the *Protestant Ethic and the Spirit of Capitalism*" [Kaelber's interpretation in *Weber 2003*] that was to appear fifteen years later with great acclaim as well as controversy [*Weber 1958*]. Still, the Protestant ethic thesis departs significantly from focusing on law and legal structures as critical factors in economic development.

In sum, Weber's training in law and legal history set him on a path that led him to think broadly and deeply about the place of law in social and economic activity, and above all, in a comparative and civilizational framework. This framing of the issues prevented him from projecting onto other cultures characteristics that were uniquely Occidental. That stands in contrast to his contemporary Eugen Ehrlich (1862–1922) who wrote his own book on the fundamentals of the sociology of law [*Ehrlich 1913/1962*] and set out a conjectural path of legal development that appeared to be universal when in fact it completely ignored legal development outside of Europe [*Ehrlich 1922*].

Weber planned two opening chapters on law for *Economy and Society*: the first was to focus on "Economy and Law (1. Principal relationships. 2. Epochs in the development of the contemporary situation") [*Schluchter 2023: 3–7*; *Gephart in MWG I/22-3: 57ff., 135ff.*; *Gephart 2015: 69ff.*]. Thus early in this period (i.e., ca. 1907–1910), while working on his major contribution to the *Handbook of Political Economic*s (later, *Outline of Social Economics*), Weber thought that the role of law was a critical variable in the development of economy and society; and second, that law as well as the economy (and "the state") had gone through "epochs" (or stages) of development, which was a common assumption in that period of scholarship.

I shall turn to Weber's last thoughts on the four-stage model presently. Despite criticisms of the model,[6] it signifies that Weber's larger objective was to provide a deep analysis of legal development taken as a very broad mandate encompassing primitive and preliterate forms of law, the role of law prophets, the existence of a variety of influential legal actors (legal *honoratiores*) [*Weber 1978: 784ff.*; *MWG I/22-3: 476ff.*] directing that process, and, at least in Europe, the rationalization and systemization of law through codification. Efforts toward codification in Islamic and Russian law were also attempted in the 19th century (to be discussed in Part III). In whatever manner we construe Weber's early efforts in the sociology of law, it must be admitted that even his incomplete (and sometimes mistaken) writings offer the rudiments of a unique and powerful approach to comparative and historical legal studies, not just in the "West," but cross-culturally.

Unfolding Weber's Theories of Legal Change

Although the broader task of Weber's *Developmental Conditions* is the laying out of the four-stage progression of legal development from charismatic revelation, to the emergence of judge-made law, "imposition of law from above", legislative enactment and then the workings of legal scholars, Weber repeatedly deviates from that story to explore the processes of legal change and innovation in a variety of social and developmental contexts. Weber's unfolding inquiry sets forth numerous generalizations about patterns of legal development that could only come from a long study of historical development that was part of Weber's long legal education.

As a beginning university student, Weber read large parts of the *Corpus Juris Civilis* – Roman Civil Law – such as the *Digest* (Pandects), the *Code*, and the *Institutes* [*Whimster 2017: 231–331*]. For his doctoral thesis he wrote *the History of Commercial Partnerships in the Middle Ages* (1889) [*Weber 2003*], and this was followed by his *Roman Agrarian History* (1891) [*Weber 2008*]. This was followed by *The Agrarian Sociology of Ancient Civilizations* (1909) [*Weber 1976*]. Clearly Weber was soaked in European legal history. When, in 1910-11, as he began his inquiries that would turn into the never-completed sociology of law, Weber was very much a legal historian and amateur economist whose deepest studies were in Roman law and its history. To be sure Weber in the first decade of the twentieth century was exploring many facets of sociology as a nascent social science, but the key to Weber's breakthrough as a sociologist, and on the path to "my sociology," was the "Categories Essay" of 1913 [*Weber 1913*; *Schluchter 2000*; *Adair-Toteff 2011*], part of which involved Weber's severe critique of the legal scholar, Rudolf Stammler.

Accordingly, the generalizations that Weber presents in the *Developmental Conditions* are often very complex legal ideas that he abstracts from the developing history of European law from its Roman roots to the medieval and early modern period. Much of these preliminary findings that he presents to the reader are intellectually indigestible because of our lack of a legal education such as he had and refined by teaching both Roman and German law. For example, the long chapter 2 is notably structured around a bevy of legal concepts that

[6] "[T]he division into stages and eras does not follow … the history of events. It also fails to allow for an exact indication of historical time periods. Yet it refers to the history of events and to approximate dates" [*Schluchter 1991* as cited in *Treiber 2020: 36*].

would be familiar to law students such "legal propositions", "freedom of contract", "purposive contracts", "legal autonomy", "juridic person/personality", legal "obligations" linked to coercive punishment, and "legal privileges" issuing from contractually secured rights; "negotiable instruments", and many more.

Weber's definition of law is essentially positivist in the sense that it is predicated on the existence of a set of norms (rules) whose existence "are directly guaranteed by legal coercion" [*Weber1978: 313*; *MWG I/22-3: 215*]. It is the element of coercion, of norm enforcement, by a staff of enforcers who have been appointed for that purpose, that establishes the existence of a lawful regime. The idea of "law as rules" has a long history and was most systematically explored philosophically by H. L. A. Hart [*1961*], indeed with Weber's work in view [*Lacey 2004: 230*]. This is not to discard other approaches to the study of law and legal regulation, only to state Weber's view, and to suggest that sociologically, as a behavioral science, this makes perfect sense. It does not preclude discussion of "justice", or natural law and how such concepts might be embedded in a larger philosophical framework. It places emphasis on behavioral and empirical markers, not jurisprudential efforts to arrive at the correct legal concept or ruling.

Weber's opening discussion of "Fields of Substantive Law" (his first "chapter" in the *Developmental Conditions*) references the usual divisions of private vs public law, criminal law, procedural law, the early existence of "primitive dispute resolution" and so on. The inquiry seems to be preliminary and unfolding but in the last section of this discussion Weber introduces the schema according to which law develops through a process of "analysis, generalization, construction, and systematization" [*Weber 1978: 655*; *MWG I/22-3: 301*].

This is actually a formulation borrowed from the legal scholar, Rudolph Jhering (1818–1892) and his book, *The Spirit of Roman Law* [*1888: 334–388*]. Weber had read this book during his first years as a university student studying law [*Whimster 2017: 232*]. In addition he adopts the German Historical School's ideal of *codifi*cation whereby the goal of legal development is the production of a "gapless system of rules" [*Weber 1978: 656*; *MWG I/22-3: 303*] under which it is implied that all conceivable fact situations must be capable of logical ordering.

The modern legal system under this view, developed by the Pandectists (modern German students of Roman law), is governed by five postulates:

First, that every concrete legal decision [must] be the "application" of an abstract logical proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract, legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must at least be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as an "application" or "execution" of legal propositions, or an "infringement" thereof since the gaplessness of the legal system must result in a gapless "legal ordering" of such conduct [*Weber 1978: 657–658*; *MWG I/22-3: 305*].

This codified and putatively gapless system is the one that came to dominate Continental Civil Law, and by extension, large parts of the non-European world in the latter part of the 19th century when forms of it were adopted by Middle Eastern Islamic countries [*Merryman 1985*; *Glendon – Carozza – Picker 1999*; *Khadduri – Liebesney 1955*; *Anderson*

1976]. Even Russian officials in the 1860s attempted to reconstruct Russian law in this spirit [*Wortman 1976*; *Butler 1993*].

This is the ideal type of the modern, rational-legal system that Weber takes as a model and then seeks to explain how it came about. He wants "to find out how the various influences", the sociological and historical forces, produced these results [*Weber 1978: 657*; *MWG I/22-3: 305*]. The code Napoleon was in Weber's view, "completely free from the intrusion of, and intermixture with, non-juristic elements and all didactic, as well as all ethical admonitions; casuistry, too, is completely absent" [*Weber 1978:865*; *MWG I/22-3: 552*]. This, I believe, is what Weber meant by the rationalization of the law, its systemization and elimination of extraneous elements that arose in the past, such as references to religious or ethical ideas.

This model of legal organization does not apply to English Common Law that was organized along very different lines. It developed the collection of legal precedents and relied heavily on traditions of the past. Though Jeremy Bentham (1748–1832) was the originator of the idea of "codifying" all legal systems, many British scholars did not agree. They claimed that their system was just as rational as Roman law and that it was not possible to transform it under the guidance of Roman law, as the Germans had done, into the new form of codification recommended by various scholars [*Maitland 1922: vii–lv*]. Berman [*2006: 3*] argues that Weber misunderstood certain parts of English law while others have sought to defend Weber's argument [*Trubeck 1972*; *Sally Ewing 1987*].

How Legal Change Happens

Before turning to the great transformation of European law and society, we need to recognize Weber's vision of micro-legal change. Weber takes up the question of how law originates and changes in three different chapters. This he does in "Legal Order and the Economic Order" [*Weber 1978: 321–323*; *MWG I/22-3: 191–203*]; in "Forms of Right Creation" [*Weber1978: 666ff.*; *MWG I/22-3: 306ff.*]; and the "Emergence and Creation of Legal Norms" [*Weber 1978: 753–776*; *MWG I/22-3: 430ff.*]. In his original discussion of law [*Weber 1978:321f.*; *MWG I/22-3: 192*] Weber suggests that legal change comes about through "inspiration", which seems to refer to the insights attributable to unique individuals, perhaps those who "have experienced abnormal states". Nevertheless, in the third chapter, Weber takes a quite different approach, following his question, "How do new legal rules arise?" [*Weber 1978: 753*; *MWG I/22-3: 430*]. In it Weber examines theories suggesting that legal norms arise from new behavior that becomes customary, then becomes ordinary "usage", followed by the emergence of a coercive apparatus that makes norms justiciable and enforceable [*Weber 1978: 754f.*; *MWG I/22-3: 433f.*]. The change occurs almost unconsciously when ordinary actors or business people interpret a legal norm in a new way, though they claim that the law had always been thus [*Weber 1978: 755*; *MWG I/22-3: 434*]. The departure begins with individuals engaging in new forms of activity, often in the economic sphere, and when forced to justify their behavior through litigation, the legal specialists, usually lawyers, claim that the law had always been so. The result is a subtle shift in legal understanding.

But following this micro-analysis, Weber continues on with the transition from "irrational adjudication" to "the emergence of judge-made law", followed by the "imposition" of

law "from above" as in legislative enactment; and finally, the emergence of legal specialists who "formally elaborate" and administer the law. This latter development achieves a high state of logical-rational development [*Weber 1978: 754–777*; *MWG I/22-3: 433f.*].

But there is another, many times longer, discussion in which Weber sketches a series of legal innovations that in effect, transform social interaction and the organization of European society.

Legal Privilege, Purposive Contracts and Juristic Personality

As noted above, Weber was deeply conversant with Roman law, its historical development and transformation in the fashioning of Canon law in the 11th and 12th centuries. In his longest section in *The Developmental Conditions* [*Weber 1978: 666–774*; *MWG I/22-3: 306–429*] Weber sketches a long period of legal change that extends from ancient "status" relations to the emergence of "purposive contracts", taking place in some indeterminate period of time. In the process he introduces many new concepts and suggests the novel idea that volitional contracts – "purposive contracts" – represent a new means of legal change. Such contractual agreements bind two or more parties together and at once grants them privileges available only to the contacting individuals. At the same time it subjects them to contractual obligations whose neglect could result in coercive enforcement.

The beginning point is similar to Henry Sumner Maine's passage from status to contract except that Weber's contractual stage is one of intentionally designed contracts that signify the creation of *new legal rights*. That new status follows an entirely different set of dynamics than might have been anticipated and heralds "freedom of contract" in the modern sense.

Weber takes the reader through a long and complex discussion of legal concepts and multiplying qualifications. In the first phase of this new state of purposive contract formation, the availability of contractual freedom enables the rise of new *rights* and *privileges.* These are created by the action of ordinary citizens joining in concert with one or more others to create a new binding legal situation. Through the instrumentality of a purposive contract, the individual acquires power over another or in concert with another (i.e., in a contract-bound relationship) with exclusive control over property, resources, and potentially patentable products and processes. Such concerted action could generate exclusive rights over property (and possibly commercial processes, including what is now called "intellectual property"[7]), for *private use* [*Weber 1978: 699*; *MWG I/22-3: 368*]. What could be seen as a process of generating greater inequality and monopoly through status privileges, Weber instead sees as a general trend within Western law toward formal equality that makes such privileges "formally and generally accessible to any person" [*Weber 1978: 697*; *MWG I/22-3: 367*]. It represents a transition from social selection in economic affairs based on the assumption of a special "quality" of the person to selection based on merit or special competence. Weber identifies the rise of the "principle of formal legal equality" that means that anyone, "'without respect to person,' may establish a business corporation or entail a landed estate …" [*Weber 1978: 699*; *MWG I/22-3: 369*]. Such voluntary associations

[7] Laura Ford has spelled out a major insight regarding the origins of property and intellectual property rooted in Weberian assumptions in her outstanding work [*Ford 2021, 2022*].

may be of virtually any nature, "a club, just as well as a business corporation, a municipality, an 'estate', a guild, a labor union, or a circle of vassals" [*ibid.*]. In short, Weber claims that, in the West at least, there has been a grant "to everyone the power to create law of one's own by engaging in private legal transactions" [*Weber 1978: 698*; *MWG I/22-3: 365f.*].

Along with this practical modification of the law, Weber is gesturing toward a broader, civilization- wide transformation that encompasses elements of legal innovation that extend from early Roman law up to the late Middle Ages, the emergence of Canon law, along with the rise of the administrative state. But his starting point is, historically speaking, with all individuals ensconced in a primitive status contract binding them to their group and community without the capacity to make individual contracts outside their family, ethnic or religious group [*Weber 1978: 672f.*; *MWG I/22-3: 315*]. The same restriction applied to the incapacity of the individual to alter religious or customary rules of testation. The best example of this is Islam and the Quran where it spells out the exact divisions of inheritance that are to be applied at the death of any family member [*Schacht 1964: 169ff.*]. In such a regime, all rights are fixed by tradition and are administered solely by the head of household. Weber frequently refers to this situation as one in which law is simply an administered informality, without implicit rights or rules of due process [*Weber 1978: 643, 844*; *MWG I/22-3: 278*]. Thus the invention of purposive contracts represents a sharp break from the earlier reign of status contracts and the assumption that legal change is brought about only by legal authorities.

There are three dimensions to this momentous shift in law creation and social organization that Weber is sketching. One dimension concerns the rise of a contractual society of purposive contracts. The other entails the formation of *legally autonomous* entities, *corporations*, and the proliferation of these creates a whole new social, economic, and political organization, though Weber does not explicitly say so. The third transformation about which Weber says very little, is the rise of *the administrative state* and its monopoly of law creation [*Weber 1978: 666*; *MWG I/22-3: 306*], though the other two pathways to law making (instituting purposive contracts and the creation of corporate bodies with their own rights) suggest a good deal of spontaneous and autonomous legal innovation. The rise of the state as a dominant Western institution is generally dated to the 12th and 13th centuries [*Bagge 2019*; *Strayer 1970*; *Tilly 1975*] but Weber does not offer any details on that in the *Developmental Conditions*. He does mention that in earlier legal discussions, there was a debate as to whether the state was an independent corporation [*Weber 1978: 715*; *MWG I/22-3: 399*].

To break out of traditional constraints on human relatedness and in a formal legal sense such as this, seems revolutionary, and would stand in contrast to what an Islamic judge or mufti, or Chinese magistrate would have thought possible in the late nineteenth century or earlier (as will be shown later). It is only much later that Weber remarks on differences with China, Islam, and Russia [*1978: 726*; *MWG I/22-3: 419ff.*].

Weber is fully aware that all these formations of purposive contracts (and sometimes, corporate entities) inevitably have effects on third parties, resulting in "special laws" [*Weber 1978: 695*; *MWG I/22-3: 361*]. This arises in part because of the existence of many "law communities" and when new contractual arrangements are made, the priority of "particular" rights overrides the "general" [*ibid.*]. In the long run Weber sees the process producing "a great mass of legal particularism" [*ibid: 698*; *MWG I/22-3: 366*]. Weber's discussion of

freedom of contract and the emergence of purposive contracts often entails some form of corporate entity such as an endowment, an institution (*Anstalt*) or a corporation [*ibid.: 708*; *MWG I/22-3: 384*]. Consequently, Weber devotes many pages to the emergence of the *juridical person*, the legally autonomous corporation.

Corporations and Juridic Personality

Otto Gierke (1841–1920), one of Weber's dissertation examiners, gives credit to Pope Innocent IV (1243–1254) for finally defining the characteristics of a corporation [*Maitland 1922: xix*]. In terms of the historical development of fictive legal entities, there were aspects of corporate existence in Roman law, especially in the form of legally independent towns and municipalities; but a *theory* of corporations had to wait for the Canonists in the 12th and 13th century to fully articulate such a theory and the bundle of rights that obtain with the achievement of that status [*Berman 1983: 215*; *Duff 1938: 62*].

With the action of Pope Innocent IV in 1243, those entities labelled as a *universitas, corpus, or collegium* (and typically, a *societas),* were declared to be *persons* (*persona ficta*) in law. They have the same rights as others, such as the right to own property, to make contracts and to have legal representation, but they could not commit treason or criminal acts. With the eventual proliferation of such entities across Europe, a new social, political, and economic organization began to take shape.

This invention of the juridic person is often connected to purposive contracts, as we have seen, and signifies the creation of a whole large *class* of fictive entities bearing legal rights. Despite his deep knowledge of this literature, extending all the way to Roman law and the seminal work of his teacher, Otto Gierke, Weber does not concisely spell out the underlying rules and assumptions of corporation theory as they evolved and were understood by the 12th and 13th century Canonists [*Tierney 1982*; *Berman 1983: 199ff.*]. He is aware of the proliferation of legally autonomous entities and the complications they bring for the administrative state, but stops short of articulating the broader sociological implications of their existence for Western law and society.

On another level, Weber is attempting to piece together the elements of corporation law from pre-existing early Roman law but also borrowing certain conceptions from German corporate ("fellowship") law (*Genossenschaftsrecht,* the work of Gierke), along with the work of the Canonists and their unique Christian ideas of spiritual unity [*Berman 1983: 215ff.*]. Indeed, Weber admits that a "peculiar ecclesiastical corporate law" was elaborated by Church officials and "this very ecclesiastical law … markedly influenced the development of the secular corporation concept of the Middle Ages" [*Weber 1978: 714*; *MWG I/22-3: 398*].

With the proliferation of all these corporate entities and the rise of an economically competitive society, Weber speaks of the growing complexity of social and economic life. The rise of the administrative state itself further spawned the need for accountability and thus the creation of "separate juristic persons of innumerable public enterprises such as schools, poor-houses, state banks, insurance funds, savings banks, etc." [*Weber 1978: 715*; *MWG I/22-3: 399*]. Notwithstanding the great variety of such entities that take on corporate status, all of them are treated exactly alike [*Williston 1888: 10ff.*; *Duff 1938*].

Given all this complexity, Weber argues, there was a need for the "the unambiguous" determination of "the significance of every action of every member and every official of an organization" [*Weber 1978: 706*; *MWG: 381*]. In other words, to maintain accountability and transparency in this increasingly complex world, a technical solution was needed, and Weber suggests that the "juristic person" was that solution. Clearly it was not an independent bourgeoisie that produced this technical innovation, but rather the trained legists of the Church.

The first step in that direction he suggests, was a "complete separation of the legal sphere of [group] members from the separately constituted legal sphere of the organization" [*Weber 1978: 707*; *MWG I/22-3: 382*]. This is related to Weber's dissertation on commercial trading companies in that the creation of *the business firm* as a legal entity required just such a separation of the business from the household (which had been the primary unit of production). This was necessary for the purpose of increasing accountability within the firm. Relying further on corporate theory of this era, it was understood that "certain persons designated, according to rules, are regarded from the legal point of view as alone authorized to assume obligations and acquire rights for the organization", while "the legal relations thus created do not at all affect the individual members and their property and are not regarded as their contracts, but all these relations are imputed to a separate and distinct body of assets" [*ibid.*]. In this way Weber invoked the many prerogatives of corporate existence in which the assets of the organization are separated from those of members, that "what is owed to the organization is not owed to the individual members" [*Weber 1978: 715*; *MWG I/22-3: 400*]. Once created, a corporation must (have a name) and appoint a specific official, chosen by way of a majority vote, to make contracts and other arrangements in the name of the corporate entity. The organization itself now acquires rights, to be represented by an official agent, to buy and sell property, to make additional contracts, and so on.

This is as far as Weber takes the reader in understanding some major legal changes in the late medieval and early modern era. In the next chapter Weber returns to his multistage theory of legal development that results in the imposition of law from above discussed earlier.

Part II

Toward Comparative and Historical Analysis

If we start with a broad comparative and historical demarcation, "East" and "West", we can notice that in virtually all European languages, the terms for law (*ius, diritto, droit, derecho, Recht*) refer to both law and to rights [*Pennington 1998*]. Indeed, the medieval Canonists (the ecclesiastical legal scholars) worked out the idea of subjective human rights in the 12th and 13th centuries [*Tierney 1997*]. These were rights that were possessed by the individual and were enforceable by law with precedents going back to Roman law [*Wolff 1951: 62*]. But this was not the basic assumption that we find underlying Islamic, Chinese [*Bodde – Morris 1967*] or Russian law [*Pomeranz 2018: 165*] prior to the arrival of European influences. Accordingly, we need a different set of conceptual terms to establish a heuristic framework for carrying out more detailed comparisons of European law and the three other systems in a Weberian spirit.

We saw in Weber's chapter on "Forms of Right Creation" that he was gesturing toward a large transformation of the European legal system that was emerging out of the new contractual freedom to create and use purposive contracts along with a plethora of autonomous legal entities, namely, endowments, corporations, trusts and institutions representing every sort of business, civic, charitable, professional, and other interests. But it was Harold Berman [*1983*] who pointed out that Europe during this period – starting with the Investiture controversy (1076–1122) – began to completely reorganize all the spheres of the law, that, taken together, constitute a sweeping legal reform, indeed, a revolutionary reconstruction, of all the realms and divisions of law – feudal, manorial, urban, commercial, and royal – and therewith the reconstitution of medieval European society.

Behind all this was the revolutionary transformation of Canon law and the general development of a new science of law. It fused Roman, European folk and Canon law into a new entity, commonly referred to as the *ius commune*, the Common law of Europe [*Stein 1999: 74f.*; *Wieacker 1998*; *Pennington 1998*]. It was taught in the universities and put into practice across the Continent and in England [*Hartmann – Pennington 2016: 2–3*; *Brundage 2008a: 3ff.*, *2008b*]. The list of legal items to follow represents in skeletal form an outline of the emerging legal culture of Europe that many historians have associated with the Renaissance of the 12th century and is still not fully appreciated.

The European Legal Revolution: A Heuristic Framework

In didactic form the legal revolution contains [cf. *Berman 1983: 7–10*] the following items:

(1) a legal reorganization and transformation of European society whereby collective actors were treated as legally autonomous entities, i.e., whole bodies (corporations) that included cities and towns, charitable organizations, professional associations of doctors and lawyers, parliamentary assemblies and universities. Because this legal innovation created the concept of a fictive or juridic personality, each of the entities mentioned was granted a bundle of rights: a) the right to buy and sell property, b) to sue and be sued, c) the right to have legal representation in courts and before the king; d) along with the right to issue their own internal regulations and ordinances, even to set up their own courts of adjudication (witness the Law Merchant); e) national/regional units were empowered to issue legislation transcending scriptural sources applicable within a jurisdiction, i.e., delimited legal and geographic space; and f) such entities were expected to follow the organizational principle of election by consent following the rule of "what concerns all should be considered and approved by all" [*Post 1964: 135*], or the will of "the greater or sounder part"; 2) a formalized judicial process following a calendar of proceedings so that a trial should involve a plaintiff and a defendant [*Pennington 1998*; *Brundage 2008*; *Hartmann – Pennington 2016*] each with his own trained advocate, operating according to formalized litigation protocols involving witness testimony, carefully recorded evidence (oral and written), cross-questioning, conjoined with the public presentation and preservation of court records; and 3) new protocols developed for holding public *officials (prince and pope) accountable and subject to the legal order* [*Pennington 1998, 1993*]. Underneath this sociological transformation were the rich political and legal ideas of *jurisdiction*, *sovereignty*, and *ownership* that were carefully delineated by the Canonists. According to them, to

possess jurisdiction one had the right to legislate, to judge, and to execute the law [*Tierney 1982: 45*]. Legally autonomous entities were granted sovereignty, i.e., legitimate authority (jurisdiction) over the members and the affairs of the organization within a delineated territory and with the assumptions specified above. A further distinction was made between the right to rule or govern and ownership of the office itself and its assets [*Tierney 1982: 45*]. To serve as the designated official of the entity was not the same as ownership that belonged to the collective. Other specific elements of law that Weber stressed can also be incorporated in detailed analyses.

Law, Modernity and Institutional Structure

These intellectual landmarks, I have argued elsewhere [*Huff 2020*], constitute the central core of what I call the *hidden structure of modernity*. Taken together and in their separate ways these elements of legal process serve to establish institutional spaces – neutral spaces – wherein a myriad of social conflicts and disputes could be resolved peacefully.

A case can be made that the foundations of free inquiry established in the universities of Europe were a product of the European legal revolution, and that no such major legal reform happened outside Europe, as we shall see. The universities are the premier example of legally autonomous entities, corporations, that allowed free and unfettered pursuit of ideas that arose during this time (but not outside Europe), as I have argued elsewhere [*Huff 2017: 293–294*].

Similarly, parliaments are political institutions that allow, encourage, and routinize the means for regulating human conduct and creating political and social change using legislative action and public debate [*Marongiu 1968: 47*; *Downing 1989*; *van Zanden 2012*]. I submit that this constellation of resources and legal devices serve in these ways to both stabilize human relations, create forums for peaceful resolution of conflict, and space for political and social change in the early modern period. As we shall see, they did not develop in the same way if at all in Islamic, Chinese, or Russian law.

The heuristic markers laid above (1a–f; 2a, b, and 3) are the criteria against which other legal systems can be fairly compared. In what follows I shall use this heuristic framework to compare aspects of European legal development with that of Islamic, Chinese and Russian law during the early modern period. Notice, however, that the legal revolution as I have portrayed it, was something that happened mainly in the 12th to 14th centuries.

Consequently, comparisons with the other legal systems in the centuries thereafter are appropriate. However, to understand Islamic law and its development, one must understand its formative period, roughly 8th to 10th centuries C.E. Similar background is partially needed for Chinese and Russian law.

Islamic Law and the Sharia

Max Weber's categorizing Islamic law as *sacred* law implies a rigid derivation of law from sacred revelations but contemporary sources suggest that it was a human construction. As several leading specialists in Islamic law put it, "The Sharia developed by means of human juristic efforts into a comprehensive and detailed corpus of law …" [*Masud – Messick – Powers 1996: 4*]. This had to be so because there were multiple elements and actors

that made that construction possible. The first is the Quran whose verses originally existed only in oral form for the purpose of recitation. They had to be written down in order to be studied and fully understood; but there was an additional difficulty in that there were "seven *ahrufs*", seven alternative readings of the Quranic verses and it was believed that Muhammad himself had approved them [*Déroche 2022*; *Dutton 2012*; *Berg 2020*]. However, there were not just the seven approved alternative readings but ten and even more [*Déroche, ibid.*; *Dutton, ibid.*; *Nasser 2013*]. Much of this had to do with the consonantal Arabic text of the Quran that before its early standardization lacked vowels and diacritical marks. As the process unfolded, multiple copies were produced requiring various officials and their assistants to serve as both scribes and editors [*Powers 2009: 155–169*]. For some people it would seem extraordinary that the Quran remained "open and fluid … a full century after the death of the Prophet" [*Powers, ibid.: 161*], but that appears to be the case. Despite all those interventions, scholars today believe that the collection of the Quran compiled under the supervision of the second caliph, "Uthman (r. 644–656), has come down to us with a considerable degree of faithfulness to the original" [*Déroche 2022: 36*].

With the standardization of the Quran, a different problem arose: only a few verses of the Quran relate to legal matters, even if we extend the category to include verses concerning ritual prayer, purification, and so on. Lacking further guidance in the Quran, caliphs, governors and proto-judges (*qadis*) made their own legal decisions following *reasonable inferences* which became part of the Muslim legal tradition.

But the most important part of the juridic tradition was the *sunna,* the deeds and dicta of Muhammad (the *hadith*) that were recorded by pious Muslims and thus became an official part of the Sharia. This second source amounted to thousands of items that had to be combed for relevant legally binding injunctions. These in fact, became the most numerous element in the legal manuals.[8] Once these two sources of the Sharia were identified and made available, the task was to meld them together into a legal manual. Such a manual emerged

Table 1. Distribution of Legal Subjects in the *Muwatta*[9]

Inheritance	3%
Manumission of slaves	7%
Marriage/divorce, and fostering by suckling	9%
Sales	10%
Judicial rulings	7%
Preemption rights	1%
Agricultural partnerships & the lease of agricultural land	1%
Investment partnerships	3%
Acts of battery	4%
Collective oaths	1%
Scripturally determined criminal penalties	3%
Inebriating beverages	1%

[8] For example, almost every verse of the over 2000 verses of the Muwatta (the first Islamic legal manual) begins with a hadith, a saying attributed to Muhammad or one of his close religious followers.

[9] As reported in Fadel and Monette [*2019: 25–26*].

in the last half of the second century after the hegira, ca. 770 CE [*Wyman-Landgraf 2013*]. This was the *Muwatta,* the "smooth path" to salvation written by Malik ibn Anas (d. 795). His organization of Islamic law in the *Muwatta*, scholars now assert, became the paradigmatic expression of Islamic law and its organization that was followed by virtually all legal scholars thereafter [*Dutton 1999: 157*; *Fadel – Monette 2019: 7ff.*]. Its distribution of legal rules reveals the following:

There was little on litigation and no mention of defending attorneys, for which Arabic lacked a term and did not evolve during subsequent years [*Jennings 1975*; *Tyan 1955: 257*]. As a legal system of practitioners, there was a bifurcation between two sets of actors, judges (qadis) on the one hand and muftis (jurisconsults) on the other. The qadis were state officials appointed by the caliph, his vizier or governors. They were charged with presiding over litigation, issuing binding decisions and supervising enforcement. They also had many other duties such as collecting taxes, supervising public buildings and roads, etc. With regard to court room practice, the qadi's decision in litigation was binding only on the parties involved and was not publicly recorded, nor was it presumed to have any bearing on future cases [*Masud – Messick – Powers 1996: 3f.*]. There was no effort to create a collection of authoritatively decided cases adjudicated by judges that could serve as precedents and also enhance uniformity of justice before the law [*Masud – Messick – Powers 1996: 19*].

In contrast, the *muftis* (jurisconsults) were learned masters (*mujtahids*) of the Quran and the hadith collections. From the 10th century onward the written opinions (*fatwas*) of the muftis analyzing cases referred to them were informally collected and formed the basis upon which future muftis determined what the law is. A mufti might be consulted in the midst of a trial, either by the judge or one of the litigants, or he might be consulted outside the litigation.

When consulted, the mufti had four sets of sources to reconcile in the process of giving his opinion [*Powers 2002: 229ff.*]. The first of these was the Quran; the second the Hadith literature; the third was comprised of cases (*Nazila)* [*Encyclopedia of Islam, second edition*] that previous muftis had discussed and compiled [*Masud – Messick – Powers 1996: 9ff.*[10]]. Lastly, Maliki jurists would need to consult the *Muwatta,* the most important legal handbook, roughly half of whose verses deal with legal questions. It should also be noted that in the process of issuing an opinion and reviewing a particular case, the mufti did not review the actual factual basis of the litigation, only the law surrounding it [*ibid.*].

In the end, the mufti's opinion (fatwa) remained non-binding. Even as the most qualified jurisconsults, muftis were not empowered to issue definitive legal rulings that establish precedents or innovative opinions that transcend the injunctions of the Quran or the hadith collections. In H. L. A. Hart's terms, Islamic law lacked "rules of change" [*Peters – Bearman 2014: 5–7*]. Put differently, the mufti was not empowered to issue definitive precedents (the concept did not exist [*Masud – Messick – Powers 1996: 19*]). The mufti had to walk the fine line between *taqlid*, following the established view of a particular school of law, and being creative by issuing a ruling falling outside the established view, a very rare event. Nevertheless, a common view was that every mufti is obligated to exercise his intellectual abilities to the fullest and to decide the case for himself. Some even claim that "it is

[10] These have been estimated to be far more than 6,000 cases [*ibid.: 10*].

prohibited for such a jurist to follow the opinion of another jurist; it is obligatory on him to derive the law itself" [*Nyazee 1994: I, 589*].

In the same sense that Islamic law lacked a mechanism of legal change, it did not have a special court that could function as an "appellate court", though there was a *mazalim* court (court of grievances) launched by the Abbasids [*Tillier EI3*]. These courts were run by local rulers and did not follow the same rules as the qadi courts, nor were they consistently staffed by experienced qadis [*Tillier 2009*]. In addition, only another qadi could reverse or undo a decision made by a qadi [*Masud – Peters – Powers 2006: 6–16*; *Powers 1992*]. Considering all this, it is not surprising that there was often disagreement between muftis as seen in 14th century fatwa collections in the Maghrib (the Western, North African domain). Based on his study of such documents in this period of Marinid Maghrib, David Powers reports that "in almost every case that we will examine, two or more muftis disagreed about the proper outcome of the dispute, thereby demonstrating that the norms and values of Maghrib society in the Marinid period were highly contestable" [*Powers 2002: 11*]. This follows from a similar assessment by Wael Hallaq who reports that during the formative period of Islam, legal thought "was highly individualistic, giving rise to an extreme version of 'jurists' law'," and a "staggering plurality" of opinion regarding Islamic doctrine, each espoused by a different jurist [*Hallaq 2009: 76*].

If we refer back to the heuristic markers set out earlier, it is evident that Islamic law did not introduce the legally innovative concepts that the Europeans did in the 11th to 12th centuries. It continued to lack the concept of a legally autonomous corporation (the juridic person) and there were no legally autonomous entities as discussed earlier by Weber. Later specialists in Islamic law have confirmed Weber's view [*Schacht 1974*; *Stern 1970*]. The religious trust, the *waqf*, was a pious endowment dedicated to the letter and spirit of Islamic law [*Makdisi 1981: 35ff.*; *Catton 1955: 203–222*]. Nothing contrary to the religious sciences could be studied or pursued within a waqf. Once established, it remained dedicated solely to its original religious purpose and it had no mechanism for change, for undertaking a new agenda, religious or otherwise. It was not an autonomous juridic person. Business partnerships, likewise, lacked legal autonomy and were entirely ephemeral because if one partner died or withdrew from it, the partnerships dissolved [*Udovitch 1970*; *Kuran 2011: 63ff.*].

In short, there were no legal entities that empowered its members to establish new legal rules, regulations and privileges, nor were there entities in which the members could govern themselves through a process of *election by consent* and decision-making based on "what concerns all should be considered and approved by all", or the greater and sounder part [*Berman 1983*; *Post 1964*]. Neither jurisconsults (muftis) nor qadis were trained lawyers in the Western sense and did not "defend" one party against another. Nor did they think of writing or enacting new law.

The planned sequel to this paper will examine the nineteenth-century Islamic legal reforms, the assumptions and practices of Chinese law during the Qing dynasty, and the problematic attempt to create a modern legal system in Russia, eighteenth to twentieth century.

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