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## **Islam and private property**

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**ABSTRACT:** this article argues that the relative absence of economic freedoms in the countries of the Muslim world can be explained by the history of Muslim law, and more particularly by its conception of property rights. It shows that the main obstacle to the emergence of private property has been the status of land, originating out of the domination of the first caliphates. It recalls the effects of formal inequalities between individuals (men – women, men – slaves, Muslims – non-Muslims) on the one hand, and the effects of property restrictions on economic development on the other, but maintains that the heart of the blockage lies in the legal status of land, a status which protects public ownership and even extends it to cover water rights. This encloses the economy in a philosophy of enrichment where the opportunities for profit are artificially created through the rents seized by the ruling class. The conclusion is devoted to the future of economic freedom in the Muslim world.

**Key words:** economic development, property rights, Islam, predation

**JEL Classification:** K00, N23

**RESUME :** Cet article soutient que la faiblesse des libertés économiques dans les pays de l'aire musulmane (1) s'explique par l'histoire du droit musulman et plus particulièrement sa conception des droits de propriété. Il montre que la principale résistance à l'avènement de la propriété privée fût le statut de la terre hérité de la domination des premiers califats. Il rappelle, d'une part, les effets des inégalités formelles entre les hommes (homme – femme, homme – esclave, musulman – non musulman) en droit musulman et, d'autre part, des restrictions sur la propriété sur le développement économique (2), mais soutient que le cœur du blocage est le statut juridique de la terre. Ce statut protège la propriété publique et l'étend à l'eau. Il enferme l'économie dans une logique d'enrichissement où les opportunités de profit sont artificiellement créées par les rentes saisies par la classe dirigeante (3). La conclusion est consacrée à l'avenir de la liberté économique dans cette aire (4).

**Mots clés :** développement économique, droit de propriété, Islam et prédation

Economics is facing an ever-growing demand to explain the links between Islam and economic development. The terrorist attacks of September 2001, the failure of institutional reforms in Muslim countries and the Iranian revolution of 1979 are three events that contribute to this keen interest in the economics of religion, and of Islam in particular. The present article is part of this movement. It affirms that Islam has been a brake on development, but that it possesses the qualities necessary to invent a model of development wherein its values can be reconciled with those of a prosperous free-enterprise economy. It criticises both the studies that exonerate Islam from all responsibility in the institutional evolution of the Muslim lands and those that present the secularisation of society as the sole means of removing the socio-cultural barriers to development. Thus, it makes a clear distinction between the question of the emergence of institutions capable of safeguarding economic freedoms, and the question of their implementation within a non-Western culture. We do not deny the effects of European imperialism (Rodinson 1966/1973), geography (Diamond 1997, 2000) or the possession of important energy resources (Youssef 2004) on the differentials of development between the West and the East; we believe that Islam has mapped out the ethical path of institutions in Muslim countries, and in this regard it has provided fertile ground for the establishment of institutions that encourage unproductive activities (Facchini 2007). European imperialism may explain the low level of GDP per capita in countries of the Muslim world, but this does not allow us to exclude the cultural factor, and particularly its religious dimension. We therefore set out to show that religion has an effect on institutional choices because it has an effect on mentalities, on the economic and political beliefs of individuals and political decision-makers. By inventing institutions that safeguard economic freedoms, the Western model has caused other regions of the world to question their own models of development. In this sense, colonisation is not a cause, but rather a consequence of the military and economic decline of the Arab and then the Ottoman empires. The state management of energy resources is also a consequence rather than a cause of the authoritarian political regimes that govern Muslim countries. Subsequently, of course, oil revenues help these regimes to maintain stability through the classic mechanisms of redistribution. Geography certainly limits the choices of a country, but it does not dictate its moral code.

Several works and types of arguments could dissuade us from this culturalist thesis. The first is the work of Rodinson (1966 p. 47, 1973), who asserts that Islam is no hindrance to the development of capitalist-type relations. Jomo (1977, p. 243) furthered this thesis, rightly observing that we cannot know whether Islam would not have adopted capitalism, if there had been no European colonisation. The second argument is based on the fact that the Prophet was originally a trader. Surely a former trader could not be unfavourable to the market. This argument is supported, for example, by the fact that the Muslim civilisation under the Abbasside dynasty (around 820 of the Christian era) was founded on great cities, opulent courts and a system of long routes of communication by land, sea and river (Elisseeff 1977, p. 312). The third is the argument that Islam does recognise and protect private property (Habachy 1962), and that the only difference between the West and the East lies in the foundations of property. According to this argument, property has secular foundations in the West, whereas it has religious foundations in the East (Habachy 1962, p. 453). Consequently, the hostility of Muslim countries towards private property can be explained by the socialism that filtered into Muslim countries when they gained independence (Habachy 1962, p. 472). The fourth is the recent publication of two articles maintaining that the variable "Islam" is not significant (Noland 2007, Pryor 2007). Noland (2007) asserts that the variable "percentage of Muslim population of a country" does not explain growth differentials between countries; on the contrary, it has a positive and significant effect on growth when the sample consists exclusively of developing countries (Noland 2007). The econometrician concludes that religious sociology is less useful than Solow's model and its derivatives for explaining the particular growth of countries in the Muslim world. Pryor (2007) defends a similar idea by showing, on the basis of multifactorial analysis, that there is no Muslim institutional model, and that when the sample only comprises developing countries from which Muslim countries

that are too small or too rich (from oil resources) are excluded, the religious variable (percentage of Muslim population) does not explain the economic performances of different countries.

The object of this article is not to discuss the limitations of these analyses, but to describe the ethical path followed by formal institutions in the Muslim world. We agree, on this point, with J-P. Platteau (2006, p. 2) that more can be learned about the influence of Islam on economic development through historical investigation than through cross-sectional analysis. Without wishing to prejudge future econometric results, we believe it is difficult to deny that Islam has, to varying degrees, shaped the ethical path of institutions in Muslim countries. This historical point is indisputable, and provides us with a firm basis on which to extend the approach proposed by Kuran (1997), Nafissi (1998) or Voigt (2005), by affirming that religion in general, and Islam in particular, has had and still has an effect on development, through the constraints it imposes on institutional choices. This does not exclude the direct influence of religion on economic behaviour (employment for women, fatalism, spirit of enterprise, taste for accumulation and hoarding, etc.) (Guiso, Sapienza and Zingales 2003) or the role played by colonisation and geographic factors, but it does lead us to attach greater importance to the ethical dimension.

This article maintains that the relative absence of economic freedoms in the countries of the Muslim world (part 1) can be explained by the history of Muslim law, and more particularly by its conception of property rights. It shows that the main obstacle to the emergence of private property has been the status of land, a status inherited from the domination of the first caliphates. It describes the effects of formal inequalities between individuals (men – women, men – slaves, Muslims – non-Muslims) on the one hand, and the effects of property restrictions on economic development on the other (part 2), but maintains that the heart of the blockage lies in the legal status of land. This status protects public ownership and extends it to water rights. It encloses the economy in a philosophy of enrichment where the opportunities for profit are artificially created by the rents seized by the ruling class (part 3). The conclusion is devoted to the future of economic freedom in these countries (part 4).

## **1. Muslim countries and economic freedom**

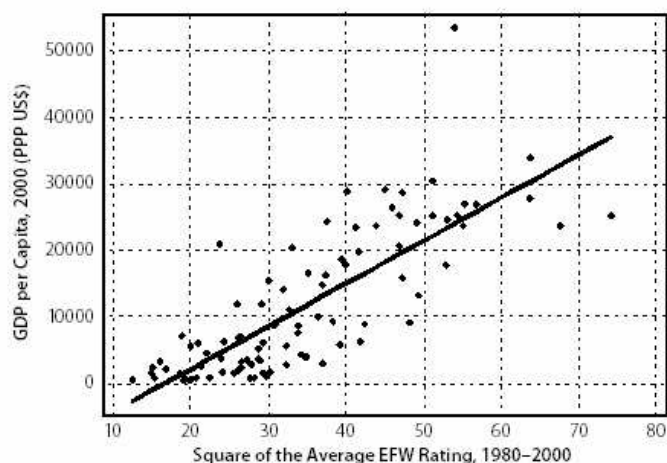
The countries of the Muslim world have neither political nor economic freedom, and are currently undergoing a severe economic crisis. The countries of North Africa and the Middle East, after having enjoyed very strong growth rates from 1960 to 1980, entered into crisis in 1980, with average growth rates of 1% for the area as a whole. This stands in striking contrast to the countries of South-East Asia for example, or even Latin America, which recorded an average growth rate of 2.7% between 1990 and 2000 (more than three times higher than the average for the Middle East over the same period). The economic stagnation of the 1980s in most countries of the Muslim world and the Middle East (Youssef 2004), the low GDP per capita (excluding oil-producing countries), the fact that Muslim countries currently have lower GDP per capita than neighbouring non-Muslim countries with comparable levels of natural resources (Spain, Italy, Greece, etc.) (Hillman (2007, p. 264), and low productivity levels (UNDP 2002) suggest that the economic problems facing these countries may be explained in terms of one of the main features they have in common: Islam. Logically, this explanation takes on even more significance for the countries at the heart of Islam (Arab countries) than for the others.

These economic difficulties can be explained by low levels of economic freedom. It is widely acknowledged that economic freedom is a necessary condition to economic development. Figure 1 gives a first illustration of the positive, significant relation between growth and economic freedom. It summarises, in the form of a graph, the primacy of the quality of institutions over all the other causes of under-development. The principal source of under-development is poor institutional design.

Good institutions are ones that secure the private property rights of merchants (North and Thomas 1980, Rosenberg and Birdzell 1986, or de Soto 2005). The private ownership of capital is a condition of economic calculation (Mises 1949, pp. 211-212). It provides security for investments by protecting entrepreneurs from expropriation (predation) (Hayek 1976, 1982, p. 16, Dawson 1998, Besley 1995) and is a necessary condition of contractual freedom (Kirzner 1992, pp. 51-54). Conversely, public ownership and the abuse of power over private owners harm development by directing resources towards unproductive activities. Agents do not abandon enterprise, but they turn away from the search for profit. They seek to use the force of the State to obtain privileges, in other words to modify the structure of rights to their advantage. The opportunity to act in such a way diverts entrepreneurs from the market and turns them into political entrepreneurs (i.e. predators). Their objective is no longer to create wealth, but to acquire control over existing wealth.

Voigt (2005, p. 65) has calculated the average index of economic freedom for countries in the Muslim world, on the basis of a report by Gwartney, Lawson and Samida (2002). This index ranks countries on a scale from 1 (not free) to 10 (free). The average score of Muslim countries is 5.7, compared with an average for the whole sample of 6.32. Figures 2A and 2B also demonstrate the relatively low indices of economic freedom in the countries of the Muslim world. These figures show that on average, despite the communist period in Central and Eastern Europe, European countries have higher indices of economic freedom than Islamic countries. Scully had already remarked on this fact in 1987. He observed that countries with Islamic law had lower indices of civil liberty than Christian countries in general and Protestant countries in particular.

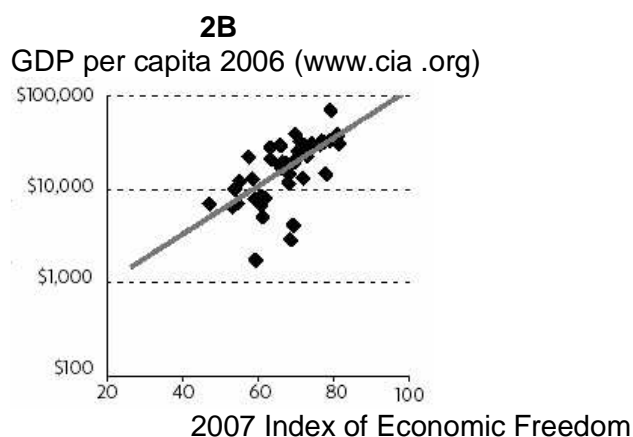
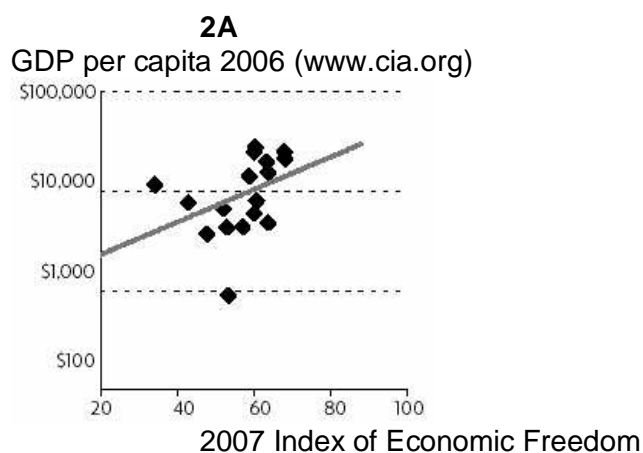
Figure 1: Correlation between GDP (PPP US\$) per capita in 2000 and the square of the average EFW rating 1980 – 2000. Source: [www.cato.org/pub](http://www.cato.org/pub) Economic Freedom of the World 2004 Annual Report by James Gwartney and Robert Lawson (Chapter 2). (For the countries listed and more details, see the report).



R2 = 64.0

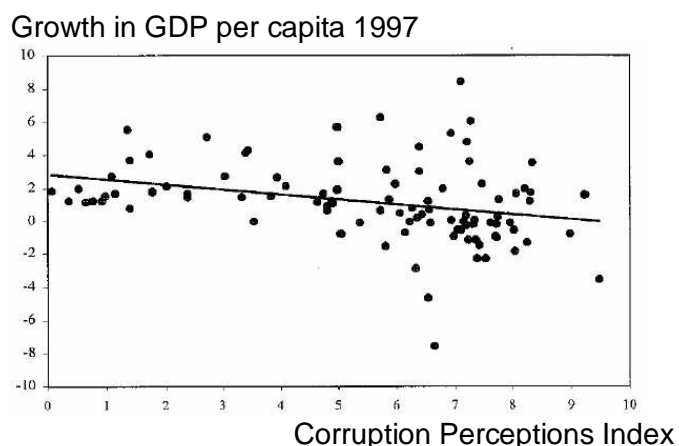
Figure 2: Comparison of the correlation between the Heritage Foundation's Index of Economic Freedom and GDP per capita for the countries of North Africa and the Middle East (A) and Europe (B).

Source: 2007 Index of Economic Freedom, [www.heritage.org/index/](http://www.heritage.org/index/)



These low scores for economic freedom are compounded by high levels of corruption. Figure 3 shows that corruption (as measured by the Transparency International Index) is negatively and significantly correlated to economic growth. Statistically, Muslim countries are poorer and more corrupt than non-Muslim countries (Paldam 2001, p. 404). Like the Roman Catholic church, and unlike Protestant and tribal religions, Islam is positively and significantly correlated to corruption, although this does not mean that it is the root cause.

Figure 3: Corruption and growth in 97 countries for 1997. Source: Tanzi and Davoodi (2000).



## 2 Islamic law and private property

The relative under-development and low growth rates of the Muslim world can be explained in terms of its institutional failures. It has been argued that the origin of these failures lies in a politico-economic equilibrium favourable to the *status quo* and unfavourable to institutional reform. According to this theory, religion is exploited by the ruling class. It does not play a full-fledged role, serving rather as a form of window-dressing.

We do not share this view, which leaves no room for axiological rationality in its explanation, focusing exclusively on the instrumental dimension of rationality. When a head of government believes in the precepts of Islam, he does not act solely out of self-interest (a consequentialist ethic), but also by conviction. Islam is the ethical path of the institutions of countries in the Muslim world. It explains the past trajectory, the difficulties encountered by colonisers and the nature of the reforms undertaken by governments upon accession to independence. We therefore adopt an institutionalist perspective in our reflection. The institutional design of countries in the Muslim world has been shaped above all by Islamic law, derived from the sacred texts. Kuran has devoted several articles to this subject.

From a general point of view, Islamic law recognises public and private human rights (Khadduri 1946, pp. 77-78). Private rights concern individuals in the community, while public rights concern the Muslim community itself. As in the Judeo-Christian tradition, property law is founded on the Divine Creation. God is the owner of everything because he is the Creator of everything. “*Absolutely, to God belongs everything in the heavens and the earth...*” (Sura 24, verse 64). However, the *Koran* says nothing very precise about individual property. This law derives rather from the *Sunna*, in other words from the tradition and rules of custom existing in the conquered countries. It is acknowledged, on the basis of these sacred texts, that the protection of property is very marked in Islamic law (Schacht 1964, 1999, p. 118).

Islamic law stemming from the interpretation of sacred texts can be distinguished from the Western model, however, by the fact that it restricts the freedoms and prerogatives of the owner on several points (2.1), that it does not establish formal equality before the law (2.2) and that it pronounces on the spoils of war, in other words it legitimises predation (2.3). This last characteristic appears to us decisive in explaining socio-legal resistance to economic freedom. Taken together, these three characteristics refute the argument that socialism is responsible for leading Muslim countries to renounce private property. The reason is more profound, and founded in principles deriving from Islamic law.

### 2.1 Restricted property rights

Individual freedoms, in other words the use of one's property, are limited by the prohibition of usury<sup>1</sup>, the obligation to give legal alms, inheritance law<sup>2</sup>, the absence of juridical personality, collective lands, the State's right of eminent domain over the land and the prohibition against the appropriation of water and pasture (Rodinson 1966, p. 30). All these restrictions have contributed to the formation of institutions quite distinct from those of the free market.

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<sup>1</sup> Islamic finance is based on the prohibition against usury or *riba*, identified with the loan interest practised by banks; the sharing of profits and losses between an entrepreneur who borrows and his lender; the prohibition against the funding of forbidden activities such as gambling, etc. Rather than lending money for someone to buy a house, the bank buys the house and rents it out.

<sup>2</sup> Europe has not experienced this ethical path of the law because the Bible lays down no precise rules about inheritance (Kuran 2004, p. 75). See: Durand B. (1991).

The prohibition on lending with interest has been circumvented, but it continues to inspire Islamic finance. The rejection of interest deprives individuals of a synthetic indicator of the temporal preferences of agents and hinders the intertemporal coordination of supply and demand. Legal alms-giving justifies redistribution, strengthens the requirement for distributive justice, condemns inegalitarian societies and paves the way for Arab socialism. Inheritance law favours the indivision of Muslim lands, i.e. *“legal situations where at least two people share rights of the same nature over one same good or over one same set of goods, without there being any material division of their shares”* and insecurity as regards the lands of non-Muslims. Indivision limits the concentration of wealth. More generally, it threatens the succession of firms and capital from one generation to the next (Kuran 2004). It has had the same effect as the civil code had on the parcelling-out of lands in France. Islamic inheritance law has fragmented fortunes and has had the unintentional effect of limiting innovation (Kuran 2003, 2004, p. 75). It has strengthened the effect of the absence of juridical personality on the dynamic of accumulation in Muslim lands. The absence of juridical personality has prevented the emergence of collective enterprises with legal rights distinct from those of the individuals who finance them, i.e. corporations. Kuran uses this to explain why finance in the Middle East before the year 1000 operated without banks and without credit markets in the modern sense of the term. Uncertainty about the legitimacy of interest and the lack of corporate law has resulted in contracts where the borrowers and lenders are individuals (Kuran 2004, p. 73). This has also had the effect of limiting investment and, ultimately, innovation and growth. The rigidity of Islamic law has prevented countries subject to it from developing large-scale businesses capable of taking advantage of economies of scale and of developing new technologies. The effects of collective, joint and State property will be examined in more detail in the third section of this article.

## *2.2 Unequal property rights*

To these restrictions, we must add the fact that Islamic law does not establish formal equality before the law; it simply endorses the inequalities between Muslims and non-Muslims, men and women, free men and slaves. Although it is true that everyone living in the Muslim world has the right to life and safety, to respect of their reputation and to equal justice, these rights are above all vouchsafed to Muslims. Full human rights, and property rights in particular, are only recognised for free Muslims. In Islamic law, human rights are not conferred on everyone in the same way. To obtain property rights, one must be adult, free and of the Islamic faith (Khadduri 1946, p. 79). This means that the rights of Muslims are more secure than those of slaves or non-Muslims. Three social inequalities have been sanctified by holy writ (Voigt 2005, p.65): the relation between master and slave, the relationship between man and woman and the relationship between believer and unbeliever. The slavery breaks human right. There is underinvestment in women’s human capital. And part of the population is therefore deprived of the stable rules of law favourable to investment (Voigt 2005, p. 66).

This moral difference between Muslim and no Muslim strengthens also the homogeneous groups like Jews or Christians and discrimination. By means of discrimination, Islamic law creates advantages that are only accessible to Muslims. The tolerance shown towards the Christian and Jewish communities enabled them to organise themselves and create their own club goods. An ethnically homogeneous groups explains the low level of transaction costs within the group: Italian mafia, the economic success of Indians in East Africa, Syrians in West Africa, Lebanese in North Africa, Jews in Europe in the Middle Ages and Florentine merchants in the Florentine banking system in Europe. Belonging to a group is equivalent to having citizen’s rights. It gives members privileged access to markets and professions, but access to the group is not open to everyone. From this perspective, codes of ethics are interpreted as the functional equivalent of the Law Merchant or modern contractual law (Landa 1981, p. 357). In the absence of formal laws governing contracts, merchants customise or particularise their trade relations in such a way as to limit contractual uncertainty and reduce transaction costs.



The co-existence of different religious communities became a source of mutual gains. Each community secured its contracts in the absence of formal contractual rights. This co-existence can be explained by the Koranic principle of tolerance and by the beneficial consequences of this principle for the public finances of the Empire. Eliana Bella (2004) advances the second of these reasons to explain why Muslim authorities have always maintained ambiguous relations with Christians and Jews. As a State, the Ottoman Empire respected free trade and the religions of the book because Muslims were the cornerstone of the finances of the warrior empire. Non-Muslims were prepared to pay for the right to practise their religion by paying taxes; in exchange, they were afforded not only protection, but also aids to help maintain their churches or synagogues. According to Bella (2004), these aids served to discourage Jews and Christians from converting to Islam.

We can, however, put forward another reason to explain why so few People of the Book living in Muslim lands converted to Islam. Admittedly, they paid more taxes than Muslims, but they could organise themselves to produce their own specific club goods, like the Chinese communities in Malaysia described Carr and Landa (1983, pp. 154 – 155). They had no interest in breaking with their communities, because converts to another religion are always treated with suspicion. The costs of conversion are non-null. There is suspicion both from unconverted Christians and Jews and from Arab Muslims. In addition to the axiological rationality that guides behaviour, it was not necessarily in the interests of Jews and Christians to convert even from a viewpoint of strict instrumental rationality. The interest of non-Muslims, and Jews in particular, has been described by Grief (1989, 1993). Grief (1989) takes as his point of departure the idea that the intensity of exchanges depends on merchants' ability to secure their sales in distant territories without having to travel themselves, while still respecting the principle that the merchandise can only be sold when it has reached its destination. But there are risks involved in delegating the sale of one's goods to strangers. One group of merchants solved this problem by forming a network. These were the "Maghribi traders", for the most part Jewish, who had started to spread through the whole Mediterranean basin from the city of Baghdad in the middle of the 10<sup>th</sup> century (Grief 1989, p. 861 *et seq.*). By uniting, they found they could limit the problems of information asymmetry and organise the punishment of dishonest individuals within their community, thus contributing to the emergence of reputations. In this way, they reduced transaction costs. They probably succeeded in becoming richer as Jews in a Muslim country than they could have become as Muslim converts.

Lewer and Van Den Berg (2007) draw on Grief's work to advance the hypothesis that religion favours international trade through network effects. Alongside the variables of geographic proximity and demographic importance, they add a 'religion' variable to explain exchanges between two territorial zones. Networks encourage trust and favour exchange, but they can also work negatively if they prevent exchange between strangers. The emergence of a secular merchant community makes exchange more impersonal and consequently mitigates this restrictive effect of religion. So non-Muslims contributed all the more actively to the empire's wealth as they overcame the insecurity of long-distance exchange through the formation of a network in which religious affiliation was the common denominator.

### *2.3 Law that pronounces on the spoils of war and legitimises predation*

The other characteristic of this law is that it pronounces on the spoils of war. Man can acquire property through conquest and plunder. "*What God gave as spoils to His Messenger from the people of the cities is God's, and the Messenger's, and for kinsfolk, orphans, and the poor, and the wayfarer...*" (Sura 59, verse 7, *The Koran*). Here, moveable goods are not the primary object of plunder. Immoveable goods, such as land, can also be appropriated. This legal ruling on plunder plays an important role in reconciling two apparently contradictory facts. On the one hand, it is clear that Arab-Muslim empires were rich, that trade flourished, that the *souk* was the heart of their cities and that merchants occupied an important position in them, the Koran having been revealed to a trading people. On the other hand, the economy of these empires was largely

founded on predation, in other words conquest and colonisation. The merchants of the imperial cities seized the artificial opportunities for profit created by conquests. These opportunities were artificial in that they derived from an economy of predation rather than an economy of production. The triumph of trade and the wealth of traders depended essentially on the spending of plunder acquired by the aristocracy, in other words the occupying power. This Muslim aristocracy extracted substantial income from the system of land taxation that it had established. It embodied the power of landowners (Benabdelali 1999, p. 183 and p. 275) living on the revenues from their land and imposing on society the dominant values of generosity and giving that were contrary to capitalism's values of frugality and efficiency (Benabdelali 1999). Through their social domination over the merchants, the aristocrats maintained a gift economy that recycled agricultural surpluses and nurtured a flourishing urban productive sector (Benabdelali 1999, p. 307). For these three reasons, land law is very important in helping to understand and describe the effect of Islam on institutional choices and more particularly on private property, because land was the main source of revenue for the Arab elite. It is all the more important when we take two other facts into consideration: the key role played by the enclosure movement in the emergence of English capitalism and the first industrial revolution on the one hand, and the importance of the farming economy in countries of the Muslim world on the other. Consequently, the protection of property can be very marked in Islamic law (Schacht 1964, 1999, p. 118) and yet not lead to the invention of institutions that safeguard economic freedoms.

The phenomenon of State ownership derived at least partly from this history, blocking the introduction of economic freedoms and preventing the spread of private property in domains as important as farming, water or the exploitation of oil reservoirs.

### **3 Land ownership in Muslim law limits privatization of natural resources**

In Islamic law, the land is sacred and managed by the owners, who have a duty of equity. Sura 59, verse 7 of the Koran is often quoted to recall that land is not a definitively-acquired good when the threshold of self-sufficiency has been crossed and it runs the risk of lying fallow, becoming a tool of exploitation or being transmitted by unique inheritance. However, it should not be supposed that the status of land is the same throughout the Muslim world, for it has evolved not only with the revelation of the prophet and his conquests, but also more recently with European colonisation. It is difficult to say what Islamic land law would have been in the absence of European intervention. We can, nevertheless, draw on the sacred texts and the history of the first Caliphates to sketch the broad outlines of the ethical path of land law in the Muslim world.

#### *3.1 Land ownership, predation and the tragedy of free access*

As we mentioned above, there is no unique land law in the Muslim world, but the sacred texts and the political unity arising out of the military conquests of the first Caliphates does provide Islamic land law with a general coherence (De Bellefonds 1959). Before the advent of Islam, each country had its own rules. After Islam, land became the eminent domain of the State and the main tool for the enrichment of the Islamic aristocracy of the State.

The first form of property was that owned by the State. During the first Caliphates, it was constituted of the lands possessed by those who had fought against Islam. The State (the Caliph) had the right to appropriate one fifth of the spoils of conquest, and therefore of the occupied lands.

The second form of property was that owned by conquering Arabs and non-Arabs (as in Iran) who had adopted Islam as their religion. These owners had to pay a tax called the *Zakat*, which represented 2.5% of the goods, destined for the poor.

The third form of property was that of non-Muslims. This was the most profitable for the political authorities, because the owners had to pay not only the *Zakat*, but also the *Kharaj* (tax destined for the State, calculated on the basis of the area farmed). Thus, non-Muslims had to pay the *Zakat*, the *Kharaj*<sup>3</sup> and an annual poll tax (the *Jazieh*). They were the largest source of revenue for the State and the Muslim aristocracy. Non-Muslims did not have the same rights as Muslims, as we explained above. They did not have the same freedom to use their income as Muslim owners, soldiers, officials, etc.

The fourth form of property was that arising out of *Waqf*, in other words lands given to religious institutions and charities. These lands were partly or totally exempt from taxes.

The fifth form of property was that of collective ownership by Muslims. The existence of collective or common ownership, the extent of which is difficult to ascertain for periods in the distant past, and sometimes even for the current day, can be explained by two major *hadith*<sup>4</sup>, and one of lesser importance (De Bellefonds 1959, p. 121). The first says that according to the Prophet: "*Muslims have common share in three things: pasture, water and firewood*". The second says: "*There is no hima (private pasturage) except that of Allah and His Messenger*". The third says: "*Do not withhold excess water, preventing others from obtaining extra pasturage through it*". The commentators define pasture as plants that have grown spontaneously. This excludes cultures in which work has been invested. The majority of them then accept that a certain category of inhabitant (the messengers of God) can have exclusive rights over the common pasturages. The third *hadith* has led some theologians to maintain that each person has the right to take possession of the plants growing on other people's land and to pasture their herds on them (De Bellefonds 1959, p. 131). The extent of these common lands depends, in practical terms, on tradition, for the *Sharia* says nothing on this point (De Bellefonds 1959, p. 126). The inappropriable character of certain land "*does not derive from its intrinsic nature (as there are private pasturages and appropriated forests), but from the principle, consecrated by the Sunna, that certain goods are a gift of God to which, as a consequence, everyone has an equal right*" (De Bellefonds 1959, p. 123). Such lands have become, definitively, *res communes*. They can no longer become somebody's property.

In all these forms, land remained the eminent domain of the State, and the owner had usufruct. He could sell, rent or mortgage the land, but he could not bequeath it by will. A father without sons, for example, would see his land pass to the State.

The first and third form of property shows the importance of spoil in the economy of the Arab-Muslim empires and strengthens the argument propounded above. It also explains why no Muslim owners invested so little in their lands. State property limits transferability and competition around the useless of land. It is, for this reason, that this form of property is less efficiency than private property. Owners of state seek to maximise their rent, but they are in position of legal monopoly and can use the violence if the level of rent is too low. The tax on no Muslim's land property explain underinvestment and mistrust between Muslim and no Muslim. It is the classical effects of tax. The second form is classical and efficiency. The consequences of the fourth form (*Waqf*) has been analyse by Kuran and Shatzmiller (2001). The *Waqf* prevents accumulation and immobilizes the land ressources. The fifth form is common. *Res communes* engenders a risk of destruction of natural pastures and the forest heritage (De Bellefonds 1959, p. 114). Standard economic theory provides a perfect explanation for this phenomenon in the form of Hardin's "Tragedy of the Commons", more precisely described, in this case, as a tragedy of free access. Logically, free access leads each user to exploit a common good until there is

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<sup>3</sup> According to Noël J. Coulson (1964, 1995, p. 25) it was Umar, one of the four companions of the Prophet, who defined Islamic public finances and the land tax (*Kharāj*) on the occupier, thus inaugurating a new status for the land.

<sup>4</sup> The *hadīth* are collections of texts that retrace the words or deeds of Muhammad, currently said to form the *Sunna* ("tradition").

nothing left. If a good has no price, because there are no property rights over it, individuals cannot express their preferences and construct a market. With zero prices, demand is never satisfied. This is nothing more than the strict application of the law of supply and demand.

The tragedy of free access existed not only for common lands, but also for the other non-appropriable goods: water, pasture and firewood, and also oil reserves or salt-marshes.

### *3.2 Ownership of water and the tragedy of common pasture*

As is the case for land, the *Koran* is not very precise about the ownership of water. It simply gives certain orientations and indications.

Dante A. Caponera (1973, 2003) deals specifically with the evolution of water rights in Muslim lands. He notes that before the Prophet, there was no regulation. The whole tribe or the individual whose ancestors had dug the well became the owners, and they then exacted a fee from the people or tribes who wanted water for themselves or their animals. In the south of Arabia, the selling of water was current practice. However, when water was less abundant, it became the object of bloody conflicts in which the law of the strongest prevailed. God, through the mouth of the Prophet, declared that access to water was a right. The policy that arose out of God's revelations to the Prophet was based on the principle that no one could monopolise water for themselves alone. The intention was to ensure access to water for the greatest number. This explains why, according to Islam, water resources are public property (belonging either to the State or in the public domain). To use water, one must first obtain a concession or licence from the public administration, and then one must request an opinion from the same administration before fixing a price or selling water or irrigation rights. Legal traditions are then more or less favourable to the sale of water or of irrigation rights, but only once authorisation has been obtained to commercialise water.

This brief history of water and land law in Muslim countries leads us to make two observations. This is not libertarian law, closer to the rules before the revelation of the Prophet (the right of the first occupier and of those who have performed the work). The institution of a license to use water, for example, is a source of corruption and diverges from the principle of exclusivity that governs over the private property and economic calculations of the market economy.

More generally, and in the light of these developments over land and water rights, it appears that Islamic practice and law are unfavourable to the privatisation of resources and the individualisation of rights. For this reason, they have acted as obstacles to the good use of rare resources, because they have prevented the emergence of institutions capable of establishing a market for water or land. They have favoured the disinterest of owners for the improvement of their capital. They have given to the State, as usufructuary, a role that has placed the owner in a position of legal insecurity and income-sharing. They have prevented evolution of the law towards more liberal forms because they have legitimised it by the word of God, which cannot be brought into question. They have perpetuated the economy of rent or plunder up to the present day. Such institutions have diverted entrepreneurs from productive activity, favoured unproductive activity and the corruption of economic mores. By pronouncing on land rights, Islamic law has favoured practices contrary to the word of the Prophet by encouraging the payment of bribes to seize artificially created profit opportunities, in other words to gain access to markets controlled by the aristocrats or politico-financial elites of the country. By founding law on the word of God, Islam has therefore prioritized morals over efficiency, ultimately harming good business morality. We can then conclude, with Voigt (2005, p. 66) that by making these goods inalienable, Islamic law pronounced their public exploitation by numerous Muslim States. Islamic law does not, therefore, naturally set these countries on the path towards the privatisation of natural resources and oil revenue. It pronounced the shift from the spoils of war to exploitation of the income from the production of oil or gas.

For all these reasons, it is difficult to deny the role of Islam in the institutional situation of Muslim countries. This does not exclude the possibility of a strong paradigmatic or ideological crisis in both domains. In Thomas Kuhn's theory of scientific revolutions, the absence of a solution generates crises and changes in normal beliefs, in other words the secularisation, Christianisation, Hinduisation and/or any other form of conversion. This is the supreme risk for the Muslim world, which has, ever since its inception, seen itself as a religion threatened by non-believers, hypocrites, infidels and/or crusaders. This risk is clearly perceived by Muslim intellectuals (Kuran 1997a) and Muslims in general,<sup>5</sup> who seek solutions that safeguard their values, their civilisation, their belief in God and in His word. There is indeed, therefore, a religious obstacle to economic freedom in the Muslim world (of varying importance depending on the countries). Such an obstacle is not necessarily insurmountable, but it would be unwise to deny its existence if we wish fully to understand the absence of institutions or institutional reform. Islamic law is not a rule like an other. It is the holy writ and nobody after the prophet have haven revelation. God does not speak after him. So, Islamic law is the origin of institutions in Muslim countries and it creates an institutional path dependency.

#### 4 Conclusion

In the light of the history of Islamic law and its economic consequences, we believe that it is fair to maintain that Islam has been an obstacle to the discovery of the right institutions for the economic development of the Muslim world. The institutions of Muslim countries are not the fruit of chance, but of Islam. This thesis explains why all the debates over institutional issues, even in international organisations, raise the question of the compatibility of institutional reforms with the sacred texts and tradition. When faced with the over-use of common pastures and its effects on the spread of desert zones, with the ever-growing need for clean water (Faruqui *et al.* 2003), with the parcelling-out of lands and women's land rights (UN Habitat 2005), or with financial and economic questions (Beaugé 2005), the first thing the experts seek to determine, even before looking at scientific evidence, is what tradition and the sacred texts have to say. In this sense, the most important characteristic of the Muslim world is that it has remained faithful to its religion; whatever the problem, it seeks a solution in harmony with its belief of the words of God revealed to the Prophet.

This thesis explains also why we think that it would be wrong to reduce Islam to a simple tool at the service of the power firstly of the Caliphs and then of more or less secular governments. Islam is not only a tool for political power. Firstly, we can not use a western concept to analyse an institutional reality which ignores the separation between spiritual and political power. The differentiation between temporal order and celestial order was born out the first Christians' suspicion of and hostility towards the public sphere as such. They did not claim power, but the right not to participate in government and to work for their eternal salvation (Tierney 1982, 1993, p.140). Islam has a different tradition. There is not separation between spiritual and temporal because the state is submitted to the law of God. Here, the political power is an tool of spiritual power and not the contrary. So, the religion uses the politic and the politic uses the religion. The Ulama manipulate Islamic teaching to the advantage of undemocratic political leaders (Al-Suwaidi 1995, pp.87-88) to defend also the law of God. This does not mean that there are no economic interests at stake in the conflicts between schools that are often grafted onto inter-clan conflicts over to obtain the rent (Platteau 2006, p. 14); it means that we should not interpret history solely from the perspective of instrumental rationality. We must leave room for axiological rationality in our reading of social phenomena. Secondly, Islam is a total religion, where man is above all else a Muslim. Whether he is a simple trader or a governor, there is no dissociation in his personality. He is a Muslim before being a trader, ruler or soldier. The main consequence of this conclusion is that formal institutions do not have primacy over informal ones, but that informal institutions, culture and its religious dimension, interact with the formal institutions and,

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<sup>5</sup> A survey into 14 Muslim countries showed that the inhabitants of these countries generally felt that Islam was under threat. (*Pew Research Center for the People and the Press* (2003, p. 46).

ultimately, with individual behaviours and their interest for the creation of wealth. Economic development does indeed represent a change in mentalities (Colombatto 2001, Pejovich 1994), but this evolution in mental models occurs within institutions. So, as Hayek theorised in *Law, Legislation and Liberty*, the human mind (mentality) is as much the product of the social environment in which in turn acts on these institutions and modifies them. Our article thus joins in the controversy about the theory of institutional changes, defending the thesis that the forceful introduction of market institutions (capitalism by fiat, private property by fiat) is not enough, on its own, to achieve the hoped- for results. Each nation has its own specific moral path to follow, and the use of force only slows down the process of identification of the right institutions, initiated by political entrepreneur or entrepreneur in institution.

This thesis does not say, nevertheless, that Islam and religiousness in general are incompatible with the spread of commercial relations and the protection of property rights. Mises (1981, pp.386 – 387) wrote, “*just as in the case of Eastern religions, Christianity must either either overcome Capitalism or go under*”. The thesis of incompatibility gave rise to Ataturk’s policy of secularisation in Turkey. In the end, this was a matter of taking the path followed by countries like Japan, or the five dragons of South-East Asia, to make a partial break with Islam in order to bring the Muslim world into the modern era, in other words into a secularised world. We can address a lot of critics at this hypothesis. It is a more or less elaborate form of social determinism. Everything comes down to the standard of living. Rises in income provoke a break with the traditional values of security and protection and encourage values of personal fulfilment and freedom. Normally, the countries of the Muslim world should modernise and adopt the paths of democracy as they grow richer. However, this thesis is contradicted by two facts. The first is the religiousness of the Americans. The second has been the object of an article by Martin Paldam (2008). Muslim countries and Arab countries in particular are growing richer. Their levels of income are rising, but their values remain traditional and hostile to modernity (Paldam 2008). To explain this fact, Paldam starts by advancing the idea that oil exports enable these countries to get richer without having to modify their values or question their traditions. To support his argument, he observes that the countries with sizeable natural resources (notably in oil) are generally less democratic than countries of equivalent levels of wealth but poor in natural resources. This explanation can be challenged by pointing out that democracy was born in Europe in countries that did not necessarily, at the time, have a standard of living any higher than those observed in many developing countries today. Indeed, one can perceive, in Paldam’s argument, the weaknesses of reasoning that is founded not only on recent quantitative history without any longer-term perspective, but also on the idea that what has been, will be.

By ruling out the thesis of secularisation, we dissociate ourselves, naturally, from the thesis of incompatibility, and advance the idea that religiousness and Islam are not opposed to economic development. Our first idea is sustained by Berger’s thesis (1993). The guiding light of economic development is the market entrepreneur, who operates within a subculture present in many societies that have not been in contact with each other. The constituent elements of the productive activity of entrepreneurs transcend the differences between societies or epochs (Berger 1993, p. 7). Our second argument is that Islamic law can evolve. Its story shows that is possible (Coulson 1964, Schacht 1964, 1999). If the *Ulama* can manipulated the Islamic teaching and to provoke an interpretative turn, then we can think economic freedom in an Islamic context. This interpretative turn will be possible because in Islamic law, “*out of the 600 verses of the Koran, the large majority deal with religious duties and the ritual practices of prayer, fasting and pilgrimage. No more than about eighty verses deal with strictly legal questions*” (Coulson 1964, 1995, p. 14). This means that apart from a few very precise rules, the *Koran* is essentially composed of general verses (Ragab 1980, p. 514) and that the heart of Islam is spiritual. Nevertheless, *Ulama* manipulate in institutional path dependency. The liberalization will make without secularisation. To defend this position we can recall that the heart of the conflict between Islam and the Western model of secularised development does not lie in property law but in family law and criminal law. These domains of law touch human right, but they do not directly involve commercial trade. The British were confronted with this problem

during the colonisation of Nigeria, as Alhadji Bouba Nouhou points out (2005, p. 119). It is in the domain of criminal law that the *Sharia* is applied most. The conflicts that arose during British colonisation were centred more on reprisals in the case of death, for example, (the level of punishment) than on questions of property, the latter being governed more by the customs and legal traditions of each country than by the sacred texts. Likewise, the conflict between East and West, today, is not over economic questions, but over spiritual questions such as the place of God in society or questions of mores, such as homosexuality, gender inequality, polygamy, Ramadan, apostasy or the role of religion in the constitution or in education (secular model). The main problem for economic development is not to protect political liberty (democracy), but to respect private property right. If we are right, the necessary conditions for an Islamic model of development can be attained. It is possible for a society to be conservative in its values and still accept the efficiency and rationalisation of the market. Indeed, the American model is not so very different from this situation.

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