

1. Introduction. Babel, Islamic finance and Europe: preliminary notes on property rights pluralism

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OVERLAPPING CULTURES IN A SHRINKING WORLD: THE BABEL OF GLOBAL TIMES

In Genesis 11, 1–9, the story of Babel warns mankind not to challenge God’s majesty. According to the Bible, the city of Babel (or Babylon) united all of mankind, speaking a single language, but soon the inhabitants decided to build an immense tower for the glory of man, and the Lord punished their arrogance, gave each person a different language and scattered the people throughout the Earth. The *Mishnah*, the first written redaction of the oral Torah (around 200 CE), describes the tower as a rebellion against God. The *Qur’an* (2: 102) names Babylon, referring to two angels, Harut and Marut, who taught the inhabitants the sinful art of magic to trial their faith; in *Qur’an*, 28: 38 and 40: 36–7, the Pharaoh asks Haman, his chief minister, to build a clay tower to reach heaven and challenge the God of Moses.

While this book does not deal with the meaningful images of the Old Testament and their reciprocal recall in the three great monotheistic religions, its specific matter, namely Islamic finance in Europe, makes the reference to Babel very helpful.

In the last decades, in fact, globalization has shrunk the world into a smaller place for living. With regard to the international financial system, this has quickly reconceptualized the traditional frame of inter-state commerce in the light of transnational investments and multinational actors. At the same time, in this shrinking global village, cultural peculiarities, even in commercial practices, are becoming more apparent, shaping a plural market where the hybridization of legal and economic structures has become an inescapable feature of our post-national world.

In this context, the image of the tower of Babel stands mightily,

reminding us about the challenge of dealing with a plurality of ‘languages’, that is, of ‘cultural realities’, overlapping one another in a constant process of mutual interaction and contamination. If phenomena of cultural exchanges have always occurred in human history, our global time offers major potentialities of mutual contact, making the tower, both in terms of opportunities and issues, even stronger.

The implications of the globalization process have been also witnessed by the epistemological turn in social sciences from the twentieth century onwards. In fact, the cultural ambitions of the West to ‘civilize’ the world of the first half of the twentieth century (linked to sad pages of totalitarianism, imperialism and colonialism) have rapidly turned into a plurality awareness, shaping post-modernity. Taking suggestion from Dawkins,¹ it can be said that the selfish meme of the Western culture has been rapidly replaced by a reality of ‘memetic pluralism’, where memes recognize each other as legitimate cultural alternatives, as well as interfere, compete and contaminate by reciprocal influence and interaction.

Within this reality, the growth of Islamic finance in Europe constitutes a remarkable example of the memetic pluralism that we are experiencing today, implying new opportunities and challenges for economic development and social integration.

LAW AND ECONOMICS IN GLOBAL TIMES: WHOSE PROPERTY RIGHTS?

In comparative social research, thanks to the epistemological turn previously mentioned, plurality awareness has already spread.

With specific regard to legal studies, the proud intent to shape a ‘common law for the civilized world’² (First International Congress of Comparative Law in Paris, 1900) has been replaced by the recognition of the sociological and cultural background of any legal tradition. Accordingly, the functional approach to comparative legal studies, assuming that different cultures tend to resolve practical problems in similar ways (Zweigert and Kötz, 1977, p. 30), has been gradually substituted by attention on the cultural specificity of each legal order.

Within the frame of legal pluralism (Griffiths, 1986; Merry, 1988), Chiba conceives law as a cultural entity inseparably rooted in society (‘law must be recognized as an aspect of the total culture of a people’: 1986, p. 1); Geertz depicts law as ‘part of a distinctive manner of imagining the real’ (1983, p. 184), while Glenn describes the co-existence in the world of different legal traditions in constant communication and interdependence

as 'information transmitted through generations' (2004, p.42; see also Legrand, 1999; Menski, 2006).

At the same time, doubts have been advanced on the factual capability by comparative legal scholars to transcend their own culturally specific legal concepts to draw valid conclusions about foreign legal systems, underlining that

[n]o matter how neutral and objective legal categories may appear, they are themselves creatures of a historically and culturally contingent social world, bearing the normative patina of the context from which they were derived. Just as fish always in the sea have no consciousness of being wet, scholars always immersed in the ocean of their normative order may well be unaware that this order permeates the very conceptual tools that they use in attempting to understand each other. (Ainsworth, 1996, p. 31)

The last remark may help us to broaden the reasoning to law and economics interactions. On the matter, the *praesumptio similitudinis* of traditional comparative law asserted that 'developed nations answer the needs of legal business in the same or in a very similar way' (Zweigert and Kötz, 1977, p.25): leaving aside the matters 'heavily impressed by moral views or values, mainly to be found in family law and in the law of succession' (Zweigert and Kötz, 1977, p.25), a dogma of cultural neutrality for contract and business laws was posed and still affects, to a certain extent, comparative commercial studies. The assumption of the cultural neutrality of 'property rights' (as the basic notion describing any relations between people respecting things, either in contract or business law) is also maintained in Western economic literature,³ despite the warnings given by anthropological studies on the cultural peculiarities of land and water rights in Africa, Asia and South America (see, for instance, Meinzen-Dick and Pradhan, 2002; Meinzen-Dick and Nkonya, 2007). In particular, the economic analysis of law is still lacking in complete awareness of the cultural premises of legal relations, resulting in a Western 'economic jurisprudence' rather than a social scientific study of law in a global society (Von Benda-Beckmann, 1995). At the same time, comparative economics, traditionally devoted to the comparison between capitalism and socialism (see, for instance, Pejovich, 1990), has recently reoriented its epistemological objectives in the light of institutional efficiency (Djankov et al., 2003), while the very conceptual tools of lego-economic analysis, namely 'property rights', are never put under trial: just as fish always in the sea have no consciousness of being wet, economists perpetuate the conceptualization of property rights according to the Western heritage, despite the African or Asian recipient of development policies.

Thus, the selfish meme, which we believed to be rid of, still shapes economic analysis in global times:

property models that purport to be universal are in fact largely based on Western legal categories, the most important of these being the notion of private individual ownership, often regarded as the apex of legal and economic evolution as well as a precondition for efficient market economies. This has led to a misunderstanding of property both in Third World societies and in Western industrialised states, encouraging property policies that have unintended and deleterious consequences. (Von Benda-Beckmann et al., 2006, pp.2–3)

Accordingly, economic policies in Asia, Africa and South America are still framed in the light of an individualistic conception of property rights that belongs to Western capitalism, with scarce awareness that property relations always stem from the interaction between the individual and his social context, thus inevitably bearing cultural elements.

Actually, in our global times, not only alternative conceptualizations of property(ies) exist in local realities through the assertion of customary and traditional rights (Eidson, 2006; Muttenger, 2006), but they are also 'invading' transnational commercial practice.

This is exactly what the growth of Islamic finance is revealing.

Nourished by ethical values rooted in the Muslim tradition and divinely guided by *Shari'ah*, in fact, Islamic finance has rapidly acquired a promising role in the international financial system, offering alternative solutions in terms of risk and capital management. But, at the same time, the appearance of this new actor, fostering pluralism in the financial market, has raised fundamental issues not only about the plural ethical nature of social responsible investments, but also with regard to the application of conventional financial regulation and, more generally, to the tenability of a global financial market where alternative legal standards are overlapping in framing investors' property rights. In other words, the factual combination between Western and Islamic standards in hybridized expressions of social economic justice(s) (MacIntyre, 1988) is leading the global financial market towards social interactions whose property rights become inherently multicultural.

At this point, which methodology may help the efficient distribution of property rights, as differently conceptualized in the Western and Islamic traditions? Whose property rights are those in the Islamic financial market? Are they more Islamic or Western? And does this affect the overall efficiency of the global financial market? If yes, to what extent?

PROPERTY RIGHTS PLURALISM, COASE AND THE CHALLENGE OF ISLAMIC FINANCE

Indeed, while legal scholarship has already acknowledged Islamic finance law as a new area of study (Foster, 2007), there is still reluctance in the economic literature to embrace a plural property rights framework.

Of course, numerous studies are already available on the integration between Islamic and conventional finance (see, for instance, Sundarajan and Errico, 2002; Grais and Pellegrini, 2006; Solè, 2007), but, as previously remarked, the very conceptual tools of economic analysis with regard to legal regulation remain unquestioned, and the Western paradigm of property rights, shaped by the notion of private individual ownership as the cornerstone of efficient capitalism, is still purported as a 'universal' when dealing with resource allocation policies.

Consequently, within the firm belief of Western property rights universality, Islamic finance has been sometimes conceptualized as a subcategory of Western ethical investments, interpreting the 'injection' of religious values as a 'moral' constraint to Western individualistic attitude in financial investments (for a critical perspective: Cattelan, 2010). Following this logic, the selfish DNA of Western property rights is deemed to be tamed in Islamic finance by moral inhibitors like the prohibitions of interest (*riba*), excessive risk (*gharar*) and gambling (*maysir*), plus major attention to social welfare.

Unfortunately, it seems to me that this conclusion derives from the absence of an appropriate plural theory of property rights.

The perpetuation of Western property rights universality, in fact, has regrettably 'reduced' Islamic finance to a 'moralized' version of the Western conventional market, impeding the recognition of its autonomous potential in suggesting new and viable means for economic and financial development. In this situation, on the one hand, a critical investigation on the DNA of Western property rights has been further postponed; on the other hand, the DNA of Islamic property rights has been 'levelled' around ethical and religious issues (usually conceived from a Western perspective: *sic*), misinterpreting the practical rationality that it embeds. In the concurrence of these two interrelated epistemological faults, the genetic experiment of fostering Islamic finance by replicating Western products (as revised according to Islamic law) has given birth to a 'mutant' unable to satisfy the expectations of its masters (for similar criticism, see El-Gamal, 2006).

In my opinion, the original sin in this memetic experiment has been the lack of plurality consciousness with regard to property rights genes. But why does this matter so much? Because well-perceived and well-defined

property rights affect economic efficiency in limiting transaction costs, as remarked by the Coase theorem (1960).⁴

In the well-known example by Coase on the land-use conflict between a cattle rancher and a crop farmer, in fact, it is implicitly assumed that the only issue under discussion is where property rights should be allocated (or, in similar terms, who should be the beholder of property rights) in the light of an efficient distribution of resources, not what property rights are and how much their memetic variance may affect economic efficiency.

Of course, half a century ago the power of globalization had not yet fully appeared, and imagining a Western rancher competing with a Muslim farmer for the best allocation of resources was unlikely. But today, the necessity of considering the existence of alternative paradigms of property rights becomes inescapable as the rise of Islamic finance shows. In which way, then, does the DNA-variance between Western and Islamic property rights affect regulation while inserting Islamic finance in a conventional-based market?

The matter has to be discussed considering the memetic core of Western and Islamic property rights: on the point, while in the Western tradition, property rights are basically conceived as jural inter-personal relations aimed at an *equal division* in social economic justice, in the Islamic universe, in contrast, they belong to a social reality shaped around an *equal sharing* of economic resources. Both the conceptions can be seen as a result of a fabric that history, ethics, tradition, society, language and religion have anthropologically threaded in a culturally based conception of economic justice.

In the Western world, the first formalization of property rights probably dates back to the ancient Roman civilization, where the basic notion of asserting possession (*hanc rem meam esse aio*: 'the thing is mine') was framed in terms of *dominium* and later *proprietas* (ownership), as expression of the '*suum cuique tribuere*' ('giving to each his own').⁵ The conception of the human being as 'centre' of attribution of rights and responsibilities of Roman anthropology was later perpetuated (while deeply transformed) by Christian thought,⁶ reinforced in the Renaissance and rationalized during the Enlightenment, fostering a self-feeding conviction in the autonomy of the human will in sovereignly defining the best allocation of resources (Ranouil, 1980). Accordingly, the individual, at the same time source and beholder of any right, has become in the Western thought the protagonist of any jural inter-personal relation,⁷ as well as the centre of attribution of economic resources, conceived as 'portions' of justice (*suum cuique tribuere*) to be achieved by fair competitiveness in the marketplace. In this conceptual framework, consequently, competition in the *division* of economic resources has become in

Western capitalism the right path to assure human freedom, wealth and independence.

On the contrary, in the Islamic world the assumption of the centrality of God as the only Creator has directed the basic notion of property rights towards a conceptual framework focused not on dividing separate portions of economic justice, but on participating in the unique divine justice (*'adl*) by *sharing* economic resources. Accordingly, jural inter-personal relations have been framed through the lenses of a human agency towards God, witnessing the conception of life as God's vice-regency on Earth (Kamali, 1993). Being God the only Creator and Owner of everything in the universe, His order (*hukm*) guarantees per se the justice of any property right (*haqq*), which is not the 'right' of a person against the 'right' of another person (as in the Western tradition), but the 'right' of a person with the corresponding 'obligation' of another person, linked together in a constant unity (*tawhid*). Islamic economics has accordingly developed from the 1970s through the certainty that any act, 'material and spiritual, has to be in accordance with what the Lord has ordered' (Uthman, 1998, p. 84; Chapra, 2001). In Islamic law, the prohibitions of *riba*, *gharar* and *maysir*, which may appear from an external eye simple moral corrections to Western economic thought, are, on the contrary, logical consequences of an autonomous rationality interested not in the contents of the pans (as 'portions' of justice), but on maintaining the central balancing pivot of the scale, 'sharing' divine justice (Smirnov, 1996). This gives birth to an alternative conceptualization of capitalism, recognizing the freedom of men only within the right path given by God, that is, the *Shari'ah* (Çizakça, 2011).

This very brief comparative outline does not pretend to be a comprehensive investigation: its fundamental aim is simply to underline how an unjustified assumption on the universality of Western property rights may prevent appropriate understanding of Islamic finance, and consequently hamper its efficient integration in the conventional market.

It should be noted that a plural theory of property rights implicitly attributes ethical and religious DNA components not only to Islamic finance but also to its Western counterpart, in reflecting alternative conceptions of economic justice(s) fostered by anthropological, cultural and historical factors. Of course, the Western rancher may be less keen on admitting the spiritual roots of his secular enterprise (that is, the incidence of Christian thought in shaping Western capitalism); at the same time, depriving Islamic finance of its exclusive moral status may risk displeasing the Muslim farmer. But a plural theory of property rights will certainly lead the two neighbours to a better mutual understanding, thus improving overall land use by efficient resource allocation.

ABOUT THIS BOOK: PLURALISM, ISLAMIC FINANCE AND EUROPE

A plural theory of property rights constitutes the background for this book in investigating Islamic finance in Europe according to a multi- and inter-disciplinary approach. Embracing a conceptual frame of financial pluralism, this book is divided into three parts.

Part I ('Pluralism and Islamic finance: conceptual tools') provides primary instruments for managing Islamic finance in the Babel of global times. In Chapter 2, Werner Menski argues that the pluralistic nature of Islamic finance requires an appropriate 'kite flying methodology', in order to take into serious consideration religion and culture when dealing with legal and financial policy-making. Adopting Menski's kite methodology, in Chapter 3 I describe the interdependent truths involved in the complex fabric of Islamic finance. In the light of the various spiritual and secular factors interlinked in this fabric, I summarize the Islamic theory of property rights in three fundamental rationales: (1) the centrality of the object in the transaction as something 'real' to be traded; (2) the fundamental need for an equilibrium in the exchange; and (3) asset-backed risk and investment risk-sharing as primary risk management strategies.

Part II ('Islamic finance, economic development and social integration') addresses the potential impact of Islamic finance, both from economic and social perspectives. In this regard, Mehmet Asutay focuses on Islamic moral economy as the foundation of Islamic finance (Chapter 4), while Salman Syed Ali shows how Islamic finance can contribute to fair economic development through strengthening financial stability (Chapter 5). With reference to international financial stability, Claudio Porzio and Maria Grazia Starita subsequently analyse the risk profile of Islamic banks through the classification of the typical risks associated with the main Islamic banking contracts (Chapter 6). The investigation then focuses on the economic and social fabric of Europe: Laurent Weill studies the potential consequences of the rise of Islamic finance in terms of financial stability, bank efficiency, bank competition and access to finance (Chapter 7), while Luca M. Visconti and Enzo M. Napolitano insert Islamic finance in the broader context of migrant banking in Europe (Chapter 8). In Chapter 9, Deborah Scolart concludes Part II by reorienting the topic of the relationship between Islam, economy and social integration with reference to women's empowerment in Arab countries and Europe.

Finally, Part III ('Islamic finance in Europe: accommodating pluralism in state legislations') focuses on European national policies towards Islamic finance (Khan and Porzio, 2010).

The role of the state as traditional law-maker has been certainly reduced

in Europe not only by the forces of globalization (Santos, 2002; Berman, 2005), but also by the transfer of sovereignty to the European Community in the 1950s and later to the European Union (EU) in 1992. Nevertheless, the old nation-state maintains a pre-eminent position in creating legal and regulatory frameworks concretely affecting the development of emerging markets like Islamic finance, being entitled to implement EU harmonized regulation according to national peculiarities, priorities and strategies. In particular, in the attempt to tame the global and plural nature of Islamic finance, the policies of European states have been shaped in the light of objectives of social integration and economic competitiveness, and more precisely along three concurrent variables: (1) the different presence of Muslim populations within national boundaries; (2) divergent national immigration and religion policies, affected by historical, cultural, social and political factors; and (3) different levels of internationalization of the national financial markets, especially in relation to the Gulf, Middle East and North Africa (MENA) and South Asia regions. These variables represent the conceptual background for interpreting European national policies towards Islamic finance, within the common umbrella of EU supranational regulation.

In Chapter 10, Gabriella Gimigliano preliminarily outlines EU regulation with regard to credit institutions, financial intermediaries and payment institutions, highlighting how the teleological approach of EU law can reconcile Islamic banking with its standards. The attention of the book then moves to national experiences. Firstly, Chapters 11 and 12 focus on two countries that have considerably invested in the internationalization of the national financial system, namely the United Kingdom (Chapter 11 by Jonathan Ercanbrack) and Luxembourg (Chapter 12 by Eleanor de Rosmorduc and Florence Stainier). Ibrahim-Zeyyad Cekici examines the emergence of Islamic finance in France as a means of social integration and economic development through the lenses of the principle of *laïcité* in Chapter 13. In Chapter 14, Azadeh Farhoush and Michael Mahlkecht investigate Islamic finance in Germany, suggesting further improvements in the national tax, legal and regulatory frameworks. Finally in this part, Mehmet Asutay describes in Chapter 15 the regulation of Islamic banking in Turkey, as well as current trends, prospects and political economy issues. Not only is the case of Turkey interesting as a Muslim country with the status of candidate member to the EU, but also for the peculiar strategy by the local political will of 'dissimulating' Islamic banking in the form of 'participation banks'.

In the conclusions (Chapter 16), the contents of the volume are summarized and financial pluralism is suggested both as a descriptive tool for interpreting the current evolution of the international financial market, as

well as a methodological tool for managing economic development and social integration in a global open society.

NOTES

1. According to Dawkins (1976), the spread of cultural phenomena ('meme' is a unit of human cultural evolution analogous to the gene, suggesting that the selfish replication of genes may similarly model the replication of memes in human culture) can be interpreted in the light of Darwinian evolutionary principles, through processes of variation, mutation, competition and inheritance.
2. A clear expression of the selfish meme: the 'civilized' law to be spread was clearly the Western one.
3. Anyway, the relation between legal and economic conceptions of property rights is not unquestioned: in fact, 'economists sometimes define property "rights" in ways that diverge significantly from standard legal conceptions': consequently, 'those divergent definitions can bias economic analyses and create the potential for misunderstanding' (Cole and Grossman, 2002, p. 317).
4. The Coase theorem (1960) describes the economic efficiency in the allocation of resources in the presence of externalities. Its contents can be summarized as follows: if trade in externalities is possible and there are no transaction costs, bargaining will lead to an efficient outcome regardless of the initial allocation; in practice, inevitable obstacles to bargaining, like poorly defined property rights, prevents efficiency. This theorem, along with his studies on the nature of the firm (also emphasizing the relevance of transaction costs) earned Coase the Nobel Prize in 1991.
5. In a famous maxim, the Roman jurist Ulpian defines the fundamental precepts of law as: '*honeste vivere, alterum non laedere, suum cuique tribuere*' ('to live honourably, to harm no one, to give to each his own': *Digesta* 1.1.10).
6. Obviously, the complex interrelations between legal and anthropological dimensions in the ancient Roman civilization, and later in Christianity, cannot be explored in the text. The reference to the principle of *suum cuique tribuere* is simply functional to outline an idea of economic justice based on a reciprocally recognized position of autonomous 'centres' of rights and responsibilities. For some insights on the ideas of freedom and justice in Roman times, and their later influence on the Christian thought, see Meslin (1978, in particular, ch. 10). I want to thank Dr Anna Angelini and Dr Doralice Fabiano for their precious advice on ancient Roman anthropology.
7. For a classical relational definition of property rights, see Hohfeld (1913, 1917) and Demsetz (1967).

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Islamic finance in europe. By Filippo di Mauro. 1. NOTE: This Occasional Paper should not be reported as representing the views of the European Central Bank (ECB). The views expressed are those of the authors and do not necessarily reflect those of the ECB. This paper can be downloaded without charge from <http://www.ecb.europa.eu>, <http://www.ifsb.com> or from the Social Science Research Network electronic library at http://ssrn.com/abstract_id=2251204. Introduction. 1 islamic finance " principles and characteristics (angela DI maria). 1.1 Denition and sources 1.2 Why "Islamic" nance? 1.3 The main requirements 1.4 The main nancial instruments. The Catholic Pope in Europe during the middle age become dictator due to the teachings of Thomas Aquinas that natural law is the law of God to the people and that the pope was the representative of God on earth to equally enforce them on the subjects and the kings. At the late of the Feudalism stage, Locke, Montesque and others taught that person is created free, equal and independent by taking the concept of Natural law as the individual.