Chapter 19

The Ancient Euro-Mediterranean Aversion for Usury

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One of the most specific characteristics of Islamic law in economic matters is considered to be the prohibition of interest in financial transactions (*riba*), based on Qur'anic precepts.[1] In fact, most organized societies worldwide have displayed in their legal texts some kind of aversion for usury or at least an attitude calling for its careful regulation.[2]

Everybody can see that excessive imposition of interest on loans can lead to disastrous economic consequences for debtors—including sovereign states, which are required in some cases to pay interest every year on their foreign debt in amounts comparable to their gross domestic product, thus severely affecting their chances of economic development.[3]

The use—or abuse—of lending and financial mechanisms may lead not only to a general increase of the abstract figures of an economy, including gross domestic product, but also to a wide divide between those in control of the financial mechanisms and the mass of citizen—debtors—the former becoming richer and richer, controlling lives and misfortunes of a mass getting poorer and poorer—with a number of resulting social and political issues.

The three legal traditions related to the three major monotheist religions are all based on this wisdom and on the prohibition of those mechanisms allowing money to produce money by itself without association with any apparent human activity. Objectively, these three traditions have rules against the enslavement of men to men by economic means. Understanding how philosophers and lawyers had such a clear view of the distortions of the twentieth century so many centuries or millennia before they became evident on a global scale may be difficult (unless it is explained by taking into account, of course, the divine essence of the sources).

Islamic finance has been booming in recent years, with trillions of dollars of resources managed annually; it is producing a panoply of new financial schemes and facilities designed and operated by financial institutions in the East, reproducing Western financial operations through acceptable Islamic legal mechanisms. As has been observed, this approach in current global Islamic finance amounts to paying formal respect to the Shari'a rule while actually making interest-based finance possible in an Islamic context,[4] thus disregarding the authentic spirit of Islamic law and the underlying substantial economic vision—of which the prohibition of *riba* is just a fragment.[5]

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1 Examples include the following: "Allah has permitted trading and forbidden riba" (Qur'an 2:275); "O you who believe! Do not devour *riba* doubled and multiplied" (Qur'an 3:130).

2 See, for example, the Hindu legal tradition based on Vedic texts in Jha (1930: 133–45), where the relevant classical Vedic sources are analyzed in detail. For a general overview, see Visser and McIntosh (1998). In Chinese dynastic legal codes as well, a general regulatory frame for interest rates on loans is identifiable through the criminal sanctions imposed for charging excessive interest. See, for example, *lü* 149 of the Great Qing Code, establishing a cap on monthly interest rates and providing that the total amount of interest paid may not exceed the principal, irrespective of the time passed.

3 The phenomenon is well known, and the literature on it is vast. Suffice it to mention here the presence of a significant number of documents issued by the United Nations General Assembly on the subject of external debt sustainability and the economic development of indebted countries. Among the more recent, see United Nations General Assembly (2013), which specifically mentions at paragraphs 13–18 of the draft resolution titled "External debt sustainability and development" the need for public and private creditors to consider debt management and debt relief initiatives in favor of overindebted countries to make their debt service sustainable and their economic development possible.

4 This observation is, for example, the main line of El-Gamal (2006).

5 Ibid., especially in the conclusions at 190–91.

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Of course, usury has been a controversial and sensitive issue in Western cultures as well, across space and time, and a significant legal issue for most important Euro-Mediterranean societies for a very long time—since the days when society, religion, and law were much more intertwined than they are now in Western societies. Western legal traditions also feature, historically at least, a degree of aversion toward usury in their social and economic visions.

The contraposition between Western economic culture and laws, on one side, and Islamic ones on the other side, as belonging to two different and segregated worlds—the former characterized by the preeminence of financial economy and liberal, individualist thought; the latter by Islamic, communitarian precepts of social justice and "real" economy—is far too simple and certainly unsatisfactory. Moreover, that narrative may contribute to the consolidation of stereotypes, mutual ignorance, distrust, and divides—and ultimately affect East-West cooperation.

The Aversion to Usury: A Euro-Mediterranean Archetype

The present-day word *interest* is a general one, designating at least two different concepts of patrimonial increase on capital related to the passing of time: one is that of an acceptable compensation for the use of such capital; the other is that of *usury*—that is, an unjustified and thus forbidden increase.[6]

In different times and places, however, this distinction has not necessarily been made. Interest transactions were common practice in pre-Islamic Arabia, as can reasonably be inferred from the fact that the Qur'an and several hadiths in the Sunna prohibited it.[7] In the Middle Ages, banking activities in the Arab world were conducted by Christians and Jews, while the Islamic prohibition of the *riba* was observed by Muslims. Islamic law is rigid on this principle, which under the name of *riba* seems to encompass any type of remuneration for the use of capital, not just an excessive one.[8]

On its face, Islamic law would have great difficulty in overcoming such a clear prohibition because of the well-known operational limits of *ijtihad*, which cannot be used to reach a result contradicting rules established in the Qur'an and the Sunna (see, for example, Doi 1984: 78–79).

The prohibition of *riba* is not a specific feature of just the Islamic tradition, however. Similar precepts can be found in the Jewish sacred texts, such as "Thou shall not lend money for interest to your brother,"[9] effectively prohibiting the practice of charging interest on loans among Jews.

Canon law primary sources also display a marked aversion for usury, both in the Holy Books[10] and in specific normative acts of the Roman Catholic Church since its very early days: the limitation on charging interest on loans—initially limited to the clergy and capped at 1 percent per month at the First Council of Nicaea in 325—was later substituted by a total ban for both clerics and laity. The Third Lateran Council decreed in 1179 that persons who accepted interest on loans could not receive the sacraments or a Christian burial; Pope Clement V declared the belief in the right to impose usury as amounting to heresy in 1314 and abolished all secular legislation that allowed it. At the Council of Vienna in 1314, governments enacting laws enforcing usury were excommunicated. Pope Sixtus V condemned the practice of usury as "detestable to God

6 "When money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use, the increase is called interest by those who think it lawful, and usury by those who do not" (Blackstone 1915: 1, 336).

7 See, for example, the fragments cited in note 1, and the hadiths, all classified as *Sahih*: "Allah curses the one who accepts *riba*, the giver of it, the two witnesses of it, and the one who writes it"; "One dirham of *riba* that a man devours, while knowing it is *riba*, is more severe (in crime) than 36 acts of fornication (or adultery)"; "*Riba* has 73 doors. The least one (in sin) is as that of a man who sleeps with his mother. And the worst form of *riba* is harming the honor of a Muslim man."

8 See note 1. See also El-Gamal (2006: 190–91).

9 Deut. 23:20–21. Several other references to the prohibition of usury are found in the Old Testament: Ex. 22:24; Lev. 25:36 ff.; Deut. 25:6, 28:12, and 28:44; Neh. 5:7; Ps. 15:5 and 55:12; Prov. 28:8; Isa. 29:5; Jer. 9:5; Ezek. 18:8, 18:12–13, 18:17, and 22:12.

10 References to this prohibition are also found in the New Testament: for example, Mt. 5:42; Lk. 6:35 and 19:23.

and man, damned by the sacred canons and contrary to Christian charity" (Moehlman 1934: 6–7; see also Cremona 2001: 41–42; Noonan 1993).

An element of caution against usury was also present in Roman law, to which canon law is heavily indebted, for which the *mutuum* (loan) was, originally and essentially, an interest-free transaction, unless a special additional stipulation, *pactum de usura*, was clearly formalized.[11]

Canon scholars in the Middle Ages—especially St. Thomas Aquinas in the twelfth century and then Spanish and Portuguese Jesuits in the fifteenth and sixteenth centuries—developed legal doctrines from these prohibitions,[12] including elements of *ius naturale* and of philosophical visions derived from the works of Cicero, Cato, and especially Aristotle, according to whom it is against nature to have money produce money by itself.[13]

Those values were widely shared in the culture and society of Europe in the Middle Ages, just as they were in the Islamic Middle East. Dante considered usury as one of the three violent sins against God and nature (with a clear link of continuity with Aristotle and Aquinas), together with blasphemy and sodomy, and consequently located the three groups of sinners against nature in the same part of his *Inferno*.[14]

In Dante's vision, art and craft are the creation of humanity, just as nature and humankind were the creation of God, in a three-level continuum reflecting the essence of the natural universe—including the fruits of humankind's work—protected with spiritual sanctions against violators. Punishing usury was necessary to protect human work, just as punishing sodomy was intended to sanction the laws of nature and just as the sin of blasphemy sanctioned the recognition of the role of God.[15]

Dante is also a bright example of the "global" reach of elite intellectuals in the Euro-Mediterranean cultural medium of the Middle Ages. He was a devout Christian and a man of his times; thus, he was loyal to his religion and opposed Islam fiercely, both politically and religiously. However, he certainly had access to Islamic culture and appreciated it.[16] Important Muslim characters are included with appreciation and respect in the *Divine Comedy*, such as the great twelfth-century ruler of Egypt and Syria, Saladin (Salah al-Din Yusuf Ibn Ayyub),[17] and the philosophers Avicenna (Ibn Sina) and Averroes (Ibn Rashid)—with an express mention of the latter's commentary to Aristotle[18]—both located with Aristotle and other great Greek and Latin philosophers, poets, and scientists in a beautiful castle in Limbo, symbolizing human wisdom, where great non-Christian spirits are supposed to spend eternity.[19]

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11 Roman sources establish the need of a specific agreement on payment of interest in addition to the *mutuum*; in *Justinian's Digest*, see D. XLVI, 2.27; D. XLV, 1,126.2; D. XLIV, 4.2.3; D. XII, 1.30. See also Talamanca (1999).

12 For a review of these doctrines, see Cremona (2001).

13 *Nicomachean Ethics* V, c. 5, l.9; *Politics* I, c. 3, l.7.

14 *Inferno*, XI, 46–51.

15 *Inferno*, XI, 94–111. Those three categories of sinners are located in the seventh circle (violent sinners), third ring (violence against God). Their fate is described in Canto XIV for sinners of blasphemy, those directly violent against God; in Cantos XV and XVI for sodomites, sinners against nature, daughter of God; and in Canto XVII for usurers, sinners against human art and craft—human art being the child of humankind and thus nephew of God.

16 Certainly Dante's mentor Brunetto Latini had spent some years at the Spanish court of Alphonse X of Castille, an enlightened king quite familiar with Arabic language and culture. Dante himself seems to have had access to Islamic works, such as the *Kitab al-Mi'raj*, or *Liber scalae Machometi*. This ancient book, the original Arabic version of which has been lost, narrates the ascension of the Prophet Muhammad to heaven and his visit to hell during a night journey from Mecca to Jerusalem. It was first translated into Spanish by order of Alphonse X of Castille and then into Latin and French. The book, to an extent that is still debated today, may have influenced Dante's *Divine Comedy*. See, for example, Asín Palacios (1919); Cerulli (1949; 1971); Wünderli (1965). According to the traditionalist metaphysician René Guénon, Dante's contact with the Islamic world and its culture also included a deep exposure to Sufism. See Guénon (1925); for an English translation, see Guénon (2004).

17 *Inferno*, IV, 129.

18 *Inferno*, IV, 143–44.

19 *Inferno*, IV, 130–51: Dante found there, together with Avicenna and Averroes, Aristotle, Plato, Socrates, Seneca, Cicero, and others.

Since long before the Dark and Middle Ages, around the shores of the Mediterranean, a society more closely interconnected than many would think possible today existed. Mercantile activities; political events; and the circulation of people, religions, art, and ideas had taken place forever in that complex multicultural environment. Cultural cross-fertilization was common; circulating social values and legal elements were shared across the basin and across political, cultural, and religious divides.[20]

The aversion for usury is a deep cultural archetype and a shared social and legal value belonging to all Euro-Mediterranean societies since very ancient times.

Some three centuries after Dante's *Divine Comedy*, another clear literary example of societal aversion for usury came from England. Shakespeare's play *The Merchant of Venice* depicted how the law, invoked to enforce a usurious contract, was negotiated and ultimately circumvented to the benefit of the debtor, with deep scorn, of course, for the usurer.

Operational Solutions

Credit is a necessary tool for economic life and development, and capital owners are very seldom inclined to lend capital for free. In addition, a just, equitable economic development is recognized as being good for the material and spiritual progress of humankind in all three monotheist religions. Islamic scholars have developed solutions for this seeming dilemma over the centuries, based on the idea that lending money could produce a licit profit or compensation whenever the lender participated in the risk of the venture of the debtor or bore some costs in relation to it (for example, salaries for the lender's employees or administrative costs). The well-known Islamic mechanism of *musharakah, murabaha*, *taqaful*, *mudarabah*—the last being at the origins of medieval *commenda* (Çizakça 1996),[21] which is still a feature of commercial law in civil law jurisdictions[22]—and others represent Shari'a-compliant forms of equity-based, risk-sharing economic cooperation between the creditor and the debtor.[23] Secular laws in modern Muslim states reflect and enforce those legal principles, sometimes providing for a separate Islamic banking financial sector along with a conventional banking industry[24] and in other cases enforcing Islamic principles in a most general way.[25]

Canon law also developed doctrines substantially similar to Islamic ones. These doctrines are based on the acceptability of compensation for a service actually given or for a cost or risk borne by the lender (Cremona 2001). Eventually, the area of licit compensation was extended to include lost profits for an alternative use of the lent capital that would have been possible in the idea of cost.[26] After an initial allocation of the burden

20 Specifically on the circulation of legal elements, Glenn (2004) reports how this happened, pivoting around the Muslim kingdoms of southern Spain and Sicily of the twelfth century to transfer significant elements of the Islamic legal tradition into the then-newborn English common law. See Glenn (2004: 226, 227, 232, 236, 237, 254, 255) and the literature cited therein.

21 . A reference to the diffusion of *commenda* in Europe, including England, is in Glenn (2004: 254–55).

22 See, for example, the Italian *società in accomandita semplice*, articles 2313–24 of the Civil Code.

23 Details on the basic instruments mentioned in this text may be found in any of the many available books on Islamic law, Islamic economics, and Islamic finance. See, for example, El-Ashker and Wilson (2006); El-Gamal (2006); Saw and Wang (2008); and Taqi Usmani (2002).

24 For example, Egypt in the 1960s, Kuwait and Dubai in the 1970s, for Malaysia and Indonesia in the 1980s had such laws.

25 Within the Shi'a tradition, the Law on Banking of the Islamic Republic of Iran of 1983—named in the English translation appearing on the website of the Central Bank of the Islamic Republic of Iran (http://www.cbi.ir [accessed: February 10, 2014]) "Law for Usury (Interest) Free Banking"—establishes the prohibition of usury. At the same time, it permits forms of remuneration for capital deposited with banks in the form of bonuses for depositors (article 5) and forms of remuneration for capital invested by banks in the various forms of cooperative economic partnership with the economic sector through precalculated ratios of profit within maximum and minimum margins established by the government (article 20). A similar approach, based on the distinction between usurious interests and a moderate, acceptable compensation for the use of capital, is enforced in several recent laws in the Gulf region.

26 The compensation for lost profits should correspond to real lost profits. Thus, for example, it was acceptable to charge interest only if the merchant, in the case of a sale by installments, could have otherwise

of proof on the lender to indicate the actual lost profit, the system evolved toward the acceptability of a reasonably precalculated amount (Cremona 2001: 125–29).

The Catholic Church itself eventually sponsored the *Mons pietatis*, pawn-based credit shops run by the Church—*ad maiora mala vitanda*—allowing them to take fees to permit the institution to work and be viable and later also to have some excess money at the end of the year. This excess money was intended to cover the risk of not having ends met and of eventually perishing as an institution (Cremona 2001: 133–56).

The doctrines and legal techniques in canon law reflected, like the Islamic ones, a particular vision of the economic relations within a given community, characterized by a social dimension and by a quest for social justice in economic matters—to which the practice of charging interest (at least beyond what is a fair compensation for a substantial service given) was considered detrimental. The doctrines tried to find an acceptable and functional operational balance in the tension between the needs of the economy and the need to enforce those moral and social values.

From "Brother versus Other," to "Brothers," to "Others"

On the scope of application of the prohibition of interest, it is interesting to note how in Jewish law the prohibition was limited to intracommunity transactions rather than being a general rule: "thou shall not lend money for interest to your brother."[27] This rule is clearly a defensive one, meant to reinforce community bonds and implying an "us versus them" idea and the idea that an act that is inherently evil act can be performed against non-Jews.

Islamic law, too, permits the faithful to commit acts that would otherwise be sinful when in a state of extreme necessity or of need.[28] Included in this idea of need is the necessity to avoid the weakening—and thus pursue the expansion—of Islam, thereby also legitimating *haram* transactions when conducted in a non-Muslim context and against non-Muslims:

> According to Shari'a, Muslims are not obliged to establish the civil, financial, and political status of Shari'a in non-Muslim countries, as these lie beyond their capabilities. Allah (swt) does not require people to do things that are beyond their capacity. Prohibiting usury is a matter that concerns the host non-Muslim countries, and which Muslim communities can do nothing about it. It has many things to do with the socioeconomic philosophies of the host countries. However, in these countries, what is required of the Muslim is to establish the Shari'a's rulings in matters that concern him in person, such as the rules that govern acts of worship, food, drinks and clothes, marriage, divorce, inheritance, and so on. If Muslims choose not to deal with these invalid contracts, including contracts involving usury in non-Muslim countries, this would weaken them financially. Islam is, however, supposed to strengthen Muslims not weaken them, increase rather than diminish them, benefit and not harm them. Some Salafi scholars claimed that Muslims could inherit non-Muslims as this goes in line with the hadith which says: "Islam increases and does not decrease," i.e., increases Muslims in power, wealth, etc. Similar in content is the other hadith which says: "Islam is superior and none can excel it." Therefore, if Muslims are not to trade with these invalid contracts and transactions (where extreme necessity and urgent need is involved), then they will end up paying what is required from them (in transactions that involve usury) without receiving any benefit in return. They will be losers as they will be obliged to honor these transactions, and in return they will get nothing. This way Muslims will be financially deprived and suppressed. Islam never punishes Muslims for their Islam nor abandons them in countries other than their own Muslim countries. Islam never means to let unbelievers abuse Muslims financially or otherwise, at

sold the goods to a different purchaser able to pay the full price immediately. In other cases, there was no lost profit; selling by installments could, in fact, be an advantage to the merchant, because in many cases it could make possible a sale that would not have taken place otherwise. See Cremona (2001: 91–130).

27 Deut. 23:20–21

28 "And He has not laid upon you in religion any hardship" (Qur'an 22:78); "Allah does not want to place you in difficulty" (Qur'an 5:6).

> a time where it prohibits them from getting any benefit in return.… It is permissible for Muslims to trade with usury and other invalid contracts in countries other than Islamic countries. This opinion is held by a number of renowned scholars such [as] Abu-Hanifah, his colleague Muhammad As-Shaybani, Sufayn At-Thawri, Ibrahim An-Nakha'i, and according to one opinion of Ahmad Ibn Hanbal, which was declared as true by Ibn Taymiah, according to some Hanbalite sources. It is also the declared opinion of the Hanafi school of jurisprudence.[29]

Jewish law distinguished *brother* from *other*. So does Islamic law. In addition, St. Ambrose (339–397), bishop of Milan, whose works influenced medieval Christian thinking, considered lending to a stranger (that is, to a non-Christian and living under the rule of a law other than civil law) a legitimate hostile act against an enemy (Banterle 1988: 105–106).[30]

Later in the Middle Ages, Christian Catholic universalistic doctrines affirmed the principle that every human being is a *brother*. The initially religious and ethnically based prohibition of *usura* in canon law was expanded to a general principle, applicable for anyone. St. Thomas Aquinas (1225–1274) remarked about the Deuteronomic double standard: "The Jews were forbidden to take usury from their brethren, i.e., from other Jews. By this we are given to understand that to take usury from another man is simply evil, because we ought to treat every man as our neighbor and brother."[31]

Northern European political events and new religious doctrines at the beginning of modern times, after the Lutheran reform and then that of Calvin, supported different ethics of economy and work (Berman 2003; Weber 1905). As individualistic religious doctrines and social philosophies developed in central and northern Europe, everybody became *other*.[32]

The Western Deviation

At the inception of the modern era, national states were emerging in Europe, consolidating their power and projecting it overseas, where new worlds had been discovered to be explored and exploited. Scientific and technological advances were reached; the economy started growing at an unprecedented pace; and new economic models were implemented, including large-scale finance. Liberal economic thought developed on the basis of Locke's philosophy[33] and grew as a consequence of political revolutionary events in England, France, and the United States in the seventeenth and eighteenth centuries.

In the new, modern world, buying capital in the market for a price became acceptable, along with the idea that capital was a commodity—different from the Aristotelian idea of money as just a measuring unit for the value of "real" things.

As centuries- or millennia-old archetypes and prohibitions were challenged by the forces of modern economy, the law followed suit. The distinction between legitimate *interest* and illegal *usury* was legally formalized in 1545, as England's King Henry VIII passed an "Act Against Usurie" (repealed in 1551 and reenacted in 1571), permitting loans with interest up to 10 percent, while a heated debate preceded and followed the enactment.[34]

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29 Quoted from a recent *fatwa* of the European Council for Fatwa and Research—a private foundation presided over by the influential Islamic scholar Yusuf al-Quaradawi—aiming at disseminating traditional Sunni Islamic values in the West (http://www.e-cfr.org; as of January 20, 2014, the English version of this website seems to be no longer available). The *fatwa* on "Permissibility of conventional mortgage under necessity," dated January 16, 2014, is available at http://www.globalwebpost.com/farooqm/study_res/i_econ_fin/ecfr-fatwa_mortgage.htm [accessed: February 10, 2014].

30 In the same period, St. Jerome, in contrast with Ambrose, was an early theorist of the universal reach of the prohibition (see *Hieronymi stridonienses epistolae selectae*, letter 58).

31 St. Thomas Aquinas, *Summa Theologica*, question 78, article 1, *ad secundum*.

32 This change of approach over the centuries and its rationalization as a paradigm shift, from "tribal brotherhood" to "universal brotherhood" to "universal otherhood," so to speak, has been brilliantly described by Nelson (1949).

33 Locke (1690) is probably the cornerstone of Western liberal philosophy.

34 For details, see Hawkes (2010).

In the following centuries, modern European nation-states centralized and monopolized the issuing of money and made money more abstract: first, by introducing *notes*, paper money that circulated and represented a value rather than having a value, as had gold or silver coins or bullion; then, further favoring the abstraction of money by authorizing banks and financial institutions to multiply it by mere arithmetic—permitting them to keep only fractional backing for deposits held, thereby multiplying the amounts of circulating wealth. Money in the form of these abstract numbers was no longer a yardstick to measure the value of other things; it represented credits and debts that themselves became commodities. As this commodity was exchanged and lent for a price, according to the law of supply and demand in financial markets, it produced even more of those abstract numbers (Macleod 1894).[35]

A significant and increasing share of the real economy thus came to be operationally related to the financial industry, bound to pay for its services, and eventually, in fact, enslaved to it—as is demonstrated by the world economic crisis that originated in 2007 from the explosion of purely financial speculative bubbles. Since the beginning of the modern era, Western economic and legal thought has deviated from an original vision that had been in line with the prior Euro-Mediterranean tradition of aversion to usury, common to both European and Islamic cultures and legal traditions, toward a more individualistic and debt-based vision of the economy.

Other Western Voices

Modern and contemporary history saw the expansion of Western political and economic power worldwide, notably that of the United Kingdom and then of the United States. Their global success was synergetic with the expansive enforcement of liberalist economic policies, of a more or less unrestricted financial economy based on the credit-debt concept of money, and of the supporting concept of the rule of law promoted within the frame of the common law legal tradition.[36]

In several Western countries, contemporary legislation sanctions usury, establishing caps to interest rates and sanctioning them with invalidity and in some cases imposing criminal sanctions.[37] These civil and criminal legal regimes, however, seldom interfere with current practices of banks and financial institutions, which are subject to very little policy and regulatory supervision with respect to the issue of how much they can charge for their services, probably as a result of both liberal ideas on the sanctity of the "invisible hand" and the actual capacity of the banking industry to significantly affect regulators' decisions through a number of official and unofficial channels.[38]

However, more traditional visions of the economy have survived (if in the minority) the waves of new economic ideas sweeping modern and contemporary Western societies. They supported an economic vision more related to the values of the "real" economy, contrasting to some extent with the idea of liberal interest charging and the features of contemporary, mostly financial Western economy. Adam Smith (1776: book 2, chapter 4) himself has advocated the imposition of a legal ceiling on the charging of interest in financial transactions, which he explained would help prevent financial resources from being apprehended by prodigals and hazardous speculators rather than by those willing to invest more solidly in socially beneficial investments.

35 See also Graeber (2011) and Mitchell-Innes (1913, 1914). Both of Mitchell-Innes's articles are reprinted in Wray (2004).

36 See Mattei and Nader (2008), who analyze how the synergetic effect of Western financial economy and common law concepts of rule of law eventually led to the economic failure of many developing countries, mostly to the advantage of Western financial circles and institutions.

37 In the Italian Civil Code, article 1815, the sanction for usurious interest rates is the voiding of the relevant agreement, with the consequence that only the principal will be repaid. The applicable interest rate is fixed periodically by the government according to statutory provisions (Law 108 of 1996 and Law 24 of 2001). The Italian law, moreover, sanctions usurious transactions with criminal sanctions in article 644 of the Penal Code.

38 In Italy, for instance, it was considered a very unusual and significant event when the Corte di Cassazione ruled (in sentence 2593 of February 20, 2003) against the practice of applying regularly and frequently compounded interest—previously normally charged by Italian banks despite a specific prohibition in article 1283 of the Civil Code—on loans being repaid with delay and on negative balances in current accounts.

This explanation was criticized in 1787 as being inconclusive by Bentham (1818), who advocated a laissez-faire approach toward the charging of interest in the financial markets.[39] Smith's arguments against usury may perhaps not seem to be the best available; however—or precisely because of that weakness—they reveal the existence of a deep, hidden, nonverbalized cultural norm, or cryptotype (Sacco 1991: 384–85), against usury.

Even in the twentieth century some nonmainstream voices advocated the abandoning of the credit- and debt-based idea of money in favor of an equity-based one, the return to the gold standard and to the yardstick function of money, and the restriction or elimination altogether of the practice of fractional reserve for bank deposits. Among these thinkers were economists such as Milton Friedman (1960), the anarch-libertarian Murray Rothbard (2004), and the economists of the Austrian school.[40]

Beyond the economists, voices such as that of *maudit* poet Ezra Pound (1937) strongly supported the same vision of usury and financial economy.[41] Recent global financial events certainly contributed to an increased aversion of the Western general public toward the purely financial economy, reflected in corresponding stances of politicians[42] and in some cases government action against speculative transactions.[43]

Global Islamic Finance and Its Hybridity

An initial wave of Islamic finance swept Muslim countries in the second half of the twentieth century, when mostly state-sponsored Islamic financial institutions and Islamic legal mechanisms have been at work on a commercial scale in some national markets to conjugate economic development with adherence to Islamic principles.

It is generally acknowledged that the phenomenon has not been very successful for a number of reasons, including the limited, local reach of the institutions involved (Saw and Wang 2008: 1–8); the legal insecurity related to the multitude of Shari'a schools and scholarly approaches (Venardos 2005: 93, 110–11); the aggregate instability of the industry, caused by the volatility of early Islamic banking accounting and supervisory-regulatory standards (Venardos 2005: 101–17); and the higher costs of Islamic financial services when compared to the instruments of Western finance, resulting in a lack of competitiveness in a not entirely Islamicized environment because of the higher complexity and costs of formalities and transfers of equity (including taxation) necessary to assemble equity-based financial transactions compared to the more straightforward Western substance of agreements simply featuring loans in exchange for payment of interest (El-Gamal 2006: 74–80; Venardos 2005: 99–100).

Toward the end of the twentieth century and at the beginning of the twenty-first, a second wave of Shari'a-compliant financial instruments became an important and growing part of global finance. This wave was probably the result of a changed world political-economic situation and a stronger perception of the Islamic identity in many Muslim regions, as well as the very aggressive stances adopted by some financial markets in Muslim countries to develop a global Islamic financial industry and to promote their products, most notably in

39 Later, Mill (1891) also opposed usury laws, which he considered to be government interference with market forces "grounded on erroneous theories," as per the title of chapter 10 of book 5 of his work.

40 A complete synthesis of the positions of the Austrian school is probably best represented by the works of Ludwig von Mises, of whom Rothbard had been a pupil; see, especially, von Mises (1949).

41 See, in particular, cantos 45 (titled "Against Usury,") canto 46, and canto 51 (which contains a reference to Dante) in Pound (1937).

42 Alan Greenspan (2000), former chairman of the US Federal Reserve, stated that "[the founders of] the Austrian School have reached far into the future from when most of them practiced and have had a profound and, in my judgment, probably an irreversible effect on how most mainstream economists think in this country." Other critical voices against the current mainstream economic and financial thought favoring a debt-based conception of money and fractional reserve banking can be found in a wiki page of the Ludwig von Mises Institute at http://wiki.mises.org/wiki/Criticism_of_fractional_reserve_banking [accessed: February 11, 2014].

43 For example, at the height of the world financial crisis, the governments of Belgium, Italy, and Spain repeatedly issued temporary orders suspending short-selling transactions in their respective national stock exchanges in 2011 and 2012.

the Gulf Cooperation Council countries (El-Gamal 2006; Saw and Wang 2008: 1–8) and in the Far East (see, for example, Saw and Wang 2008: 65–78; Venardos 2005: 144–60).

This trend produced an increased sophistication of Islamic financial products, which were more and more inclined toward mimicking Western products in their economic functionality (including bond issues, short-selling transactions, and even hedge funds), through complex financial algorithms featuring combinations of basic financial tools of the Islamic tradition such as the *mudarabah*, the *suquq*, *salam* transactions, *takaful*, *'ina*, and others (of which the current more complex schemes often keep the names to emphasize their being Shari'a based and Shari'a compliant).[44]

Clearly, a large issue exists here—on which I do not take any position—of assessing whether or not the global Islamic industry is actually enforcing substantial Islamic principles of economic cooperation, development, and social justice.

Several quarters in the Islamic world—though probably not in the mainstream—do criticize the current use in global Islamic finance of combinations of traditional names and legal mechanisms to vest conventional, substantially prohibited financial transactions with acceptable Islamic forms. They advocate a change of mentality that could allow an expansion of Islamic financial activities, consistent with the true spirit of Islam, in more socially useful areas (El-Gamal 2006: 190–91; Venardos 2005: 210–20), such as social lending or microcredit.[45]

Concluding Remarks: Two Stories That May Come Full Circle

First, to put the issue of usury as an "East versus West" issue is misleading. The historical and ideological divide is not a simple, vertical, geohistorical one between East and West. It is first and foremost a horizontal one between the two related but different visions of the "real" economy and financial economy. Historically, these two visions are present in both the East and the West, if in very different proportions, times of appearance, and orders of prevalence. The "financialist" vision originated in what I have labeled a Western deviation from an ancient and common Euro-Mediterranean conception of life and the economy.

Second, the different attitudes in Eastern and Western legal traditions, with their historical differences and divergences, may allow areas of possible convergence. Global finance has produced some economic and legal hybridity already, as the Islamic world demonstrated its capacity to absorb and operate global financial tools through Shari'a-compliant legal techniques—including some speculative operations such as *salam* transactions (short selling), which in some cases recently have been restricted by the governments of some Western countries to limit the negative effects of financial speculation.

A related qualitative and quantitative analysis could be carried out on the different apportionment of the two cultural, legal, and economic models present in the different mixtures identified. However, certainly the divergent developments of the past centuries have come full circle to some extent, producing a reencounter of East and West in the area of present-day global Islamic finance.

The resulting economic and legal environment may certainly be labeled as a hybrid, because substantial economic principles of the Western tradition have been mixed with formal schemes originating in the Islamic tradition. Global Islamic finance, which can be considered a very specific environment within the larger dominion of present-day *lex mercatoria*, can be a very fruitful field of investigation for comparative legal

44 See El-Gamal (2006), especially at 190–91. According to El-Gamal, the higher costs of Islamic schemes compared to the Western instruments that the Islamic schemes tend to imitate have progressively decreased because of the larger scale of transactions and the sophistication of the industry. The extant cost spread is often considered an acceptable price for the instruments' Shari'a compliance.

45 Muhammad Yunus, Nobel laureate in 2006 for his social credit activities in Bangladesh and worldwide, was initially opposed by the conservative Islamic establishment in his country, who considered his Grameen Bank microlending activities to be *haram* (Yunus 1999).

research—especially focused in recent years on the dynamics of legal pluralism,[46] legal transplants,[47] legal mixity,[48] and hybridity[49]—being located at a crux where different legal and economic ideas and religious, political, and societal values meet and interact.

Third, the legal discourse on social justice in the economy is suffering a bit more, comparatively, in current Western economy, law, and practice. This is because of the historical prevalence of a liberal, individualistic approach to life and the economy—and to a "commodity" concept of money and fractional backing for banking deposits—whereas in the Islamic world, religious and political factors have kept ultraliberal, ultraindividualist visions at a distance from the main economic and legal arena.

The social and economic vision behind the Islamic precepts and the corresponding vision also present in (a part of) the Western legal tradition still have to come full circle. To some extent, it still has to be acknowledged that they actually may. This lack of recognition may also be caused by a stereotyped narrative, popular in the West and objectively functional to an expansive strategy of the financial economy—purported as *the* Western model—depicting the aversion to interest as an idea belonging only to the Islamic tradition and distant from the Western one.

The lack of awareness about the historic similarities and possible convergence of the two traditions de facto produces a weakness for the principles of social justice in the economy, vis-à-vis the expansive strength of the ideology behind current global finance. The latter may be suffering a bit now because of the current world financial crisis, but it certainly did manage to produce hybrid legal and financial tools palatable to both worlds, thus introducing or consolidating features of Western financial economy in several Islamic jurisdictions. Time will tell whether this consolidation will amount to a cultural and economic invasion, to a controlled borrowing and absorption, or to a balanced mix of some sort.

Fourth, common principles based on the described ancient Euro-Mediterranean archetype and fundamental vision of life and the economy are at the basis both of Islamic and of Western (most notably Roman and civil) laws. These two streams of thought have existed parallel to each other—certainly with different fortunes in the East and the West—without interacting much so far. Beyond historic differences and divergences, a possibility still exists for this second story to come full circle, too.

Islamic law is scholarly based, like Roman and civil law, with which it shares a number of fundamental principles in the law of transactions (most notably, *favor debitoris*, good faith, and *synallagma*). Its developments, instead, are based on *qiyas*, a process resembling the common law process of analogy and distinguishing to develop the law. Dialogue and debate between Western and Islamic legal scholars and economists is possible—and crucial.

Researching and developing knowledge on the fundamental communality of principles may facilitate this other convergence, perhaps making this second story come full circle too, thus producing increased dialogue and legal tools that will lead to a more just and humane economic development in both worlds.

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46 On legal pluralism, see, for example, Chiba (1989); Griffiths (1986); Guadagni (1998); Merry (1988); Moore (1973); and Tamanaha (2008).

47 On legal transplants, see Watson (1974). Graziadei (2007) emphasized how the very core of comparative law is in the study of legal transplants. Also see Graziadei (2009). Volume 10 of *Theoretical Inquiries in Law*, in which this article is published, consists of 15 articles, all related to legal transplants.

48 On legal mixity, see Örücü (2008) and Palmer (2012).

49 On hybridity, see Castellucci (2008); Chiba (1989: 270–71); and Donlan in Chapter 2 of this book. The term *hybrid* had already been used by Zweigert and Kötz (1984) to indicate both civil law-common law mixes and Western and non-Western ones. The idea of hybridity is known to other social sciences as well. See, for example, Burke (2009); Clements et al. (2007: 50); and Stross (1999).

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