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Legal Pluralism, Property Rights and the Paradigm of Islamic Economics

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Abstract. This article discusses Islamic economics by applying a legal plural approach to property rights: more precisely, it argues that Islamic economics embodies a property theory that is alternative to the conventional one and that this property theory gives rise to a paradigm of economic justice that is unique to Islam. The reasoning proceeds as follows. (§ 1) After introducing its subject-matter, (§ 2) the article reviews the moral approach to Islamic economics, and (§ 3) challenges through legal pluralism the neutrality and universality of conventional property rights, as commonly assumed by law and economics literature. (§ 4) Subsequently, it identifies the uniqueness of Islamic property rights in the light of the distinctive conceptualization of legal, commutative and distributive justice that belongs to Islam. (§ 5) To conclude, the study highlights how the unique paradigm of Islamic economics can contribute to the promotion of a "plural market" in the global economy.

***Keywords*:** Islamic economics; Islamic finance; law and economics; legal pluralism; property rights; paradigm; plural market

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1. Introduction

"Property rights are too important to be left [*only*] to economists" (Deakin et al., 2015, p. 10).

By highlighting the constitutive role of law in market economy, legal scholars have recently started to challenge the classic approach to property rights[(1)] in law and economics literature, and in particular the tendency by economists to undervalue the legal meaning of concepts such as property, possession, ownership, contract, promise. For instance, although much economic analysis treats property as a relatively unproblematic concept (Arruñada 2012, p.

(1) "Property rights" can be seen as an attribute of any economic good and in this light the term describes any relation between people respecting things, either in property, contract and business law. The concept is also employed with regard to the theory of the firm and company governance. In law and economics literature, property rights correspond to socially-enforced mechanisms that define how economic resources are owned, used, managed or transferred. On the topic, see more detail in section 3 below.

24), from a legal perspective the notion of property rights is far from being uncomplicated and trouble-free. In fact, large debate continues to characterize the matter not only in the light of the divergent regulation of property rights in different legal systems, but also due to the persistent ambiguities over their notion(s) in the works by economists (on this vagueness see Cole and Grossman, 2002).

While this article employs the disputes over the concept of property rights as a starting point of reflection, it actually attempts at re-formulating the discussion from a rather specific perspective, namely that of legal pluralism(2).

To this objective, it takes Islamic economics (section 2) as an example of an economic theory that not only can foster in the practice of Islamic finance an ethical re-formulation of conventional capitalism, but can also be seen as an alternative paradigm(3) for economic development when a legal plural approach is coherently applied in the study of property rights (section 3).

Hence, the text openly challenges the assumption of the cultural neutrality of property rights that still dominates law and economics literature and is usually overlooked by legal institutionalists (Deakin et al., 2015)(4), where much socio and anthropological research is missing (an investigation that can be found, on the contrary, in Meinzen-Dick and Pradhan, 2002; Meinzen-Dick and Nkonya, 2007). In actual fact, both the economic analysis of law and the search for the constitutive role of law as a market institution perpetuate the parameters of a Western economic jurisprudence, rather than fostering the study of law in a global plural society. Accordingly, property rights as the very foundational tools of lego-economic analysis are rarely put on trial in the "totalitarian" paradigm of mainstream capitalism, where Western property rights are assumed as universal, with little concern over non-Western cultural recipients of development policies and the peculiar structure of their *own* property relations.

To rectify this approach, as previously mentioned, the article shows how the rationales of Islamic economics (as a non-Western model of development) can be understood as direct consequence of an *alternative* theory of legal, commutative and distributive justice in a market economy when a legal plural approach to property rights is upheld, as it postulates a *participation* in socio-economic justice that is achieved by *sharing* economic resources (rather than adopting criteria of *competition* and *division* as in conventional capitalism). It is precisely through their alternative rationales (and namely, (i) the primacy of real economy, (ii) the prevention of unjustified income (*ribā*), uncertainty (*gharar*) and speculation (*maysir*), and (iii) the focus on asset-backed and risk-sharing investment strategies) that Islamic property rights characterize Islamic economics as an alternative paradigm for market economy (section 4).

(2) In legal and sociological research, the notion of "legal pluralism" holds both a descriptive and normative dimension. From a descriptive perspective, it refers to the existence of multiple legal systems within a given society or geographical region (e.g. in former colonies, where indigenous law has been replaced by colonial law, but its practice is still in force at a community level). From a normative viewpoint, legal pluralist scholars, in dealing with situations of polycentric law and potential conflicts between overlapping legal systems, on the one side, work on tools of legal integration and harmonization; on the other side, by highlighting the cultural distinctiveness of each legal tradition in a given social reality, emphasize the need to consider "diversity in law" in order to reach more efficient and legitimate policy-making when law is put in practice. In the present article, both the descriptive and normative dimensions of legal pluralism are under consideration (see section 3); in particular, the diversity of Islamic property rights from conventional ones is remarked to conceptualize Islamic economics as a distinctive paradigm for market economy (section 4). With regard to the literature on legal pluralism, the bibliography today is enormous; as seminal works on the subject, the reader may refer to Griffiths (1986) and Merry (1988).

(3) The word "paradigm", from the Greek *paradeigma*, means "pattern, example". In science and philosophy, it refers to a set of concepts, standards and theories that are shared by a research community, and in this sense characterizes its distinctiveness from the others: in summary, it constitutes the philosophical and theoretical framework of that school/research community. In his influential book *The Structure of Scientific Revolutions* (1962), American philosopher Thomas Samuel Kuhn describes a "paradigm shift" as a fundamental change in the assumptions, concepts and practices within a scientific discipline (on the concept, see also here, section 2). This article argues that the "paradigm shift" from conventional to Islamic economics requires to embrace, as a preliminary condition, a plural legal approach to property rights conceptualization.

(4) The term "legal institutionalism" is usually used in legal scholarship to refer to socio-legal theories of law, connecting rules to the social institutions where they are applied (hence, the way law interacts with, develops from and affects society). Here, in line with Deakin et al., the article employs the term "to denote legally-grounded approaches to the institutional and economic analysis of capitalism" (2015, 24, note 1).

As a corollary of the discussion, the article will remark how the unique paradigm of Islamic economics can contribute to open the global economy to a model of development which is independent from the conventional one. This diversification, by embracing a plural approach to property rights, can actually represent the first step towards the constitution of a "plural market" where alternative forms of property rights can co-exist, embracing principles of economic justice which are different from those taken for granted in the conventional capitalistic paradigm (section 5).

2. Islamic Economics and Finance: from Ethics to Property Rights

From a historical perspective, Islamic economics can be seen as a recent phenomenon, while rooted in a very old tradition. As is well-known, it emerged as a discipline in the post-1960s period, assuming criteria of social justice (*ʿadālah*) and human agency (*khilāfah*) in the conceptualization of commercial transactions in compliance with God's Will, thus re-discovering the heritage of classical Islamic jurisprudence (*fiqh*) as guideline for economic dealings.

Accordingly, the appearance of Islamic finance as a growing niche in the international financial system in the last decades (Warde, 2000) can be interpreted as the outcome of an intellectual commitment em-bracing the application of Islamic law in the management of money and the validity of financial transactions (in particular through the prohibitions of illegitimate increase, *ribā*, of unreasonable risk, *gharar*, and gambling, *maysir*).

In this context, partnership financing principles form today the basis of modern Islamic interest-free banking, promoting the practice of trade over finance (thus indirectly reminding medieval Islam: Udovitch, 1970) in a deed of partnership between the bank and the depositor, where the former acts as the active partner in an enterprise that invests the money of the latter in gainful ventures (Mawdudi, 1970). At the same time, contemporary Islamic finance covers not only banking but any other aspect of a modern financial system, from insurance (*takāful* industry) to capital markets (e.g. *ṣukūk*), providing investors with the widest possible array of products and services compliant with Sharīʿah.

As clarified above, this article does not deal directly with Islamic finance as a rising segment of contemporary international finance (for a systematic view, please refer to Vogel and Hayes, 1998), nor it wants to provide a general introduction (Ayub, 2007) or a forward-looking view on the matter (El-Gamal, 2006). Its aim is more theoretical while having, at the same time, fundamental operative implications. More precisely, this contribution focuses on the understanding of Islamic economics (and finance, as its operative result) as promoting a property rights theory that is *alternative* to the conventional (Western) one, leading subsequently to the foundation of a distinctive paradigm for economic science that is unique to Islam.

To this objective, a critical perspective on the mainstream ethical approach to Islamic economics and finance (later on, in the text, IEF) is preliminarily needed.

On the matter, the specific point is *not* doubting the strong religious and moral foundations of IEF, which are certainly indisputable for Muslim believers. Differently, the problem here is to evaluate *if* and *how much* this ethical approach is apt to best disclose the peculiarities of the Islamic approach to property theory and to differentiate this theory from the conventional one. In other words, the reasoning does not contest the ethical bases of IEF, but their suitability to found a sound theoretical background for Islamic economics and the Islamic financial market (Cattelan, 2013c).

In fact, speaking of Islamic moral economy (later on, IME) as the foundation of IEF, an immediate link is certainly established between economics and Islamic religion, cosmology(5) and epistemology(6), emphasizing an assumption of equality of the individuals in their relations with the Creator in the *tawḥīd* (the profession of unity of Allah) of creation

(5) "Cosmology" (from the Greek *kosmos*, "world", and *logos*, "study of", "discourse") indicates the study of the origin, evolution and destiny of the universe. In Islamic religion, all the universe depends, at any instant, on God's Will.

(6) "Epistemology" (from the Greek *episteme*, "knowledge", and *logos*, "study") is the branch of philosophy which refers to the nature, rationality and theory of knowledge. The understanding of God's Will, through the study of the revealed sources in the tradition of *fiqh*, for instance, represents the core of Islamic law knowledge.

and justice. This monism, which is at the same time ontological (i.e. "in the being" of the creation) and deontological (i.e. "in accordance with (divine) justice", *ʿadl* or *ʿadālah*), directly implies criteria of social equality where the believer is responsible for performing the "right" (*ḥaqq*) as the result of God's "decree" (*ḥukm*) revealed in the Sharīʿah. Thus, within this *tawḥīdi* framework, Al-Makarim (1974, p. 25) defines Islamic economics as "the science that deals with wealth and its relation to man from the point of view of the realization of justice in all forms of economic activities", while Khan (1984, p. 55) identifies its fundamental objective in the "study of human *falāḥ* ["salvation", "prosperity", "welfare"] achieved by organizing the resources of Earth on the basis of cooperation and participation." Founding IEF on IME as a value-oriented proposition, the supporters of this ethical approach commonly refer to the idea of *homo-islamicus* as ethically superior to the secular *homo-economicus* (that is to say, the human being acting according to conventional economics standards) (Asutay, 2007; Çizakça, 2011, pp. 5-6) and explain the current drawbacks of IEF in terms of insufficient concretization of IME (Asutay, 2008).

But, although it may appear satisfactory at a first glance, this conceptualization suffers from at least two epistemological limits.

On the one hand, it reduces human economic action outside IEF to the mere research for profit, identifying the secular attitude of conventional economic actors (*homo-economicus*) with the absence of *any* social justice. As a result, anthropologically speaking, IME identifies any non-Islamic economic attitude with the maximization of profit, conceived not only as the fundamental pillar of conventional economic investigation, but also as the nature *tout court* (i.e. the very essence) of the human being outside IEF. Adopting a more sensible evaluation, at any rate, it should be recognized that conventional economic science does not lead *tout court* to an anthropological nihilism(7) of the human being into a greedy *homo-economicus*, as many examples of Western literature certainly recognize the centrality of justice (see for instance Sen, 2009), ethics and even the influence of religion (on the matter, Weber, 1905 continues to be a landmark example) for the understanding of human social nature.

On the other hand, and to a certain extent paradoxically, one should realize that the more the moral nature of IEF is emphasized, the more conventional economics results to be confirmed as a unique paradigm (on the epistemological meaning of paradigm, see Kuhn, 1962 and, in brief, note 3 of this paper) for economic research. In fact, the IME approach suffers from intrinsic weakness for its incapability to challenge the universality of conventional economics as a "totalitarian" model (that is to say, a paradigm precluding any valuable alternative to its scientific assumptions): a model that IEF criticizes for its secular excesses, but that IME, in the end, is unable to question at its very roots, offering an *autonomous* scientific background for economic investigation. Furthermore, to a certain extent IME unintentionally risks reducing IEF to a sub-category of the loose realm of ethical investments, or of the ubiquitous domain of corporate social responsibility, thus certainly promoting a moral advance in economic dealings, but without the capability to challenge the fundamentals of conventional economics, whose *scientific* paradigm, on the background, remains essentially unquestioned.

As an outcome, a "scientific revolution" (or "paradigm shift", Kuhn, 1962) is by definition precluded by the IME approach: the implicit perpetuation of the conventional paradigm as "universal" (in logical terms), in fact, reduces IEF into a "particular" which necessarily depends on the former for its operative elaboration (Cattelan, 2013c). Thus, IEF has no alternative than existing only "in comparison to" conventional economics (the "universal"); its religious/moral values become a mere correction to this universal paradigm, subsumable in the category of ethical investments (among many other "ethical particulars"). Operatively speaking, within this logical framework, IEF services and products are (necessarily) structured by replicating conventional ones, giving rise to the well-known contamination through financial engineering (El-Gamal, 2008) that eventually leads IEF to a departure from its moral

(7) That is to say, the exclusion of the relevance of any (religious or ethical) value from the conceptualization of human existence as if life (in conventional economic theory) would be without any meaning, purpose or principle except from the search for profit.

and religious objectives. In a nutshell, IME paradoxically ends in reinforcing that "form-above-substance approach" (El-Gamal 2006, p. 2) against which it advances its criticism.

Given the limits of the IME approach, this article proposes a different logical path to highlight the distinctiveness of Islamic economics as an economic paradigm that is unique to Islam by showing how it embodies a property rights theory that is *alternative* (not *only* in the sense to be *ethically superior* for Muslim believers, as discussed above, but also *scientifically autonomous*) to the conventional one.

Referring onwards in the text mainly to IEF (as Islamic finance should embrace in its practice the principles of Islamic economics)[8], the reasoning will proceed as follows:

In the attempt to make up for the theoretical weakness of the IME approach, the work will initially challenge the universality of conventional economics by broadening the discussion to property rights and development issues. In fact, property rights being the very conceptual tools of lego-economic analysis, the search will firstly criticize the universality of conventional economics paradigm by questioning the neutrality of Western property rights, both in descriptive and normative terms, and proposing a plural approach to property rights as a suitable framework to highlight the peculiarities of IEF as a paradigm alternative to conventional capitalism (section 3).

Within this plural frame, section 4 will disclose the Islamic theory of property rights. More precisely, by discussing the conceptualization of legal, commutative and distributive justice in Islam, the article will highlight the existence of distinct market models in the Western and Islamic traditions: while Western capitalism conceives the individual as the source and beholder of any right, as well as the center of attribution of economic resources (deemed as "portions" of "divided" justice), IEF frames property rights in the sense of *participating* in the unique divine justice by *sharing* economic resources. As a result, through this alternative conceptualization on property rights, IEF promotes a complementary path to development and growth, upholding, as we will see, (i) the primacy of real economy over finance; (ii) the prevention of unjustified income (*ribā*), uncertainty (*gharar*) and gambling (*maysir*); (iii) the focus on asset-backed and risk-sharing investment strategies.

To conclude, as previously mentioned, section 5 will provide final considerations about how the unique paradigm of Islamic economics can contribute to the promotion of a "plural market" in the global economy, by fostering an alternative conceptualization of property right and their *own* model of economic justice.

3. A Legal Plural Approach to Property Rights

> Property rights are fundamental in economics. Most elementary economics texts make the point, often early in the book, that a system of property rights "forms the basis for all market exchange" […], and that the allocation of property rights in society affects the efficiency of resources use. More generally, assumptions of well-defined property rights underlie all theoretical and empirical research about functioning markets. The literature further assumes that when rights are not clearly defined, market failures result. The meaning of property rights is, thus, central to the language of economics. (Cole and Grossman 2002, p. 317).

Despite this centrality (or maybe exactly by reason of their fundamental nature), property rights do not receive much investigation (nor criticism) in conventional economic literature. Indeed, as basic conceptual tools of any lego-economic analysis (see, in the regard, the seminal work by Coase, 1960), property rights are rarely put under trial, being the essential "bricks" of any "construction" in economic reasoning, and thus usually taken for granted. Consequently, not only does a certain ambiguity continue to characterize the concept of property rights, employed with different meanings by economists and legal scholars (Cole and Grossman, 2002), but it also implicitly perpetuates parameters of private individual ownership, commutative and distributive justice that are actually derived from Western/conventional economic thought.

(8) The article does not aim at evaluating the current gap between the theory and practice of IEF.

In other terms, a dogma of universality and neutrality characterizes this (Western) property rights conceptualization as it could be applicable in any context, independently from the social background of the recipient. In fact,

> property models that purport to be universal are… 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 the precondition for efficient market economies. This has led to a misunderstanding of property both in the Third World societies and in Western industrialized states, encouraging property policies that have unintended and deleterious consequences. (Von Benda-Beckmann et al., 2006, pp. 2-3).

The assumption of neutrality of Western property rights, as already remarked, represents the other side of a coin holding conventional economic paradigm as a "universal" that the IME approach to IEF cannot question at its very roots.

Broadening the discussion to development studies, as in the passage just quoted, this has implicitly perpetuated the maintenance of Western capitalism as the only model for development, despite the growing attention in anthropological and economic descriptive studies for alternative systems of property governance (probably one of the most famous books on the topic remains, Ostrom, 1990), implying the necessity for a contextualization of property rights models within their *own* social background, and more generally within the underlying culture of a given community (Meinzen-Dick and Pradhan, 2002).

On the matter, the permanence of open (and still far to be properly resolved) issues on property rights theory clearly appears from a growing hiatus between these descriptive analyses and the normative approach to development which keeps Western capitalism as a "totalitarian" model for economic growth, excluding alternative (and possibly competing) non-Western theories. In addition to issues of legal pluralism (Griffiths, 1986; Merry, 1988) related to the cultural background of property rights (see for instance, Cattelan, 2013a), this gap between descriptive and normative theories on property rights is clearly revealed by current law and economic literature.

A striking example of this divergence can be found in De Soto's influential book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000). Here, the leading assumption by the author is that the origin of underdevelopment outside the Western world can be traced back to the persistence of local and not formalized economic structures, which prevent people from entering the official market and transform their labor and belongings into capital.

This formalization of property rights through legal state-sanctioned instruments (i.e. documentation, certification, clear definition of legal entitlements) does reflect one of the fundamental assumptions of law and economics, that is to say, the idea that well-defined property rights affect economic efficiency in limiting transaction costs, as shown by the Coase theorem (1960). At the same time, De Soto's first reliance on the effectiveness of property rights formalization has been deeply criticized as an excess of neo-liberalist confidence, since it underestimates the impact of extra-legal factors that are dramatically relevant in underdeveloped societies (such as corruption and wealth concentration), to the extent that "many of De Soto's policy prescriptions may be inappropriate for the poorest and most vulnerable, and could have negative impact on their security and well-being" (Kingwill et al., 2006, p. 2), concluding that "[p]olicy makers must resist the temptation to seek simplistic solutions to poverty of the kind offered by De Soto" (ibid.). Further criticism has been directed towards the formalization policy itself, being unable to really recognize and incorporate informal property rights, since they involve a great deal more indeterminacy than institutional theorists assume (Meidinger, 2006); moreover, it has been argued that "property rights formalization does hold the promise of unlocking capital and growing the wealth of nations, but... legal reform must be both comprehensive and culturally relative, taking special note of the unique socio-political heritages of the societies in question" (Shackelford, 2014, p. 109).

This last consideration, referring to the cultural background of social communities, further underlines the dramatic distance between the traditional normative approach to property rights (within which economic policies in non-Western

countries are still framed in the light of the conception of individual private ownership that belongs to Western capitalism) and an emerging awareness that property relations always stem from the contact between the person and his *own* social context, thus inevitably bearing cultural elements (Von Benda-Beckmann et al., 2006).

From this perspective, De Soto's recipe for capitalist growth has been radically contested for its implicit assumption that the Third World countries "will not eliminate poverty unless they embrace the juridical language and practices of the global economy" (Okoth-Ogendo, 2006, p. 8). Indeed, especially in post-colonial studies, the policy of formalizing property mimicking Western standards has been rejected as a way to simply re-affirm the exclusivity of the "Western path of capitalism", thus reinforcing the "totalitarianism" of a paradigm which has led to a "structure of domination of the political economies of the South by those of the North" (ibid., p. 7), perpetuating a cultural unilateralism where

> [u]nderneath the proposition that "formal" (i.e. documented) systems of exchange and transactions are a more efficient engine of development than "informal" relations, is an ideological message… [that] was pursued to explain, impose, and sustain a system of law, administration and property relations which was not simply alien, but which grew to oppress, destabilize and stultify the evolution of indigenous social systems. (ibid., pp. 6-7).

Okoth-Ogendo's words clearly express a claim of exploitation of developing countries, furtively perpetuated by the transplant of the juridical language and the practices of Western capitalism, of which property rights formalization can be seen as further manifestation.

At the same time, this criticism implicitly claims the *non*-universality of Western capitalism, thus suggesting that economists should look at economic growth *outside* and *beyond* the mainstream paradigm, in the light of plural legal approach to property rights.

This "plurality-consciousness" (Menski, 2013) constitutes a fundamental methodological hint to fill the persistent gap between descriptive and normative property rights studies, as well as a primary tool to recognize the peculiarities of IEF as a paradigm alternative to the conventional one.

In fact, while both De Soto's "mystery of capital" and the ethical approach to IEF maintain a unique paradigm for development (leading to the recipe of formalizing "informal" property rights, on the one side, and to the "injection" of religious values as a "moral" constraint to Western capitalism, on the other side), a theoretical framework of property rights pluralism can lead to an understanding of IEF as an economic paradigm *autonomous* from the conventional one, moving from an approach "universal/particular" (see here, section 2) to a perspective "one/many" (Cattelan, 2013c). In other words, while the IME approach results in the conceptualization of IEF as an "ethical particular" of a "neutral universal", speaking of "many" alternative economic paradigms (in the light of property rights pluralism) permits to highlight the specific peculiarities of an autonomous property theory in IEF (section 4), implicitly leading to recognize the possible co-existence of models of economic justice(s) that are different from that of conventional capitalism in the practice of a "plural market" (section 5).

Accordingly, the autonomy of the IEF paradigm with regard to its property rights theory will be underlined in the following section (no. 4) through the understanding of:

> (i) the primacy of real economy over finance, not in terms of ethics, but in relation to the performance of God's decree (*ḥukm*) through rights (*ḥuqūq*) linked to tangible goods;
>
> (ii) the prohibitions of unjust enrichment (*ribā*), unreasonable risk (*gharar*) and gambling/ speculation (*maysir*) not in terms of avoidance of exploitation of the poor, but in the light of maintaining an equilibrium in the transactions as an expression of the divine unity (*tawḥīd*) in the creation;
>
> (iii) the preference for asset-backed and risk-sharing investment strategies as a specific rationale linked to a market model whose assumptions derive from a theory of justice that is not based on the division of economic resources (conventional paradigm), but on *sharing* goods and *participating* in the *unique* divine justice (Cattelan, 2013b).

4. Islamic Property Rights: Legal, Commutative and Distributive Justice

Nourished by ethical values rooted in the Muslim tradition, Islamic finance has rapidly acquired a promising role in the international financial market, offering alternative and viable solutions in terms of capital management. At the same time, the appearance of this new industry has not been accompanied, as seen, by a coherent re-framing of economic theory in the light of a plural legal approach to property rights (section 3), since it has been usually "reduced" to a moral variation of conventional capitalism (section 2). Conversely, shifting from an ethical conceptualization of IEF to legal pluralism by challenging the neutrality and universality of Western property rights as the basis for *any* economic development, this section will show how IEF can be recognized as beholder of a property theory that is autonomous from the conventional one.

As well-known, IEF embraces a market model of development where labor and investment are the only legitimate instruments for the acquisition of properties and where money is conceived not as unbundled commodity, but only as a means for production. Furthermore, the accumulation of wealth through forms of unjust enrichments (*ribā*), such as interest, or based on uncertainty (*gharar*) or gambling/speculation (*maysir*), is rejected.

These foundational principles, which are conceptualized in terms of ethical superiority of IEF in comparison to the conventional one (according to the IME approach), become in a plural framework of property rights the manifestation of a specific economic paradigm which deeply affects the idea of social justice in Islam. This distinctive conceptualization can be properly disclosed in its diversity from the conventional one by contextualizing IEF within a theory of justice (*ʿadl*) centered on the ontological and deontology-cal unity (*tawḥīd*) of the creation that is unique to Islam, where the complete sovereignty of God implies the responsibility of the human being (as God's agent, *khalīfah*) for performing the "right" (*ḥaqq*) as a result of the divine "decree" (*ḥukm*), thus participating in His justice.

In Islamic anthropology, in fact, any conceptualization of justice (*ʿadl*) assumes the centrality of the Divine Will in establishing what is "right" (*ḥaqq*) through the Truth (again, *ḥaqq*) of the revealed "Path" (Sharīʿah). As Santillana clearly points out, in Islam, "the law is the Will of God, the rule given by Allah Legislator to the People that He has chosen, and according to which He will judge them" (1926, p. 5); thus, "law and religion, legislation and ethics are the two aspects of that same Will for which the Muslim community has been founded and on which it is founded; every issue of law is also a problem of consciousness, and jurisprudence, to say it straightforwardly, is founded on theology" (ibid.).

Further elements for the understanding of IEF and the recognition of its peculiar property rights theory can be derived from its contextualization within the submission of the believer (Muslim) towards God in Islamic thought. More precisely, not only is Allah the only "sovereign" of all the universe, but He is also the only "actor" of the creation, while the human beings simply perform His Will as "agents" (Watt, 1985). In this constant tension between divine omnipotence and human agency, it is God's "decree" (*ḥukm*) to rule. The notion of *ḥukm* (that can be translated in English into "rule", but also "decision", "assessment", "qualification", "judgement") (Wehr, 1979) relates to the meaning of "judging", "ordering", "ruling" and implies an established divine judgement on the ontological status of the action. In view of that, al-Ghazali, the most celebrated medieval Muslim jurist theologians of Persia (A.H. 450-504/C.E. 1058-1111), explains in *al-Mustaṣfá* (*Quintessence*), his work on *uṣūl-al fiqh*, that "a rule (*ḥukm*)… denotes the dictum of the revelation when it is linked to the acts of those made responsible" (Moosa, 1998, p. 9). In this understanding of human ethics, therefore, the "decree" (*ḥukm*) determines a pre-defined deontological status of the action that the reality ontologically asserts in the "right" (*ḥaqq*). In other terms, while the *ḥukm* defines the ethical status of the action, the personal rights (*ḥuqūq*, pl. of *ḥaqq*) are the means through which the Creator *realizes* (in the proper sense of "making real") that status, in

> a vision of reality as being in its essence imperative, a structure not of objects but of wills. The moral and ontological change places, at least from our point of view. It is the moral, where we see the "ought", which is a thing of descriptions, the ontological, for us the home of the "is", which is one of demands. […] The "real" here is deeply moralized, active, demanding real, not a neutral, metaphysical "being," merely sitting there awaiting observation and reflection; a real of prophets not philosophers. (Geertz 1983, pp. 187-188).

Thus, not only is the "real" (*ḥaqq*) deeply moralized as materialization of the Truth of the Legislator (*al-Ḥākim*), but the "right" (*ḥaqq*, again) also reflects in its conceptual structure the unity (*tawḥīd*) of the creation, to the extent that an opposition between the "right" (as the active side of a bilateral juridical relation) and the "obligation" (its passive counterparty), as in the Western legal thought, does not exist anymore. In this perspective, Kamali correctly underlines that

> the Sharīʿah does not seek to eliminate the distinction between rights and obligations or to emphasize their duality and division […]. In the Qur'ān, right and duty merge into justice so much so that they become, in principle, an extension of one another. […] *ḥukm* (ruling) subsumes both rights and obligations. The relationship between ruling and justice is also of means and ends: a ruling is the means towards justice, while the fulfilment and realization of *ḥaqq* in its dual capacities of right and obligation is predicated upon justice. Islam thus seeks to establish justice by enforcing Sharīʿah rulings which, in turn, is expected simultaneously to mean the proper fulfilment of rights and duties. (Kamali, 1993, p. 357).

This preliminary investigation upon the legal-economic anthropology of IEF (underlining (i) the "real"(*ḥaqq*) nature of any right (*ḥaqq*), as concretization in the creation of God's decree (*ḥukm*), and (ii) its bilateral nature, subsuming both the "right" and the "obligation" as expression of the unity – *tawḥīd* – of God) appears of dramatic relevance not only for a proper understanding of the Islamic theory of property rights, but also to underline its conceptual distance from the Western tradition, in terms of an autonomous paradigm for economic science.

Indeed, while the Western legal-economic thought conceives the individual both as the source and beholder of any right (a "right" which is, in the end, "a power conferred to the person"; Chehata, 1973, p. 179), in the Islamic tradition, on the contrary, the *ḥaqq* reflects a conception of the reality as being essentiality ethical, a product of God's Will in the unity of the creation. In this way (i) the right ontologically acquires a "tangible", "real" nature (not by chance, "reality" is one of the various meaning of *ḥaqq*, next to "truth" and "right"; Lane, 1865), as a "concrete" entity (ii) whose collocation (i.e. the attribution to the single individual) has been already established by Allah not in the light of an opposition/competition between His agents, but of their (iii) cooperation/sharing of the unique divine justice. Thus, the *ḥaqq* is not conceived anymore as the "right" of a single person in opposition to the "right" of another person, but (both) the right and the obligation (Kamali, 1993, see above) make sense "only within the *unity* of the two "elements" […] the *ḥuqūq* are not the "rights" and "obligations" that serve to connect autonomous elements" (Smirnov 1996, p. 345; emphasis in the original text): they become "sides" of a *unique* justice which makes sense only within the unity of two elements in equilibrium (*mīzān*, "balance," as synonym of *ʿadl*).

In this way, far apart from the assumption of competition between economic subjects in the market which belongs to the Western model of capitalism, Islamic property rights are not conceived as "portion" of "divided" justice to be allocated on people (according to parameters of distributive justice which find their core, again, in the individual), but as *shares* of a *unique justice*, in which the human beings participate by sharing economic resources. This subsequently leads the distinctive paradigm of Islamic economics to a property theory (i) promoting the primacy of real economy over finance, (ii) the prevention of unjustified income in form of interest (*ribā*), uncertainty (*gharar*) as well as of gambling (*maysir*), and (iii) with a focus on asset-backed and risk-sharing/participatory investment strategies.

At this point of the discussion, in order to conclusively disclose the property theory that underpins IEF, it is useful to define a comparative outline between Islamic and Western/conventional economics by linking the aforementioned three rationales to a comprehensive conceptualization of social justice including: (i) *legal justice* (a domain which refers to the rights/duties of each individual towards the community); (ii) *commutative justice* (that is to say, the conception of the just allocation of rights in private bilateral transactions); (iii) *distributive justice* (i.e., the fair distribution of economic resources among all the members of the community)[(9)]. Following this approach, the distance between conventional and Islamic economics, with regard to their respective conceptualization of property rights, can be summarized as in Table 1 below.

(**9**) Of course, while this threefold description is helpful for our reasoning, these domains are mutually interdependent.

Table (1). Comparison between Western and Islamic property rights.

	Conventional property rights	***Islamic property rights***
(I) *Legal Justice*	Western tradition conceives the *individual* as the source and beholder of any right, as well as the centre of attribution of any resource.	Islamic tradition assumes the centrality of *God* as the only Creator, whose Will (*ḥukm*) is performed by the human agent, and correspondingly realized in the subsequent "right" (*ḥaqq*: "real," "true," "*just*").
(II) *Commutative Justice*	The equilibrium of the transaction is deemed to be the *result* of an agreement that looks at *resources as "portions" of divided justice, which separately belong to single individuals*.	The equilibrium of the transaction is conceived as the *maintenance* of a *balanced unity (tawḥīd)* that looks at *resources as "shares" of a unique justice established by God*.
(III) *Distributive Justice*	Distribution of resources refers both to real and financial assets; in recent times, financial assets have become predominant in Western capitalism, leading to the primacy of *debt-based economy*.	Distribution of resources refers to (i) real (*ḥaqq*) assets, according to (ii) a sharing principle, whose final outcome is the theoretical foundation of an economy which is *asset-backed and equity-based*.

Source: Author

As seen, taking as a starting point an alternative ontology and deontology (i) Islamic legal justice (linking the ontological and the deontological in the dyad *ḥukm*/*ḥaqq*) gives rise to a peculiar conception of economic justice where the principle of the *suum cuique tribuere* ("giving to each his own") is articulated in the sense of collocating the "real," the "right" (*ḥaqq*) in the "place" (i.e. upon the legitimate beholder, as agent of the divine Will) to which it belongs according to justice (*ʿadl*): *taqrīr al-ḥaqq makanāhu huwa al-ʿadl*, in the words by Hamid al-Din al-Kirmani (1983, p. 456), one of the most important theologians of the Fatimid period (eleventh century C.E.).

This concept can be better explained by referring to the metaphor of the scale as a symbol of justice, and highlighting the distance between Western and Islamic economic thoughts, the former being founded on the division of economic resources, while the latter on their sharing. In fact, the right (*ḥaqq*) in Islamic legal justice being

> a sort of substance that has a constant volume, of which some parts may happen to be not where they belong, not in the due place… justice means the necessity of returning them to where they should be. It is not all by chance that the definition of justice already cited mentions "establishing the right (*ḥaqq*) in its *[due] place*; each of the rights due has its own "place" (*makān*)" (Smirnov, 1996, p. 344).

At the same time, any property right being inserted in a unity (*tawḥīd*) where the "right" and the "obligation" do not oppose one another but participate in the same justice,

> one may say that Western thinking is concerned with the pans of the scales and their contents, while for classical Islamic thought the stress lies on the central balancing pivot. It is making one equal to the other (equality between two necessarily *separate* entities) that is important in the first case, and theoretical discussion tries to determine the accuracy of this equalising… In the second case it is the fact of balancing the opposites that is important, this balance being centred by means of the centring and mediating pivot; the theoretical task is to find out how the two might be linked to form a balanced unity and what the conditions are for such a linkage. (Smirnov, 1996, p. 346-347).

But how does the conceptualization of the "right" as a "substance that has a constant volume," whose parts have to be returned where they should be, affect commutative and distributive justice in Islam? And how does Islamic legal justice, as centered on the "mediating pivot" rather than on

the "separate pans" of the scale, lead to a property theory which is alternative to the conventional one?

With reference to (ii) commutative justice (that is to say, just allocation of rights in private bilateral transactions), the equilibrium of commercial transactions in IEF is conceived in terms of maintenance of a balanced unity (the idea of *tawḥīd*), where property rights are *shares* of the *unique* justice established by God (see Table 1, above). This balanced unity, as the fundamental rationale of Islamic commutative justice, does appear, first and foremost, in the doctrine of *ribā* as prohibition of interest and any unlawful addition (which may undermine the equivalence of performances in the transaction, making it void). Moving from a quantitative to a qualitative conceptualization of contractual equilibrium, this balanced unity also appears in the doctrines of *gharar* and *maysir*, which require avoiding any element of unreasonable risk and speculation through gambling that may render the *ḥaqq* defective.

Furthermore, while in Western capitalism real and financial assets concur as autonomous goods in the distribution of resources, the money being conceptua-lized as unbundled commodity(10), this identification of money as an independent asset is precluded in IEF (see, again, Table 1). In fact, in the Islamic property theory, money (lacking of any tangible nature) is only a means (not an object) of exchange or investment: (iii) distributive justice, therefore, refers to (i) "real" (*ḥaqq*) assets according to a sharing principle in a (ii) balanced unity, whose final outcome is the theoretical foundation of an asset-backed and equity-based economy. In other terms, the balanced and disclosed correspondence between tangible counter-values necessarily results in a favor towards asset-backed and equity-based capital instruments and a correspondent dismissal of both debt-based products (producing *ribā*) and hazard-affected securities (invalid for *gharar* and *maysir*) in the distinctive economic model that is unique to Islam (Cattelan, 2013b).

To summarize, it is this whole of legal, commutative and distributive justice that brings about a property theory in Islamic economics able to found a paradigm alternative to the conventional one. Accordingly, looking at IEF as an alternative paradigm through a plural approach to property rights allows departing from IME as a conceptual frame for IEF.

In particular, with regard to (i) legal justice, the primacy of real economy over finance (e.g. as in the mechanism of the contract of *murābaḥah*) does not prove the moral superiority of IEF *per se*, as argued by IME, but becomes evidence of the conceptualization of the *ḥaqq* as something "real," "just" and "true" in the creation.

With reference to (ii) commutative justice, it is the need of a balanced unity between the counter-values which explains the prohibitions of *ribā*, *gharar* and *maysir* and their application in the financial market, and not the need for a protection of the poor in the transaction (for support to this interpretation: see Saleh, 1992; El-Gamal, 2000 and 2006).

This alternative economic conceptualization, finally, leads to a market theory that, in terms of (iii) distributive justice, logically focuses on asset-backed and equity-based investments, according to a sharing principle which does not signal a major solidarity *per se* as ethical value, but reveals a practical rationality based on *participating* in a *unique* justice, where profits and gains are coherently distributed among the partners of a venture or investment (e.g. *mushārakah* and *muḍārabah*).

(10) Whose predominance in the recent financialization of the global economy has also led to the primacy of debt-based financial securities in capital markets (see also, in this regard, the conclusions of this article).

5. Conclusions. Islamic Economics Paradigm and the "Plural Market"

"Property rights are too important to be left [*only*] to *Western* economists".

Paraphrasing the opening quotation of the article, this statement can probably summarize the core concept of the present paper. By reviewing the ethical approach to IEF and challenging the neutrality and universality of Western economic thought, in fact, this study has suggested the application of a plural legal approach to property rights as a viable path to identify the distinctiveness of Islamic economics as a scientific paradigm that is unique to Islam. In this framework, IEF has been interpreted as beholder of an indepen-dent property theory, fostering the autonomy of Islamic economic thought with regard to legal, commutative and distributive justice, by promoting (i) the primacy of real economy over finance; (ii) the equilibrium in commercial transactions, through the prevention of unjustified income (*ribā*), uncertainty (*gharar*) and speculation (*maysir*); (iii) the focus on asset-backed and risk-sharing investment strategies. Accordingly, by rejecting the "totalitarian" view on property rights of conventional capitalism, the recognition of the conceptual autonomy of Islamic economics can postulate a departure from Western economic thought in terms of "paradigm shift" (Kuhn, 1962).

As a corollary of the discussion, moving from the theory of Islamic economics to the practice of Islamic finance, the assertion of an independent property rights theory in IEF can lead to infer the possible co-existence of different models of economic justice(s), which are alternative from that taken for granted in the conventional capitalistic paradigm, thus promoting a "plural market" based on concurrent models of economic development.

With regard to the constitution of this "plural market", the conceptual distance between Western and Islamic property rights (as outlined in this article) does not prevent the possibility of their re-conciliation in the practice of commercial dealings: in fact, the contemporary market has already shown a variety of tools through which conventional and Islamic finance can work side by side. What is unfortunate, at any rate, within the persistence of a "totalitarian" approach to property rights, is that this integration has mainly led to the "Westernalization" of IEF, due to the incapability to foster the autonomous nature of Islamic economics as a paradigm unique to Islam and not merely an ethical variation of the conventional market (section 2). On the contrary, a plural legal approach to property rights can constitute a helpful device for managing a globalized financial market, where alternative conceptualizations of development co-exist in descriptive terms, and can contribute to complementary ways to the growth of global economy, from a normative perspective. For instance, the focus of the Islamic economics paradigm on real (instead of financial) economy may represent a fundamental guideline for the promotion of a social impact model of development, whose outcomes should be judged in the light of the effective contribution of financial instruments to the (economic/social) wealth of a given community, in terms of real growth of entrepreneurship, economic empowerment and financial inclusion (and not simply in terms of nominal values).

Of course, the extent to which this "plural market" will be fostered in the near future depends on the effective recognition by legal and economic scholarships of the diversity between property right theories in a global context, of which Islamic economics represents a paramount example. In other terms, while alternative paradigms for economic development do not imply any practical opposition among competing forms of social justice in the practice of the market, only the acknowledgment of their *autonomous* paradigms according to a plural lego-economic approach to property rights can actually contribute to the mutual enrichment between the conceptual backgrounds underlying Western and non-Western economic theories, leading potentially to a more sustainable, open and shared growth at a global level(11).

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التعددية القانونية وحقوق الملكية والنموذج الإرشادي للاقتصاد الإسلامي

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باحث مشارك - المركز السعودي - الإسباني للاقتصاد والتمويل الإسلامي

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المستخلص. تتناول هذه المقالة الاقتصاد الإسلامي من خلال مقاربة قانونية متنوعة لحقوق الملكية. وتقرّر المقالة بالتحديد أنّ الاقتصاد الإسلامي يُجسِّد نظرية للملكية بديلة للنظرية التقليدية، وتحمل هذه النظرية في طياتها نموذجاً للعدالة الاقتصادية يعدُّ من الخصائص الفريدة للإسلام. وتتناول المقالة هذه القضية على النحو التالي: بعد التعريف بالموضوع (الفقرة ١)، تقوم باستعراض المقاربة الأخلاقية للاقتصاد الإسلامي (الفقرة ٢). ثم تدحض -من خلال التعددية القانونية- فكرة حيادية وعالمية الحقوق الملكية التقليدية، كما هو مفترض غالباً في أدبيات القانون والاقتصاد (الفقرة ٣)، كما تُبيّن تَفرُّد حقوق الملكية الإسلامية في ضوء المفاهيم المتميزة للعدالة القانونية والتوزيعة والتبادلية، وهي من خصائص الإسلام (الفقرة ٤). في الخاتمة يُسلّط الضوء على إمكانية إسهام هذا النموذج الفريد للاقتصاد الإسلامي في بلورة أشكال متعددة للسوق في الاقتصاد العالمي (الفقرة ٥).

الكلمات المفتاحية: الاقتصاد الإسلامي، التمويل الإسلامي، القانون والاقتصاد، التعددية القانونية، حقوق الملكية؛ النموذج الإرشادي؛ أشكال متعددة للسوق.