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The governance of religion and law: Insights from the prohibition of usury

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ABSTRACT

Religion and law are often portrayed as belonging to different, isolated spheres and as conflicting with each other, especially with regard to the process of governing today's global economic and political affairs. The portrayal and handling of such conflicts are especially reflected in media reports and are ultimately part of the public debates that precede legislative action dealing with a great variety of legal issues, including, but not limited to, sumptuary laws, the wearing of the headscarf and other apparel in public, the acceptance and application of a cultural defense in criminal law, and the exclusion of various cultural products, such as food, beverages, or motion pictures, from international trade. This article argues against this dominant perception, positing that religion and law are instead complementary and merely operate at different levels of perception, effectively pursuing the same purpose. Therefore, it is advocated that greater caution or a so-called "precautionary principle of incomplete information" should be applied to various legislative proposals that are aimed at sanctioning various issues of religious relevance by strict positive laws. This argument is further supported by a brief reference to the prohibition of *riba* (usury and interest) in Islamic banking and its relevance in the world today.

Keywords: law and religion, Islamic law, prohibition of usury

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1. INTRODUCTION

Questions about the relationship between religion and law, or religious norms and legal norms, are elusive and mystifying. Yet such questions are unavoidable and indispensable, as they touch upon the principal issues that determine human behavior, both individually and collectively. Evidently, such a finding is already dependent on the particular meaning that is attached to each of these concepts. However, the process of clarifying the meaning, either for oneself individually or for others collectively, is not easy and is certainly not aided by the great religious diversity that is prevalent on this planet. This difficulty is further magnified by the many different conceptual or cognitive models for the manifestations of life and nature, regardless of whether they are classified as religious, spiritual or philosophical. One could even go so far as to contend that there are as many explanations as there are people in the world, plus all of the people who have ever inhabited it and who have left traces of their own explanations. Seen from this angle, it hardly comes as a surprise that the conceptual “religious” diversity, as it shall be understood here without attaching a particular religious confession to it, finds a similar reflection in the legal sphere. Terms such as the fragmentation of international law,¹ legal pluralism² and legal polycentricity³ are merely three examples of those used to grasp the large number of different legal systems and traditions in the world. For both spheres of religion and law, the perception of diversity has further intensified due to the acceleration in the mobility of people and the increased global access to information, both of which are affecting all of the world’s societies.

Even if such questions were dismissed as irrelevant by a doubting mind, it is still hard to dismiss the increased attention that the religious sphere is receiving in public legal debates. In effect, there are numerous examples in which regulatory challenges appear to conflict with certain obligations or traditions that are espoused by various religious faiths or ancient religious norms. As illustrations, some prominent conflicts include the recurrent debates that address the ban of the *burqa* (enveloping outer garment) and *niqab* (face veil) from public life, as well as other religiously motivated problems with sumptuary laws, such as the compatibility of the *dastar* (turban) worn by Sikhs or the Jewish *kippa* with traffic or work safety regulations that require a helmet to be worn.⁴ We may also consider the debate over the display of religious symbols in public offices or public schools and the discussion over proposals for a ban of totalitarian symbols that may bear similarities to religious symbols.⁵ Another more general field of conflict is the question of religiously motivated objections to the universality of human rights, known as the concept of “cultural relativism.”⁶

A similar conflict arises from the tensions between religiously or culturally induced behaviors that may conflict with the norms of criminal law. In practice, this debate is also known as the concept of “cultural defenses” for criminal offences.⁷ Another area that is affected by possible tensions between religious and legal norms is international trade law, in which there are various religiously induced exceptions for certain goods, notably, foodstuff and beverages.⁸ Some examples of this include

¹See, e.g., INTERNATIONAL LAW COMMISSION, UNITED NATIONS, FRAGMENTATION OF INTERNATIONAL: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW (2006), available at <http://legal.un.org/avl/ha/fil/fil.html>; A. Fisher-Lescano & G. Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int’l L. 999 (2004).

²“Legal pluralism” describes “the parallel existence of different legal systems or orders in one geographical or in one topical area”; see I.-J. Sand, *From the Distinction between Public and Private Law – to Legal Categories of Social and Institutional Differentiation, in a Pluralistic Legal Context*, in LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW 85, 88 (H. Petersen & H. Zahle eds., 1995).

³The term “legal polycentricity” was coined by Professor Henrik Zahle at the Conference on Legal Polycentricity, convened by the Institute of Legal Science of the University of Copenhagen and is defined as “consisting in a critique of the single-value approach to law, a denial of radical relativism, and in an acceptance of moral pluralism”; see S.P. SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW 1 (1996).

⁴See, e.g., J.I. Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts*, 61 AM. J. COMP. L. 1 (2013); A. Dean, *Unveiling the Complexities Surrounding the Right to Take Part in Cultural Life: The Effect of General Comment No. 21 on the Legality of the French Burqa Ban under the ICESCR*, 26 AM. U. INT’L L. REV. 1437 (2011).

⁵See, e.g., *Lautsi v. Italy*, App. No. 30814/06, 50 Eur. H.R. Rep. 42 (2009); *Vajnai v. Hungary*, App. No. 33629/06, 50 Eur. H.R. Rep. 44 (2008).

⁶“While human rights are universal in nature, they must be considered in context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.” UNITED NATIONS, WORLD CONFERENCE ON HUMAN RIGHTS (1993), available at <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx>.

⁷See, e.g., N.S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N. M. L. REV. 101 (1997); T.F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize A “Cultural Defense”?*, 99 DICK. L. REV. 141 (1994).

⁸See, e.g., Article 8 [Special Exception for Kashruth] of the Israel Free Trade Agreement, Aug. 19, 1985, 24 I.L.M. 657, which stipulates that “[t]his Agreement shall not preclude the adoption or enforcement by either Party of

non-kosher products, pork or alcohol in Muslim countries or beef in India. Occasionally, even self-proclaimed secular countries appear to defend their national products with a fervor similar to that found in religious movements, as can be seen in the debate over geographical indications.⁹ Equally affected are marketing strategies in combination with various new technologies, such as Digital Rights Management (DRM). For instance, Digital Versatile Discs (DVDs) and their Regional Coding System allow for the marketing and sale of different versions in different regions that take into account the religious background of a majority of consumers. It was reported that the movie *Eyes Wide Shut* was released in different versions in which the main differences related to sexually explicit content and respect for religious texts.¹⁰ Various products of the media, such as movies, books, and more recently, caricatures that have been deemed blasphemous, have caused a controversy with global dimensions.¹¹ No less controversial are various disputes that concern the ethical handling and legal regulation of scientific research and development that are caused by disparities in the religious dogma underlying several religious faiths. The controversies that surround contraceptive measures or embryonic stem-cell research are good examples of these disputes.¹²

Against the backdrop of the great diversity of conceptual models and the rising number of conflicts, it is believed that it is time to rethink the relationship between religion and law, notably, beyond their traditional separation, which is based on a secularism that is built largely on an opposition of state and religion.¹³ This article marks an attempt to outline the contours of each of the two concepts with the aim of paving the way to an enhanced understanding of the qualitative character of their relationship. In particular, it seeks to assess whether it is possible to mitigate the severity of the debate by trying to offer alternative perceptions and conceptions that may help to overcome the apparent incompatibility between religious and legal norms.

To this end, the article will first highlight some of the principal features and problems that impinge on their mutual relationship. These problems include conceptual difficulties as much as the ensuing institutional fragmentation and the absence of a coherent framework, which stands in stark contrast to the resulting dilemma of the integrity of the human person as both the origin and the center of interest for both religious and legal norms. The aforementioned dilemma is strongly reflected in other conceptual difficulties and various limitations in human thinking, perception and imagination. These limitations, it is argued, often appear in the form of paradoxes or so-called “essentially oxymoronic concepts,” a phrase that was created as an elaboration of the term “essentially contested concepts,” which was coined by William B. Gallie. Therefore, the utility of paradoxes will be critically discussed and their relevance to the distinction between religion and law will also be assessed. The objective will be to gain insight into their relationship in order to improve the law and the policy-making process. The insight that is gained will then be tested using the example of the prohibition of usury in Islamic finance in order to help find possible solutions to the conundrum of the relationship between religion and law. Finally, in the conclusion, an attempt will be made to formulate recommendations for the future handling of regulatory challenges having religious relevance.

Footnote continued

measures relating to prohibitions on religious or ritual grounds provided that they are applied in accordance with the principle of national treatment.”

⁹See, e.g., M. Agdomar, *Removing the Greek from Feta and Adding Korbelt to Champagne: The Paradox of Geographical Indications in International Law*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 541 (2008); T. Broude, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 *U. PA. J. INT’L ECON. L.* 623 (2005).

¹⁰See, e.g., R. Neuwirth, *The Fragmentation of the Global Market: The Case of Digital Versatile Discs (DVDs)*, 27 *CARDOZO ARTS & ENT. L.J.* 409, 462.

¹¹Similarly, but only causing regional controversy, an Austrian cartoonist found his comic book confiscated and was later convicted by a Greek Court in the first instance for the allegation of blasphemy for his cartoons depicting Jesus but was acquitted in the second instance. See *Prozess wegen “Jesus-Buch”: Karikaturist Haderer in Griechenland freigesprochen!*, *NEWSAT*, Apr. 13, 2005, <http://www.news.at/a/prozess-jesus-buch-karikaturist-haderer-griechenland-109620>.

¹²See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Sherley v. Sebelius*, 689 F.3d 776 (U.S. App. D.C. Cir. 2012).

¹³See G.J. HOLYOAKE, *THE PRINCIPLES OF SECULARISM* (3d ed. 1871); but see V. BADER, *SECULARISM OR DEMOCRACY? ASSOCIATIONAL GOVERNANCE OF RELIGIOUS DIVERSITY* (2007); B. LEDEWITZ, *HALLOWED SECULARISM: THEORY, BELIEF, PRACTICE* (2009); *COMPARATIVE SECULARISMS IN A GLOBAL AGE* (L.E. Cady & E. Shakman Hurd eds., 2010); T. ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2011).

2. A SHORT INQUIRY INTO THE RELATIONSHIP BETWEEN RELIGION AND LAW

The question of the mutual relation between religion and law is of great significance to the governance of the world's numerous societies and of global affairs. However, a first problem in the understanding of their mutual relationship depends largely on the meaning that is attributed to each of them separately. As both of the concepts are vast in scope and are dynamic, given their openness to change, they are difficult to define with precision; this issue that is further aggravated when they are placed in relation to each other. Their dynamic nature, in particular, causes further difficulties in attempts to define them, notably, the problem of their exact delimitation from other related concepts, such as culture, church, faith, spirituality, values, and even philosophy, secularism, laicity, atheism and science, to mention a few.

The great number of related, but "essentially contested concepts," as Gallie put it,¹⁴ or available synonyms, means that, for a fruitful debate to develop, it is crucial to find a consensus regarding the meaning of the specific terms in order to construct a common understanding of the respective paradigm, ideology, context or world view that is attached to it. The great religious diversity that characterizes this planet notwithstanding, it is too often forgotten, especially within national public debates, that words and symbols carry different meanings and evoke distinct associations in different peoples parts of the world.

In line with the usual path from thoughts to words and from words to deeds, the almost Babylonian terminological confusion that pertains to these concepts is also translated into practice and mirrored in their respective factual or institutional settings. As a result of this conceptual fragmentation, a central predicament that has equally befallen religion and law is the ongoing fragmentation of their respective systems. This appears to be true, above all, at the global level, but it tends to increasingly affect the regional, sub-regional and local levels, as societies are becoming more migrant, and thus, more culturally diverse. It appears paradoxical that, in principal, religion and law share, (in their beginnings), both religious and legal systems proposed to set forth a certain degree of unity. Eventually, however, they became frail and fragmented.

Currently, the fragmentation that has befallen religion is apparent in the many different religious faiths that are being practiced. In the case of law, it is the ongoing fragmentation of international law itself and the planet's territorial division into distinct jurisdictions that are often aligned to sovereign nation states. Regardless of humanity as a whole, even within the respective religious faiths, one or more schisms have occurred over time.¹⁵ There is hardly a religion that can claim that it has not experienced such centrifugal forces.

Similarly, regional and national legal systems are further fragmented and subdivided and often stand in fierce disagreement over the allocation of powers and the distribution of competences between them. Considering the great number, immense diversity and ongoing fragmentation in existing religious and legal systems, it comes as no surprise that the scientific discourse on the relationship between religion and law also is severely fragmented. Literature on issues related to "law and religion" is prolific, but most of it is usually confined to one national jurisdiction, or perhaps, compares one or more jurisdictions, as well as legal traditions.¹⁶ Or, it may be limited to one religion, but several countries. Few are the books that are not edited volumes, but take a wider view and attempt to extract a number of common dynamics.¹⁷ In other cases, if the literature tends to be more universal, then it is usually confined to one scientific discipline, such as politics, history, anthropology or law.¹⁸ For instance, within the area of law, many articles discuss or compare specific legal problems, but are limited to the realm of specific legal disciplines, such as the relation between international law and religion, or the question of references to God in the Treaties of the European Union.¹⁹ Most of the available writings are therefore seldom truly interdisciplinary and universal at the same time. This means that, at present, no principal and universal treatises on the relation between law and religion exist. The same can be said independently of the many religious and legal systems of the world.

¹⁴See W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN Soc'y 167 (1956).

¹⁵See SACRED SCHISMS: HOW RELIGIONS DIVIDE (J.R. Lewis & S.M. Lewis eds., 2009).

¹⁶See, e.g., P. RADAN, D. MEYERSON & R.F. CROUCHER, *LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW* (2005); P.W. EDGE, *RELIGION AND LAW: AN INTRODUCTION* (2006); *AFTER SECULAR LAW* (W.F. Sullivan, R.A. Yelle & M. Taussig-Rugbo eds., 2011).

¹⁷See, e.g., H.P. GLENN, *LEGAL TRADITIONS OF THE WORLD* (2000).

¹⁸See, e.g., ASAD, *supra* note 13.

¹⁹See, e.g., *RELIGION AND INTERNATIONAL LAW* (M.W. Janis & C. Evans eds., 2004); K. NAUMANN, *EINE RELIGIÖSE REFERENZ IN EINEM EUROPÄISCHEN VERFASSUNGSVERTRAG* (2008).

The absence of a principal and universal framework for the consideration of the relation between religion and law leads to the following related problem. A third problem that is common to the spheres of religion and law is that both operate in areas that are closely related to human existence as a whole. As a human being is a complex whole, the fragmentation of the religious system to which s/he feels akin and the legal system to which s/he is subject may create a serious dilemma. This dilemma becomes even more complex when a conflict arises between one or more religious and legal norms. In other words, there is a clear contrast between the proliferation and segmentation of religious and legal norms and the universality and integrity of the human being. Conflicts that stand in contrast to the integrity of the human being can occur both within one particular faith and between different faiths that may compete to provide answers to questions that a person may pose. The same problem is known in legal systems when persons may find themselves in legal dilemmas or may look for better solutions in other legal systems or jurisdictions. We may only think of choice of law clauses or forum shopping in the context of conflicts of law. Combined, the two problems may appear to be conflicts that involve both religious and legal issues, such as conflicts that are derived from a change of faith or confession.²⁰

These dilemmas, which are common to the spheres of religion and law, lead to two further elements for consideration that are inextricably linked to the question of the determination of the mutual relationship between religion and law. These elements concern the nature and the function of the human being in the widest sense. What precisely constitutes a human being, and where a human being begins and ends, in all possible terms, including those that are physical, psychological, emotional and temporal, have themselves been and continue to be subject to fierce controversy and speculation in the realms of religion and law (and possibly, also science, philosophy and magic).²¹ Thus, both religion and law face the problem that they claim to be based on holistic conceptions, but they operate in complex, but segregated environments.

In other words, both systems claim to be complete, but once they proceed from the ideal to the material level, they are confronted with an important set of incomplete information with regard to some of the most fundamental questions regarding human existence and the nature of human beings, notably, the origin of life and the nature of death, the existence and/or seat of the soul, and the forces of sexuality, to mention but a few. These questions, which have and will continue to concern not only religion and law, but also science and philosophy, are of utter importance in determining the meaning, efficiency, and legitimacy of norms, regardless of whether their character is religious or legal. The most serious normative questions would certainly be easier to address if we had more and, most of all, better information regarding the nature of human existence and if our “veil of ignorance” was lifted in this regard because consensus would be more likely among members of the societies involved.²²

This applies, in my view, not only to the essential aspects of human life and bodily integrity, such as the right to life and the prohibition of killing, the death penalty, abortion, and different forms of discrimination, but it also has great relevance to many more issues. This can be elucidated using the following example: What if, one day, we are able to solve what Hubert Benoit calls the “illusory ‘enigma’”?²³ In other words, what if we gain scientific proof, in accordance with the law of the conservation of energy, that death is not the end, but instead, that life is only part of a life-death continuum? That is to say, that death constitutes a mere snapshot or a turning point in a continuous and possibly infinite process as is reflected again in Hubert Benoit’s words when he states that “life is only death incessantly avoided.”²⁴ What if reincarnation became a scientific fact and we could gain insights into past as well as future lives? In reply, it is hard to imagine that we would not completely change our approach to the entire organization of our lives, including decisions about our family law and inheritance law, but also decisions about how to invest our capital and, more generally, how to behave in relation to fellow citizens.

²⁰See, e.g., T. Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 B.Y.U. L. Rev. 251 (1999).

²¹See generally B. MALINOWSKI, *MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS* (1948).

²²See also J. RAWLS, *A THEORY OF JUSTICE* (1971).

²³H. BENOIT, *LET GO ! THEORY AND PRACTICE OF DETACHMENT ACCORDING TO ZEN* 154-63 (1973).

²⁴See also H. BENOIT, *MÉTAPHYSIQUE ET PSYCHOANALYSE: ESSAIS SUR LE PROBLÈME DE LA RÉALISATION DE L'HOMME* 113 (1949), writing “c’est que cette vie n’est qu’une mort sans cesse évitée.”

For the time being and until such progress in our perception materializes, there should be great caution in the debate about strictly binding norms that are sanctioned through coercion or force. It would hence be advisable to apply what – based on lessons learned from the debate about sustainable development, particularly in environmental matters – could be called a “precautionary principle of incomplete information.”²⁵ Such an approach, however, should be linked with a neutral judgment of the knowledge that is available. Moreover, it should be combined with a closer inquiry into the causes of our incomplete understanding of the principal features that mark human existence and determine the functioning of human behavior.

In this inquiry, an important element is found in the critical questioning of the processes that underlie human thinking as the point of departure for the realization and materialization of thoughts and ideas. On this point, we clearly face a difficult problem when it comes to the two realms of religion and law. The problem consists in the dichotomy that strongly characterizes the process of human thought. Here again, we do not dispose of sufficient knowledge of the scope and depth of the human mind, but it nevertheless has been argued that “it may be that we cannot shake off our dualistic way of thinking because it is innate and modular, and innate modular beliefs are extremely hard to shift.”²⁶ The lack of certainty about the functioning of the mind calls for great caution. Nonetheless, I have tried to argue elsewhere that the mind, in a wider sense, is the prime source of normativity.²⁷ Hence, depending on the nature of the human mind, we can speculate that the mind is the central switch point between the spheres of religion and law. This duality is, in my view, also referred to in the Biblical adage: “God hath spoken once; two-fold is what I heard.”²⁸ It is also described by Mircea Eliade, who stated that “Human existence therefore takes place simultaneously upon two parallel planes; that of the temporal, of change and of illusion, and that of eternity, of substance and of reality.”²⁹ Applied to the spheres of religion and law, this duality can be described as meaning that religion is mystical, while law is rational, or that the former is “surreal,” while the latter is “real.”

All in all, the dilemma that is opened by the dualistic way of thinking that is intrinsic to the mind (which has in particular seized control of Western scientific thinking) calls for new approaches to logic and perhaps even for the eventual acceptance of a new paradigm. In this regard, John Dewey once wrote that the “infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need.”³⁰ The same need can actually be derived from the many paradoxes that the human mind has created in order to cope with the complexity of the current global developments.³¹ These paradoxes can be regarded as early indicators for a new paradigm to materialize that indeed inaugurates an age of paradox.³² This new paradigm may consist in a gradual shift from the tendency to logically oppose antagonistic concepts, towards their mutual complementarity. It can also be regarded as the primordial human desire for atonement. It is interesting to note that the concept of “atonement” in the English language originally comes from “at-one-ment,” which is an expression of the desire to be “one” or in harmony with the rest of the world. It appears to express the desire to overcome all kinds of divisions that are created by the mind. These divisions and the desire to overcome them are, in my eyes, expressed in the many paradoxes that we face in the debate about the governance of global affairs in the world of today.

3. PARADOXES AS A MEANS FOR TRANSCENDING THE RELIGION AND LAW DICHOTOMY

It appears that today, paradoxes, or more generally, “essentially oxymoronic concepts,” are becoming the predominant rhetorical figures of scientific discourse.³³ However, it is not only scientific discourse that is prone to using paradoxes or oxymora; rather, any public debate or public controversy, whether it is

²⁵See generally J. ZANDER, *THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE IN PRACTICE: COMPARATIVE DIMENSIONS* (2010); C.E. FOSTER, *SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS: EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY* (2011).

²⁶See, e.g., P. CARRUTHERS, ST. LAURENCE AND S. STITCH, *THE INNATE MIND: FOUNDATIONS AND THE FUTURE* 101 (2008).

²⁷See R.J. Neuwirth, *Law as Mnemonics: The Mind as the Prime Source of Normativity*, 2 *EUROPEAN JOURNAL OF LEGAL STUDIES* 143 (2008).

²⁸See I. MYER, *QABBALAH VI* (2003); Psalms 62:11.

²⁹See M. ELIADE, *PATTERNS IN COMPARATIVE RELIGION* 460 (1996).

³⁰J. Dewey, *Logical Method and Law*, 10 *CORNELL L. Q.* 17, 27 (1924).

³¹See, e.g., ROY SORESENSEN, *A BRIEF HISTORY OF THE PARADOX: PHILOSOPHY AND THE LABYRINTHS OF THE MIND* (2003).

³²See C. HANDY, *THE AGE OF PARADOX* (1995).

³³See R.J. Neuwirth, *Essentially Oxymoronic Concepts*, 2 *GLOBAL JOURNAL OF COMPARATIVE LAW* 147 (2014).

cultural, economic, social or political in nature, may find itself explicitly, or even implicitly, using a paradox. Examples of such paradoxes or oxymora are the concept of “soft law” in legal discourse, the concept of “culture industry” in the context of cultural policies, and other concepts, such as “simplicity,”³⁴ “glocalisation”³⁵ and “framegration”³⁶ in various political discourses. Even the European Union can be understood to fall within this category, when it is taken as a concrete realization of the idea of Europe and its peoples as *discordia concors* (harmonious discord), which is otherwise reflected in its unofficial motto “united in diversity.”³⁷

Generally, a paradox is defined as a “seemingly absurd or self-contradictory statement which, when investigated or explained, may prove to be well-founded or true.”³⁸ The use of paradoxes is most easily detected when it occurs explicitly in the form of oxymoronic constructions or “figures of speech in which apparently contradictory terms appear in conjunction.”³⁹ Other uses may well be more difficult to detect or may remain in hiding until their deeper meaning is uncovered as the result of some type of active intellectual or spiritual effort. This is, for instance, the case with *koans*, which function as conundrums of a paradoxical character that cannot be answered on the basis of rational thinking (alone). Instead, the unraveling of the conundrum requires a swift change in the comprehension or a sudden transcendence, by way of intuition, of the usual perception that is caused by the limitations that are imposed by the intellect on the mind.⁴⁰ A *koan* can therefore be regarded as a technique that operates inside the switch point that the mind constitutes, as outlined above.

The key element common to paradoxical statements or concepts is the initial comprehension of their “absurdity” or “contradiction.” However, as the adverbial addition to the definition of the term paradox indicates, the absurdity or contradiction of the argument is only “seeming” or “apparent,” and it may not be well-founded. Hence, the contradiction or absurdity may – later, and after a closer look – dissolve, giving way to a more complete picture or optimized understanding of the phenomenon described by it. As such, the great value of paradoxes is, first, their use to build upon the dynamic nature of things, and second, their use to require a process of learning through both the broadening and deepening of our understanding. More generally, a paradox can therefore also be described as the point of departure for an intellectual endeavor that initiates a process by which two apparently contradictory propositions are weighed against each other and eventually are dissolved to form a novel concept or the foundation of an improved understanding.

Applied to the concepts of religion and law, this means that progress in the understanding of their mutual relation can arguably be made by understanding their relationship as being part of a dynamic process and/or as not being mutually exclusive. Their apparent mutual incompatibility may be rooted in the discourse about the separation between the state and the church. It has also been reinforced by the Western scientific discourse and its strong Cartesian orientation. Here, the global discourse, and especially discourse in the Western hemisphere, often uses an understanding of the role of religion and of law that is too narrow. It is also rendered more difficult by the established understanding of the separation of state and church. Such an understanding, however, is rather based on an assumption or a mere trick of the mind, namely, that law is separated from morality.⁴¹

³⁴See J. KLUGER, *SIMPLEXITY: WHY SIMPLE THINGS BECOME COMPLEX (AND HOW COMPLEX THINGS CAN BE SIMPLE)* (2008).

³⁵See G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (G. Teubner ed., 1994), understanding “glocalisation” as the parallel coexistence of the local and the global level in the context of the dynamics of globalization.

³⁶See B. Hettne, *The International Political Economy of Transformation*, in *INTERNATIONAL POLITICAL ECONOMY – UNDERSTANDING GLOBAL DISORDER* 1, 22 (B. Hettne ed., 1995), using the concept of “framegration” to describe two movements pressing in opposite direction, namely, toward fragmentation, on the one hand, and toward integration, on the other hand.

³⁷See W. Kaegi, *Discordia Concors: Vom Mythos Basels und von der Europa-idee Jacob Burckhardts*, in *DISCORDIA CONCORS – FESTGABE FÜR EDGAR BONJOUR ZU SEINEM SIEBZIGSTEN GEBURTSTAG AM 21. AUGUST 1968* 131, 136-52 (M. Sieber ed., 1968).

³⁸See *THE CANADIAN OXFORD DICTIONARY* 1054 (K. Barber ed., 1998).

³⁹*Id.* at 1040.

⁴⁰The term *koan* derives from Zen Buddhism and means a “public document setting up a standard of judgment” or more generally a “public matter for thought.” In its origin, the Chinese term *kung-an* referred to the field of jurisprudence and meant “legal precedent”; see D.T. SUZUKI, *THE ZEN KOAN AS MEANS OF ATTAINING ENLIGHTENMENT* 81 (1994) (a better edition is the German one, D.T. SUZUKI, *KOAN – DER SPRUNG INS GRENZENLOSE: DAS KOAN ALS MITTEL DER MEDITATIVEN SCHULUNG IM ZEN* (1988)); see also M.S. DIENER, *DICIONNAIRE DE LA SAGESSE ORIENTALE: BOUDDHISME - HINDOUISME – TAO SME - ZEN* 291 (G. Schoeller ed., 1989).

⁴¹See generally LON L. FULLER, *THE MORALITY OF LAW* (1964); N. E. Simmonds, *Law as a Moral Idea*, 55 *U. TORONTO L.J.* 61 (2005).

The lack of consensus regarding the meaning of these concepts and the absence of an open debate are among the principal causes for the frequent misperceptions of religious systems and their mutual relation to the legal sphere. After a closer look, it is hard to deny that the separation of law from religion is practically and theoretically impossible. It was, at its best, an auxiliary tool used for a scientific experiment. In my view, this is also the case with Hans Kelsen's concept of a *grundnorm* (basic norm), whereby he merely substituted the religious sphere by a secular concept or bracketed out the religious from the legal.⁴² In fact, Kelsen himself hints at this by discussing the dualism of legal theory and ways to overcome it.⁴³ In my reading of his pure theory of law, its purpose was to improve the internal consistency of legal orders and not to eternally preclude a discussion of matters that we deem to be beyond the sphere of rational thinking from the legal debate. More importantly, he also indirectly refers to a possible link between a religious and a legal order by acknowledging a relative, and not absolute, difference between them.⁴⁴ Generally, we can note that if two concepts stand in relation to each other, then they will influence each other even if, at first sight, they appear antagonistic in their meanings. Kelsen already points at some sort of relation or mutual influence, given that he refers to the difference as being "relative."⁴⁵ This relative difference clearly indicates the existence of a "relation," which can be located in the process of the so-called "secularization of law."

4. LAW AND RELIGION: SECULARIZATION VERSUS SPIRITUALIZATION

Secularization is usually understood as the process by which legal norms become dissociated from religious norms. Historically, it can also be read as the gradual struggle for the separation of church and state as it has been promoted, particularly in the West. This process from the divine to the mundane or the religious to the secular legal sphere is perhaps best exemplified in the concept of sovereignty.⁴⁶ Sovereignty, which in its etymological origin merely means "authority" or "rule," was used to denote the divine origin of the secular ruler or to add divine legitimacy to the mundane rule of a mundane ruler who, however, saw herself or himself as placed in this role by the grace of God (*dei gratia*). Later, the application changed to the description of an independent territorial (nation) state. In total, however, it remains unclear the extent to which the concept "sovereignty" is truly a secularized concept (as proposed by Carl Schmitt) or if it is merely the "locus, the point of the point of expression of a secularizing movement."⁴⁷

Ultimately, a possible definite answer to this question again remains highly speculative and entirely depends on the underlying interpretation and understanding of the concepts involved. It is safer to merely state that secularization is perceived notably in the West as a process that is needed for the establishment of a democratic society. This understanding notwithstanding, the degree of the separation of religion and law, or church and state, differs considerably in many countries in the West alone. The degree of separation varies even more widely in the entirety of the countries in the world, with perceived disparities between the West and the East. The difference in degree is also largely blamed as providing the principal cause for the conflict between different cultures and their societies. This also strongly characterizes the apparent conflicts between Western and Islamic societies, as it is outlined also in the theory of a clash of civilizations.⁴⁸ Regarding the clash of civilizations, it is doubtful whether it deserves to be called a "theory"; perhaps it should rather be characterized as an "agenda" or a "foreign policy goal" that eventually turned a proposal into something close to a "self-fulfilling prophecy" based on the old adage, "*divide et impera*" (divide and rule). This may provide an appropriate characterization of the clash of civilization agenda, especially when it is critically contrasted with the following statement written by Albert Einstein on a telegram:

⁴²See H. KELSEN, *PURE THEORY OF LAW* 31 (1967).

⁴³See H. KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* 37-53 (1992).

⁴⁴KELSEN, *supra* note 44, at 219, writing "[A]ccording to a positivistic theory of law the validity of positive law rests on a basic norm, which is not a positive but a presupposed norm, hence not a norm of the positive law whose validity is founded on the basic norm; and according to the natural-law doctrine, the validity of positive law likewise rests on a norm that is not a norm of positive law and functions as a value standard of this law. *In this fact one might see a certain limitation imposed upon the principle of legal positivism and one might describe the difference between a positivistic theory of law and a theory of natural law as relative rather than absolute*" [italics added].

⁴⁵*Id.*

⁴⁶See, e.g., G. Buijs, "*Que les Latins appellent maiestatem*": *An Exploration into the Theological Background of the Concept of Sovereignty*, in *SOVEREIGNTY IN TRANSITION* 229 (N. Walker ed., 2003).

⁴⁷*Id.* at 232-35, 255.

⁴⁸S.P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1996).

If the believers of the present-day religions would earnestly try to think and act in the spirit of the founders of these religions then no hostility on the basis of religion would exist among the followers of the different faiths. Even the conflicts in the realm of religion would be exposed as insignificant.⁴⁹

Hence, assuming that conflicts between (and within) societies are caused by differences in the respective religious (or – by proxy – cultural) backgrounds of the societies (or their members) is problematic. Rather, they appear to be caused by strong misconceptions and a lack of mutual knowledge or partial interpretations of their respective norms.

More generally, and leaving aside the possible root problem of the lack of knowledge that the respective religious systems have of each other, it may also be forgotten that things and societies do not stand still or subject to a further strong misconception that they do stand still.

In accordance with the continuous change, the differences between religious and legal systems appear to be caused less by their differences and more by the fact that they are situated at different stages in their cyclical development. In other words, it is forgotten that it can never be night and day simultaneously on the entire planet. This can also be exemplified by experiences in other areas, such as the degree of respect for human rights, the enforcement of intellectual property rights, or more generally, the degree of economic, cultural or political development.

To briefly summarize, the many remaining doubts as to the true nature of the process of secularization obstruct deeper insights into the precise nature of the relationship between religion and law. Doubts notwithstanding, the fact that there is empirical evidence about the process of secularization supports the assumption that there is a qualitative link between the two concepts. It remains to be seen, however, whether the relational process is unilinear, leading either through the secularization of theological concepts to secular legal concepts or, inversely, through a spiritualization of secular concepts to legal norms having theological content. Both trends can currently be observed in the many governance debates around the world. Hence, it can be advocated that a cross-fertilization between what we could generally describe as the religious sphere and the legal sphere takes place cyclically, or even simultaneously. It therefore remains to be explored whether some deeper insights can be gained from a brief excursus into an area of ancient religious law and its reception in modern legal orders. This area is Islamic banking and the prohibition of *riba* (usury), to which we now turn.

5. LAW AND RELIGION INTERTWINED: THE CASE OF THE PROHIBITION OF USURY IN ISLAMIC BANKING

As was stated above, the dawn of the twenty-first century often displayed various tendencies that appear to be opposed to each other. On the one hand, technological and scientific progress is flourishing, national markets are becoming integrated into a single global economy, and the importance of the role of international law is increasing through a proliferation of international organizations. On the other hand, dramatic poverty prevails in major parts of the world, nationalist movements are increasingly gaining support and traditional spiritual values and laws are re-emerging. One of the most powerful and most coherent traditional concepts that provides guidance in almost all spheres of human daily life is Islam. Based on divine revelation, Islam is, by its very nature, a broad and holistic concept that governs not only religious rituals and moral behavior, but also provides complete guidance for all kinds of human activities. Thus, it goes without saying that Islam also touches upon economic matters in human behavior in general, and upon the banking system as the financial pillar of each economy in particular.

The Islamic economic philosophy is characterized by the Man-God relationship, which is defined by *tawhid*, the total commitment to the will of Allah, and only Allah. The underlying principle of this relationship is that “man is accountable to Allah and his success in the life hereafter depends on his performance in this life on Earth.”⁵⁰ The accountability of man towards God also includes the relation of men among themselves. This leads to conclusion supporting fair allocation of resources to people. In this regard, it is widely agreed upon that Islam rejects asceticism and allows for a “materially well provisioned life.”⁵¹ On the other hand, moderation with respect to an

⁴⁹ALBERT EINSTEIN – THE HUMAN SIDE: NEW GLIMPSES FROM HIS ARCHIVES 96 (H. Dukas & B. Hoffmann eds., 1981).

⁵⁰See M.N. SIDDIQUI, MUSLIM ECONOMIC THINKING: A SURVEY OF CONTEMPORARY LITERATURE 5 (1981).

⁵¹*Id.*

excessive lifestyle, luxurious goods, or greed is recommended. A further important feature is the role of the state in securing economic well-being by enhancing development and growth.⁵²

A cornerstone of Islamic economic thought is the Islamic banking system, which is widely associated with the Qur'anic prohibition of any form of usury or interest (*riba*) on money that is lent. The prohibition of *riba* is certainly a principal characteristic of the Islamic banking system, but its implications for an economic system go far beyond it. Islamic economic thought was largely construed by Muslim jurists, Sufis and philosophers in accordance with and based on the teachings of the *Qur'an* and the *Sunnah*.⁵³ It can be seen as a response to the economic challenges of their times.

Nonetheless, the recent resurgence of Islam in the present time has brought major changes for the traditional, the so-called "European or Western" banking system that derived from the financial activities of Northern Italian medieval cities and that, as seems to have been forgotten, in earlier times, also condemned usury.⁵⁴ During the last few decades, many Islamic countries or countries with a respective Muslim majority also began to adapt their economies to the foundations of the traditional banking model as they tried to bring their legal systems into greater harmony with Islam. In addition to the core legal areas, such as criminal law and family law, commercial laws and, in particular the banking regulations also have undergone a process of Islamization.

Due to the increasing mobility of people in the wake of globalization, however, Western countries, particularly those with a considerable Muslim population, also have begun to face the challenge of Islamic banking.⁵⁵ In recent decades, Islamic banking has moved from a purely theoretical concept to an operational banking system that encompasses hundreds of financial institutions in a growing number of countries.⁵⁶ Hence, what began in the 1960s and has in the meantime attracted great interest, not only in the financial centers in the Middle East but also in other financial capitals, such as London, Singapore, Hong Kong, Kuala Lumpur, France, South Korea and the US. Islamic banking has also received greater attention globally, albeit with significant national differences.⁵⁷ The interest in Islamic banking has risen further since the fall of 2008 in the context of the comparatively positive performance of its banks in the global financial crisis.⁵⁸ Although Islamic banks were not immune from the consequences of the crisis, it was found that "the restrictions applicable to Islamic finance—the requirement that investments and financings be tied to productive assets and the avoidance of speculative investments—will no doubt benefit Islamic finance during the current financial crisis and as the industry develops."⁵⁹

Even if the exact causes for the resilience, at least, of Islamic banks during the global financial crisis cannot be determined, the theory of Islamic banking in general and the prohibition of *riba* (usury/interest) may have played an essential role in it. The word *riba* literally means "excess" or "increase" and is generally understood to cover both interest and usury, but its precise meaning and scope has been widely debated since early Muslim times.⁶⁰ For instance, it has also been argued that *riba* has a much broader sense under *Shari'a*, which is described as an unlawful gain derived from the quantitative inequality of the counter-values in any transaction that purports to effect the exchange of two or more species (*anwa*), which belong to the same genus (*jins*) and are governed by the same efficient cause (*illah*).⁶¹

⁵²*Id.*

⁵³The *Sunnah* is defined any saying, action, approval or attribute whether physical or moral ascribed to the Prophet Muhammad (PBUH).

⁵⁴For a useful comparative survey of the approaches to usury by the Judeo-Christian-Islamic faiths, see Y. ABDUL RAHMAN, *THE ART OF ISLAMIC BANKING AND FINANCE* 16-46 (2010).

⁵⁵See, e.g., M. FAHIM KHAN & M. PORZIO, *ISLAMIC BANKING AND FINANCE IN THE EUROPEAN UNION; A CHALLENGE* (2010).

⁵⁶See also M. Iqbal & P. Molyneux, *Thirty Years of Islamic Banking: History, Performance and Prospects* (2005).

⁵⁷See, e.g., IBRAHIM WARDE, *ISLAMIC FINANCE IN THE GLOBAL ECONOMY* (2000).

⁵⁸See, e.g., F. Saleh, *Islamic Banking: Steady in Shaky Times: Principles Based on Religious Law Insulate Industry From Worst of Financial Crisis*, WASHINGTON POST, Oct. 31, 2008; C. Yeates, *Islam could help us avoid toxic assets*, SYDNEY MORNING HERALD, May 28, 2010, at 4.

⁵⁹See I. Salah, *Islamic Finance in the Current Financial Crisis*, 2 BERKELEY J. MIDDLE E. & ISLAMIC L. 137 (2009); I. Warde, *The Relevance of Contemporary Islamic Finance*, 2 BERKELEY J. MIDDLE E. & ISLAMIC L. 137, 157 (2009); see also CURRENT ISSUES IN ISLAMIC BANKING AND FINANCE: RESILIENCE AND STABILITY IN THE PRESENT SYSTEM (A.M. Venardos ed., 2010); A.M. EL TIBY, *ISLAMIC BANKING: HOW TO MANAGE RISK AND IMPROVE PROFITABILITY* xv (2011) ("Islamic banks were the least affected by the credit crunch due to their asset-based nature of operations. However, they still face many challenges; many bankers as well as regulators are assessing Islamic banks' robustness").

⁶⁰See HANDBOOK OF ISLAMIC BANKING xviii, 43 (M.K. Hassan & M.K. Lewis eds., 2007).

⁶¹See N.A. SALEH, *UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW, RIBA, GHARAR AND ISLAMIC BANKING* 13 (1986).

In the course of time, which has seen the formation of numerous different schools of legal thought (*Madhab*),⁶² different classifications of *riba* have been introduced, such as the *riba al-qarud*, which refers to usury involving loans, and *riba al-buyu*, which relates to usury involving trade, and which themselves can be further subdivided.⁶³ The central importance of such classifications is that they reflect various efforts to assess what kind of *riba* is unlawful under Islamic principles and whether there is the possibility to exclude some categories from the prohibition. The question of the prohibition of *riba*, however, is also closely linked to the role and ability of human perception and interpretation, notably, to the efforts to adapt our understanding to the rapid occurrence of change in time.⁶⁴ Therefore, interpretations of the prohibition of *riba* have not only differed in terms of different sources of Islamic law, from *Qur'an* to *Qiyas*,⁶⁵ but also in terms of changing times and contexts.

As for the context, it was during the time of Prophet Muhammad (PBUH) that the city of Mecca was actively involved in trade and business. The businessmen of Mecca were mainly engaged in what is now termed as “import and export.” One important issue that was of great concern to these businessmen was to be as productive and to gain as much benefit from their transactions as possible. They, therefore, got involved in loans for interest, speculations and aleatory transactions.⁶⁶ Gradually, a strong recommendation against taking interest emerged, when the *Surah al-rum*, as one of four verses in the Holy *Qur'an* that mentioned the prohibition of *riba*,⁶⁷ was revealed in Mecca. It was believed that the “prohibition of *riba* protects [the] weak against exploitation and at the same time encourages that investors and laborers combine their resources in ways other than lending money for profit.”⁶⁸ Verse 39 of the *Surah al-rum* is related to a mere judgment of value and states as follows:

And that which you give in gift (to others), in order that it may increase (your wealth by expecting to get a better one in return) from other people's property, has no increase with Allāh, but that which you give in Zakāt seeking Allāh's Countenance then those, they shall have manifold increase.⁶⁹

This revelation emphasizes that interest deprives wealth of God's blessings⁷⁰ and is respected as an introduction to the prohibition of *riba*.⁷¹ This implicit condemnation was followed by a limited one and a straightforward one came later in Medina. Three Medinan *Surahs* of *Qur'an* specifically deal with this issue. The implicit condemnation can be seen in the *Surah al-nisa*, chapter 4, verse 161. This revelation condemns *riba*, i.e., “placing interest in juxtaposition with wrongful appropriation of property belonging to others” as follows:

And their taking of Ribâ (usury) though they were forbidden from taking it and their devouring of men's substance wrongfully (bribery, etc.). And we have prepared for the disbelievers among them a painful torment.⁷²

The direct prohibition of *riba* is finally found in the *Surah al-Imran*, verses 130 and 131, which enjoin Muslims to stay clear of interest for the sake of their own welfare in the following words:

O you who believe! Eat not Ribâ (usury) doubled and multiplied, but fear Allāh that you may be successful.(130), and fear the Fire, which is prepared for the disbelievers.(131)

⁶²Following the Amman Message, i.e. a statement issued on 9 November 2004 by H.M. King Abdullah II bin Al-Hussein in Amman (Jordan), there exist eight different legal schools, namely four Sunni schools (*Mathahib*) of Islamic jurisprudence (*Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*), the two Shi'i schools of Islamic jurisprudence (*Ja'fari* and *Zaydi*), the *Ibadi* school of Islamic jurisprudence and the *Thahiri* school of Islamic jurisprudence. Summary, THE AMMAN MESSAGE, [http://www.ammanmessage.com/\(last visited July 4, 2014\)](http://www.ammanmessage.com/(last%20visited%20July%204,%202014)). On the evolution of Islamic jurisprudence, see, e.g., JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE (1979); C. MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH-10TH CENTURIES C.E. (1997).

⁶³See HANDBOOK OF ISLAMIC BANKING, *supra* note 62, at 43.

⁶⁴On the problem of the interpretation and development of Islamic legal studies, see also W.B. Hallaq, *The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse*, 2 UCLA J. OF ISLAMIC & NEAR E. L. 1 (2002).

⁶⁵In Islamic law, analogical reasoning as applied to the deduction of juridical principles from the *Qur'an* and *Sunnah*.

⁶⁶See H. LAMMENS, LA MECQUE A LA VEILLE DE L'HERITAGE 27 (1924), rewritten in SALEH, *supra* note 63, at 10.

⁶⁷See HANDBOOK OF ISLAMIC BANKING, *supra* note 62, at 41.

⁶⁸See SALEH, *supra* note 63, at 11.

⁶⁹*Surah al-rum*, verse 39.

⁷⁰See M. Ariff, *Islamic Banking*, 2 ASIAN PAC. ECON. LIT. 46 (1988).

⁷¹See S. Draz, *L'usure en Droit Musulman*, in TRAVAUX DE LA SEMAIN DE DROIT MUSULMAN 147 (1953), rewritten in SALEH, *supra* note 63, at 33.

⁷²*Id.*

The *Surah al-baqarah* verses 275-281, which establish a clear distinction between interest and trade, urge Muslims to take only the principal sum and to waive this sum if the borrower is unable to repay. They stipulate as follows:

Those who eat Ribâ (usury) will not stand (on the Day of Resurrection) except like the standing of a person beaten by Shaitân (Satan) leading him to insanity. That is because they say: "Trading is only like Ribâ (usury)," whereas Allâh has permitted trading and forbidden Ribâ (usury). So whosoever receives an admonition from his Lord and stops eating Ribâ (usury) shall not be punished for the past; his case is for Allâh (to judge); but whoever returns [to Ribâ (usury)], such are the dwellers of the Fire - they will abide therein (275). Allâh will destroy Ribâ (usury) and will give increase for Sadaqât (deeds of charity, alms, etc.) And Allâh likes not the disbelievers, sinners (276). Truly those who believe, and do deeds of righteousness, and perform As-Salât (Iqâmat-as-Salât), and give Zakât, they will have their reward with their Lord. On them shall be no fear, nor shall they grieve (277). O you who believe! Be afraid of Allâh and give up what remains (due to you) from Ribâ (usury) (from now onward), if you are (really) believers (278). And if you do not do it, then take a notice of war from Allâh and His Messenger [] but if you repent, you shall have your capital sums. Deal not unjustly (by asking more than your capital sums), and you shall not be dealt with unjustly (by receiving less than your capital sums) (279). And if the debtor is in a hard time (has no money), then grant him time till it is easy for him to repay, but if you remit it by way of charity, that is better for you if you did but know (280). And be afraid of the Day when you shall be brought back to Allâh. Then every person shall be paid what he earned, and they shall not be dealt with unjustly (281).

These revelations are widely considered to be the principal sources of the prohibition of *riba*. The prohibition of *riba*, however, is also embedded in other sources of Islamic law. More concretely, the prohibition of *riba* is also cited in the *Sunnah* or *Hadiths* (the sayings or behavior of the Prophet).⁷³ Generally, the Prophet condemned not only those who take interest, but also those who give interest and those who record or witness the transaction, "saying that they are all alike in guilt."⁷⁴ The prohibition is further mentioned in the third source of Islamic law, which is *Ijma* (scholarly consensus). *Ijma* is used when one can find neither a passage from the *Qur'an* nor a *hadith* bearing on the matter at hand.⁷⁵ It consists in a rule that is unanimously approved through a general consensus of Islamic scholars.⁷⁶ The fourth source of Islamic law is *Qiyas* or reasoning, which is accepted as a tool for the interpretation and application of the law. It mainly consists in a devoted study with the view of deriving an appropriate rule by logical inferences and analogy.⁷⁷ Therefore, this source can be said to be based mainly on human reason.⁷⁸ In accordance with the hierarchical structure of the sources of Islamic law, however, it is necessary to follow a strict order. This means that, in the case of any question, one must refer first to the *Qur'an*, then *Sunnah*, and if neither a passage of *Qur'an* nor a *hadith* can be found, only then should one refer to *Ijma*. In the case of the failure of all three, *Qiyas* will be utilized. In the case of the latter (similar to the third), it should be mentioned that only a scholar who is trained in a special way and "deeply learned in all the nuances of the law is equal to the task."⁷⁹ Such a scholar is known as *mujtahid* and his exertion called *ijtihad*. Regarding the source of *Qiyas* and the exertion of *ijtihad*, one can say that *Qiyas* may be seen as a technique of *ijtihad*. If the meaning of the text is open to more than one interpretation, the rule is derived from the text through *ijtihad*. However, the proofs of the *Qur'an* and *Sunnah* must be given precedence over the view of any *mujtahid* or scholar, and a weak *hadith* is preferred over an analogy and an (individual) opinion.⁸⁰ The prohibition of *riba*, for example, is part of a divine order, and Muslims need no proofs before they reject the institution of *riba*.⁸¹

⁷³The question of whether the *Sunnah* should be seen as a supplement to the *Qur'an* is subject to debate among Islamic scholars but the majority is that "there is no necessary conflict in maintaining that the *Sunnah* is a supplement to the *Qur'an* as well as a source of Shari'ah in its own right," see M.H. KAMALI, *SHARI'AH LAW: AN INTRODUCTION* 25 (2008).

⁷⁴*Hadith* compiled by Muslims (*Kitab al-Musaqat*) rewritten in *id.*

⁷⁵See C.G. WEERMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 39 (1988).

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸It is important to mention that *Sunni* and *Shia* Muslims have different opinions about considering *qiyas* as a source of Islamic law. *Shia* Muslims classify the sources as *Qur'an*, *Sunnah*, *Ijma* and *Aql* whereas *Sunni* Muslims categorize them as *Qur'an*, *Sunnah*, *Ijma* and *Qiyas*. The argument over *Qiyas* between *Shia* and *Sunni* is considered one of the main, crucial disputes. *Shia* Muslims divide the *Qiyas* into various categories and one of these categories, which is introduced by them, is not accepted by *Sunnis*. Some believe that this difference in opinion is too trivial to be considered as one of the main disputes between *Shia* and *Sunni* Muslims.

⁷⁹See WEERMANTRY, *supra* note 76, at 41.

⁸⁰See Ariff, *supra* note 71.

⁸¹See Ariff, *supra* note 71.

This means that the prohibition of *riba* is, in principal, certain and not subject to question, whereas the extension of its prohibition to other matters can be challenged through *ijtihad*, i.e., the reasoning of qualified scholars. However, to mention a last important aspect of *ijtihad*, it must be noted that, according to the general opinion among Muslim historians, the right to refer to *ijtihad* was cut off in Sunni Islam sometime in the tenth century.⁸² This is covered in the phrase, “the closing of the door of *ijtihad*.”⁸³ The question of the closing of the door of *ijtihad* has occupied scholars and clerics over centuries and has stirred strong controversy.⁸⁴ Particularly, this is of fundamental importance because it concerns the evolution of religious systems in general and the adaptation of their content to changes in the societies that they serve. Therefore, it is also of great significance to the link between religion and law.

Without exploring the controversy any further, it can be stated that the controversy over the closing of the door of *ijtihad* is central for two reasons. First, it is important in the process of the adaptation of ancient religious texts to the needs of modern society and, second, for the example it provides of the difficulty of extracting a deeper and yet concrete understanding from such religious norms. This difficulty is further concretized in the realm of Islamic law by way of the schism in Shiite and Sunni Islam, as well as the existence of different schools of law (*Madhab*), notably, the four Sunni schools of law, the Hanafis, Shafi’is, Hanbalis, and Malikis, who have all commented inter alia on the prohibition of *riba*. Corresponding to the numerous schools, a large number of related instruments have been created that will pave the way to a form of banking that is compatible with Islam.⁸⁵ Efforts pertaining to the establishment of these instruments, however, point again to the general perceptual or cognitive difficulty in interpreting both religious and legal texts. Thus, the cognitive level is where future approaches to the religion and law linkage must begin, by relying less on their separation, and instead, by duly emphasizing their complementary character.

6. TOWARDS A POSSIBLE SOLUTION OF THE CONUNDRUM: PARALLELS BETWEEN RELIGION AND LAW

A closer look at the theory of Islamic banking allows for several interesting findings. First, it reveals the gradual manifestation of a spiritual idea in a concrete legal and factual expression. The only difference between this and secularization, as it is understood in many Western countries, is in fact conceptual, namely, that the manifestation takes place “within” the system and does not require a rigid separation of religion and law. In Islam, instead, the gradual manifestation only proceeds through the various sources of Islamic law, from the *Qur’an* itself via the sayings of the prophet (*Hadith*) to various forms of interpretative tools, such as reasoning or consensus. From a different angle, it also means a gradual manifestation of a common collective through the sum of all individuals. At the lowest end, it is met with the difficulty of applying the most basic religious principles to the most detailed challenges of daily life, which in this case, means the establishment of an economic order or business environment that it is line with the spirit and letter of Islam in its entirety.

By contrast, the conception of secularization in the West is currently not based on such a unitary or holistic conception. Due to historical and political reasons, it was perceived as necessary that this process proceed by way of separating religion from science in a broader sense and from law in particular. The reason for this separation is most likely to be found in the strongly centralized mundane manifestation of political power by the Catholic Church. In fact, it appears that the separation of law from religion was partly based on a wrong conception of legal positivism and was caused more by the need for the adaptation of traditional rules to the changes in modern societies. On a deeper level though, the separation may have also been caused by the separation of philosophy from knowledge that was undertaken by Plato and Aristotle, which may have helped to shape particular modes in the cognitive processes of the Western mind that are described as

⁸²Some believe this time to be around the beginning of the fourth century and others advance it to the seventh. CLASSICISM ET DECLIN CULTUREL DANS L’HISTOIRE DE L’ISLAM: ACTES DU SYMPOSIUM INTERNATIONAL D’HISTOIRE DE LA CIVILISATION MUSULMANE (BORDEAUX 25-29 JUIN 1956) (R. Brunschvig & G. von Grunebaum eds., 1957).

⁸³W.B. Hallaq, *Was the Gate of Ijtihad Closed?*, in *LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM* 7 (1994).

⁸⁴See R. Peters, *Idjtihad and taqlid in 18th and 19th Century Islam*, 20 *DIE WELT DES ISLAMIS* 132, 145 (1980).

⁸⁵See also J. Thomson, *Developing Financial Law in Conformity with Islamic Principles: Strict Interpretation, Formalism or Innovation?*, 4 *DEAKIN L. REV.* 77 (1999/2000).

so-called “dual process theories of reasoning.”⁸⁶ This is also manifest in the realm of economics, in which similar dynamics are at play when economic integration is carried out solely on the basis of a process of negative integration, without considering the complementary process of positive integration, i.e., the adoption of new positive rules to fill the void that is created by negative integration. This argument is also supported by the most recent tendencies that can be observed in secular legal discourse, which suggest a return to similar objectives, such as the unity of the (international) legal system,⁸⁷ sustainable development,⁸⁸ and inter-generational equity.⁸⁹

The global financial crisis of the fall of 2008 further supports such an understanding, as it was said to have been caused, among other things, by excessive risk taking and excessive compensation in the financial sector. In this respect, the G-20 summit leaders’ statements seem to read like a modern interpretation of the prohibition of usury.⁹⁰ In the context of a growing inequality, even the Noble Prize winner in economics, Joseph E. Stiglitz, stated that “the financial crisis unleashed a new realization that our economic system was not only inefficient and unstable but also fundamentally unfair” and, consequently, he notably recommended the reform of the banking sector to “make it more difficult for banks to engage in predatory lending and abusive credit card practices, *including putting stricter limits on usury (excessively high interest rates)*.”⁹¹ Or, seen from a different angle, it could be argued that the financial crisis was, among other reasons, also caused by a neglect of traditional and religious rules and of their function in former centuries.⁹² This neglect may again have been supported by cognitive factors that have contributed to the ongoing specialization in science which, in the legal sphere, has been translated into a fragmentation of regulation and possible gaps between the specialized areas.

Hence, the example of the prohibition of usury in Islamic banking shows that the focus is less on the form, (i.e., whether a norm was revealed by divine power or adopted as positive law), and more on the substance and its hidden message that needs to be critically examined and duly interpreted. Such a proposition can also be extended to other areas of apparent regulatory conflicts between religious and legal norms. This is because, in most cases, the underlying problem is universal, as the facts show and different arguments against interest have existed worldwide and throughout great parts of history. Arguments against interest-based transactions are, for instance, found in Hammurabi’s Code, texts of the ancient Greeks and Romans, as well as in the Old and the New Testament.⁹³ Similarly, a large number of religions and cultures recommend, especially when entering religious sites, that the head be covered, either through the Islamic veil, the Christian headscarf, the Russian *babushka*, the Sikh *dastar*, the Jewish *kippa* or an Indian *saree*.

These examples finally suggest that, from a substantive viewpoint, there is little difference between religious and (secular) legal texts. This was also found to be true for the process of their interpretation, which has been described as follows: “Firstly, both kinds of interpretation treat texts as repositories of hidden or esoteric meanings. Secondly, both kinds of interpretation treat texts as authoritative for our own decisions and conduct. Thirdly, both kinds of interpretation treat a diversity of seemingly disparate texts as forming a harmonious, univocal whole.”⁹⁴

These similarities do invite us to try to overcome the conception that religious and legal norms pertain to different orders. Furthermore, they are reminders of their underlying teleology, which is principally their function as so-called “mnemonic traces and mnemonic devices”⁹⁵ or reminders of past experiences for a better governance in the future.

⁸⁶See E.E. Buchtel & A. Norenzayan, *Thinking Across Cultures: Implications for Dual Processes*, in *TWO MINDS: DUAL PROCESSES AND BEYOND* 217 (Jonathan S.B.T. Evans & K. Frankish eds., 2009).

⁸⁷See, e.g., P.-M. Dupuy, *L’Unité de l’ordre juridique*, 297 *REC. DES COURS* 9-490 (2002).

⁸⁸See, e.g., P. Ala’i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body’s Shift to a More Balanced Approach to Trade Liberalization*, 14 *AM. U. INT’L L. REV.* 1129 (1999).

⁸⁹See, e.g., E. BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY* (1989).

⁹⁰See, e.g., *The Pittsburgh Summit*, G20, https://www.g20.org/sites/default/files/g20_resources/library/Pittsburgh_Declaration_o.pdf (last visited July 7, 2014).

⁹¹J.E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* xli, 335 (2013) [italics added].

⁹²See also C. Wu, *Islamic Banking: Signs of Sustainable Growth*, 16 *MINN. J. INT’L L.* 233, 262 (2007).

⁹³See H. ALGABID, *LES BANQUES ISLAMIQUES* 48-53 (1990); RAHMAN, *supra* note 55, at 16-46.

⁹⁴See St. D. Smith, *Law as a Religious Enterprise: Legal Interpretation and Scriptural Interpretation*, in 4 *LAW AND RELIGION: CURRENT LEGAL ISSUES* 2001 83 (R. O’Dair & A. Lewis eds., 2001).

⁹⁵See R.J. Neuwirth, *Law as Mnemonics: The Mind as the Prime Source of Normativity*, 2 *EUR. J. LEGAL STUD.* 143, 155-57 (2008).

7. CONCLUSION

Against the widespread portrayal of religion and law as belonging to different isolated spheres, and therefore, being prone to conflict with each other, this paper has tried to recognize a few principal features of the relationship between religion and law to be understood more as a problem of perception in a continuum known by the process of human learning. As an introduction, it found several terminological uncertainties related to both concepts that have been caused by a serious degree of fragmentation in their respective factual and institutional settings. In other words, the initial unity, either at the moment of divine revelation for a religious order or at the constitutional moment for a national or an international legal order, has often been lost in the process of the interpretation, implementation and enforcement of their respective contents. In the course of history, it can be observed that both religious and legal systems are often subject to an ongoing fragmentation and that they fall victim to serious conflicts, both internally and externally, between other respective faiths or legal systems, as well as between religious and legal norms in general.

One important element in the occurrence of these conflicts was found to exist in the fact that both systems claim to be holistic and conclusive in the regulation of human affairs, but ultimately operate with an incomplete knowledge about their underlying dynamism and natural processes. A second important element that has resulted from these conflicts is that they appear to prove the existence of a limitation of the dominant scientific paradigm, and notably, the underlying connection between logic and the mind. As was stated, this limitation in our perception and understanding often appears in the form of paradoxes or related rhetorical figures that have been termed “essentially oxymoronic concepts,” which – by transcending the contradictions that are imposed by a dominantly binary logic – are mnemonic reminders of the dynamic nature of all things. These essentially oxymoronic concepts pave the way to the possible finding that even antagonistic concepts may stand in some sort of relationship and, most of all, that even contradictory or absurd statements may eventually be found to be true.

Applied to the dominant perception in the West of religion and law as being antagonistic or belonging to different spheres altogether, this may be interpreted to mean that the strict separation should be critically reassessed and possibly replaced by the formation of a new understanding with a view to finding their complementarity. Likewise, it could be argued that a new understanding of each of the concepts could even render their separation unnecessary, especially when it is built on the unity and integrity of the human being. Such propositions were tested using the example of the prohibition of *riba* (usury) in Islamic banking. Not only is or was the prohibition of usury known to other religious and cultural systems, but it also currently is being proven (again) to be of great relevance in the global economy and in the wake of the recent global financial crisis. Hence, it may be possible to extend the lessons that can be learned from the case of the prohibition of usury to other apparent conflicts between religious norms and the regulation of the public sphere through positive law. As a first insight, it can be said that the emphasis should be put on the content and purpose (*telos*) of the respective norms, and less on their classifications as belonging to the legal or the religious spheres. Such a functional approach also requires greater caution, given the incomplete scientific knowledge that we possess. This is the case with economic indices about the growth of the world economy as much as with the actual purpose behind a tendency to cover head hair in public, at least in sacred sites of prayer, or with calls for caution with respect to scientific experiments altogether.

A way out of this conflictual situation is perhaps to first recognize the human mind as the switch point between the incomprehensible and the comprehensible or the intangible and the tangible, in order to use some synonyms for the spheres of religion and law. This may constitute a useful step in the attempt to shift the attention from the mutual incompatibility of different religious orders, of different jurisdictions, and of religious and legal orders, to a perception of their mutual complementarity. This shift may result in seeing their manifold relationships as being part of a process of mutual cross-fertilization that especially governs the secularization of religious norms, on the one hand, and their transformation in religious norms, on the other. Then, perhaps the case can be made that most regulatory problems and conflicts could be avoided, in particular, if they were based on a more appropriate or more inclusive premise. For the time being, such an inclusive approach also demands a more cautious application of laws and regulations, considering the aforesaid precautionary principle of incomplete information. As a point of departure for future contemplation, this would also allow for the possibility that religion and law are indeed

complimentary and not in conflict at all. In fact, their relationship may be compared to the one of dreams and myths that is described by Otto Rank as follows:

The manifestation of the intimate relationship between dream and myth – not only in regard to the content but also to the form and motor forces of this and many other, more particularly pathological, psyche structures – entirely justifies the interpretation of the myth as a dream of the masses of the people.⁹⁶

The analogy between the religion-law and the dream-myth relationship could entail that there are no differences between religious systems; instead, they are the sum of all individuals' projections of thoughts, emotions, aspirations and the like towards the metaphysical level. Evidence to this end is strong if we consider only the evolution of the three monotheistic religions of Judaism, Christianity, and Islam from the Old, via the New, to the Last Testament. Clues and keys to the many linkages between other religious faiths still need to be found. At this moment and pending further insights, it is due to our limited knowledge that the various conflicts between religious norms and legal norms should be handled with extreme caution, excessive regulation should be avoided and serious efforts should be undertaken to broaden and expand our present understanding, particularly in areas that are less known.

⁹⁶O. RANK, *THE MYTH OF THE BIRTH OF THE HERO: A PSYCHOLOGICAL INTERPRETATION OF MYTHOLOGY* 9 (F. Robbins & Smith Ely Jelliffe trans., 1914).