

## ISLAMIC BANKING AND FINANCE TODAY: ISSUES AND IMPLICATIONS

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### ABSTRACT

Far from being a curiosity, Islamic banking and finance products have come of age. It has become a force to be reckoned within the international financial market breaking new grounds and making giant strides by the day. This growth and geographical spread has brought in their wake several challenges which could no longer be ignored; hence the need for them to be addressed by academics and scholars, professionals and practitioners in the industry, technocrats in the government circles, standard boards as well as allied organizations, shari'ah experts and other jurist consults. Some of these challenges are natural for any evolving/developing system like that of Islamic Banking and Finance (IBF). Yet, others are sociological and they altogether pose a big threat to the further growth and development of the industry if left unaddressed. Attempt is therefore made in this paper to look into such issues and proffer solution to them in order to ensure even and healthy growth and development of the industry.

*Keywords* : Islamic banking and finance, shari'ah, *maqasid* shari'ah, cross border practice, *halal*, *haram*, litigation, *hilah*.

## Introduction

Islamic banking and finance today is making giant strides in terms of products and services, much as it is spreading fast to all the nuck and cranny of the world. The success story has not come without their challenges. These challenges are diverse and multidimensional. The earlier they are addressed the better for the industry as this would enable it to further move ahead. The challenges range from shari'ah compliance of certain products and services rendered by some Islamic Banks, certain risks that are peculiar to Islamic banking and finance, validity or Islamicity of the industry itself as some scholars are of the opinion that there is nothing like Islamic banking, challenges relating to the cross border practices and litigations of cases arising there from, training and retraining of personnel, regulations and codes of conduct, Islamic Banking and Finance and the war against terrorism, creating an enabling environment and the problem of *riba* to those of controversy among scholars and advisory boards, dual legal systems within a particular jurisdiction leading to confusion in the adjudication of matters relating to IBF as well as Islamphobia and the role of the mass media.

These challenges are considered one after the other in what follows hereunder with a robust analysis of the present situation with a view to proffer solution or making recommendations as to the way and means of overcoming them. The Islamic finance observes (Iqbal, 1997:4)<sup>1</sup> 'broadly refers to financial activities that are guided by the teachings of shari'ah (the Islamic Law), which strictly prohibits the payment and receipt of interest. However, describing Islamic Financial system simply as 'interest free' does not reflect a true [w]holistic picture of the System. Islam in general and Islamic finance in particular, strives for preservation of property rights, emphasizing ethical standards, sharing of risks, and promoting social justice. Moreover, not only must investment activities be in line with the ethical principles of the Shari'ah, they should also take into consideration public interest (*masalih*)'. Based on the foregoing

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<sup>1</sup> Iqbal, Z., (1997). Islamic financial system. *Finance and Development*, 34: 42-45.

definition, the present practice seems to have been over burdened with the attitude of looking at products and services from the perspective of shari'ah compliance rather than shari'ah based which was the very 'first best' envisaged or aimed at by the forerunners of Islamic banking and finance System. Much shall be said on this later.

### *Validity of Islamic Banking and Finance*

On 29th August, 2008, a fatwa was issued by a group of jurists or religious scholars declaring the present Islamic Banking and Finance unIslamic and therefore, inconsistent with the principles of shari'ah-the Islamic law. Mansori, M.T. (2010:7&9)<sup>2</sup>, argues that the main contention were based on the concept of *islah*. It was argued that *murabaha* and *ijarah* are legal devices (*hilah*) and not real alternatives to interest. According Aishath Muneeza et al (2010)<sup>3</sup> *hilah* simply means a legal device. The Arabic term *hiyal* is the plural form of *hilah*, which means as opined Muneeza et al, a device, expedient artifice, strategem or the means or way of evading a thing or affecting an object. So, to Arabic lexicographers like Ibn Manzur (1999)<sup>4</sup>, the original meaning of the word *hilah* and other similar terms like *hayl*, *tahayyul*, *ihiyal* et cetera mean ingenuity, skill in management of affairs, shrewdness, raggedness of intellect and or cleverness. Imam Malik and Ahmad disapproved the use of *hilah* whatever type or form it may take.

However, if the findings made by Fage (1978:157)<sup>5</sup> and the conclusion drawn or reached by him are anything to write home about, the current controversy over the validity or Islamicity of Islamic banking and finance is unfounded, unwarranted and uncalled for. He says: 'Beyond the immediate circle of the court, the keys to

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<sup>2</sup> Mansori, M.T. (2010). Shari'ah legitimacy of Islamic banking. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations. 15 – 16 June 2010.

<sup>3</sup> Aisath, M., Nik Nurul Atiqah, N.Y. et. al (2010). *Hilah* in the banking instruments in Malaysia with reference to the banking practices in other jurisdictions: Is there a need to standardize Islamic banking instruments used in all the jurisdictions? A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations.

<sup>4</sup> Jammaluddin Muhammad I.M.I.M. (1999). Lisanu Al- Arab, Beirut: *Dar Sadir & Dar Beirut lil-Tiba'a wa al-Nashr*, 3: 339.

<sup>5</sup> Fage, J.D. (1978). *A History of Africa*. London: Hutchinson & Co Ltd.



advancement and wealth were no longer military valour, but success in business or banking<sup>6</sup>, law or scholarship. Baghdad became the commercial capital of Asia, and the shining centre of Islamic culture and learning at their glorious peak, but there was no longer an Arab empire [at around 750CE.]<sup>7</sup>

However, it is good to examine whether the current practice satisfy the Islamic norms and values, or in other words, the *maqasid* shari'ah-the higher objectives of the Islamic Law. The fact that certain terms of banking and finance in modern conventional system are Arabic words either Anglicized or Gallicized as the case may be, as pointed out by Doi (1980:398-402)<sup>8</sup> in his work; shari'ah- the Islamic Law is a significant pointer to the fact that banking has being part of Islam from the earliest time and it is therefore not alien to Islam and the Muslims as claimed by some scholars. Take for example, he pointed out that *mohatra* which means risk was taken from the original Arabic *mukhatarah*. The same thing applies to bill of exchange which derives its origin from *suftajah*. He therefore concludes that, Muslims were the first to lay down the true foundation of proper trade and even banking in modern civilization. He stressed further that the present day banking terminology is permeated (or replete) with Arabic words and expressions. The very word cheque, he asserts, is originally Arabic, the etymology of which goes back to *sakk* (pl. *sukuk*). He further establishes that traffic and trafficking which origin was *tafriq* and buy was coined from *bai'* both of which are Anglicized from their original Arabic source. Acheter is *ishtara*; tariff is *ta'rifah* the duo of which were Gallicized by the French scholars or people.

Umar bin al-Khatib (634-644CE) was said to have been the first person to draw a cheque, put his seal and append his signature. Al-Yaqubi (d.897CE), a prominent Muslim historian mentioned in his work '*Inna Umara Ibn al-Khatib kana awwala man sakka wa khatama asfala al-sikak*', meaning: Umar Ibn al-Khatib was the first to

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<sup>6</sup> Emphasis ours

<sup>7</sup> What we have at this time is a true reminiscent of the universality of Islam with great emphasis on the universal brotherhood espoused by the Qur'an and exemplified by the Prophet.

<sup>8</sup> Doi A.R. (1980). *Shari'ah-The Islamic Law*. London: Taha Publishers.

draw cheques and put his seal underneath and sign them. Similar statement was made by Al-Jahashiyari (d.942CE) in respect of Harun Ar-Rashid thus: *sa' alahu'l Fadhl 'an yasukka bi-hadha'l-mablaghi bi khattih'*, that is, Al-Fadhl asked him (Ar-Rashid) to draw a cheque in his own hand with regards to this sum of money (which was a million dirham). Ibn Miskawaih (d. 1030) in his *Tajarib al-Umam* also mentioned that wages and salaries of the army were paid via cheques and that one of the major charges made against Muhammad bin Dawud was that he paid the army in cash instead of cheques. So, from thence forward the custom of using cheques becomes a usual and common practice among the general populace. Thus, centres of money exchange were established by the Muslim merchants in different parts of the Muslim world and beyond. Hence, Muslim states and dynasties all over the world embraced this well established banking and finance system scrupulously avoiding *riba* in all the form and manner it may take. If however, as a result of the lethargy of the Muslims and the external interference occasioned by imperialism and western dominance, the world has more or less forgotten this just and suitable Islamic Economics, banking and finance system, the great depression (1930s) and the recent economic meltdown (2008 to date) has indeed ushered in a golden opportunity for man, of course as an impetus, particularly the Muslims to re-visit it in order to overcome the present predicaments.

#### *Cross Border Practices and Litigations*

According to Adeyemo and Mobolaji (2010:5)<sup>9</sup>, cross border practices means the practice of a trade, profession, or an art beyond the shore or border of a nation. In which case, they posit further, such practice/s bears an international outlook. In this case, it refers to the practice of Islamic banking and finance across borders of two or more nations or countries otherwise called jurisdictions in the legal parlance. We agree with the observations made by them that unless necessary rules and regulations,

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<sup>9</sup> Adeyemo, L.K. & Mobolaji, H.I. (2010). Islamic banking and finance today: Professional ethics and cross border practice and litigations. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations. 15 – 16 June 2010.

policies and or code of conducts or ethics are properly formulated and seriously enforced, such practices are likely going to be problematic given a number of reasons which include but are not limited to differences of laws and jurisdictions, culture as well as the prevailing circumstances in each of the jurisdictions concerned.

Litigation assert Adeyemo and Mobolaji (2010:5), is the process of making or defending a claim in a court of law, that is, the procedure or process for seeking redress to certain issues of contention or resolving them in a court of law. Thus, in this case as observed by them, it refers to the settling of dispute or misunderstanding arising from the cross border (global) practices of Islamic banking and finance. There should therefore be, as pointed out in their work cited above, deliberate, conscious and concerted efforts by the stakeholders in the industry to promulgate necessary law and formulate suitable policies within the purview or ambits of shari'ah-the Islamic Law in order to ensure smooth running of the industry across the globe. This becomes imperative in view of the fact that, unless this is done there would be, and there would continue to be conflict of law as well as even that of jurisdictions; as it will be difficult to decide or determined which of the concerned jurisdictions or law should be used to adjudicate in a matter or a case. However, in the interim, particularly in a situation whereby such policies and law are non-existent or yet to be formulated and or promulgated, Alternative Dispute Resolution (ADR) may be resorted to if the parties to the conflict or misunderstanding so agree. This is faster, economical and also facilitates amicable resolution of misunderstanding or conflicts. This is so because, the matter is going to be resolved based on mutual diplomatic process.

Observes Muhammad Zakhiri Muhammad Nor (2010:2)<sup>10</sup>, *fatawa*, shari'ah resolutions and civil law overlaps and are not properly integrated whereas the proper integration or co-ordination of these three elements of regulations could ensure healthy growth and proper functioning of the industry. The above observation is worth considering

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<sup>10</sup> Muhammad Zakhiri, M.N. (2010). The application of *fatawa/resolutions/rulings* by the judges in contemporary Islamic finance. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigation, 15 – 16 June 2010.



given the geographical spread of the industry as this would equally exhibit the humanism of Islam as encapsulated in the greater objectives of shari'ah otherwise called *maqasid* as-shari'ah. Besides, it will facilitate easy and amicable global practice of Islamic Banking and Finance.

#### *Training and Re-training of Personnel*

Since Islamic banking and financial products are becoming popular by the day and are spreading not only among the Muslim nations but equally to those of non-Muslim states, there is a dearth of personnel; including shari'ah scholars to serve in the shari'ah advisory boards of banks and Shari'ah Advisory Council of several central banks across the globe. This therefore suggests that, more and more of our universities and colleges need to start relevant programs at both the undergraduate and graduate levels in order to overcome the challenge. It is not equally enough to just have the training and go into the industry, there should be in-service (refresher) training or course for those who are already practicing; much as there is need to organize conferences, symposia, seminars and workshops to address new issues that are coming up from time to time owing to dynamism of the industry. This will provide an avenue for both the practitioners and researcher and even those of the concerned university and college dons to interact, exchange notes and provide solutions to problems as at when they surface. Suffice to add therefore, that scholarships should be awarded to promising students particularly at the graduate level much as there is need for research grant for academics, scholars and graduate students to do their research in certain areas.

The need for more shari'ah scholars who are well grounded in *Mu'amalat* was observed by Mansoor (2010:3)<sup>11</sup> in order to ensure validity of new products and sustain public confidence. Observe Adeyemo et al (2010:8) 'Consider what 'Umar Ibn al-Khatib (R.A.) says: 'No selling (for anyone) in our market unless (for the one who)

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<sup>11</sup> Mansoor Javed M. (2010). Corporate governance of Islamic finance institutions. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations. 15 – 16 June 2010.

comprehends religion.’ They posit further: Giving the above *hadith* credited to ‘Umar (R.A.) who was not just one of the leading companions of the Prophet but one of the *Khulafaur-Rashidun*, one begins to reflect over whether the modern training given to the practitioners of IBF is sufficient enough [or not]; particularly those of them who are not Muslims. For knowledge intended by ‘Umar (R.A.) in this *hadith* refers to the one that leads to practice borne out of conviction as a result of the acquired knowledge. We believe that Islamic epistemology and philosophy of education and or learning is: Learn to know, know to practice, practise to become; you are what you practise. One who learnt Islam is therefore expected to know it, he is further required to practice it; so that by so doing he becomes a Muslim; for knowledge is useless when left unused by the one who acquires it. We do not know whether this could be said of those concerned practitioners. This is because, Islam is a practical religion and we believe that one that acts against what he preaches has provides enough evidence for his audience to jettison it.

The present situation whereby a person is serving in as many as seventy boards across the globe is unwholesome and it goes to say that beyond being overstressed, issues would not be properly attended to before decision or conclusion would be reached. Besides, it shows that more and more experts are needed in the industry. Perhaps the observation made by Dato’ Muh’d Razif (2009)<sup>12</sup> is worth repeating here, he says: For Islamic finance to move forward, we have to review how we practice Islamic finance...Currently, Islamic finance assessment is compliance-based...compliance is not the problem, but we must ask ourselves, is that enough?” Based upon the above observation, there is need for a paradigm shift, that is, an attitude of basing the assessment of the system on shari’ah rather than on shari’ah compliance thus making it shari’ah based approach as distinct from shari’ah compliance which has continued to be in vogue for quite sometimes.

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<sup>12</sup> Muhammad Razif, A.K. (2009). ISRA Bulletin Vol.2, April.



So, what we need to do is the suggestion or recommendation made by Iqbal A. Khan (2008)<sup>13</sup>: *'The challenge we now face is to enable a transition from shari'ah-compliant to a shari'ah based approach. A shari'ah based approach represents holding to the spirit as well as the letter of shari'ah, and look to finance genuine economic activity with a more authentic model. It represents an attempt to capture the essence of Islamic economic ethics which, to me, is built on fairness, risk sharing, and an investment orientation. No matter how successful Islamic banking is today, he argues further, we must confess that a contemporary model of Islamic banking is not exactly the 'first best' that we were hoping for-one that can unleash the goodness of the Islamic economic system, its capacity for equity, stability and growth. So far, Islamic banking is the product of financial engineers trying to design structures that can deliver the same economic outcome of conventional banking products while meeting requirement of shari'ah-compliance. The end result is the mere modification of an already existing system to meet constraints. It cannot be argued that this is not permissible according to the shari'ah, for it is. However, one can contend that it is only 'second best' and that it is even 'negative' in that it only considers 'legalistic' limitations by observing the constraint of haram. A 'first best' then would be 'positive'. On the other hand, it would encompass the macro objectives of the Islamic economic system, while on the other, result from the natural evolution of the system itself rather than being imposed or imported from outside*<sup>14</sup>.

It is clear from the foregoing quotations therefore, that the paradigm shift from Shari'ah-compliance assessment to shari'ah-based should be incorporated into the curricular or syllabi of training of personnel as the present system akin to *hilah*. Perhaps this is the more reason why some scholars are contending the Islamicity or rather the validity of the current practice.

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<sup>13</sup> Iqbal, A. K. (2008). Perspective on Tawarruq. A Paper presented in the Workshop on Tawarruq: A Methodological Issue in Shari'ah Compliance Finance, Kuala Lumpur, 01 Feb 2008.

<sup>14</sup> Mahmoud, A. E-G. (2006). *Islamic Finance Law, Economics, and Practice*. London: Cambridge University Press.

*Regulations and Code of Conduct*

There is an urgent need for harmonized rules and regulations which is well codified and gazetted. *Fatawa* is persuasive and not binding before a court of law, it is only valid when it has been gazetted and codified. Hence, there is need to codify and or harmonize them. This will ensure uniformity and facilitate easy access to legal facilities in the event of misunderstanding arising from Islamic banking and finance particularly from its global practice. Indeed, regulatory and shari'ah considerations apart, there are compelling reasons for good corporate governance of Islamic Financial Institutions. Such reasons as observes Mansoor (2010:7) include the ability to reduce cost of capital, gaining operational efficiency, reduction of risk and becoming more resilient to external shocks are some of the incentives for implementing effective corporate governance strategies.

An effective corporate governance framework must, asserts Mansoor, have as its key strategies for promoting performance measurement methods in relation to those key strategies, the defining of responsibilities together with accountability, appropriate internal controls and monitoring, ensuring compliance with rules and regulations, promoting a culture of compliance and rewards for those who value good governance in Islamic Finance Institutions (IFI), together with measures protecting employees who have been steadfastly compliant as regards corporate governance. According to him 'If Islamic Finance Industry does continue to grow at the pace it has sustained in recent years, there is likely to be tremendous challenges sides by side the successes of the industry. From all indications and given the market potentials, there is no doubt, he concludes, that this industry will grow tremendously unless factors of a very serious nature that could hamper its growth unexpectedly emerge.

The World Bank publication 'Risk Analysis for Islamic Banks' points out: The activities of Islamic banks and banking may affect the welfare of more than 20% of the World population mostly concentrated in developing countries, and their corporate

governance arrangements matters for economic development.' According to Iqbal and Abbas (1999)<sup>15</sup>, Corporate Governance in Islamic Finance entails implementation of a rule based incentive system that preserves social justice and order among all members of society. There is no gainsay the fact therefore, that there is urgent need to come up with codes of conduct and shari'ah based and not shari'ah compliant corporate governance system suitable for IBF. From the World Bank 'Risk Analysis for Islamic Banks' comes the observation: Islamic banks emphasize services to multiple stakeholders. Governance processes and structures inside and outside the firm are needed to protect the ethical and pecuniary interests of shareholders and stakeholders.' Hence shari'ah validity requirement must exist side by side with effective corporate governance in the industry. Directors, for their part, must ensure that the directives of the shari'ah Board are being complied with. Hence there is need for proper monitoring mechanisms which are *sin qua non* for the realization of these lofty goals. The management must also be cautious at the post shari'ah Board approval stage. For it has been observed that product that may seem compliant when examined in isolation by the shari'ah Board may pick up deviant characteristics at the stage of implementation; as these involve human participation, and certain product features may have been missed by oversight at the approval stage, and the shari'ah Board's attention may be needed at the product implementation stage as well. Thus, shari'ah Review Unit of AAOIFI is exceptionally useful in this regard. It therefore means that, if our products are shari'ah based rather than compliance inclined, we would be spared of this trouble or challenges. The standard boards, shari'ah council and advisory board must equally be guided by certain rules and regulations and code of conducts. There should be provision for regulating the extents and limits of disagreement and controversies so that they do not transcend the limit set by Islam which are assuredly aimed at *islah*. Hence, the lawmakers or rather the standard setters must be guided by certain rules and regulations to ensure general acceptability of law or standards set by them.

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<sup>15</sup> Iqbal, Z. & Abbas, M. (1999). Progress and challenges of Islamic banking. *Thunderbird International Business Review*, 41(4-5 July-October): 381-405.



*Islamic Banking and Finance and the War against Terrorism*

Since September 11, 2001, observed Anderson and Mahbub (2010)<sup>16</sup>, a black mark was left on Islam and the Muslims. It has not only changed the lives of the Muslims around the world but also the security landscape across the globe. Islamic finance was blemished when it was blamed for international flow of funding to terrorists. How far this is true has yet to be proven with strong evidence. They posit further that, nevertheless, it clearly showed that international terrorism has emerged as the most immediate threat to not only global security but posterity of the world in general and Muslims in particular. Observed Crimm (2008)<sup>17</sup> 'Islam stresses the importance of *zakat* and *sadaqah* to Muslim as philanthropy and charity. Islam places a high value on compassion, wealth redistributions, social justice, and supporting and enhancing fellow humans; both philanthropy and charity [therefore] play crucial roles for Muslims and their societies'. Hence, Muslims, particularly those of them who live as minorities in Europe, America and elsewhere across the globe may be disenfranchised, isolated and alienated from their fellow Muslims and the rest of the world if the war against terrorism and the quest to flush out those funding terrorism are not done with caution as observed the duo of Anderson and Mahbub in their work. This situation has therefore subjects Islamic banks and banking to certain peculiar risks and also limits their operations.

*Creating an Enabling Environment*

Most of the countries operating IBF today either run it as a full fledged Islamic Banks and Finance outfits or as a window under the existing conventional system. Besides, regardless of whether they operate as a window or as a full fledged Islamic Banks so to speak, IBF operate under laws and environment that are not only alien to the system but equally unfriendly some of the time, thereby predisposing it to certain peculiar

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<sup>16</sup> Anderson, A. & Mahbub, B. (2010). Financing terrorist: Does Islamic financing has a role? A paper presented in the International Islamic Finance Conference, Labuan. 18 – 20 March 2010.

<sup>17</sup> Crimm, N.J. (2008). The moral hazard of anti-terrorism financing measures: A potential to compromise civil societies and national interests. *Legal Studies Research Series*, Paper No. 08-0139, October 2008.

risks. Sometimes cases emanating from Islamic banking and financial services and products are referred to civil court for adjudications. It is particularly pathetic in a situation whereby those hearing the case have little or no training about the Islamic commercial law or *muamalat*. There are cases whereby dual legal systems are practised in certain states, yet under such circumstances shari'ah is only applicable in principle but subordinate to the common law in practice. This situation has strangled some of the Islamic banks hence the need to review the existing law in order for the system to have a comparative advantage of competing favourably with the existing conventional system. United Kingdom has provided a cue in this direction which is worth of emulation by others.

### *The Problem of Riba*

Concern (doubt) has been raised by some scholars about the validity of certain products which are *riba* or interest inclined. Although, considering Islamic banking and finance as just ordinary interest free as earlier observed narrows the scope of the system yet, of paramount importance is the avoidance of interest in an Islamic economy. It is therefore, a fundamental issue to ensure that all products and services to be rendered by Islamic banks and similar finance outfits are devoid of interest regardless of whatever form it may take. Ones that readily come to mind are *bai' al-inah*, *tawwaruq* (commodity *murabahah*), sales of debt derivatives and so on. There is an urgent need therefore to come to term on this issue so as to ensure uniformity and vitality of the industry. After all, what is lawful is clear much as does the prohibited ones, however in between them are the ambiguous ones which we need to stay clear of in order to safeguard our religion and avoid unlawful things for whosoever falls into the ambiguous ones has indeed fell into *haram*.

*Controversies among Shari'ah Scholars and the Problem of Dual Legal System*

There is in the recent time, controversy over whether money should be gold or silver. Money is considered as a means of exchange and not as a commodity in Islamic economics throughout the long history of Islam. The question of whether money should necessarily be gold and or silver does not therefore arise except and if only they are potent for solving the prevailing economic/financial problems. Caution should be exercised in proffering solution to problems in order not create a greater one, that is, one that is more pernicious than the one it is aimed at solving. Most of the issues over which there are controversies are majorly because of differences of opinion held by different *mazhabs* and this could be overcome by bringing to a roundtable scholars from the four major *mazahib* so that they could deliberate on issues and finalize them based on the opinion that best suit an issue and the particular circumstance with regards to the major sources of shari'ah while taking into consideration the higher objectives of shari'ah itself. After all, the founders of these schools of thought did not intend to cause confusion in Islam and for Muslims but rather to ease the practice of *Din*<sup>18</sup> for the *ummah* and this is why none of them has ever claim exclusivity of knowledge or arrogate unnecessary authority to themselves, they rather referred to the Prophet and by extension those of his companions as the ultimate authority.

Although, Islamic Banking and Finance has come of age yet some scholars are still of the opinion that it is not valid as far as the shari'ah is concerned. To them, it is a clever way of circumventing the law otherwise known as *hilah* in the Islamic legal parlance or jurisprudence.

Consider for example the fatwa issued in 1989 by the late Sheikhul Azhar, Muhammad Sayyid Ali Tantawi in which he ruled that the interest from conventional

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<sup>18</sup> We have chosen *Din* and not religion so that we may not be misunderstood as religion is limited in scope. Whereas *din* means a comprehensive way of life that covers the whole gamut of human life in all its ramifications, religion on the other hand is considered to be a belief system regulating the kind of relationship that exist between a man and the object of his worship.



deposit is permissible contrary to the one issued/judgment pronounced by Sheikh Taqi ud-Deen Uthmani as well as the fatwa issued by Sheikh Annas al-Zarqaa'. The controversy between OIC Fiqh Academy and AAOIFI on the validity of *tawarruq* is not a good omen for the further development of the industry. Muhammad Nejatullah (2006)<sup>19</sup>, observes that Sheikh Nizam Yaqubi declared organized *tawarruq* as valid even though it brings more harm than good and the recent judgment on *sukuk* by Sheikh Taqi Uthmani declared that *sukuk* is not Shari'ah compliant<sup>20</sup>. When Sheikhul Azhar, Muhammad Sayyid Ali Tantawi in 1989 concludes that the interest from conventional deposit is permissible it was to the alter chagrin of the Muslims across the globe as it equally generate some reaction here and there. The fatwa as earlier observed was a complete contrast of the judgment issued by Sheikh Taqi Uthmani and that of Sheikh Annas al-Zarqaa' and it contradicts the age long understanding of the Muslims about what constitute interest.

So, while BBA is accepted as valid in Malaysia and certain other countries, it is considered as invalid in the Middle East and therefore not being used in those places. This is another issue whereby interest is feared to have crept in and of course the reason why some states or countries are not using it as a valid product or service. Of course, the idea of *bay al-Inah* which is applied in BBA financing is actually a legal device to get loan and it is invalid according to Maliki and Hambali and even the evidence of its permissibility under Shafiy School of Thought is indeed very weak<sup>21</sup>. One is therefore skeptical of its validity. This is perhaps part of the reason why some scholars have passed a general and blanket fatwa that Islamic Banking has no place whatsoever in the shari'ah-the Islamic law and hence unIslamic.

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<sup>19</sup> Muhammad Nejatullah, S. (2006). Economics and the role of shari'ah experts. A paper presented in the Seminar on Islamic Banking and Finance. Renaissance Hotel, Kuala Lumpur, Malaysia, 30 August 2006.

<sup>20</sup> Nizam, Y. (2009). *Reuter's 'Organised Tawarruq is Valid Under Shari'ah*. Kuala Lumpur: Malaysia Reserve and Muhammad Nejatullah, S. (2007). Economics of Tawarruq: How its mafasid overwhelm its masalih in *Tawarruq: A Methodological Issue in Shari'ah Compliant Finance*. Kuala Lumpur

<sup>21</sup> Saiful Azhar, R. & Mahmoud M. S. (1999). The application of *bay-al-inah* and *bay-al-dayn* in Malaysia Islamic bonds: An Islamic analysis. *International Journal of Islamic Financial Services*, 1(1&2): 10

The hindrance created by the secular nature of certain states particularly those of the Muslim nations had limited the performance of Islamic banking and finance in such countries. Sometimes, certain Muslim populated nations like Nigeria and elsewhere are unable to even take off owing to certain peculiarities not even far from the secular nature of the country. The duty of an Islamic state is to uphold justice and the welfare of the citizens including the equitable distribution of wealth<sup>22</sup>. This could only be observed or rather attained when and where necessary facilities or machinery of the state has been tailored towards this lofty goal.

There are yet some states where common law is used to adjudicate on matters/issues relating to Islamic finance. This situation had not only leads to certain problems but equally constitute a complete aberration in the system. There are also certain instances where although Islamic law is adopted along with the common law however, Islamic law seems to have been subsumed under the conventional law; thus unable to function properly much as it suppose to. Such situation has not in most cases, allow proper adjudication of cases or issues arising from Islamic Financial services and products.

The absence of codified version of Islamic Commercial law in many jurisdictions, legal and constitutional framework equally constitutes a serious challenge to the growth and development of Islamic Financial services and products. The misconception about shari'ah and its objectives as Islamic contracts are prepared by conventional lawyers who have no proper training in Islamic law is, no doubt, constituting some hindrance just like those enumerated above<sup>23</sup>.

In Malaysia for example, Islamic banking and financial matters fall within the jurisdiction of civil court though it is *fiqh mua'malaat* matters<sup>24</sup>. Scholars have tried to

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<sup>22</sup> Mawardi (2003). *Al-Ahkam As-Sultaniyyah*, Al-Qairah: Dar Al-Nahdah Al-Arabiyyah see also Muhammad Zakhiri (2005:5)

<sup>23</sup> Baker, M.O. (2008). AAOIFI Pronouncement on Sukuk: History, Implications and the Way Forward from Shari'ah Perspective. A paper presented in the Global Update on Sukuk: Post AAOIFI Pronouncement. Hotel Nikko, Kuala Lumpur, Malaysia.

<sup>24</sup> Zainal Azam, R. (2009), *The Application of Islamic Law of Contract : Issues and Challenges in Islamic Finance*. INCEIF, Kuala Lumpur. See also Zainal Azam Rahman *Islamic Finance in Malaysia (Legal and Shari'ah Framework)*, accessible at [wems2.lofsa.gov.my/.../shariah0/020legal0/020of0/020islamic0/020finance0/020...](http://wems2.lofsa.gov.my/.../shariah0/020legal0/020of0/020islamic0/020finance0/020...) also see Wan Azhar

proffer solution to this problem however, it has not effectively work out as expected. For example Muhammad Zakhiri advocates integration of *al-fatwa*, *al-imaamah* and *al-qadaa*. He stressed that there should not be conflict between them and therefore the need to work together, harmonize and codify these ordinances. Unfortunately as he observed, we can see that shari'ah has been used as an escape route by the debtor not to pay the creditor as in the case of the Investment Dar Company KSCC v Blom Development Bank SAL when certain product has been declared as invalid by the court even though shari'ah Board already issued resolution/fatwa and approved that the product is shari'ah compliant and Islamic Banking businesses is not a full fledge Islamic as it is dependent on conventional counterpart. This is the present situation in Malaysia and certain other places, a phenomenon that will not only put Islamic Finance industry in a state of uncertainty and cause confusion among the general public but importantly put the industry into disrepute, if not unable to realize its set objectives, he observed.

Salim & Younes (2010)<sup>25</sup>, assert that 'whereas from a regulatory point of view, Accounting and Auditing Organizations for Islamic Financial Institutions (AAOIFI) resolved that surplus in *takaful* fund belongs to *takaful* participants only. Hence, *takaful* operators are not entitled to receive any part of the surplus. However, in contrary to this, Bank Negara Malaysia (BNM) ruled that surplus should be shared between *takaful* participants and operators<sup>26</sup>.

Observes Gintzburger (2010)<sup>27</sup>: The variation in opinions on contracts may be attributed to a diversity of backgrounds, to schools of jurisprudence, the college or the university where training was acquired, as well as to the environment in which the

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(2007), *Whither Jurisdictional Conflict* in The Star, Kuala Lumpur, Coulson, N.J. (1969), *Conflicts and Tensions in Islamic Jurisprudence*, Chicago: Chicago University Press.

<sup>25</sup> Salim, A.A.-A. and Younes, S. (2010). *Sharing of Underwriting Surplus in Takaful Operation: Practical Perspective*. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations. 15 – 16 June 2010.

<sup>26</sup> Salim, A.A.-A. and Younes, S. (2010). p2

<sup>27</sup> Gintzburger, A.S. (2010). An analysis of global trends and regional pockets in the application of Islamic financial contracts in Malaysia and the Gulf Cooperation Council. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations. 15 – 16 June 2010.



members of the shari'ah board functions. In theory Islamic Finance relies on equity participation-the system is still developing currently, it is yet to develop real equity finance globally. There is an urgent need for dialogue between Malaysian Islamic financial experts and those of Gulf Co-operation Council in order to exchange ideas, cross fertilize them and avoid unnecessary controversy. This will bring about convergence of opinion rather than its divergence. Asserts Ibrahim (2010)<sup>28</sup>, In determining the validity of a product or service, the Qur'an, the *Sunnah*, *Ijma'* etc should in this order be given priority and as observed by Adeyemo and Mobolaji any ambiguity should be avoided.

Edib and Elmin (2010)<sup>29</sup> observe that 'being a niche industry, Islamic Finance is faced with a long way ahead that need to be conquered before it may be elevated to the next level. (Singh, 2009)<sup>30</sup> states that Islamic Finance Industry is in its adolescence when it comes to issues like transparency, accounting and ratings, with very different standards being used. Robinson (2005)<sup>31</sup> adding his voice opines that there is therefore an urgent need for standardization to ensure uniformity, one that is aimed at effecting transparency, credibility, integrity and accountability in the industry.

The name Islamic finance may lead someone to believe that is only for the Muslim countries with majority Muslim population. However, it is being argued that majority of Islamic finance customers are actually non-Muslims. Today Islamic finance attracts both Muslim and non-Muslim market participants (Monger & Rawashdeh, 2008)<sup>32</sup>. In fact, United Kingdom is leading the western, non-Muslim countries in developing Islamic finance services. With \$19bn of reported assets as of end of 2008, United Kingdom is ranked eighth and is considered as Europe's premier place for Islamic

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<sup>28</sup> Ibrahim, V.F. (2010). Towards global standard of Islamic banking and finance practice: A review of the relevant principles and products by the management body of Islamic banks. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations.

<sup>29</sup> Edib, S. and Elmin, H. (2010). Islamic banking and finance beyond borders: Issues of standardization. A paper presented in the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigations.

<sup>30</sup> Singh, H. (2009). World desperately looking for sustainable financial system. *The Malaysian Reserve*, 30 April, p14.

<sup>31</sup> Robinson, K. (2007). *Islamic Finance is Seeing Spectacular Growth*. New York Times. <http://www.nytimes.com/2007/11/05/worldbusiness/05ihtbankc0106.3.8193171.html>

<sup>32</sup> Monger, R. and Rawashdeh, M. (2008). Islamic finance enters the mainstream. *Management Accounting Quarterly*, 9(3): 1-6.

finance. This was attained by joint efforts of UK Government, Bank of England and Financial Services Authority (FAS) who identified main barriers for introduction of Islamic finance and took proactive steps in creating level playing field for Islamic financial services to thrive. Other countries are joining the bandwagon. For example, Singapore, Hong Kong, France, Germany, Luxemburg, Ireland-just to mention a few-all of which either amended their laws or are on the right track to do so in order to facilitate the development of Islamic financial industry. Other countries, including Muslim and non-Muslim states should emulate the United Kingdom by providing level plain field for Islamic Finance to thrive and compete favourably with the existing conventional system.

Islamic finance is faced with a number of challenges calling for prompt attention of the Muslim scholar most particularly those who are specialists in *Fiqh Mu'amalat*. The industry will move ahead if right response is given at the right time. Observes Karuvelil (2000:155)<sup>33</sup>, ' The industry [Islamic finance] faces a considerable challenges; it is response to them that will determine whether it will become a significant alternative to the conventional system in global financial markets. There is therefore, an urgent need to make provision for efficient legal framework, qualified personnel, standards, procedures and code of conducts, and the will power on the part of governments to support the industry in order to safeguard it from increased risks to which it is exposed (Khorshid, 2009)<sup>34</sup>. The divergence of opinion among the Muslim jurists regarding the validity or non-validity of certain products need to be put to check for the good health and even growth of the industry. Hence, opinions need to be harmonized, standardized and codified (Shanmugam & Zahari, 2009)<sup>35</sup>. The use of different terms and terminologies among scholars, banks and other Islamic Financial Outfits should be checked too and adequately regulated. There is need hence or therefore, for integration and harmonization in order to ensure uniformity and to guard

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<sup>33</sup> Karuvelil, K.Z. (2000). Islamic finance: Sustaining success of Islamic finance: Local challenges, Global Opportunities. A paper presented in the Third Harvard University Forum on Islamic Finance. Centre for Middle Eastern Studies, Harvard University.

<sup>34</sup> Khorshid, A. (2009). Time to clarify opaque system. *Islamic Banking and Finance*, 6(5): 11-12.

<sup>35</sup> Shanmugam, B. and Zahari, Z.R. (2009). *Primer on Islamic Finance*. The Research Foundation of CFA Institute.

against confusion particularly among the general public most whom of are not, at least as of now, conversant with them.

## Conclusion

Although Islamic Banking and Finance is doing very well and making giant stride by the day, yet the growth has not come without its challenges. If these challenges are met appropriately at the right time, it means a further growth of the industry, however, if they are neglected or wrong and unsuitable solutions are proffered to them they may have an overall devastating effect on the industry. Voice has been raised questioning the validity or rather Islamicity of certain products; and expert opinions are now saying that rather than shari'ah-compliant which invariably signifies adopting/adapting the existing products of the conventional system, we should rather look inwardly into shari'ah based products. The controversy between the various shari'ah boards and councils should be lay to rest and attempt should be made to unify and codify their resolutions and *fatawa*. The need for the training and retraining of professionals and experts in this field could not be overemphasized. Such training should be focused on shari'ah based products and service so as to graduate from shari'ah compliance 'the second best' and move ahead to shari'ah based products and services which is going to be positive approach to Islamic finance and indeed 'the very first best' intended by our forebears. Research need to be encouraged in this field of studies. Hence, we recommend that scholarship should be awarded to graduate students to do their research in certain areas much as their dons should be given or awarded research grants for their further enquiries and findings. Provisions should be made for enabling, suitable and congenial environment by way of reviewing the existing Banking and Financial law in each country practicing or that has the urge to practice IBF whether now or in the future. It is very pertinent state categorically that more and more of our universities and colleges need to mount relevant programs both at the undergraduate and graduate level in order to supply the human resources needed in the industry, which no doubt, in short supply as at present.



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