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Islamic Finance *ijtihad* in the information age: Quo vadis?

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Abstract - Islamic finance faces an unprecedented existentialist threat from the exponential explosion of knowledge in the current Information Age. Excessively legalistic current practices such as Shariah arbitrage, fatwa shopping, and the use of legal ruses have collectively exacerbated a pre-existing deficit of trust with ordinary Muslims. The pervasive spread of information overload today highlights this present trust deficit and compounds it with additional unique complications for the future development of Islamic finance. The independent reasoning (*ijtihad*) exercised by Islamic scholars to these present and potential problems may well determine the extent to which such present and potential problems are successfully overcome. Yet contemporary Islamic finance *ijtihad* is both a victim and perpetrator: scarred by its own loss of both contextual focus and practical finesse, Islamic finance *ijtihad* is also actively hastening Islamic finance's possible demise by creating conditions for wider disillusionment with the industry amongst lay Muslims. Even though some of these conceptual concerns are already known to industry practitioners at the operational level, this article argues that a meaningful exploration of the relationship between the changing nature of information and the role of *ijtihad* is still lacking at the strategic level. Hence, this paper constructively sets forth some possible embryonic macrocosmic solutions to help reduce the debilitating effects of information overload upon Islamic finance's overall feasibility.

Keywords: *Ijtihad*, Information Age, Islamic law, Islamic finance

1. Introduction

At the dawn of the third millennium (C.E.), we face an unprecedented threat from information overload. More than ever, we are bombarded with practically infinite volumes of instantly accessible information and intellectual stimuli which challenge our cognitive capacities beyond their natural abilities and limits. As a result, human beings suffer increasingly from an "attention deficit," made constantly worse by the snowballing changes in information technology and the impact such technological challenges are having on both the intensity of our work lives and our employment patterns (Klingberg, 2009, pp. 4–5). Even in a fairly young industry such as Islamic finance, the repercussions of these sea changes and their collective onslaught on our organizational and cognitive abilities are inescapable. Although theoretically such unprecedented access to information holds out positive possibilities for the advancement of humankind, the actual reality is that there is a general struggle for meaning and useful knowledge in the current Information Age. Herein lays the paradox: the more information overload we experience, the less efficient our knowledge distillation processes become.

It is not just that information is increasing: there is cause for concern about the calculus by which this transformation

in information is taking place. Access to a virtually infinite amount of documents, presentations and databases online does not equate to meaningful knowledge, which is far more than the simple agglomeration of disparate information sources and raw, unprocessed data. Knowledge creation is more a process whereby form is imposed upon chaos to create something previously unknown or unnoticed, which becomes a useful epistemological commodity worth sharing. This is the second paradox: the infinite savings in time created by information dissemination platforms such as the World Wide Web and popular search engines such as Google, however worthwhile, is counteracted by the vast increase in our tasks, thus creating backlogs of knowledge for us all. Consequently, the tempestuous flood of information overload threatens to render obsolete the current structures and frameworks of references with which we have previously made sense of the fast-paced developments in the burgeoning field of Islamic finance. With these circumstances in mind, this article proffers some modest thoughts and solutions regarding this existential threat of information overload to the Islamic finance industry.

Knowledge creation backlogs are occurring precisely because humanity has yet to devise accessible, affordable

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and intelligent systems to organise or contain the flood of information. But just as we can tap into the ocean's resources and make sensible use of these natural resources, then it stands to reason that similar techniques can be applied to information as well. Such techniques are already being developed in efforts such as the Semantic Web, but are not yet accessible to those with little knowledge of computer programming techniques. Governments and large corporations may have access to more reliably intelligent next-generation systems, but these are obviously beyond the financial reach of most ordinary academic institutions, let alone individual researchers or workers. At present therefore, in the absence of such tools and their effective utilisation, *ijtihad* remains our best hope for the contemporary renewal of Islamic finance.

Ijtihad is the application of independent reasoning by Islamic scholars to interpret the revealed sources of Islamic law in light of the problems faced by Muslims of their age. Giving a succinct and singular definition of what *ijtihad* entails is almost impossible, as classical scholars such as Ibn Ashur and Al-Shatibi demonstrate. Ibn Ashur (2006 pp. 5–6) provides a definition of *ijtihad* which has five distinct aspects, whilst Al-Shatibi provides a two-stage definition of *ijtihad* which inextricably links the practice of *ijtihad* to the higher objectives of Islamic law, the *Maqasid al-Shariah* (al-Raysuni:331). For convenience's sake therefore, these definitional intricacies are left aside and focus is rather on the issues arising from the application of contemporary Islamic finance *ijtihad*. In this paper, *ijtihad* is denoted interchangeably as either "legal interpretation" or "independent reasoning."

2. Current Issues Affecting Islamic Finance

The trust deficit of Islamic finance

The primary contention of this paper is that *Shariah* today suffers from a credibility gap between theoretical ideals and practical realities stemming from two main factors: a significant over-reliance on debt-based *Shariah*-compliant instruments; and the virtual unenforceability of *Shariah* in a modern cross-border transactional context. Along with unfortunate and excessively legalistic practices such as *Shariah* arbitrage, *fatwa* shopping and legal ruses, these two main factors continue to fuel a deficit in trust which harms the Islamic finance industry's reputation amongst lay Muslims, who constitute the lifeblood of Islamic finance as depositors and shareholders in Islamic financial institutions. For instance, according to El-Gamal (2006:20, 177), *Shariah* arbitrage is a "peculiar form of regulatory arbitrage," which merely mimics "Western regulatory arbitrage methods aiming to reduce tax burdens on high-net-worth individuals." The pervasive spread of information overload today highlights this present trust deficit and compounds it with additional complications for the future development of Islamic finance. First, there is a significant over-reliance on debt-based *Shariah*-compliant instruments and structures as opposed to equity-centred *Shariah*-based products. This preference for debt over equity damages the credibility of Islamic finance, and thus harms the industry's long-term viability and sustainability. On the one hand, the present legalistic approach to Islamic finance helps legitimize a

distressingly myopic preoccupation with the practice of Islamic finance with a *Shariah*-compliance certificatory system for predominantly debt-based modes of finance, which is criticised to be grounded more in the letter than the spirit of Islamic jurisprudence. On the other hand, however, the normative evolution of Islamic finance towards more equity-based modes of finance, e.g., "profit-loss sharing" partnerships, holds out rich possibilities for *Shariah*-based product development, which is firmly rooted in the spirit of Islamic commercial jurisprudence (Lewis, 2007). Quite understandably, the current *status quo* in the practice of Islamic finance is in many respects not viable, as Islamic financial institutions have to continuously strive to seek a balance between the provision of authentic *Shariah* compliant financial products and financially viable products – the two basic requirements for depositors and shareholders in their endorsement of Islamic financial products (Rehman, 2010, pp. 115–121).

Second, *Shariah* today is virtually unenforceable in a cross-border transactional context (DeLorenzo & McMillen, 2007, p. 136). Recent cases which have come before the courts of secular jurisdictions, such as England, as well as commentaries on them, proffer ample evidence of the problems in enforcing a non-national legal system open to equally authoritative interpretations (Bälz, 2005; "Beximco," 2004; Godden & Miller, 2010; "Symphony Gems," 2002; "Jivraj," 2009; "Musawi," 2007). Moreover, such problems with respect to enforceability are further compounded by the problematic nature of relying on religious texts as authoritative legal sources in private international law (Warde, 2000, p. 234). This unenforceability of Islamic law creates uncertainty in the Islamic banking and finance industry, which works against the general public interest ("*Maslaha*") of Muslims. Perhaps now is the time to gradually move away from the piecemeal mimicry of common law and reliance on Western legal traditions and shift towards more novel fusions of the Islamic and Western legal traditions, such as incorporating elements of Islamic arbitration within the global framework of international commercial arbitration (Nadar, 2009, p. 189).

Finally, there is also ample criticisms from academic quarters that an Islamic finance built upon compliance foundations and the certificatory functions of *Shariah* scholars, whilst technically abiding by the letter of the *Shariah*, fails to implement the wider spirit of the *Shariah* and its original intended sentiments (Abdul-Rahman, 2010, p. 237). This preference for form over intent has led, perhaps inevitably, to the emergence of several interrelated criticisms of Islamic banking practices (Ayub, 2007, pp. 445–456). Regardless of the merits of such criticisms, they still represent symptomatic discontentment by ordinary Muslims, who have misgivings over whether Islamic finance in practice is sufficiently distinct from conventional operational practices in areas such as *murabahah* finance, *bay al inah* practices and *tawarruq* financing (Iqbal & Molyneux, 2005, p. 126). So until and unless the *Shariah* becomes legally enforceable in transactional contexts; improves its value proposition to stakeholders; and derives an adequate mechanism for dispute resolution, the trust deficit will remain. In this context, the pervasive spread of information overload will only serve to starkly highlight such shortcomings in industry practice to the industry's own detriment.

Sub-optimal *Ijtihad* through excessive legalism

Ijtihad in contemporary Islamic finance is essentially the product of *Shariah* scholars' intellectual efforts to legally realise Islamic economic principles in light of the contemporary global financial and banking system. These efforts at juristic interpretation are central to the development of Islamic finance, as *Shariah* supervisory boards provide the certificatory services for Islamic financial products which financiers, as non-experts in Islamic commercial jurisprudence, cannot by themselves provide (Jobst, 2007, p. 27). Logically therefore, the presence of sub-optimality in *ijthadic* processes would not augur well for Islamic finance. Such sub-optimality does exist, and is perpetuated in large part through excessively legalistic practices such as *Shariah* arbitrage; *fatwa* shopping; and the use of legal artifices (*hiyal*). All of these three practices harm the industry and stunt its future development, whilst also reflecting a broader tension in Islamic finance between legal forms and economic substance. As Dusuki and Abozaid (2007:164) note, in certain contexts it may be best to ignore the legal form of a transaction where the net effect is merely to replicate the economic substance of a prohibited conventional transaction.

First, as Islamic financial institutions require external certification and are commercially-driven to enhance their products with the best brand endorsement possible, there is a tremendously strong demand for *Shariah* experts. Whilst obtaining input from *Shariah* scholars is innocuous on the surface, on another level, actual practice gives rise to serious concerns: these highly-prized scholars can and do leverage their "celebrity status" in this captive market to excessively influence the development of Islamic finance industry. This phenomenon is commonly known as "*Shariah* arbitrage." El-Gamal, a firm critic of such practices, avers that such practices are inherently futile, as they result in declining *Shariah* arbitrage profit margins and an inevitable dilution of the "Islamic" brand name and value: (El-Gamal, 2006). Moreover, the negative impact of such dilution of the "Islamicity" of products is increased by the use of legal artifices in Islamic finance, which help subvert the original aims and objectives of the "*maqasid al-Shariah*."

Second, there is a distinct lack of unique value propositions, which not only draw upon the rich heritage of classical Islamic jurisprudence, but also noticeably build upon the legacies of the past to create products with both strong *Shariah* authenticity and strong financial demand. Scholars such as Hegazy (2005:141–149) have pointed out at length the dangers that can arise from the abuse of *fatwas* as instruments for change in Islamic finance. In particular, such procedural abuses further harm the authenticity of the Islamic finance industry by undermining the authority of *fatwas* as religio-legal opinions of persuasive authority, and support the view that present-day Islamic finance will continue to operate at a trust deficit with both depositors and shareholders alike. In this regard, the unfortunate abuse of *fatwas* in Islamic finance *ijtihad* today through practices such as *fatwa* shopping has led us to a point where Islamic finance *ijtihad* is severed from both its religious underpinnings and, more importantly, the well-meaning foundational aspirations of Islamic economics (Hegazy, 2005, p. 149). Again, without

the genuine reassertion of *Shariah*'s authenticity through fields such as "Islamic Finance Law," Islamic finance will continue to harm itself as an emerging industry.

Third, legal artifices – "*hiyal*" (sing. "*hila*") – were a feature of Islamic jurisprudence even in the classical period of Islamic law: (Habil, 2007). In fact, some scholars such as Rosly (2010: 134) even employ legalistic approaches to the issue of legal artifices, arguing that they serve a useful ancillary function to the achievement of internal consistency with respect to the fundamental legal building blocks of Islamic commercial law and finance: (1) 'aqd; (2) *maqasid al-Shariah*; (3) financial reporting; and (4) legal documentation. Be that as it may, legal artifices still pay only lip service to the economic substance of Islamic finance transactions, and thus lead to absurd results and effects such as, for example, the giving and receiving of interest by another name via structures and mechanisms such as *tawarruq*. Finally, as Habil pointed out in his discussion on legal artifices, "*aside from its ethical vagueness and irrationality, hila is casuistic and its applicability is limited by its very nature ... sooner or later, hila leads to a dead end.*" (Habil, 2007).

Sub-optimal *Ijtihad* and Islamic finance

Yet contemporary Islamic finance *ijtihad* is both a victim and perpetrator: scarred by its own loss of both contextual focus and practical finesse, Islamic finance *ijtihad* is also actively hastening Islamic finance's possible demise by creating wider disillusionment with the industry amongst lay Muslims. These losses of focus and finesse give rise to serious doubts over the feasibility of Islamic finance as a whole, and are inherently linked to the sub-optimality of contemporary Islamic finance *ijtihad*.

3. Future Issues Affecting Islamic Finance

Quantitative quagmires: The loss of focus in *Ijtihad*

With the increasing complexity in Islamic finance and the application of Islamic commercial law, and the resulting human capital trend towards increased specialisation, there is a clear and present danger that this phenomenon of specialisation may well interact with the wider fragmentation of knowledge currently being experienced in the Information Age by Muslims and non-Muslims alike. The emphasis on micro over macro; rules over principles; and form over substance; are all symptoms of a dominant '*compliance is king*' mentality that predominates in Islamic finance today. Such a mentality at the organisational level has inevitably led to wider confusion at the regulatory level of what the actual focus of Islamic finance should be: it is, in short, precisely these quantitatively induced quagmires which leave Islamic finance open to accusations of a perceived lack of authenticity. For Hamoudi (2008:463), this clash between theoretical macro-ideals and practical micro-realities signifies "*nothing more than careful mediation, between the necessity of adopting conventional finance models and a desire to retain the appearance of a populist fundamentalist vision of economic justice in finance*" (Hamoudi, 2008, p. 463). Whatever one's views on the potency of such a statement, it is fairly indisputable that somewhere along the way towards making the dreams of Islamic economics come true, Islamic finance *ijtihad* has strayed considerably.

Qualitative quagmires: The loss of finesse in Ijtihad

The quantitative quagmires and loss of focus in Islamic finance are grimly complemented by the existence of qualitative quagmires and a resultant loss of finesse in Islamic finance *ijtihad*. Much has already been written about the numerous corporate governance issues surrounding both the practices of *Shariah* Supervisory Boards in deriving their rulings and the various conflicts of interest which bring into question their ability to remain truly independent of their client Islamic financial institutions (Archer & Karim, 2007; Grais & Pellegrini, 2006; Nakajima & Rider, 2007; Warde, 2005; Yunis, 2007). Suffice to say, such conditions are far from conducive to the reputation of Islamic law in general, and its application to Islamic finance in particular through the use of *ijtihad*. One may at this point call to mind Gresham's Law, i.e., "bad money drives out good," and readily muse whether sub-standard or inadequately prepared *fatwas* will drive out potentially better *fatwas* simply because the latter emanate from lesser well-known younger scholars, who are likely to be passed up by Islamic financial institutions in favour of more well-known older scholars. This type of pecking order seems perversely removed from the meritocratic nature of Islam, and seems increasingly anachronistic in this day and age. Hopefully, this situation will be suitably remedied by the widely-reported efforts and plans of AAOIFI to address this crisis in scholars by 2013, although according to recent media reports, even that is an optimistic timeframe.

Ijtihad as victim and perpetrator: The loss of feasibility in Islamic finance

Until 2013 though, the loss of both focus and finesse in Islamic finance will continue to worsen as demand for Islamic financial services increases amidst a background of insufficient human capital supply (Volker Nienhaus, 2007, p. 381). More importantly, the loss of focus and finesse in Islamic finance, taken together, support and fuel a wider malaise of confidence in Islamic finance's overall feasibility as an industry with aims to make a difference to the world of finance and well-being of humanity. In this day and age of innovation *par excellence*, only countries and industries which take the initiative to adapt boldly to novel technologies and paradigms will prosper – countries such as Germany, the "land of ideas", and industries such as life sciences, where high trial failure rates are offset and made profitable by the minority of game-changing success stories. It is ironic and somewhat puzzling that for an industry founded upon legal maxims such as "no risk, no profit", Islamic finance remains heavily imitative of conventional interest-based structures and mechanisms. Hence, contemporary Islamic finance *ijtihad* is both a victim and perpetrator: scarred by its own loss of both contextual focus and practical finesse, Islamic finance *ijtihad* is also actively hastening Islamic finance's possible demise by creating conditions for wider disillusionment with the industry amongst lay Muslims.

4. Islamic Finance: Quo Vadis?

Islamic finance as an industry has a myriad of potential destinies awaiting it. The focus of this paper is, however, on two particular issues. The first scenario assumes Islamic finance will meander along with little change to the issues raised above, and this promotes an inherently bleak

outlook for the industry. The second scenario however, no less possible but infinitely more promising, assumes that Islamic finance will realign its strategic development in favour of authenticity, curiosity and evolution. In particular, 'the development of "Islamic Finance Law" is central to achieving such aspirations and answering the question "Islamic finance: Quo vadis?" ("Islamic finance: Where are you going?").

Scenario 1: Wider disillusionment

On a wider level, practices such as "*Shariah* arbitrage" are dangerous for the cohesiveness and unity of contemporary Muslim society. It is ironic indeed, that for an economic system which prides itself on the ability to offer more inclusivity than incumbent economic systems such as Western capitalism, there is a risk of increasing marginalisation of future generations of Muslims in Islamic finance. "*Shariah* arbitrage" supports the monopolisation of Islamic finance *ijtihad* by concentrating key decision-making within the hands of a select few *Shariah* scholars. The rest of the Muslim society, rather than feeling comforted, feels marginalised as such a clerical clique fights to maintain its purported indispensability in an age of increasing competition. This marginalization of wider Muslim society by the scholarly community in Islamic finance today is similar in many respects to the abject and continuing failure of the doctrine of "*guardianship of the jurist*" (*wilayat-i faqih*) as practised in the state of Iran, where the safeguarding of parochial privileges through doctrinal rigidity has led to resentment among the younger generation of Iranians (Amanat, 2007, p. 134).

Also, it has been noted in previous literature on Islamic political economy that ethical values are indispensable to the establishment of an Islamic economic system (Asutay, 2007, p. 4), which would by definition include the operation of an Islamic financial system. However, in practice, Islamic finance has come up short on the ethical front in many respects. Looking ahead, one way forward for the development of earnest ethical credentials for Islamic finance in practice may be to operationally focus on "glocalization" – that is, to "think globally and act locally", by emphasising local-scale action and initiatives over global cross-border transactions. Otherwise, continuing the present industry practices may simply compound the disenfranchisement of ordinary Muslims and their considerable disillusionment with Islamic finance (Balala, 2011, p. 8).

Scenario 2: "Islamic finance law" and the golden opportunity for Ijtihad

The hypothesis of this paper is that the credibility gap in Islamic finance discussed in Section II above can be significantly reduced by re-establishing the authenticity of the *Shariah* through the systematic development and evolution of "Islamic Finance Law" as a separate discipline and emergent legal system, and this hypothesis is strongly supported at the outset by the need for the solutions discussed and outlined below. Even though some of these conceptual concerns are already known to industry practitioners at the operational level, a meaningful exploration of the relationship between the changing nature of information and the role of *ijtihad* is still lacking

at the strategic level. “Islamic finance law”, whilst by no means a panacea, nonetheless offers a viable *ijtihad*-centric alternative to the current malaise in confidence over *Shariah* authenticity in Islamic finance today. Hence, this paper constructively sets forth some possible embryonic macrocosmic solutions to the debilitating effects of information overload on Islamic finance’s feasibility in the following section.

5. Playing the “Ace” Card: An Embryonic Solution

Of course, uncomfortable truths are hard to swallow, as to some extent they entail the tacit acceptance of prior error in judgment. But the benefits of embracing knowledge creation techniques far outweigh the costs of stubbornly adhering to obsolete methods of learning and knowledge assimilation on flimsy and irrelevant grounds of culture, heritage or tradition. Islamic finance itself is an interdisciplinary field born out of the union between Islamic law and Islamic economics: its very birthright consists of both thoughtful industry-driven solutions by practitioners and industry-aware thoughtfulness from academicians. As such, this paper proposes a composite “ACE” card paradigm, whereby the Islamic finance industry can effectively counter the growing doubts over both its conceptual validity and practical feasibility. This prototype of a solution is but a mere sketch, and it is important to emphasise that the further illustration of such a paradigm is less important than understanding the centrality of the three key pillars: authenticity, curiosity and evolution.

Authenticity

One possible way forward for Muslims today to achieve authenticity in Islamic finance *ijtihad* would be to reassess the classical scholarship with an emphasis on purpose-based reinterpretations. By distilling the wisdom from classical texts and reviewing their application to the needs of our current era, we may perhaps get closer towards more meaningful *ijtihad* which takes account of the spirit as well as the letter of the law. Questions relating to authenticity in contemporary *ijtihad* in Islamic finance will, like other areas of Islamic law, inevitably overlap with questions relating to the general public interest (“*maslahah*”) of Muslims today. In order to move beyond previous models which apply *maslahah*, or at least reframe them in light of present-day concerns in Islamic finance, it is necessary to acknowledge the relevance of changes in Muslim societies at large. Tomorrow’s *Shariah* scholars who will exercise their *ijtihad* in Islamic finance will bring with them the benefits of higher standards of formal education in Islamic law and finance specifically; more diverse previous work experience in an age of ever-changing employment patterns; and will live in an age where the provision of information becomes ever-more ubiquitous and instantaneous. The influence of these educational, occupational and historical realities will determine their approaches to important concepts such as *maslahah*: (Opwis, 2007, p. 82). As such, we would do well as a community of Muslims to better make sense of and prepare for these sea changes in Islamic human capital.

Also, the tension between the need for certainty in an emerging field like Islamic finance and the inherent flexibility in Islamic law’s application and interpretation

makes the discussion of *ijtihad*’s authenticity especially relevant today at the operational level as well. In many respects, allowing events to simply play out for themselves between the institutional and organic levels of the Islamic finance industry may be the most feasible avenue towards an increased yet moderate degree of certainty and uniformity in Islamic *ijtihad* (Foster, 2007, p. 178). Of course, standardisation *per se* is not a bad thing, provided it does not stifle the diversity of opinions inherent in Islamic finance *ijtihad*, and this flexible form of standardisation has been achieved in several instances of Islamic insurance law (Bakar, 2002, p. 88). As such, endeavours such as a flexible system of codification in Islamic finance law would form a substantial and much-needed part of solutions to this question of balance in future *ijtihad* relating to Islamic finance (McMillen, 2011, p. 38).

Curiosity

“Islamic Finance Law” is very much an emergent legal system (Foster, 2007, p. 187). In other words, there is still much conceptual work yet to be done, which is urgently needed to cement the legal aspects of contemporary Islamic transactional jurisprudence into a coherent system of laws. With the increasing spread of globalization to Muslim lands, the need to seek out innovative and yet fundamentally authentic solutions to the problems of *ijtihad* in contemporary Islamic finance will become ever more pressing (Krämer, 2007, p. 37). It goes without saying therefore, that in such a scenario “Curiosity is key”.

Furthermore, the systematic development of “Islamic Finance Law” as a separate discipline is one of the best methods available to re-establish *Sharia*’s authenticity in the modern age. Effective Islamic finance, based around a sound application of the *Shariah* to Muslim societies’ socio-economic problems, would greatly help underdeveloped Muslim economies. Moreover, with rapidly changing political landscapes in the Middle Eastern nation states, the onus is on the Muslim communities of the world to build upon such developments in the socio-economic fields through more extensive use of Islamic finance techniques which genuinely benefit the masses. If *Ijtihad* is ignored or dismissed as unimportant in the field of Islamic finance’s normative development and evolution, there is a clear danger that instead of being a transformative tool for widening the constituency of Islamic finance, *ijtihad* will be used in Islamic finance discourse to justify the desperate existing state of Islamic finance. Such a legitimising effect would be undesirable at best, and at worst, destructive of the very ethos of reform which *ijtihadic* processes seek by their very nature to uphold (Codd, 1999, p. 131).

Historically, the decline of innovation and creativity in knowledge discovery stems from the abdication of responsibility by scholars. This abdication of responsibility threatens once more to derail Islamic jurisprudence in the field of Islamic finance, as the current information overload dictates that independent thought be eschewed in favour of mere knowledge management and the dissemination of existing knowledge sources. It is not hard to see, then, how a culture of rote-dominant rather than innovation-dominant learning springs from the proliferation and engendering of such a stifling mindset. Ironically, such a mindset stands distinctly in opposition to the flourishing of pluralistic

thought in the Golden Age of Islamic legal scholarship and should be sensibly resisted. In sum, the times we now live in called for curiosity, not conformity, in thought.

Evolution

The needs of today call for an evolution in “Islamic Finance Law”. It is not simply, and cannot be, a mere accumulation of various fragmented laws or regulations relating to transactions in Islamic finance: “Islamic Finance Law” must offer a unique value proposition of its own as an emergent legal system in this post-financial crisis era. Otherwise, the credibility of Islamic finance, which crucially derives its legitimacy from the *Shariah*, will suffer irreparably. Practices such as “*Shariah* arbitrage” have already had undesirable effects on the industry’s reputation (El-Gamal, 2005), as have conflicts of interest and concerns over independence which plague the operation of *Shariah* Supervisory Boards (V Nienhaus, 2007, pp. 136–137).

Also, the majority of contemporary Muslim countries are demographically made up of young people. These digital natives need to be actively encouraged to think independently, innovatively and insightfully in order to chart a bright new path for “Islamic Finance Law”. At present, despite the increasing growth of the Islamic capital markets and refinement of products such as *sukuk* (Islamic investment certificates) and overall brusque pace of Islamic finance’s development (Archer & Karim, 2007, p. 400), the actual level of sophistication in Islamic finance remains limited (Mirakhor & Smolo, 2010, p. 377) and clearly requires substantial further improvements (Al-Salem, 2009, p. 194).

As Vogel (2000) obliquely points out in his extended study of Islamic law as applied to the Saudi Arabian legal system, innovation and originality by legal scholars of Islam was sacrificed at the altar of expediency. Applying this historical lesson to our present times, we may well find that in today’s age of hyper specialization and the increasing fragmentation of knowledge, such recourse to expediency is becoming increasingly threatening to the role of *ijtihad* in Islamic finance today. Doctrines once alien to Islamic jurisprudence, such as the doctrine of binding precedent (*stare decisis*), are now wholeheartedly embraced by the Islamic scholarly community in the name of practicality and ummatic “*maslahah*”.

This rich plurality may well be the underestimated and ignored antidote to the suffocating monoculture that is affecting Muslim scholarship today under the guise of “consensus” and “public policy”. As several commentators on Islamic legal history point out, this rich plurality of opinions has been conveniently forgotten and emphatically airbrushed out of the historical accounts of Muslim scholarship. Hallaq (2004: 61), for instance, cites the examples of independent *mujtahids* such as Abu Thaw, Muzani and the “Four Muhammads” to illustrate how a tradition of plurality is intricately and unmistakably woven into the history of Islamic law and *ijtihad*, noting with interest that these and other scholars more or less forged their own legal philosophies. From this perspective, the “closing of the gates of *ijtihad*” is still very much debatable (Hallaq, 1984, p. 33), and it is a healthy debate which should be aired more often in Islamic banking and finance discourse.

Recently, there have been calls for standardisation of Islamic legal principles and structures in controversial products such as *Shariah*-compliant derivative products, in order to help open up new markets and opportunities for the nascent industry (Fagerer, Pikiel, & McMillen, 2010, p. 16). However, building a doctrine of binding precedent indistinguishable from the common law system may not be in the best interests of the Islamic legal framework at large. On the contrary, as Hallaq (2004: 62) avers, “*the doctrine of the closure of the gate can now be seen as an attempt to enhance and augment the constructed authority of the founding imams, and had little to do with the realities of legal reasoning, the jurists’ competence, or the modes of reproducing legal doctrine.*” What is particularly interesting here is that such an analysis may well apply to the doctrine of standardisation, as it is not dissimilar to the attempts to close the gates of *ijtihad* several hundred years ago.

Standardisation is not about the triumph of the most sensible methods of legal reasoning or the prevalence of the most competent jurists’ opinions; it is about the mere templating and reproduction of old doctrines through a process of doctrinal crystallization which is counterproductive for two reasons. Firstly, it harms Islamic finance’s flexibility and fluidity as an emergent legal system; and secondly, it goes against the very grain of the historical reality of Islamic law, i.e. its inherent respect for reasonable differences amongst reasonable people. As Imam Shaf’i stated in his *Risala* when discussing the matter of *Ijtihad*, Allah in His infinite wisdom has ‘*endowed men with reason by which they can distinguish between differing viewpoints, and He guides them to the truth either by [explicit] texts or indications [on the strength of which they exercise ijtihad].*’ (al-Shaf’i & Khadduri, 1997, p. 302)

Inherent in Shaf’i’s quoted statement is an overt acknowledgment that reason and intellect are key tools in the formation of *ijtihad*, and that since men’s intellects differ in stature and their powers of cognizance, the resultant *ijtihad* they perceive and construe will similarly differ. As a result, in today’s age of hyper specialization, a range of *ijtihad* is required, not a monoculture of a purportedly omniscient “grand *ijtihad*”. Such a monolithic construction of legal interpretation is, it is submitted, anathema to the true tenets of Islam, and calling it standardisation or associating such views with the wider ummatic *maslahah* are mere window-dressing and obfuscating ruses. If *ijtihad* were to be a tree, it would better be a palm tree rather than an oak tree – flexible and responsive as opposed to inflexible and unbending – so as to better weather the epistemological tempests in which we find ourselves today. In this regard, Vogel’s remarks on the “rule against *ijtihad* reversal” are also particularly insightful. Vogel (2000; 86) surmises that the rationale for this rule is that, in the absence of primary source certainty amidst a need for *ijtihad* to be exercised, “*all mujtahids are equal and no one has priority, whether caliph or scholar, and that any other rule would defeat the autonomy of the qadi’s conscience.*”

6. Conclusion

The short-term and long-term difficulties posed by an inability to adequately respond to the flood of information do not augur well for the industry. In fact, the existence of a medium term event horizon in the development of Islamic

finance would effectively render the industry irrelevant in a post-industrial global economy, as previously envisaged (El-Gamal, 2006, p. 25). Nonetheless, there is ample hope for the industry's salvation and cause for optimism, provided it adopts collective corrective measures over the medium-term horizon. This paper's suggestions for the centrality and primacy of "Islamic Finance Law" are a tentative start towards such corrective measures, but of course, will need to be further researched and augmented by other like-minded researchers and regulators. Courage, not complacency, is the order of the day: tomorrow is simply a day away.

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