

Fragmentation of Islamic Financial Products – An Exploratory Study of Islamic Schools of Thought

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Abstract

The international emergence and expansion of Islamic finance is an undeniable fact. Significant efforts from all stakeholders including regulatory bodies are currently under way to formulate universal framework, standards and codes of conduct for Islamic finance. This is necessary because of the heterogeneity of the Muslim community in the presence of different “Schools of thought” (hanafi, hanbali, maliki and shafi). “Schools of thought” has a great impact on development of Islamic jurisprudence and analytical thinking. Sources of Shari’ah law are clearly defined through Quran, Sunnah, Ijtihad, Ijma and Qiyas. However, multiple interpretations by various “Schools of thought” regarding Islamic jurisprudence including Islamic Finance result in minor and major disparities. Keeping in view this fact, it is logical that without a universal Shari’ah code, the acceptability of products introduced in Islamic finance shall remain fragmented. Moreover, the permissibility of certain Islamic financial products varies by region, depending on the “Schools of thought” prevalent in that geographical area. This paper explores the necessity of convergence of various “Schools of thought” to formulate a single Shari’ah code that will be universally applicable. We also intend to look at similarities between “Schools of thought” with special reference to Islamic finance. This effort may lead to development of instruments that have broader markets, multiple customer segments, enhanced liquidity and reduced liquidity premium.

Keywords: Fragmentation, Islamic banking and finance, Jurisprudence, *Madhahib*, Schools of thought, Framework.

Introduction

Islamic law is uniquely universal, both geographically and across time. It has even been proposed that it is the most encompassing legal framework ever presented and practiced for over fourteen hundred years. This universality can be observed by

its practice in countries and societies with vastly different cultures and backgrounds- all connected by the underlying thread of religion. If current trends continue as expected, this system has the capacity to become the most practiced method worldwide over the course of the next century.

As this system is implemented in the form of commercial law, we see new tests that it must endure. For the developing Muslim world, the growth of Islamic banking and finance industry indicates a serious endeavor to increase control of their financial assets. This area is proving the battleground where success lies in application based on comprehension, translation, arrangement and execution of *Shari'ah* based commercial law.

The Islamic banking and finance industry is amidst an exceptional developmental stage with CAGR of approximately 17 percent between 2009 and 2013 (IFSB, 2015). This development has been stimulated by increasing demand for *Shari'ah* compliant financial products in countries dominated by Muslim majority populations, as well as countries dominated by non-Muslim majority populations. This is clearly indicative of the fact that the growth of Islamic banking and finance is a worldwide phenomenon.

This paper aims to discuss the necessity of convergence of various “*Schools of thought*” to formulate a single *Shari'ah* code that will be universally applicable. In order to do so, the dual framework for analysis incorporates the internationalization of Islamic banking and the role of jurisprudence and *madhahib* in dissonance of Islamic banking and finance on international platforms. Lastly, we look at examples demonstrating similarities amongst various *madhahib*, emphasizing a need to revisit the similarities rather than differences.

This paper is important as it explains the foundations upon which development of instruments that have broader markets, multiple customers and increased liquidity is based. It fills an existing knowledge gap which raises fundamental and often misinterpreted aspects of the role of the *madhahib* in Islamic banking and finance. Its most fundamental policy implication is that this basis would reduce the liquidity premium on Islamic instruments and encourage companies to offer Islamic securities internationally.

This exploratory study begins with a discussion on whether a true need for Islamic finance exists. We also discussed the background regarding the international need for a unified

framework. In building the conceptual framework, the fragmentation across schools of thought or *madhahib* is also explored. Lastly, we identified the connection between Islamic jurisprudence and Islamic banking and finance, laying emphasis on common grounds.

Literature Review and Conceptual Framework

Is there a True Need for Islamic Finance?

Do Muslims around the world really need such a solution or can they use the conventional system with its much mature processes and markets? *Riba* is the basis of conventional banking. It is the excess charged that help the loan giver to multiply his wealth without entering into a profit and loss sharing model with the loanee (Siddiqui, 2004). The loans are either consumption loans or productive loans obtained from banks, other institutions or individuals (Usmani, 2002). The verdict of *riba* being *haram*; and *riba* and interest being one and the same thing has been passed again and again and has always passed the test of time. This verdict has also been passed by the Organization of Islamic Conference (OIC) (Hanif and Iqbal, 2010). The Islamic Fiqh Academy forbade Muslims to use conventional bank if an Islamic Bank was present in their area (Wilson, 1995). Thus it is the need of Muslims to move towards the Islamic banking as the alternative is dire and for this they can opt for either *Shari'ah* compliant or *Shari'ah* based financial instruments (Hanif and Iqbal, 2010).

The benefit of asset-backed investments has been clearer to the western world after the global financial crisis. At that time, when conventional institutions were declaring bankruptcy, Islamic institutions showed just mild decrease in growth rates (OIC, 2012). From 2006 to 2011, the average growth rate in the non-Muslim banks of the developed world has been around 21.6% reflecting the pull, Islamic banking was enjoying (OIC, 2012). It's not to say that such claims were just wishful thinking given in 1978 when the first Islamic Bank in the Non-Muslim zone of Luxembourg became operational and also in 2004 when Germany issued its first *Shari'ah* compliant bond. In order to recognize that Islamic finance is here for good, Global finance magazine has started the World's Best Islamic Financial Institutions Award (Perry, 2011).

Another important issue is to maintain the integrity of the claim that Islamic financial system is indeed providing Islamic financial products and not just financial products. To increase the

liquidity and in the light of weak regulations, Islamic banks are continually issuing new securities that are mirroring the conventional Islamic products (IFLR, 2005). This has caused serious shadows on the reputation and integrity of Islamic products to the extent that some have started to believe that many Islamic banks are providing securities that are based on interest but have been named otherwise (El-Gamal, 2003).

Background on the International Need for a Unified Framework

The global business is relied on the financial hub and in this regard the world's Islamic system is a small part of a global economy. On one hand it has to follow the laws and the requirements set by Islam and on the other hand it has to work within constitutional boundaries and is therefore a sister concern of the conventional financial system (Amin, 2009).

An appropriate analogy would be of a regional stock exchange. While Karachi Stock Exchange (KSE) fulfils all the commercial requirements and the needs of Pakistan to have a capital exchange, Lahore Stock Exchange (LSE) primarily performs all the functions of an exchanger and serves a niche market that is not captured by KSE. In order to do this, LSE runs many of the same functions as do KSE while following its own charter. Similarly the Islamic system is there to capture the niche market of the Muslim *Ummah*, and in this regard performs many similar functions to the conventional system such as Islamic banking, Islamic money markets, Islamic capital markets, *Takaful* (Insurance), *Ijarah* (Leasing), Islamic wealth management and Islamic asset management (Perry, 2011). In view of the foregoing, it seems that Islamic financial system has flourished not only in most of the Muslim world but also in the non-Muslim world.

As for the niche, globally there are 1.5 billion Muslims, which are approximately 25% of the world population but Islamic finance only commands 1% of the assets of the global banking system (Perry, 2011) of which the share of OIC countries is 98% (OIC, 2012). This implies that without integration and convergence, even with need, the Islamic financial system cannot increase its penetration and hence assets. If such integration is possible then the estimate is that the industry would have USD2.8 trillion worth of assets under management (Baltaji, 2010).

The Middle East and North African (MENA) region accounts for 79% of the USD1.1 trillion global Islamic financial

assets out of which 40% are with six Gulf States. Only 15% comes from the most Muslim populated areas in Asia. However, non-Muslim dominated areas contribute only 5% of Islamic financial assets (OIC, 2012). This reflects the asymmetry of distribution of Islamic assets as well as the opportunity for Islamic world.

In such a setting it is interesting to note that, except for Sudan and Iran where the financial system is synonymous to Islamic financial system, the penetration of Islamic finance in terms of total banking assets is low; the highest being in Bangladesh where Islamic assets account for 65% of banking assets (OIC, 2012). The commitment of different countries regarding Islamic finance varies in degree of relevance. The countries have been divided in various clusters based on their level of market research, explored market potential, sporadic development, market development activities and market expansion activities (Hassan, 2008). With a global Islamic protocol it would be easier for Islamic countries to take off the shelf products as well as trade in international Islamic instruments to increase the penetration of Islamic finance.

Also outside the Islamic world, the presence of Muslims is increasing due to immigration. In USA it is expected that Muslim will become the second largest group, while the Muslim base of Germany, France and UK is increasing and Muslims more or less integrating themselves as groups and not as individuals (Pew, 2010). These groups with their low penetration in world's Islamic assets require an international market to fulfill their needs as per the teachings of Islam.

The *madhahib* and their role in Islamic Financial System

Global Islamic Financial System would require as a prerequisite that the people from different *madhahib* and regions agree on an Islamic instrument as *Shari'ah* complaint and take part in its sale and purchase. Therefore, the establishment of Global Islamic Financial System is only possible when the concept of *madhahib* is revisited and root commonalities are identified.

Islamic sources of law can be conceived as a pyramid. At the top are the primary sources, Allah's word, the Quran, followed by the Prophet Muhammad (PBUH) preaching in form of both *Hadith* and *Sunnah*. If an issue is not discussed by these two sources the view can be taken from *Ijma* (consensus), and *Qiyas* (reasoning by analogy) and the learned jurist can also do *Ijtihad* (individual reflection). The scope of possible interpretations

increase as one moves down the pyramid. Quran is the only source that is known to all with full authenticity. Even in *Hadith*, there are many that are *Zaeef*. Some of this *Zaeef Ahadith* are still used for interpretations. Even the rigorous *Hadith* collection process has not dispelled doubt from some *Hadith* (Heer, 1990). This in addition to the importance laid to different methods to interpret the sources to reach a needed decision. Such differences led to the creation of different *madhahib*. Different *madhahib* are imparting different relative importance to each of the methods and sources of Islamic law to the extent that some have even called for just relying on the Quran and disregarding the man-made principals of religion through *Ijma*, *Qiyas* and *Ijtihad* (Heer, 1990).

The *madhahib* follow different procedures to come to legal decision. The *Mujtahid* was just a vessel for coming to a decision and not the law maker (Usmani, 1999). The *taarud al-adilla* (mutual contradiction of proof texts) cases were scrutinized by *Ulema* and they developed *usul al-Fiqh* (science of jurisprudence) as a tool to consistently resolve conflicts based on the basic Islamic principles. Such cases were dealt on the assumption that the differences are because of interpretation and not systematic as the law giver and his prophet messages do not reflect inconsistencies. It is for this reason that the Muslim *Ulema* were tolerant of the divergent interpretations (Murad, 1999).

And the differences in opinion were not far and few but the *madhahib* were formed around these differences. The *Hanbali* text tends to be literalist in interpreting the sources while *Maliki* and *Hanafī* allow wider interpretations. Not all *Aaimaa* have talked about all issues. Within *madhahib* different followers of *imam* have reached different conclusion from the same methodology (Shepard, 1987). Also the *Aaimaa* themselves were open to new text and experiences and did not have problem updating their stance. For example *Imam Shafi* wrote his book *al-Hujja* (The Proof) while he was in Iraq. Then he migrated to Egypt and was exposed to new set of habit literature and legal reasoning. There he wrote another book *al-Umm* (The Exemplar). However in *al-Umm*, he upgraded many of the rulings which he had in Iraq. Similarly even after the great *Imam* the faithful followers continued to work for the progress of their *madhahib* and improve upon the rulings. For example the *Hanafī madhab* was more focused on the legal work available in Kufa and Basra and was wary of that in Iraq and their early rulings reflected this feeling. However once the *Sahih Sitta* (six *Hadith* books) were collected, the *Hanafī* scholars took

these *Hadith* and updated their judicial stances on various issues (Murad, 1999).

It was the self discipline and toleration of the time, that if scholar saw practices that were under debate yet he thought it forbidden, he would not forbid the action as that would have caused disunity and break ties and cripple the *Ummah*. He also realized that these differences of opinion are a mercy on the Muslim community (Murad, 1999). For this reason *Imam al-Ghazali* condemned the “fanatical attachment to a *madhab*” i.e. to say that one *madhab* start recognizing itself superior to other *madhahib* (Murad, 1999).

The leading and the most prominent *madhahib* that have survived till today are four, the *Hanbali*, *Shafi*, *Maliki* and *Hanafi*. The *Hanafi madhab* favorite method of interpretation was *Qiyas*, for *Maliki* and *Hanbali* was *Hadith* while *Shafi madhab* used a mixed strategy i.e. they used *Hadith* more than *Hanafi* and *Qiyas* more than other two.

Over time each School has found some semblance with a particular region and this has led to geographical concentration of followers of a *madhab* in certain locations. The *Hanbali madhab* is primarily located in Saudi Arabia. *Maliki madhab* is dominated in Arabian Gulf States (Kuwait, Qatar, Bahrain, Dubai and Abu Dhabi) Spain, East and West African countries (upper Egypt, the Sudan, Tunisia, Algeria, Libya, Morocco, Mali, Nigeria, Chad, Niger, Senegal, Mauritania) Basra, Syria and Yemen. *Shafi madhab* is in Indonesia, Malaysia, Brunei Dar-us-Salam, East Africa and parts of Yemen and Egypt. The most dominant and far spread is the *Hanafi madhab* whose followers live in Turkey, Egypt, Syria, Lebanon, Jordan, Iraq and the Indian Subcontinent. Even with this special orientation of *madhahib*, the countries have been eclectic in their following of *madhab*. In Egypt the court can decide on ruling of any *madhab* at the plea of the people involved but in some countries like Algeria or Morocco decisions are based on *Maliki* interpretation only (Shepard, 1987).

In this situation of regionally separated *madhahib*, the integration of Islamic finance is only possible when the *madhahib* see eye to eye on issues on *Shari'ah* based products and services. *Riba* is not an easy matter. There are two types of *Riba*, *Riba al-Jahiliyyah* and *Riba al-Fadl* also known as *Riba al-Nasai* and *Riba al-Sunnah* respectively (Chapra, 2006). The definition of *Riba al-Fadl* arises from Prophet (PBUH) *Hadith* who said not to trade gold for gold, silver for silver, wheat for wheat, barley for barley,

dates for dates and salt for salt, like for like, equal for equal and hand to hand as whoever takes more or pays more has engaged in *riba*.

All *madhahib* agree that *Riba* is *haram* and they also further agree that *Riba al-Jahiliyyah* (pre Islamic days) is definitely *haram* in all ways. All *madhahib* agree on the basic concept of *Riba al-Fadl* i.e. it gaining a differential in volume or quantity in sale of some items however there is no agreement on the *Ribawi* goods. With regard to currency the *Hanafi* and *Hanbali* found the *illah* of weight, *Maliki* and *Shafi* inferred the *illah* of *Naqidiyyah* (currency) (Ali, 2007). With regard to other items the *Hanafi* again considered weight, *Maliki madhab* agreed on the *illat* or storable food while *Shafi* and *Hanbali* agreed on edibles. Now the problem that arises with the differences of interpretation of *illat* is that some goods are *Ribawi* in one *madhab* but not in other (Rahman, 2013). For example oranges and bananas which are sold by the dozen and not by weight are thus not *Ribawi* in the *Hanafi madhab* but are *Ribawi* in all others. Also there were rules that were followed by the *Ulema* to come to conclusions. For example prohibition took precedence over permissibility. Conflicting *Hadith* were resolved by taking in the views of the companions of the Prophet (PBUH) (Kamali, 1991).

These problems are intensified because the *madhahib* ruling for this contemporary world have not reached their zenith and are still in process of evolution. Unlike the common law or the civil law, which are both made by humans, Islamic law is made by Allah and it cannot be changed given the advances in our society. Thus the only possible remedy is interpretation of the law to find answers for today. However, by AD 1000 many *madhahib* thought they were over-interpreting and many *madhahib* stopped developing further jurisprudence even though the society was advanced in leaps and bounds (Schacht, 1964). The financial conventional law, on the other hand, in both civil and common law was a rigorous process of continuous improvement.

Not only had *madhahib* progress been curtailed for a few centuries, but the modernist are calling to bypass the *madhab* and want to think for themselves. Historically to ensure no distort in Islam, majority of the great *Ulema* strictly adhered to one *madhab* (Keller, 1994). The great *Hadith* scholars like *Imam Bukhari* and *Imam Muslim* were strict adherent of one *madhab*. Some like *Ibn Taymiyyah* and *Ibn al Qayyim* gave *fatawa* independent of the *madhahib*, however even they never recommended *Ijtihad* to a

person who was not fully qualified in the primary sources. Later on, Muhammad Abduh and his pupil, impressed by the west and their glory were fierce in their argumentation to throw away *taqlid* and the power of the *madhahib* (Murad, 1999). To do *Ijtihad* one must be *Mujtahid fil-shar* i.e. a person who has fulfilled all the conditions to give *fatwa* and for such a person even following a *madhab* uncritically is not permissible. Instantly to become a *Mujtahid fil-shar* requires mastery of Arabic language and profound knowledge of the primary sources. Such a person must enjoy a high degree of piety. Moreover he must be fully aware of the circumstance of the revelations of *Hadith* and *Ayats*, *Hadith* assessment, views of companions, followers and *imams*, methodology of *Qiyas*, intellectual experience of own society (Kamali, 1991). Fulfillment of all these requirements is very difficult for an ordinary person thus *Ijtihad* had been left to the *Ulema*. This problem is often seen in Islamic Banking. People who don't have the *Qalam* (Pen) of *Mujtahid* are often giving *fatawa* especially for the benefit of one or more financial institution of their client. To ensure credibility of the Islamic system, Islamic Banks would have to keep tag of the *fatawa* as well as of those who are giving them.

It was essential for non *Mujtahid* Muslims to follow a *Taqlid*. But then some dissenters argued for pick and mix strategy to maximize the returns. All *Aimaa* have been of the opinion that if their *fatawa* contradicted the Quran, the *Sunnah* and the even those of early followers of Muhammad (PBUH) then their teachings should be rejected and the primary sources be followed. Also *Taqlid* was only in matters which are not clear in the primary sources and have abstract interpretations. Where *Taqlid* is necessary for a *non-Mujtahid* it is essential to follow the rulings of one *madhab*. This is necessary as a person whose solution to a problem in his *madhab* is not beneficial to him then he would switch to a favorable *fatwa* in another *madhab*. But this mix and choose would just lead to people following *Nafs* which is undesirable in Islam (Usmani, 1999). Two strategies used in this regard are the *Takhayyur* and *Tafliq*. Nowadays many intellectuals do not feel bound to any *madhab* and use the process of *Takhayyur* to choose from amongst the teachings of different *madhahib* to reach their desired results (Farrar, 2011). They also practice *tafliq* to legitimize opinions that were considered unlawful in one or more *madhab*. They form a new opinion by mixing a less known opinion with another (Hallaq, 2009). Both of these have the effect

of multiplicity in opinions in the Islamic world and take away the efforts of standardization (Rapoport, 2003). Again Islamic banks have to ensure that such practices are curtailed so that the spirit of Islam survives over the spirit of capitalism.

In an environment of animosity and time where the followers of the *imam* have forgotten the golden rules of peace and tolerance and *Nafs* has taken control, the only way left with the Muslim scholars to reunite the people, is *Tawhid*. In *Tawhid* the Muslims reunite, even though they have different opinions and followings. It is essential that to move towards greater harmony, the people of *Tawhid* engage in debate and look for what is common between them (Moezzi, 2009). The people should also look what is different even if the differences are few than many. This approach is also useful in Islamic Finance. It would have to get away from the dogma and prejudices and look for commonalities within their frameworks. Until such converging factors are not agreed upon, Islamic finance will remain fragmented regionally along the lines of *madhahib*.

All the foregoing issues have implications for Islamic finance. Islamic financial institutions who are dealing with people from all *madhahib* will have to understand the intricacies of *madhahib* so that they do not lose out customers just because of failure to comply with the minute differences between the *madhab*. A deal or product can be *Shari'ah* complaint in one *madhab* and fail to be so in another.

On the Connection between Islamic Jurisprudence and Islamic Banking and Finance

The central debate is Islamic jurisprudence in the area of *fiqh-u-muamalaat* arises from the variety of opinions on individual aspects. This raises the basic debate regarding the lack of uniformity. Setting aside the existence of the various “*Schools of thought*”, the common perception of weakness in this system is in fact its strength. The diversity of juristic opinions represents incomparable richness and variety in a system with the capacity for universal application. This diversity allows application across cultures and constituencies. The adaptation and versatility indicates that variance within interpretation is representative of the law molding/adapting to the culture within which it is applied. A parallel example can be found in the success of English/Roman law. For centuries its primary advantage was its malleability. The versions of common law applied in the United Kingdom vary from

those applied in the United States and Australia. This adaptation represents the evolution of law to changing circumstances.

Therefore, the strength of one system cannot be the weakness of another. It is simply a common fallacy or misperception of the general public (Nyazee, 2015).

The property of flexibility has been the superiority of Islamic law from the beginning. It is reflected in its *madhahib* with their fairly diverse techniques in interpretation. Every school has served a pretty much adjoining geographical district, obliging the social inclinations (Nyazee, 2015). Using this concept it is necessary to draw attention to the fact that minor divergences or discrepancies do not erode the constructive contribution to the greater system. Each interpretation and *madhab* utilized the fundamentals of *riba* free products, encourage risk sharing and asset backed transactions. Therefore each part builds towards the greater benefits that result in socio economic development and stability with an alternative system. This provides a substitute for a conventional system which has revealed its great flaws numerous times throughout history.

Concluding Remarks

The discussion of a universal system is necessary and significant due to worldwide trends. The Islamic financial system started out as diverse and regionally concentrated, similar to the conventional financial system. In this context, the *madhahib* frameworks may generate the commonalities with a unique system. It has been extensively argued in literature that the *madhahib* are indicative of fragmentation of the system (Moezzi, 2009). However, we find that careful interpretation and compilation of literature indicates that this could not be further from the truth. This interpretive base can be used to formulate a universal system. A fundamental necessity is that each product structure be thoroughly analyzed as per the “*Schools of thought*”.

The integration of a universal framework across countries is more necessary now than it ever was before. It will decrease the need for conventional financing. Essentially by making a uniform system, we will be helping the whole society, investors and consumers alike. Most of the Islamic financial institutions, can then actually compete with the conventional system, by being involved in more transactions, more customers and hence more growth.

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