

***RIBA* IN ISLAMIC JURISPRUDENCE:**

THE ROLE OF 'INTEREST,' IN DISCOURSE ON LAW AND
STATE

Master of Arts in Law and Diplomacy Thesis

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Abstract

The study of Islamic Finance provides a unique opportunity to examine both the evolution of Islamic legal science, and the current struggle between fundamentalist and moderate movements over the role of Shari'a law in the modern legal system of the Islamic state.

Shari'a compliant financial instruments are those that do not contravene prohibitions in Islamic revelatory texts against *riba*, 'interest,' and *gharar*, 'speculation,' in business transactions. Although making profit off loans is illicit according to the Quran, several classical jurisprudential methodologies have been employed to create financial instruments, which concur with the letter of the law, if not the spirit. The existence of these products points to a tension between textualism and essentialism at the core of Islamic legal theory.

The tendency to apply a rigid 'textualist' framework on to Shari'a law in the area of finance is countered by the growing significance of Islamic Economics, which concerns itself with wider issues of economic and social justice and permeates religious/political discourse today.

The issuance of a *fatwa* in December 2003 by the premier institute of Sunni legal scholarship, Al-Azhar University of Cairo, permitting pre-specified fixed rate bank deposits, ignited a stormy debate whose backdrop is the 40-year struggle in the State of Egypt between proponents of positive and divine law - a debate which is being settled in the Egyptian Supreme Constitutional Court. It is with surprising tenacity that the issue of

Riba inserts itself into contemporary discourse about authority and authenticity in Islam.

It is well worth an examination.

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Introduction

There are those who credit the birth of the modern Islamic banking industry to the opening of the Islamic Development Bank (IDB) in Jeddah, Saudi Arabia, on October 20, 1975. IDB's mandate was to assist Muslim countries in their economic development by providing equity capital and loans *compliant with Shari'a law*.¹ While it is certainly true that the IDB introduced the wider world to Islamic banking, the laws underpinning Islamic Finance date back to the time of the Prophet Mohammed himself (570-632 A.D.), when the teachings of the Quran transformed the *jahiliyah* (pre-revelation, literally 'ignorance') business practices of early Muslims.

Shari'a law, whose dual sources are the revelation of the Quran and the sayings and actions of the Prophet recorded in the Sunnah, has always dictated the methods by which devout Muslims can transact and conduct financial dealings in an ethical manner. It was not, however, until Middle Eastern countries gained independence from European colonial powers in the mid-20th century, establishing their own Islamic statehood, that the experiment in 'ethical investing,' could be undertaken within the state system. Islamic banking is 'experimental' because although its roots are explicit in the Quran and Sunnah, it has not been applied under the law of the land for nearly a century and a half and therefore has had to make the leap from theory into practice in an era of radically different modes of finance.

¹ Islamic Development Bank, http://202.187.18.203/english_docs/idb_home/backgrnd.htm

Muslim states have been grappling, since independence, with integrating or replacing colonial legal systems with Islamic law, and each lies at a different place on this spectrum. The boom of oil wealth from the 1970s and increasing religiosity has spurred the growth of Shari'a compliant banks and finance institutions offering services that do not contravene prohibitions on *riba* (loosely, 'interest') or *gharar*, (speculative transactions). Today, banks offering Shari'a compliant services stand at roughly 250 in number, manage over \$200 billion in assets worldwide,² and have grown at the extraordinary rate of 15% for the past 5 years.

This paper deals with Islamic Finance on two levels. First, it seeks to unwrap the rationale, jurisprudential methodology and application of Islamic law to finance both in classical and modern Islam. Second, it attempts to investigate the disproportionately significant role of *riba* in the discourse on Islam, law and the state.

In Chapter 1, the reader is introduced briefly to the recent history of Islamic banking, and its sources in classical Islamic legal tradition. Chapter 2 provides an account of the development of Islamic jurisprudence and legal methodology in general, and then as applied to finance. These methodologies create the legal context for the development of widely used Shari'a compliant financial instruments, of which several will be described in Chapter 3. Subsequently, an analysis of the dilemmas and problems facing modern Islamic Finance will follow, including briefly, a discussion of the institutions for innovation that have arisen to resolve these issues. A prognosis for the

² Said Abdullah, "Islamic Banking and Finance Set for a Boom," *The Business Times, Singapore*, July 24, 2003

future of Islamic banking and some of the possible ramifications to Islamic jurisprudence in other spheres of law will form the necessary conclusion to this part of the paper.³

Chapter 4 examines the field of Islamic Economics, and its contribution to Islamic Finance as well as a tension that exists with traditional textualist '*fiqh*' law. Chapter 5 comprises a case study that highlights the discourse on Islamic Finance today within the context of a general struggle over legal authority between the state and the jurist-scholars over the role of Shari'a law in the state legal systems. We will begin by analyzing a *fatwa* (legal ruling) issued by the premier institution of Sunni scholarship, Al-Azhar University of Cairo, regarding the permissibility of pre-specified, fixed-profit bank deposit accounts. We will examine this controversial *fatwa* in light of recent reforms in the Egyptian legal system, and judicial interpretations of a Constitutional article naming Shari'a as the prime source of legislation for the State. We will then follow the storm of dissent raised by the *fatwa* in the Islamic ecclesiastical and lay worlds, enabling us to grasp the primacy of Islamic Finance in the world of Islamic politics today.

³ Some material from Chapters 1-3 was compiled for a paper entitled, "The Role of Islamic Jurisprudence in Finance," written by myself in December 2003, under the auspices of a course, *Comparative Legal Systems*, taught at The Fletcher School by Professor Louis Aucoin.

Chapter 1: What is ‘Islamic’ Finance?

Defining Illicit Profit

Three broad Shari’a precepts distinguish Islamic from Western-style finance. The first is a ban on *riba* or excessive profit, defined loosely as ‘interest.’ The second is an injunction against *gharar*, or transactions involving fundamental uncertainty and/or speculation. The third is a prohibition against dealings with businesses involving forbidden products or activities (such as alcohol, pork or gambling).

Legal scholarship has determined that much of what comprises Western-style finance is *haram*, or forbidden, to the devout Muslim. This list includes interest bearing accounts and loans which fall under the strict *riba* rules, most futures and options, which are considered speculative and *gharar*, and insurance, also *gharar*, because the outcome of the contract can in no way be determined beforehand (i.e. the health of the individual or business and the actual payment by the insurance company).⁴

Sources for the Prohibition against *Riba* and *Gharar*

⁴ *Finance and Economics: West meets East; Islamic Finance* (London: *The Economist*, October 25, 2003).

Prohibitions against *riba* and *gharar* are given explicit treatment in both the Quran and Sunnah, in several places and in different contexts.⁵ This means that financial services and instruments, if they are to be ‘Islamic,’ must past the test of reconciliation with these injunctions.

The Quran does not mince words when it forbids the use of usury:

Those who live on usury will not rise (on Doomsday) but like a man possessed of the devil and demented. (2:275)⁶

The Quran is compelled to distinguish between *riba* and ordinary trading for fear that the machinations of the devil will confound human reason:

This because they say that trading is like usury. But trade has been sanctioned and usury forbidden by God. (2:276-277)⁷

Without the clarification, one might assume that interest-bearing contracts entered into freely by both parties would be *halal* (permissible) under the Quranic precept that mutual consent makes a transaction licit.

The question remains, why not advance money or goods to be paid at some later date with a ‘little something extra’ for the effort? The answer is, cryptically, because ‘God made it so.’ *Riba* is reviled in both the Quran and Sunnah as a severe sin, yet no comprehensive definition is ever offered of the term, whose etymological roots are merely the word ‘excess.’ What makes a profit excessive? And what makes an excessive profit so evil?

⁵ The prohibition against *riba* is mentioned in the Quran in no less than 8 different passages.

⁶ *Al-Quran*, translated by Ahmed Ali (New Jersey: Princeton University Press, 1983)

⁷ *Al-Quran*, Ahmed Ali

Perhaps because of the ambiguity of the term, the Sunnah and Hadith cite numerous examples whereby Mohammed underscores the gravity of indulging in *riba*:

(The Prophet) even equated the taking and giving of interest to committing adultery thirty-six times, or being guilty of incest with one's own mother.⁸

The gravity of the sin, however, only increased the need for an exact definition of *riba*. Umar himself, the first Caliph, complains of the passing of the Prophet before he was able to explain what *riba* is. Umar abjures the faithful that in the absence of certainty one must “leave behind *riba* and doubt.”⁹

For a solution, Islamic scholars have looked toward *riba* practice in the time of the Prophet, and divided it into four separate categories: *riba al-buyu*, where two identical commodities are exchanged in different quantity, with the delivery of one postponed, *riba al-fadl*, a similar type of *riba* in trade, *riba al-diyun*, usury on debt, and *riba al-nasiya*, the incremental increase on the principal of a loan repayable upon termination of the loan period.¹⁰ *Riba al-buyu* and *Riba al-nasiya* in particular were popular in 7th century Arabia.

Classical Islamic legal approach hesitates to draw *qawa'id*, or general principles of law and morality, upon which the unlearned may stumble in assuming them to be the width, breadth and entirety of the rationale behind God's law. Nonetheless, it is useful to speculate on the reasons behind the Quranic and Sunnaic injunctions against *riba*.

⁸ Masri, *Masraf*, from Alexandra R. Hardie and M. Rabooy, “Risk, Piety, and the Islamic Investor,” *British Journal of Middle Eastern Studies*, Vol. 18, No. 1, 1991, pg. 59

⁹ Ibn Maja, from Frank E. Vogel and Samuel L. Hayes, III, *Islamic Law and Finance: Religion, Risk and Return* (The Hague, Netherlands: Kluwer Law International, 1998) pg. 63

¹⁰ International Islamic Finance Market, <http://www.iifm.net/glossary>

Three medieval Islamic scholars offer the following rationales for the prohibition: Ibn Rushd (1126-1198 A.D.) points to the principle of fairness in the mathematical equivalence required in transactions. Ibn Qayyim al-Jawziyya (1292-1350 A.D.) maintains that the intent of the prohibition is to avoid forms of commercial exploitation.¹¹ Historical evidence suggests that loan-sharking was rampant during the pre-Islamic era, and failure to repay debt often resulted in enslavement. The Persian scholar and Sufi mystic, Abu Hamid Muhammad Al-Ghazzali (1058-1111 A.D.) concurred with this view, denouncing the profiteering aspects of *riba* yet indicating an acceptance of a ‘fair rate of return.’¹²

Despite these ruminations of select scholars as to the *qawa'id* behind the Quran’s transactional restrictions, it is important to note that the predominance of current scholarship, and the entirety of practiced law on commerce, has followed the classical ‘*fiqh*¹³’ method of reasoning, relying heavily on *taqlid*, (rulings of past scholars) and circumscribing scholars’ ability to create novel legislation. In fact, Al-Ghazzali himself partook in the infamous ‘closing of the gates of *ijtihad* (independent legal reasoning),’ leading to the dark ages of Islamic scholarship.¹⁴

Gharar, transactions based on uncertainty or speculation, are another set of corrupt practices that Islamic law attempts to ameliorate. Gambling in general is denounced in the Quran as “acts of Satan” used to ensnare, so that Satan may “...create among (man) enmity and hatred, and divert (man) from the remembrance of God and

¹¹ Vogel and Hayes, pg. 82

¹² Ozay Mehmet, “Al Ghazzali on Social Justice: Guidelines for a New World Order from an Early Medieval Scholar,” *International Journal of Social Economics*, November 1997, Volume 24, Number 11, www.infotrac.com

¹³ Unique Islamic science of law, or jurisprudence

¹⁴ *Ijtihad* has never ceased being in use, but was increasingly circumscribed when the volume and differences in opinions propagated by different legal schools reached an unmanageable level.

from prayer.”¹⁵ While the Quranic text prohibits only games of chance (*maysir*), the Sunnah extends the prohibition to speculative forms of commerce, where like gambling, there is a deficit in knowledge by one or more parties that characterizes the transaction as ‘deceitful.’¹⁶

O believers, this wine and gambling, these idols, and these arrows you use for divination, are all acts of Satan; so keep away from them. You may haply prosper. (5:90)¹⁷

The Messenger of God forbade the ‘sale of the pebble,’ (sale based on throwing a pebble like dice), and the sale of *gharar*.¹⁸

Do not buy fish in the sea, for it is *gharar*.¹⁹

Equating *gharar* to buying ‘fish in the sea,’ highlights the speculative nature of the transaction. Buying ‘fish in the sea,’ or alternatively, ‘what is in the womb²⁰,’ violates the principle that all parties have both complete knowledge and access to the product before the transaction. Modern financial practices that are *haram* under this injunction include use of derivatives such as futures and most options, and the purchase of insurance, where profits do not derive from activities related to the efforts or personal risks of the purchaser relating to the asset or venture. Investment in the stock market is permissible however, on the principle of *shared* risks and rewards - as long as the investor does not hold preferred stock with a fixed dividend. The recently opened Dow

¹⁵ *Al-Quran*, (5:90-91), Ahmed Ali translation

¹⁶ International Islamic Finance Market, <http://www.iifm.net/glossary>

¹⁷ *Al-Quran*, Ahmed Ali

¹⁸ Muslim, from Vogel and Hayes, pg. 64

¹⁹ Ibn Hanbal, from Vogel and Hayes, pg. 64

²⁰ Ibn Maja, from Vogel and Hayes, pg. 88

Jones Islamic Market Indices contains a list of *halal* (licit) stocks of companies that do not indulge in forbidden activities and products.²¹

The Quran, in summary, forbids both *risk-less gain*, as in the case of *riba*, and transactions *based entirely on risk*. It asks its followers to earn profits by taking risks, but not by gambling, which is unadulterated risk. It has been said that in today's terminology an Islamic investor would be "risk neutral," neither seeking speculative gain or hoping to lock down all risk with fixed returns."²²

Permissible alternatives to long-term and short-term financing, equities and insurance have arisen in the observant Muslim world. The 15% annual growth rate of the Islamic banking sector attests to this fact. The question is, what has been the Islamic legal 'route,' mapped by 14 centuries of legal thought, which has led to the creation of these instruments? Additionally, can this system keep pace with the world of modern finance where the need for capital, liquidity and return on investment gives economies the impetus to develop? The answer lies in the evolution of a uniquely Islamic science of law, or *fiqh*, where the jurist's reason exerts itself to reconcile modern circumstance and need with ancient commandments - within the boundaries of tried and tested methodologies.

²¹ Dow Jones Islamic Market Indexes website, <http://www.djindexes.com/jsp/islamicMarket.jsp?sideMenu=true>

²² Hardie and Rabooy, pg. 56

Chapter 2: Islamic Jurisprudence and Finance

Fiqh and Finance

When the nascent Muslim society encountered a novel legal conundrum after the death of the Prophet in 632 A.D., the Caliph held an assembly of community leaders and attempted to resolve the issue by finding a direct answer in the Quran or Sunnah. If a definitive answer proved elusive, a debate would ensue over how to apply the texts to the given circumstance. Ideally, *ijma*, or ‘consensus’ would be reached among the learned. The process of *Ijma* has the accreditation of the Prophet himself, when he stated in the *hadith*.²³ “My community will never agree on misguidance, therefore, if you see divergences, you must follow the greater mass or the larger group.”²⁴

This process of legislation was hampered by the spread of Islam to geographically dispersed locales, and its assimilation with the ‘*adat*, or customary laws of the converted peoples.²⁵ New concepts and methods of legal reasoning needed to be established to meet changing needs. Alongside the institution of *ijma*, there arose a new method for legal derivation: *qiyas*, or ‘reasoning through analogy.’

Fuqaha (those versed in *fiqh*), using their profound understanding of the ‘*illa*, or ‘efficient cause,’²⁶ embedded in the Shari’a laws, were able to follow common ‘strands’ of divine logic throughout the Quran. These scholars then issued rulings, *hukm*, based on

²³ *Hadith* are Sunnah that contain the spoken words of the Prophet

²⁴ Ibn Maja, <http://www.sunnah.org/publication/encyclopedia/html/taqlid.htm>

²⁵ Asghar Ali Engineer, “The Concept of Ijtihad in Islam,”
<http://www.punjabilok.com/faith/islamijtihadi.htm>

²⁶ Vogel and Hayes, pg. 75

extrapolation of the essential elements of a Quranic or Sunnaic example and the application of those elements to a current dilemma. A major example often cited for the application of *qiyas* is the Quranic prohibition against imbibing grape wine. The ‘intoxicating nature of wine’ was the ‘*illa*’ chosen, and then applied to other intoxicating substances such as opium and beer – although neither is made of grapes and only one is ingested.²⁷ By 1100 A.D. four major and several minor Sunni Islamic legal schools had emerged, each differing in the methods by which they approached the immutable texts. However, most adhered to the four primary methods of law-derivation: Quran, Sunnah, *ijma* and *qiyas*, referred to as ‘*usul-al-fiqh*,’ or ‘sources of jurisprudence.’²⁸

The cryptic nature of the Quran and Sunnah, the lack of available *ijma*, the development of *fiqh* and use of *qiyas* by no means resolved the difficulties in applying the revealed sources of Shari’a to modern social needs. Particularly in the area of commerce and financial transaction, the fundamental question persisted: in what way were the rulings in the Quran and Sunnah meant to act as guides of human action? They could be regarded as general principles of justice and goodness, or as concrete and immutable rulings on human activity, to be followed nearly verbatim. For instance, in the case of *riba*, is any form of payment in excess of the exact amount of the loan forbidden under all circumstances, or is it only prohibited if it creates great inequalities in society? This quandary has led to a split in attitudes, and approach among jurists.

As long as there was no question of Shari’a law becoming the dominant legal system in any country under the foreign influence of colonialism, the profound implications that lay dormant in the divergent opinions did not come into direct

²⁷ http://www.theislamproject.org/education/D01_IslamicLaw.htm

²⁸ Due to its unique historical path, Shi’im has adopted modified jurisprudential methods.

confrontation. With independence and the establishment of Islamic statehood in several Middle Eastern countries, visions of economic justice, or an ‘essentialist’ reading of the Quran, and classical textualism collided, transforming scholarly thought about issues such as *riba* and *gharar*. With the growth of the Islamic banking sector over the last few decades, these ideas have influenced each other strongly, as will be discussed below.

However, early in the days of classical Islam, it was decided *not* to treat the Quran’s rulings as ‘hints,’ of a greater principle that man was meant to discover, thereby subjecting God’s revealed word to man’s fallible reason. Although Islamic Economics and the ‘general principle,’ approach is influencing *discourse* on Islamic financial today, the creation of a finite set of finance transactions is largely a result of classical *fiqh* scholarship. In order to understand the *halal* transactions in use today, and the possibilities for innovation in the field of Islamic Finance, it is important to understand the methodology with which they were derived. How then, was a legal system created that would suffice for the complexities of modern finance, among other things?

Jurisprudential Methodology:

Classical *fiqh* used in the area of finance has primarily utilized four major methodological tools developed by *fuqahah* to follow the ‘trail,’ back to the roots of the Quran. They are, in order of preference: *ijtihad*, *ikhtiyar*, *darura* and *hiyal* (interpretation, choice, necessity and artifice).²⁹

Ijtihad, or the ‘independent scholarly derivation of law’ from the primary texts, is increasingly in use in Islamic Finance today, especially for unprecedented situations and techniques. However, pure *ijtihad* is rare, due to a conservative tendency in Islamic

²⁹ Vogel and Hayes, pg. 34

jurisprudence, and a leaning toward points of consensus with past scholarship. It is preferable to subsume new situations under older categories, which at times is akin to fitting a ‘square peg into a round hole.’³⁰ Efforts today lie largely in creating, not in breaking new ground and employing genuine *ijtihad* but in evaluating whether transactions can be reconciled with dogmatic principles and past rulings.³¹

The necessity for consensus in the tricky area of finance has led to the creation of ‘Shari’a boards,’ in banks that try to reach common rulings about the permissibility of financial instruments and transactions. Educational reforms are underway within this field as scholars extend their expertise from the narrow field of Islamic law to knowledge of modern finance and world markets. It is crucial that this trend continue, because the task of Shari’a scholars in banking institutions has become increasingly complex as they assume greater responsibility for investment decisions as well as the minutiae of Islamic laws.³² Education of Shari’a scholars in modern economics and finance remains one of the most crucial reforms in the industry.

Reticence to propound novel solutions, has led to the increased use of *ikhtiyar*, by which a choice is made between former scholarly opinions. Several criterion guide the process of choice, including the perceived ‘strength’ of the opinion in light of the text, its ability to service the public good, and the pedigree of the scholar. Business transactions, often complex, do not lend themselves easily to affiliation with past legal rulings, and several different rulings must be drawn together to accommodate a current transaction. Therefore, at times, the application of *ikhtiyar* results in a ‘patchwork quilt,’ of past

³⁰ For instance, regarding options in light of either one of two 7th century Arabian transactions – a sale or a lease.

³¹ Vogel and Hayes, pg. 36

³² Farhan Bokhari, “Islamic Investors Seek Worldly Wise Scholars: Banks and Funds need Shari’a Boards Versed in Finance and Religion,” *Financial Times (London)*, May 27, 2002, pg. 7

rulings, yielding, paradoxically, the greatest amount of human influence, though employing the most conservative methodology.³³

A comparison may be noted here to the idiosyncrasies of the French civil law system where rigid dependence on written code and statute can often afford judges a greater flexibility to pick and choose from various laws whose ‘efficient cause’ they must extract. As *ikhtiyar* is the most common method used across the four Sunni schools in the field of finance, this is the methodology that has the greatest potential to subvert the consistency of Islamic legal logic and create financial instruments that mirror those of Western provenance, by ‘patching’ together previous rulings.³⁴ This in turn, raises cries of violation of the essential principles of the Quran – social and economic justice.

The third methodology, *darur*, is invoked under circumstances of ‘stark necessity,’ allowing a devout Muslim to contravene Shari’a directly in a life-and-death type situation. Created for the most exigent circumstances, this method is oftentimes stretched to relax laws forbidding Islamic banks themselves from holding interest-bearing accounts in foreign countries, on the asset side of their balance sheets. These *darur* opinions however, are bound to the time, place and subject of the ruling and do not apply *ergo omnes*, or under changed circumstances.

The legal artifice, or *hiyal*, is a fourth, highly contested method used for ascertaining compliance with Shari’a. *Hiyal* may follow the technical Quranic law to a ‘T’ but at times subvert the intent of a prohibition. *Hiyal* that act as ‘ruses’ to circumvent the intent of financial transactions, such as *bay’ al’wafa*, are not accepted by most schools of jurisprudence. The *bay’ al’wafa* transaction allows a borrower who owns

³³ Vogel and Hayes, pp. 37-38

³⁴ Vogel and Hayes, pp. 37-38

assets or property to ‘sell’ that property to the bank or lender and enters a ‘leasing,’ agreement whereby he or she leases the property back, paying rent and retaining the right to repurchase the property at any time.³⁵ The Malicki and Hanbali schools place an outright prohibition on these *hiyal*, but their use has been increasing in the creation of financial instruments elsewhere. Malaysia in particular has been criticized by many Gulf States for indulging in *hiyal* in order to attract customers from across the Muslim world to what they hope will become a worldwide Islamic Finance hub in Kuala Lumpur. The Malaysian fixed-rate *al-bay-bithaman ajil* (BBA) contract used for long-term financing often holds a far higher price for the borrower than a conventional loan in actual terms.³⁶ The prevention of commercial exploitation remain is unaccommodated in these transactions, nevertheless they are ‘loop-holed,’ in because scholarship in finance remains largely committed to a *fiqh* hierarchy of legislation.

³⁵ Vogel and Hayes, pg. 39

³⁶ Saiful Azhar Rosly, “The Role of the Fatwa in Islamic Finance,” *Investor’s Digest, Malaysia*, January 16, 2003, pg. 28, www.lexisnexis.com

Chapter 3: Islamic Jurisprudence in Practice: Islamic Banking

Shari'a-Compliant Financing Instruments

In order to get a sense of how the methodologies of Islamic jurisprudence have assisted in the creation of Shari'a compliant financial instruments, a short list of the most popular products is provided below. Broadly, Islamic financial instruments must not violate *riba* or *gharar*, and must be approved by a Shari'a board of accepted scholars within the bank or finance institution. This means that every effort is made to share risk and ownership of the assets financed, and to specify with the greatest amount of certainty the quantities, qualities and prices involved.³⁷

Generally accepted and in use today are the following: *Mudaraba* (trust financing), *Moshakara* (partnership financing), *Murabaha* (cost plus financing), *Ijara* (Leasing) and *Salam* (advance purchase).³⁸

Mudaraba is a form of financing based on partnership, whereby the capital required for a project is provided to the borrower, who manages the investment, pays back the loan plus a predetermined percentage of the profits to his 'partner.' The partner's share in the proceeds will be determined by how well the project fares, and he is therefore a partner in the risk of the project, and has 'earned,' the return on his investment. All Islamic schools of jurisprudence agree that the preset ratio should be in

³⁷ Kenneth Aboud, Hooman Sabeti and Asmaa Al-Shabibi, "Overcoming the Uncertainty in Islamic Financing," *International Financial Law Review*, London, August 1, 2003, pg. 3

³⁸ Husam Hourani and Abdul Wahid Al Ulama, "United Arab Emirates: Islamic Finance – A UAE Perspective," *Euromoney*, London, 2002/2003, pp. 201-205

proportion to the capital invested.³⁹ An Islamic bank may be the financing partner, or the trustee of the funds of a lender, acting as middleman in the transaction, considered a three-way partnership. This form of trusteeship is different than that in the West, because it involves profit and risk sharing by all parties.

The United Arab Emirates Civil Code, Article 693 is explicit about the risk sharing properties of the *mudaraba*: “A *Mudaraba* is a contract whereby the person owning property puts in the capital, and the *Mudarib* (the borrower) puts in effort or work, with a view to making a profit.”⁴⁰ The pedigree of the *mudaraba* is traced back to the time of the life of the Prophet himself, who was said to engage in this transaction when he utilized, to fund his business, the capital of his first wife Khadija bint Khuwaylid.⁴¹

Moshakara, called ‘partnership financing,’ is applied to old-fashioned small-scale investments, and differs from the *mudaraba* only in that all parties provide capital and it is therefore closer to a genuine partnership. Although profits are shared on a pre-determined ratio, loss is shared only proportionate to the money invested. The role of the bank in such a partnership is to provide part of the capital, and receive profits, not only from the welfare of the enterprise, but also from the share of the borrower himself. In doing so, the borrower slowly ‘buys out,’ the bank until he is left as the sole owner, in an approximation of a lease.

Murabaha, cost-plus financing, is the most widely used instrument in finance today. It takes place when the bank buys assets for a borrower from the ‘market’ and sells it to the borrower at a mark-up price (the Quran recognizes the right of a seller to set

³⁹ Hardie and Rabooy, pg. 61

⁴⁰ Hourani and Al Ulama, pp. 201-205

⁴¹ Hardie and Rabooy, pg. 60

his own price, except in the case of a monopoly). Although on the face of it, this technique appears to be similar to conventional interest-based transactions, the money is ‘earned,’ because it is provided for the bank’s services in locating and purchasing the assets, whose title is briefly held by the bank at risk. Schools unaccepting of *hiyal*, often criticize this form of finance because the ‘profit-for-risk’ stipulation is only thinly covered.

Ijara is similar to a conventional lease. Arabian traders in the 7th century bartered with leases, but its application to finance is quite new. The bank, as in the *murabaha*, buys the asset for the borrower and then leases it out to him with a rental fee. The bank, however, maintains ownership of the asset during the life of the *ijara* and must provide for its maintenance. The borrower does not, unlike the *murabaha*, have the option to purchase the asset, except in the case of a *Ijara wa Atina*, where this is stipulated at the start. The *ijara* is mainly used for customer financing of cars, housing and equipment.

Financing for construction or manufacturing is often done through the *Istina’a*, or commissioned manufacture, whereby one party buys the goods for the borrower and pays for them to be manufactured according to specifications agreed between the parties.⁴² This is accepted only by the Hanafi school and on the condition that the contract is not binding until the goods are made and delivered to the buyer, thus avoiding the prohibition of *gharar* where goods cannot be purchased unless already in existence.⁴³

⁴² Hourani and Al Ulama

⁴³ Vogel and Hayes, pp. 146-147

Problems and Solutions in Islamic Banking: Institutions, Innovations

Ultimately the continued growth of Islamic banking will depend on drawing those Muslims that are ‘on the fence’ - wishing to comport with the provisions of their religion, yet unwilling to sacrifice their ability to invest and borrow at reasonable rates. The Quran claims to provide not only spiritual guidance for reward in the next life, but rewards of prosperity and justice in this world. Thus, compliance with Islamic rulings on finance must provide good R.O.I.⁴⁴ The hurdle for Islamic banks will be whether or not they can compete with Western financial systems and fiscally reward those who choose the *halal* financing option.

Despite its growth potential, Islamic banking suffers from a languishing deal flow, which some analysts credit to lack of dynamism and innovation in the industry.⁴⁵ Product categories are still narrow, (either very long term or short term financing), and undiversified, and there is insufficient liquidity and transparency in the industry as a whole. These problems vary from one country to the next, particularly regarding transparency and industry regulation. An encouraging trend and possible resolution to these difficulties is the recent formation of unified regulatory bodies and an inter-bank market between Southeast Asia and the Middle East Islamic banking sectors.

This year’s annual International Islamic Finance Forum, held in Dubai, highlighted the need for increased standardization in the industry and the need for educating and training of Shari’a scholars in finance. In an effort to overcome the fragmented nature of the industry, the International Islamic Financial Market (IIFM) was created in April 2002 to provide a major stimulus in both regulation and financial

⁴⁴ Return on Investment

⁴⁵ Stephen Ulph, May 1, 2002

innovation. According to its mission statement, the IIFM hopes to “facilitate international secondary market trading of Islamic financial instruments by providing independent Shari'a enhancement and issuing guidelines for issuance of new products. This should considerably enhance cross-border acceptance of Islamic financial instruments and strengthening cooperation among Muslim countries.”⁴⁶ The initiative is lead by the Bahrain Monetary Agency, the Islamic Development Bank and Malaysia’s Labuan Offshore Financial Services Authority (LOFSA).

The consolidation of regulatory bodies has been propelled by the close scrutiny and intense regulation applied to Islamic financial institutions after September 11, part of the U.S. government’s Financial Action Task Force (FATF) campaign to locate and curtail terrorist financing.⁴⁷ Ironically, in the words of the CEO of the Dow Jones Islamic Markets Indices, Rushdi Siddiqi: “What’s interesting about 9/11 is that it educated Muslims to Islam and, tangentially, to Islamic Finance.”⁴⁸ In fact, following 9/11, bankers urged Muslims, especially from the Arab world to transfer their assets from the US, to avoid being implicated in terrorist financing investigations.⁴⁹

Despite improvement, the achievement of standardization in regulation and in the issuance of *fatwas* (legal opinions) remains partly hampered by different regional and national historical paths, cultural perspectives and political needs that may not disappear in the near future. To briefly highlight important factors influencing major players: Saudi Arabia has reluctantly agreed to a dual banking system, and its tolerance of Islamic

⁴⁶ International Islamic Financial Market website, http://www.iifm.net/01_mission.php

⁴⁷ The Islamic banking method of Hawal has fallen under heavy regulation by anti-money laundering bodies post- Sept-11, because the informal system often allows anonymous money-transfers to be made ‘under the wire.’

⁴⁸ Farhan Bokhari, “Pious but Still Viable: Opportunities for Muslim Investors Are Growing,” *Financial Times* (London), November 10, 2003, pg. 8

⁴⁹ Bokhari, November 10, 2003

banking is seen as a concession to increasingly powerful fundamentalist factions and an attempt to quiet aspersions cast on the legitimacy of the royal family and its dependence on the West. Bahrain, another Gulf Arab state with limited oil resources, openly embraces Islamic banking, and hopes to establish itself as the global hub for such services. This cause brings Bahrain into competition with Malaysia, whose government seeks the support of a majority Muslim population. Iran's transformation to an entirely Islamic banking system formed and still forms a component of their revolutionary ideology, despite current economic hardship.

Compounding these differences, we throw four major Sunni, two major Shi'i and several small schools of jurisprudence into the mix. Recently, Malaysian scholars shocked Gulf scholars with the introduction of Islamic zero-coupon bonds sold at discount, which is considered *haram* in Gulf institutions.⁵⁰

Islamic banking, say its proponents, has several critical strengths that will make it a credible alternative to Western-style banking - not only for Muslims who factor in the COBM, "Cost of Being Muslim," into their business dealings,⁵¹ but for those who in the past, relied on loose interpretation of *darur* (necessity), to utilize the Western banking system. They aim at capturing some of the \$800 billion dollars in Muslim assets currently invested in the West. The West is taking them seriously.

Conventional banks such as HSBC and Citigroup have recently opened up their own Shari'a divisions and provide services that have received approval from in-house Shari'a boards. They participate in Islamic banking conferences, and critically, they are putting their financial acumen and technical abilities at the disposal of scholars who are

⁵⁰ Stephen Ulph, "Special Report: Islamic Banking Gathering New Interest," *Jane's Islamic Affairs Analyst* August, 1, 2001

⁵¹ Useem, June 10, 2002

poised to create the innovations desperately needed in the system, through what Professor Frank Vogel of Harvard's Islamic Legal Studies Program calls "group *ijtihad*."⁵²

The prognosis remains mixed. Some in the industry and academia see the application of group *ijtihad* and the growth of the Islamic banking industry as a viable test case for future innovation and adaptation in Islamic law. Others see its potential for constricting this very innovation, with the fear that the pull of conservatism and a harkening to classical *fiqh* methodology will constrain future scholarship, giving the impression that Islamic legal method as it stands requires no adaptation.⁵³ Some see it as a sign of the growth of fundamentalism in the Islamic world.

Ultimately, it is the Islamic customer, investor and entrepreneur, who - with a foot firmly planted in both the Islamic and Western worlds - will provoke positive change. When demands for diversity and profitability of services increase, scholars will be forced to approach the Quran in new ways and in doing so, will enrich both the body and methodology of Islamic jurisprudence in ways that will reverberate in Islamic society as a whole.

⁵² Vogel and Hayes, pg. 36

⁵³ Frank Vogel, in lecture at the Fletcher School of Law and Diplomacy, December 2, 2003

Chapter 4: Islamic Economics; Islamic Finance Merges With Politics

Macro v. Micro: the Economists and the Financiers

Despite the continued commitment of Islamic legal schools and scholarship to a less flexible methodology of law derivation, the use of analogical reasoning, *qiyas*, does lend itself to the abstraction of principles of law that can be applied *ex ante* to a set of imaginary, foreseen cases.⁵⁴ As mentioned above, this casuistic method is not too dissimilar from the abstract judicial review practiced in the French Civil Law system. Faced with a rigid adherence to doctrine, general principles that can be derived and applied to other cases become crucial because the ‘text’ must suffice in all times and under all circumstances. This, paradoxically, gives jurists greater power over interpreting law because it is they who are given the task of extracting these principles and interpreting the intent of the code.

However, the tendency to rely on past ‘case’ rulings when similarities are integral between cases reflects the Common Law principle of *stare decisis*. In fact, Islamic transaction law, says Mahmoud El-Gamel, Professor of Economics and Finance at Rice University, is "at heart a common-law system," often relying on precedents set down by scholars.⁵⁵ Islamic law, however, is far from ‘judge-made’ law, and it is the scholar/jurists, such as those in the early days of Roman law, that are the legislators. In Islamic jurisprudence therefore, we find elements of both Common and Civil Law traditions.

⁵⁴ Vogel and Hayes, pp.43-44

⁵⁵ *The Economist*, October 25, 2003

The two disparate visions of Quranic jurisprudence, i.e. the tendency to adhere to strict methods of classical *fiqh* or the inclination to embrace a broader application of Quranic principles have clashed in the past by those holding these ‘micro’ and ‘macro’ views.⁵⁶

As mentioned above, the ‘micro,’ or atomistic approach holds sway today in the actual body of legal rulings by Islamic scholars on Shari ‘a boards regarding the permissibility of individual financial instruments – often disregarding the systemic, public welfare aspects of Islamic law. These classically minded scholars believed that the aggregate positive effects of the law would stem from a multiplication of individual benefits rather than from a ‘holistic’ application of sound economic principles.⁵⁷ Islamic scholars on Shari’a boards at banks have been guilty of what El Gamel, calls the “psuedo-economics of contemporary jurists,”⁵⁸ who hearken back to, at the latest, 15th century Arabian business practices regardless of their relevance to the intent or substantive effect of today’s transactions.

Islamic Economics and Political Islam

Islamic Economics on the other hand, takes the ‘big picture,’ approach. Far more important to Islamic economists are the general principles of societal welfare that Islamic law intended man to implement. The field of Islamic Economics burgeoned in the 1940s with the independence of Islamic states and served as the impetus for the creation of the Islamic banking system. Islamic economists presented an ambitious alternative to

⁵⁶ Vogel and Hayes, pg. 30. To my knowledge, the terms ‘macro’ and ‘micro’ view in regard to Islamic Finance have been coined by these authors.

⁵⁷ Vogel and Hayes, pg. 30

⁵⁸ Stephen Ulph, “Freeing the Logjam in Islamic Finance,” *Jane’s Islamic Affairs Analyst*, East Mediterranean Section, May 1, 2002, www.jane’s.com

capitalist and communist economies, where the abolishment of usury and the evils of socio-economic inequality, as well as implementation of property redistribution and state-imposed *zakat* (alms) were all primary components of a socially just system.⁵⁹

It is important to note that although Islamic Economics is a departure from the atomistic, individual-case style of classical Islamic jurisprudence, there were several Islamic jurists from the medieval ages onward that incorporated economics into their scholarship. The field however, holds much more sway in current discourse on the relationship between Islam and the state than it does in bank boardrooms. Islamic Economics has been an integral platform for 20th century Islamists, whose primary goal is to implement a strict Shari'a legal system in their countries, under some form of 'authentic' Islamic government. In the words of renowned Islamic historian, John Esposito, "For Islamic activists, application of the Shari'a was the litmus test for Islamic orthodoxy."⁶⁰

Islamic Economics has always had a revolutionary flavor, etched as it was in the rhetoric of the Iranian Revolution of 1979, Islamic fundamentalist groups in Egypt and Saudi Arabia, the Taliban in Afghanistan, and Usama Bin Laden and the members of Al-Qaeda in the past decade. In fact, Usama Bin Laden, in his declaration of war against the U.S. and Saudi Arabia, claims the allowance of *riba*, and the subsequent impoverishment of the Muslim peoples as *casus belli*:

"Man fabricated laws were put forward permitting what has been forbidden by Allah such as usury (Riba) and other matters. Banks competing for usury are competing, for lands, with the two Holy Places and declaring war against Allah by disobeying his order...what is it then for the person who makes himself a partner and equal to Allah, legalizing (usury and other sins)?⁶¹

⁵⁹ Jerry Useem, Banking on Allah, *Fortune*, New York, June 10, 2002, pg. 154

⁶⁰ John Esposito, *Islam and Politics*, 4th ed. (Syracuse, New York: Syracuse University Press, 1998) pg. 249

⁶¹ Bin Laden, Usamah Bin Muhammad, August 23, 1996, "Ladenese Epistle, Declaration of War," from *The Washington Post*, www.washingtonpost.com/ac2/wp-dyn/A4342-2001Sep21?language=printer

Islamic Economics lends itself for use as an ideological tool, because, according to Timur Kuran, economist at UCLA's Islamic and Near Eastern Studies Department, much of the early works of Islamic Economics were grounded in the 'clash of civilizations,' between Islam, East and West.⁶²

Egyptian Islamic ideologue and scholar, Sayyid Qutb, hailed as the most influential Islamic fundamentalist thinker of the 20th century, concentrated his literary and political efforts on the establishment of an Islamic government, first in Egypt and later throughout the Muslim world, fully incorporating Shari'a law and particularly the elements of social justice, for which an Islamic economy is a pre-requisite. Qutb was heavily influenced in turn by the Pakistani ideologue, Abul A'la Maududi, who preached against the evils of both capitalism and communism. Mohammed Baqr al-Sadr, a prominent Iraqi Shi'i cleric, wrote tracts on the development of an Islamic economic system, such as *Iqtisaduna*, (Our Economics) extending the theme of Islam as a just alternative to the corruption of other economic systems. All three thinkers are regarded as primary influences on Islamic fundamentalist thought today.

There are over 500 verses in the Quran and Sunnah that lend shape to the vision of a just economy. From these verses, Islamic economists have extracted two major underlying themes: the principle goals of fairness and equality. Both principles, it is contended, lie at the heart of the prohibitions against *riba* and *gharar*.⁶³ Equality demands that there be no gross discrepancy in wealth and resource distribution. The

⁶² Timur Kuran, "The Genesis of Islamic Economics: A Chapter in the Politics of Muslim Identity," *Social Research*, Vol. 64, No. 2, Summer 1997

⁶³ Timur Kuran, "On the Notion of Economic Justice in Contemporary Islamic Thought," *International Journal of Middle East Studies*, Vol. 21, No.2 (May, 1989), pg. 172

principle of fairness, closer to the injunction of *riba*, demands that profit be earned proportionate to risk and exertion. It is the ‘mathematical equivalency,’ of Ibn Rushd. Islamic economists, such as Maududi, Qutb, Bani Sadr, and Ali Shariati in post-revolutionary Iran, placed great emphasis on the prohibitions of interest and the evils of Western financial exploitation.⁶⁴

In most Islamic economic writings, however, there exists a profound tension between the concepts of equality and fairness. In a sense, this mirrors the macro/micro argument. Equality is based on outcome, and the outcome (a society devoid of exploitation and economic disparities) is derived from the application of general principles of human welfare. Fairness, however, is ‘means’ based, concerned with the process by which equality may be achieved, and is therefore transaction oriented. For those valuing ‘fairness’ above ‘equality,’ the rulings of the Quran are prescriptive – one need only to comply with its rulings on transactions and the outcome is guaranteed – a just society.

It proceeds naturally, that equality and fairness, with contradictory aims, often are incompatible in the realm of legislation as well. According to Timur Kuran, this leads to the adoption of inconsistent and contradictory economic models.⁶⁵

Consider this: the principle of ‘fairness,’ appears to be at the heart of the injunction of *riba*. Returns can be earned only proportionate to risk and effort. However, don’t considerations of inflation and the time value of money make non-interest loans essentially, ‘unfair?’ Furthermore, Islamic economists often espouse fixed wages and *riba*-free transactions. Fixed wages support equality – if a factory does poorly in a given

⁶⁴ Sohrab Behdad, “A Disputed Utopia: Islamic Economics in Revolutionary Iran,” *Comparative Studies in Society and History*, Vol. 36, No. 4. (Oct., 1994), pp. 775-813

⁶⁵ Kuran, 174

year, the worker, with a subsistence living, should not be made to bear the brunt of this loss. However, the worker now is shielded from market realities, contrary to the principle of fairness that the prohibition against *riba* espouses.⁶⁶

Although most issues of Islamic Finance today are resolved through the use of the classical, atomistic approach, the fields of Islamic Economics and Finance are merging in an unprecedented manner and promise to profoundly effect the course of future legal scholarship and the creation of financial innovations that will revolutionize Shari'a banking.

This merger is playing out in annual conferences held by the IDB, IIFM, the Economic Research Forum for the Arab Countries, Iran and Turkey, and other bodies created for the purpose of integrating Islamic juristic scholarship, financial acumen and scientific economic thought. The attendees reflect the apex of Muslim and non-Muslim expertise on these topics and signal a happy convergence that may bode well for the Islamic banking industry and Islamic legal scholarship as a whole. Islamic financial law desperately needs to be reconciled with commercial transactions that are far more intricate and multifaceted than those encountered by jurists of the past. In addition, no living scholar today has 'worked,' with past rulings on finance and commerce in a purely Islamic legal setting.⁶⁷ If innovations in Shari'a compliant instruments can keep apace with modern market needs, this may well spur reform in other fields of Islamic law, such as family and criminal law.

However, it remains the great irony of Islamic Finance that its practitioners utilize a rigid 'textualist' approach to circumvent Islamic injunctions, while opponents to this

⁶⁶ Kuran, May 1989, pg. 179

⁶⁷ Vogel and Hayes, pg. 29

approach invoke higher Quranic principles of social justice, while in other areas, such as criminal or personal law, often call for a strict application of Shari'a law.

Chapter 5: Islamic Finance and the State: An Egyptian Case Study

A Controversial Fatwa:

On December 2, 2002, the rector of Al-Azhar University in Cairo, the premier facility of Islamic legal studies in the Sunni world, issued a fatwa, or ‘legal ruling’ permitting bank customers to deposit funds in exchange for pre-determined profits, fixed as a percentage of capital, and with a set disbursement date.

The rector, Muhammad Sayid Tantawi issued the fatwa in response to a specific query by Chairman of the Board of Directors at the Arab Banking Corporation regarding the ‘Shari’a’ status of such accounts. Tantawi’s response, legal justification and the subsequent storm of controversy that arose surrounding this topic will be provide the context for exploring the primacy of *riba* in the discourse on legal authority and the state. The Al-Azhar *fatwa* has galvanized reaction from many quarters of Islamic legal and political thought, and is symptomatic of the ongoing crisis in the Islamic world today regarding the role of the Shari’a, versus that of positive law, in state legal systems.

Historical Paradigms of Authority

Who holds legislative authority in Islam?

Since the Shari’a is meant, in theory, to cover comprehensively all aspects of Muslim life, the Quran and Sunnah ought to be viewed as legal codes, subject, of course to interpretation through devices such as consensus and analogy. The ideal Islamic legal system would be created by those most capable of such textual derivations – the

mujtahids, or *fuqaha*. A temporal ruler would be subject to the Shari'a like any of his subjects, and would be tasked with the enforcement of such laws within the community.

The reality, however, of religion/state relations in Islamic history is that the ruler, often possessed of military might, dominated the *ulema*, who sought to *manipulate* political power rather than actively wield it.⁶⁸ The state acted as a patron of the religious institutions, funneling, in the form of *awqaf* (religious endowments), funds for the maintenance of Shari'a institutions, while reluctantly deferring to the jurists as a source of law and legitimacy.

However, with the expansion of Islam and the assumption of temporal power, the need arose for the ruler to be able to legislate in the realm of administrative and public law. The institution of ruler-derived law thus evolved to run alongside *fiqh*-derived law as a parallel legislative body.

Jurist *Fiqh* law, encompassed the derivation of Shari'a from the Quranic and Sunnaic sources, using the methodologies discussed above. *Fiqh* law was thus conscribed to use of the primary Quranic texts, reverence for *ijma*, and application of *qiyas*. For new circumstances, '*ijtihad*,' was applied, still within the boundaries of classical legal method.

Ruler-derived law, can be termed '*siyasa*'⁶⁹, law, or 'policy' law, and was traditionally relegated to the areas of administrative and public law alone. The ruler derived his authority to create law on two grounds. First, his laws must be promulgated

⁶⁸ Daniel Crecelius, "The Course of Secularization in Modern Egypt," in Donald E. Smith, ed., *Religion and Political Modernization* (New Haven: Yale University Press, 1980) pg. 51

⁶⁹ Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (The Netherlands: Koninklijke Brill NV, 2000) pg. 171

to further societal benefit, (*maslaha*) and second, they could in no way contradict the *Shari'a's* primary revelatory texts, the Quran and Sunnah.

Historically, the uneasy relationships between the *fiqh* law and *siyasa* law could exist tenuously by virtue of the fact that they ruled different spheres of law. *Fiqh* was generally regarded as the guardian of private law, including family, criminal law and religious taxes. *Siyasa* matters included administration law, treaties, and state taxes.

20th Century Paradigm Shift: Uneasy Codependance:

Siyasa, under colonial models and later, with the emergence of the newly independent Muslim nation-states, has gradually encroached on the territory of *fiqh* law. Part of the process of national self-identification that each country struggled with in the post-colonial era of the 50's-70's included a reworking of the roles of these legislative entities. While proponents of *Fiqh* law have suffered a setback, they continue to predominate in several countries.

For example, in Saudi Arabia, the institution of *nizam*, or 'decree law,' was created in order for the King to be able to address modern legal problems such as social insurance, motor vehicle registration and the organization of government bodies. The *nizam* however, remained inferior to *fiqh* laws, unlike in Common Law systems where statutes subordinate common laws.⁷⁰ The struggle between the *ulema* and the King's decrees is often settled *ad hoc* in the lower courts, where *fiqh* is applied regardless of the *nizam*, at the discretion of the judiciary. The opposition to state-made law has forced the Saudi government to resort to tribunals that try to wrestle jurisdiction from the lower courts and enforce judgments. The Saudi government has tried unsuccessfully to force

⁷⁰ Vogel, *Islamic Law and Legal System*, pg. 175

the implementation of *nizam* in the Shari'a court system, and the struggle continues, despite a clear precedent in Islamic history for the legitimacy of a *siyasa* law that does not contradict basic Quranic tenets.

This relationship of uneasy codependence between state and religious authority continues to create problems in today's modern Muslim nation-states, and explains why the accusation of 'co-optation' by the state is often used to criticize Islamic legal institutions that support state policies. The Al-Azhar Institute, the leading institute of Sunni legal scholarship, has drawn heavy fire from jurists who believe that it acts as an agent of the state in the issuance of *fatwas*.

The Egyptian legal system, whose civil code is predicated on the French *Code Civile*, and whose constitution incorporates elements of French law, has wrestled with this issue . Its unique accommodation of *siyasa* and *fiqh* into state law may serve as a model for other states, yet it has not been won without a continuing struggle. A discussion of Shari'a in Egyptian law, in the context of the controversial *fatwa* on *riba*, will throw light not only on issues of authority in modern Islamic law, but on the disparate methods of legal reasoning previously discussed, as applied to Islamic Finance.

Legal Authority in the State of Egypt:

In the mid-19th century, Egypt's modernizing ruler, Muhammad Ali Pasha, began the process of attacking the legitimacy of the ulema's role the legal affairs of Egypt. In a departure from tradition, he refused to seek the jurist's council in state affairs, ceased channeling religious taxes to them, and silenced their participation in the political process. Nonetheless, wary of the sentiments of the masses, Muhammed Ali continued

to pay lip service to the dominance of Shari'a over the Egyptian legal process, alternately bribing or threatening *ulema* to issue a *fatwa* supporting his reform movement. This co-optation has been disastrous for the reputation of the *ulema* and their institutions in Egypt.

By the later half of the 19th century, the expansion of the government into non-religious functions had overwhelmed the society and eventually paved the way for widespread legal reform. Egypt would emerge as a nation-state based on Western political institutions and theories overhauling its entire legal system.

Following WWII, there were a flurry of codifying activities in the Arab world. Scholars such as the Egyptian jurist, Dr. 'Abd al-Razzaq al-Sanhuri worked to synthesize Western and Islamic laws into a legal code that could work not only in Egypt, but also across the Arab world. The Egyptian Civil Code of 1949 reflected Sanhuri's intent to merge the two traditions, yet relegated the Shari'a to a supplementary role:

Article 1(2)

In the absence of an applicable legal provision the judge shall decide according to custom and in the absence of custom in accordance with the principles of the Islamic Shari'a. In the absence of such principles the judge will apply the principles of natural law and the rules of equity.⁷¹

Egyptian Civil Code, 1949

Sanhuri himself admitted that there were very few instances where Shari'a alone would be called upon to decide law.

Under the presidency of 'Abd al- Nasir (1952-1970), nationalism replaced religion as the binding ideology of the state. Liberal-nationalists also challenged the role

⁷¹ Herbert J. Liebesney, *The Law of the Near & Middle East: Readings, Cases and Materials* (Albany, N.Y.: State University of New York Press, 1975) pg. 95

of the *ulema* in the state, but even more explicitly than Ali had done. Islamist movements, like the Muslim Brotherhood, were brutally suppressed under Nasir's reign. While institutions like Al Azhar were subjected to government reform, with secular studies added to the curriculum, the ulema successfully staved off such attempts in their local schools, *madrasa*, thereby creating a parallel religious authority alongside the state apparatus, and gaining credibility among the people.

Sadat and the Rise of Political Islam:

President Anwar Sadat's (1970-1981) struggle to separate his policies from that of his communist/nationalist predecessor included the large-scale co-optation of Islam into politics and the exploitation of popular religious sentiment. Self-proclaimed as the 'Believer President,' Sadat was often described by his '*zabeeb*' the callus on his forehead from constant praying. Sadat increased the Islamic presence in the public sphere, adding Islamic courses to the education system from primary school to university, and increasing religious programming in the media. The government opened thousands of new mosques throughout the country, forging ties with Islamic scholars in every level of government.

Under Sadat's presidency, Al-Azhar University was chosen to be the "bastion of official Islam,"⁷² and government funds were funneled into university expansion programs. The Shaykh Al-Azhar soon became the Islamic 'stamp of approval' for several of Sadat's more controversial policies and programs, including the Egyptian-Israeli peace treaty, family law reform and ultimately, suppression of the Islamic fundamentalist movements that he had previously encouraged.

⁷² John L. Esposito, *Islam and Politics*, Syracuse University Press, 1984, pg. 236

Sadat's most significant capitulation to the Islamist camp was his introduction of Shari'a as *a* primary source of legislation in the Egyptian Constitution of 1972. In 1980, in order to further appease the growing voice of the *ulema*, Sadat introduced an amendment into the constitution elevating Shari'a's role as *the* primary source for legislation.

Sadat's financial and political support of religious revivalism soon backfired. Secularism began to lose its political capital in the 1970s, and the Islamic resurgence advocated for the reinstatement of Shari'a as the law of the land. Some credit the widespread Islamic revival in the Middle East to the gradual re-assertion of national identity upon the removal of imperial influence, and to the degree to which authoritarian, 'top down' reforms were implemented by secular elites, without economic or social benefit to the masses.

Whatever the cause, Sadat's response to the gaining power of Islamist movements was to begin to suppress them, while at the same time retaining the veneer of piety, by having Al-Azhar rubber stamp unpopular government reforms and policies. However, what was done could not be undone. On October 6, 1981, Anwar Sadat was assassinated by a member of a splinter group of the Muslim Brotherhood, the organization that he had supported at the start of his presidency.

Of Sadat's legacies, the one that has most profoundly impacted the legal system in Egypt is the 1980 amendment to the constitution naming Shari'a as *the* primary source for legislation. Subsequent attempts by the Supreme Constitutional Court of Egypt to limit recourse to Shari'a law through a narrow interpretation of Article 2 represent the judiciary and executive's attempts to hold Islamist forces at bay. It also permeates

Tantawi's argumentation in the Al-Azhar *fatwa*. It is this wider issue, of the role of Shari'a in state legislation that is the core contention, above and beyond the particulars of *riba* and finance. It is for this reason that Tantawi's Fatwa led to a great agitation in the Islamic legal community, exacerbating the issue of Islam and legal authority.

Shari'a in the Egyptian Constitution: Article 2

Taking into account the results of the referendum on the amendment of the Constitution of the Arab Republic of Egypt conducted on May 22, 1980....

Article 2:

Islam is the religion of the state and Arabic its official language.

Islamic jurisprudence is *the* principle source of legislation.

Amendment to the Egyptian Constitution, 1980⁷³

On the face of it, the wording of Article 2 would seem to constrain positive legislation by applying to it the litmus test of congruence with Shari'a law. However, Islamic historian Nathan J. Brown notes that despite the amendment, a new Shari'a based jurisprudence has failed to emerge. He and other scholars point to the actions taken by the Supreme Constitutional Court to constrain the import of Article 2 on the legal system, and maintain it's 'positivist judicial culture,' in the face of competing demands to subsume state law to divine law.⁷⁴ In fact, the SCC has upheld the role of state-legislated positive law in nearly every case challenging the constitutionality of that law under Article 2.

⁷³ The Government of Egypt, <http://www.sis.gov.eg/egyptinf/politics/parlment/html/constit.htm>

⁷⁴ Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (U.K.: Cambridge University Press, 1997) pg. 98

The SCC has done so by endorsing the narrowest interpretation of Article 2 construing Shari'a law, as the explicit *and* incontrovertible primary texts of Quran and Sunnah. This gives, in effect, not only wide reign to the creation of positive legislation, (because there are very few verses in the texts that are explicit and definitive), but also *tremendous latitude in judicial authority* to interpret texts, heretofore exclusively the realm of Islamic scholarship.⁷⁵ Shari'a in this instance is interpreted in the absence of *fiqh*, or any subsequent interpretations of revelatory text. More dissonant with Islamic legal history, it removes the last two categories of *usul al-fiqh*, namely, the *ijma* (scholarly consensus) and *qiyas*. By dividing the Shari'a into fixed (unambiguous) and changing principles, the Court seized the discretion of ruling which are the 'essential' goals of the Quran and which are time-bound.

Several rulings established the stance of the SCC in constraining the scope of Article 2. In a 1985 ruling the Court held that the 1980 Amendment could only be applied to legislation enacted post-1980. Laws enacted prior to 1980 would require new legislative action to overturn.

When Shari'a proponents started to challenge the constitutionality of legislation from the 1980's onward, the court used its discretion to ensure that few laws issuing from the government could be overturned. In 1996, the father of a girl barred from wearing a *niqab* (veil covering the full face) to a state school by a 1994 Ministry of Education rule, challenged the legislation on the grounds of violation of Article 2, and violation of the personal rights provision in the Constitution. The court upheld the constitutionality of the Ministry of Education rule holding that there was no *definitive* text to proscribe the wearing of the *niqab*:

⁷⁵ Brown, *The Rule of Law*, pg. 125

It is not permitted for legislative text to contradict those Shari'a provisions definitive in their certainty and meaning...The judgments of *reason*, where there is no text, develop on a practical basis and are more compassionate to humankind...are more protective of humanity's true interests...The statements of an expert on *fiqh* on a matter related to the Shari'a are not granted any sanctity, or placed beyond review or reexamination...Opinions based on *ijtihad* in debated questions do not in themselves have any force applying to those who do not hold them....The challenged decree does not contradict...the text of Article 2 of the constitution. The ruler has – in debatable questions – the right of *ijtihad* to facilitate the affairs of the people and to reflect what is authentic in their customs and traditions, so long as the overarching purposes of their *Shari'a* is not abrogated.⁷⁶

In a 1997 ruling regarding an issue in personal status law:

(The ruler) is not bound in this by the *ijtihad*s of past persons. He may differ with them in his legislation, seeking to order the affairs of human beings in a specific environment that is unique in its facts and circumstances. He does (however,) use such means as refer the solution back to God and His Prophet, drawing inspiration from the fact that the public interests validly considered are those that are conducive to the basic objectives of the *Shari'a* and converge with them.⁷⁷

These two rulings clearly highlight the Court's radical agenda, which invokes the old *siyasa* method of ruler-based legislation by justification of *maslaha* (societal benefit), but subsumes the *fiqh*-legislation arena of the jurist under the office of the executive.

It is now the executive who can exercise binding *ijtihad*, by determining which are the fixed principles of the Shari'a and explicating his legislations according to these justifications. The court in so doing, has lifted *ijtihad* out of the traditional realm of the scholar-jurist to that of state, and out of the scope of legal opinion, to that of binding law. This revolutionary interpretation of the Shari'a/State dynamic is the source of contestation in the Muslim world, and particularly in Egypt today.

⁷⁶ Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany, N.Y.: State University of New York Press, 2002) pg. 183

⁷⁷ Frank Vogel, "Conformity with Islamic Shari'a and Constitutionality Under Article 2: Some Issues of Theory, Practice and Comparison," from *Democracy, the Rule of Law and Islam*, eds. Eugene Cotran and Adel Omar Sherif, (The Netherlands: Kluwer Law International, 1999) pg. 537

The use of similar argumentation in the Al-Azhar *fatwa* in the discourse on *riba* places Tantawi's argument squarely at the crossroads of three 'battlefields:' legislative authority, juristic independence of Islamic scholarship, and the essentialist versus textualist conception of Islamic law.

Merits and Demerits of the Al-Azhar *Fatwa*

The *fatwa* is recorded here in its entirety, in order that we may examine the full import of Tantawi's legal claims:

Office of the Grand Imam, Rector of Al-Azhar

Investing funds with banks that pre-specify profits

Dr. Hasan Abbas Zaki, Chairman of the Board of Directors of the Arab Banking Corporation, sent a letter dated 22/10/2002 to H.E. the Grand Imam Dr. Muhammad Sayyid Tantawi, Rector of Al-Azhar. Its text follows:

H.E. Dr. Muhammad Sayyid Tantawi,
Rector of Al-Azhar:

Greetings and prayers for Peace, Mercy, and blessings of Allah. Customers of the International Arab Banking Corporation forward their funds and savings to the Bank to use and invest them in its permissible dealings, in exchange for profit distributions that are pre-determined, and the distribution times are likewise agreed-upon with the customer. We respectfully ask you for the legal status of this dealing.

[Here a sample text of an account agreement is reproduced in the fatwa]

His Excellency, the Grand Imam, has forwarded the letter and its attachment for consideration by the Council of the Islamic Research Institute in its subsequent session. The Council met on Thursday, 25 Sha'ban 1423 A.H., corresponding to 31 October 2002 A.D., at which time the above-mentioned subject was presented. After the members' discussions and analysis, the Council determined that investing funds in banks that pre-specify profits is permissible under Islamic Law, and there is no harm therein.

Due to the special importance of this topic for the public, who wish to know the Islamic Legal ruling regarding investing their funds with banks that pre-specify profits (as shown by their numerous questions in this matter), the Secretariat General of the Islamic Research Institute decided to prepare an official fatwa, supported by the Islamic Legal proofs and a summary of the Institute members' statements. This should give the public a clear understanding of the issue, thus giving them confidence in the opinion.

The General Secretariat presented the full fatwa text to the Islamic Research Institute Council during its session on Thursday, 23 Ramadan 1423, corresponding to 28 November 2002, A.D. Following the reading of the fatwa, and noting members' comments on its text, they approved it.

This is the text of the Fatwa:

Those who deal with the International Arab Banking Corporation Bank – or any other bank – forward their funds and savings to the bank as an agent who invests the funds on their behalf in its permissible dealings, in exchange for a profit distribution that is pre-determined, and at distribution times that are mutually agreed-upon...

This dealing, in this form, is permissible, without any doubt of impermissibility. This follows from the fact that no Canonical Text in the Book of Allah or the Prophetic Sunnah forbids this type of transaction within which profits or returns are pre-specified, as long as the transaction is concluded with mutual consent.

Allah, transcendent is He, said: “Oh people of faith, do not devour your properties among yourselves unjustly, the exception being, trade conducted by mutual consent...” (Al-Nisa’: 29)

The verse means: Oh people with true faith, it is not permissible for you, and unseemly, that any of you devour the wealth of another in impermissible ways (e.g. theft, usurpation, or usury, and other forbidden means). In contrast, you are permitted to exchange benefits through dealings conducted by mutual consent, provided that no forbidden transaction is thus made permissible or vice versa. This applies regardless of whether the mutual consent is established verbally, in written form, or in any other form that indicates mutual agreement and acceptance.

There is no doubt that mutual agreement on pre-specified profits is Legally and logically permissible, so that each party will know his rights.

It is well known that banks only pre-specify profits or returns based on precise studies of international and domestic markets, and economic conditions in the society. In addition, returns are customized for each specific transaction type, given its average profitability.

Moreover, it is well known that pre-specified profits vary from time period to another. For instance, investment certificates initially specified a return of 4%, which increased subsequently to more than 15%, now returning to near 10%.

The parties that specify those changing rates of returns are required to obey the regulations issued by the relevant government agencies.

This pre-specification of profits is beneficial, especially in this age, when deviations from truth and fair dealing have become rampant. Thus, pre-specification of profits provides benefits both to the providers of funds, as well as to the banks that invest those funds.

It is beneficial to the provider of funds since it allows him to know his rights without any uncertainty. Thus, he may arrange the affairs of his life accordingly.

It is also beneficial to those who manage those banks, since the pre-specification of profits gives them the incentive for working hard, since they keep all excess profits above what they promised the provider of funds. This excess profit compensation is justified by their hard work.

It may be said that banks may lose, thus wondering how they can pre-specify profits for the investors.

In reply, we say that if banks lose on one transaction, they win on many others, thus profits can cover losses.

In addition, if losses are indeed incurred, the dispute will have to be resolved in court.

In summary, pre-specification of profits to those who forward their funds to banks and similar institutions through an investment agency is Legally permissible,. There is no doubt regarding the Islamic Legality of this transaction, since it belongs to the general area judged according to benefits, i.e. wherein there are no explicit Texts. In addition, this type of transaction does not belong to the areas of creed and ritual acts of worship, wherein changes and other innovations are not permitted.

Based on the preceding, investing funds with banks that pre-specify profits or returns is Islamically Legal, and there is no harm therein, and Allah knows best,

Rector of Al-Azhar

Dr. Muhammad Sayyid Tantawi
27 Ramadam 1423 A.H.
2 December, 2002 A.D.

First, let us examine Tantawi's arguments simply in light of the hierarchy of jurisprudential methodologies and the consensus on *riba* among scholars highlighted in earlier chapters.

To begin with, Tantawi's definition of the depositor/bank relationship is one of principle/agent. In doing so, he rhetorically distances himself from the concept of interest, associated with a lender/borrower relationship. By making the bank his agent, the bank, in taking his deposited funds and reinvesting them, owes the principle investor a percentage of the profits, as well allowing itself a 'fee,' in recompense for agency work. However, and we shall see this clearly in the rebuttal to Tantawi's fatwa, even in an agency relationship, profit/loss sharing must be tied to profits, not percentage of capital, barring which there is no risk for the investor, and no earned reward.

Once semantically circumventing the biggest hurdle in the *riba* issue (unearned profits), Tantawi proceeds to tackle the second issue, mentioned above – that of the

prohibition of prefixing profits. Here he invokes the concepts of *darura*, exigency, and *maslaha*, societal benefit. Tantawi argues that in a time of moral corruption, given the temptation for the bank to understate profits and cheat the investor of rightful earnings, prefixing profits as a percentage of capital is the only way to give the Muslim investor the certainty of a fair return.

This argument, which Mahmoud El-Gamel terms the ‘moral hazard argument,’ flies in the face of a principle tenet of Islamic Finance: money must be earned. The criterion for ‘earned,’ profits are that they are inherently at risk – and may or may not in fact, come about. Fixing profits based on percentage of capital invested can lead to any number of Islamically unjustifiable occurrences. For instance, the funds invested by the bank may yield a 10% return on equity, while the pre-fixed rate may be substantially lower, at 5%. The investor is thus cheated of his invested funds. The bank on the other hand, may make a loss on the investor’s funds, and be forced to pay 5% profit to the investor, which his funds did not earn.

Of greater interest to our endeavor though, is Tantawi’s invocation of both the strictest textualist interpretation of what is *halal* (permitted) in Islam, on the one hand, and on the other, the invocation of higher *qawa'id* principles, in the form of *maslaha*. If we recall, this welcome dichotomy remains the principle means with which the Egyptian SCC maintains the supremacy of positive Egyptian law. Tantawi’s fatwa, indeed, reads like a *fatwa* equivalent of an SCC ruling in its logic. It is for this very reason that Tantawi’s opponents in the Islamic castigate him - for upholding a legal system that they claim pays lip service to Islamic law, while subjugating it to man-made laws.

Scholarly and Popular Response

A rebuttal by the Islamic Fiqh Institute of Qatar (IFI), dated January 16, 2003 summarizes the majority opinion response among Islamic scholars to Tantawi's ruling.⁷⁸ The IFI council rejects Tantawi's characterization of the depositor/bank relationship as that of a principle/agent. It states that pre-specification of profit used to guarantee the principle capital is categorically impermissible, because it violates the essence of the *mudaraba* relationship – the sharing of risk in the outcome of the funds invested by the bank. Furthermore, its opinion of Tantawi's 'reach' in invoking *maslaha* in the absence of a clear ruling in the Quranic texts is unequivocal:

This consensus is well established, and no dissent has been reported. In this regard, Ibn Qudamah wrote in *Al-Mughni* (vol. 3, p. 34): "All scholars whose opinions are preserved are in consensus that silent partnership is invalidated if one or both partners stipulate a known amount of profit. *In this regard, consensus of religious scholars is a legal proof on its own.*" (Italics mine).⁷⁹

Here we see the clear reassertion of the primacy of *ijma* in divining the intent of the Shari'a.

Sohail Zubairi, who oversees risk management at the Dubai Islamic Bank, discredits the argument implicit in the fatwa, i.e. that *functional interest* is not always *usury*, because it is not excessive and does not lead to social injustice:

...Had it been God's intention to differentiate between usury and interest, the Holy Quran would have certainly used different terminology to define them. Clearly there is no room for manipulation here...It was inappropriate for Al-Azhar to have re-opened the clear and settled issue on usury. However, it is worth noting that the fatwa has not been able to obtain the blessing of *ijma* and almost every credible Islamic institution, within and without Egypt, has categorically rejected the fatwa.⁸⁰

⁷⁸ Mahmoud El-Gamel, "Interest and the Paradox of Islamic Law and Finance," <http://www.ruf.rice.edu/~elgamal/files/interest.pdf>, pg. 13

⁷⁹ Islamic Fiqh Institute of Qatar, El-Gamel, pg. 14

⁸⁰ Sohail Zubairi, "Islamic Finance: A Non-Binding Opinion on New Issues Facing Muslims," *Gulf News*, March 31, 2004

Lay responses discrediting the fatwa, Tantawi and/or the Al Azhar Institute have been even more unguarded in language. Dr. Athar Murtuza delivered a paper at the Association of Muslim Social Scientists (AMSS) 3rd Annual Conference held at Indiana University in September of 2003, highlighting responses to the Al-Azhar fatwa collected off a single Islamic Finance internet forum, IBFNET. Of the sampling of responses offered by Murtuza, several are relevant to our earlier discussion of authority in Islam:

...But as you all may know the history of Al Azhar, is that this is one of the earliest institutions where the Shari'a was influenced by government and rulers who used this institution to declare views and rulings which were contrary to the Shari'a...⁸¹

The writer goes on to attack the basis of Al-Azhar's authority to issue rulings for the *ummah* (Islamic nation) at large:

First, it is my understanding that as pious Muslims we do not have a Vatican-model institution that is seen by many as the philosophical center of the dominant Sunni strand of the faith....

The writer finishes off with a hadith: "A time will come on my people where the most pious of them will get dirty by Riba's dust."⁸²

An article from the popular Islamist magazine *Khalifa* raises the specter of co-optation:

Sheikh Tantawi is just the latest in a long line of 'scholars,' so infatuated with the West that they are prepared to distort Islam to agree with its culture...The likes of such scholars have continuously supported the rulers in their tyranny.⁸³

⁸¹ Athar Murtuza, "Analyzing the Contemporary Discourse about Riba Among Muslims," *Association of Muslim Social Scientists*, September 26-28, 2003, www.amss.net/Abstract_32ndConference/AtharMurtuza7.htm

⁸² I was not able to uncover the source of this hadith.

⁸³ Asif Khan, "The Scholar in Islam: Government Stooge, Passive Adviser, or Powerful Politician?" www.khilafah.com, February 23, 2004

The disdain with which many in the Islamic public treat *fatwas* issuing from Al-Azhar is worrisome. For one thing, they give credit to the polemic of figures like Usamah Bin Laden, who in an interview with Pakistani press in November of 2001, stated his contempt for Al-Azhar as a body of legitimate Islamic scholarship, fully 2 years before the issuance of the *fatwa* under examination:

Interviewer: The head of Egypt's Al-Azhar has issued a fatwa against you, saying your views and beliefs have nothing to do with Islam. What do you say about that?

UBL: The fatwa of any official Aalim (cleric) has no value for me. History is full of such Ulema who justify Riba...⁸⁴

The issue of political and legal authority in Islam is far from being resolved. A trend of concern has been the increasing de-legitimization of moderate or reformist voices advocating the 'organic,' incorporation of certain Western legal concepts into Islamic law, such as human rights, democracy, and free speech. Similar to the Islamic economists but for different ends, these thinkers utilize the 'essentialist,' interpretation of Quranic texts, claiming that Islam already holds the values mentioned above, and that 'peripheral,' elements, such as the *hudud* (corporal punishment) are time bound, incidental, and should be abandoned. What is certain is the continued prominence of the place of *riba* in this discourse, both as the lynchpin of an Islamic economy, and in the view of many, as a primary component of an Islamic vision of just society.

⁸⁴ Usamah Bin Laden, interview given by Hamid Mir, *The Observer*, U.K., November 11, 2001

Conclusion

The fundamentals of Islamic Finance are rooted in 14 centuries of evolving Islamic jurisprudence. They are placed squarely at the heart of a debate regarding the role of Shari'a in the legal systems of Islamic states. They are engaged in discourse between fundamentalist and moderate movements over the future of Islam, and debated among Shari'a boards in global financial institutions. They are increasingly utilized as an ethical alternative to conventional banking. They may indeed be instrumental in paving a path for the utilization of classical *fiqh* methodologies to update and innovate laws, or alternately, may provide a reactionary pull by indicating the 'sufficiency of textualism' to meet challenges of the modern era. Whatever the outcome, or outcomes, '*riba*' will leave its imprint on Islamic religious/political discourse for a long time to come.

Appendix A: Glossary

adat- customary laws

al-bay-bithaman ajil- Malaysian fixed rate financing

awqaf- religious endowment

darura – ‘necessity’

fatwa(s)– non-binding legal opinion(s)

fiqh- Islamic jurisprudence

Fuqaha- those who practice ‘fiqh,’ Islamic jurists

gharar- speculation

hadith- sayings of Mohammed recorded in the generations following his death

halal - permissible

haram- prohibited

hiyal- legal artifice

hukm- rulings

ijara- lease

ijtihad – Independent legal reasoning

ijma- consensus

ikhtiyar- choosing between legal opinions

‘illa- efficient cause in analogy reasoning

istina’a- a commissioned manufacture lease

jahiliyah- period of pre-Islamic ignorance

maslaha – societal benefit

maysir- gambling

murabaha- cost plus financing

moshakara- partnership financing

mudaraba- trust financing,

mujtahids- those capable of ijtihad, or independent legal reasoning

nizam- ruler’s decree

qawa’id- overarching objective, formative principle

qiyas- reasoning by analogy

riba – literally, “an addition,” refers to interest

salam – advance purchase

shari'a – literally, “a path to water,” refers to Islamic law, most include in this category the Quran and Sunnah.

siyasa- temporal rulership in classic Islam

taqlid- emulation, following rulings of past scholars

ulema- clerics

ummah- the Islamic nation

usul al-fiqh- sources of jurisprudence, refers in the Sunni world to Quran, Sunnah, ijma and qiyas

zakat- obligatory alms

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