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**Shari‘a Supervisory Boards and reform of the Islamic finance industry: assessing limitations of authority and frameworks of Islamic jurisprudence**

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## Abstract

The Islamic banking industry provides services based on Islamic legal principles as an alternative to conventional banking. Established in the 1970s, the industry has continued to expand, but on a trajectory which diverges from objectives set by regulators, shareholders and theorists. The trajectory has led to calls for its reform.

This dissertation studies the ability of Shari'a Supervisory Boards (SSBs) to drive reform in the Islamic finance industry. SSBs are composed of Islamic legal scholars tasked with the responsibility of approving and monitoring the compliance of Islamic banking services with Islamic law. The involvement of SSBs in the sought reform is based on their historical shaping of the industry and their continued approval of its offerings. Yet existing literature has not addressed the influences of shareholders, regulators and other SSB scholars in limiting the scholars' authority. Neither has that literature sufficiently accounted for limitations in proposed reform approaches.

The dissertation argues that SSB scholars do not possess sufficient authority to realign the industry with its original founding objectives. This argument is based on an assessment conducted over six chapters of that authority and of reform approaches. The first chapter identifies the objectives of the industry and the level of progress achieved in their attainment. The chapter also introduces SSBs and their responsibilities, of which *ifta'* is identified as a primary approach for SSB scholars to discharge their responsibility. *Ifta'* refers to the process of deriving and issuing Islamic legal pronouncements. The second chapter examines the authority of SSB scholars from the perspective of Islamic legal theory. The third chapter studies that authority with reference to regulations to which SSB scholars are subject, as well as the scholars' qualifications and pronouncements.

The assessment of these scholars' ability to drive reform is then conducted in relation to three potential legal avenues for reform. The fourth chapter assesses *ifta'* on the basis of the Islamic legal principle of "objectives of the law" (*maqasid al-Shari'a*). The chapter evaluates several frameworks of *maqasid* and their applications by banks and regulators. Chapter five assesses *ifta'* with reference to another principle of Islamic law, that of legislating for the public interest (*al-masalih al-mursala*). The chapter studies applications of the principle by banks and regulators, along with their objectives. Finally, the sixth chapter assesses the Islamic collective obligation to "enjoin good and reject wrong" (*al-amr bi-l-ma'ruf and nahi 'an al-munkar*). The chapter evaluates the relevance of this legal principle to industry reform through examinations of legal criteria underpinning the principle. The dissertation concludes that the ability for SSB scholars to drive reform is limited by the influence of shareholders and regulators and by differences of legal opinions among SSB scholars. Shortcomings in proposed avenues for reform are found further to limit that ability.

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## Introduction

The Islamic finance industry was established in the 1970s to offer financial services to Muslim populations in compliance with Islamic law. In addition to legal compliance, other objectives were set by scholars, regulators and shareholders. These objectives included financing economically beneficial and constructive projects, facilitating an equitable distribution of reward and the use of the bank's capabilities for social initiatives. However, the industry has developed in a trajectory that has neglected some of these objectives. Critics of this trajectory have accordingly sought to realign the industry with its objectives. This study seeks to determine the role of Shari'a Supervisory Boards (SSB) in driving this reform. These boards are composed of Islamic legal scholars tasked with approving and monitoring the compliance of Islamic banking services with Islamic law. Based on assessments of their responsibilities and authorities, the study argues that SSBs do not possess sufficient authority to realign the industry with its original founding objectives.

This study assesses the role of SSBs in particular in the reform of the industry for two main reasons. Firstly, SSBs have shaped the development of the industry by participating in and leading the development of its products and contracts. They have thus enabled the operations and growth of the industry. Secondly, their continued approval of the banks' products legitimates the industry's current position. SSBs will continue to shape the industry's trajectory as long as their authority to dictate the industry's offering exists. These factors have driven critics of the industry to direct their calls at SSBs. Evidently, SSBs play a critical role in the industry.

This work seeks to contribute to the literature on the reform of the industry through a study of the potential contribution of SSBs. As demonstrated in the below review, existing literature on industry reform involving SSBs can be further developed in light of the following four observations. Firstly, existing works have not comprehensively nor systematically evaluated the SSBs' ability to drive the reform. They have instead addressed discrete topics relating to the role of SSBs. Secondly, the literature has not leveraged some important sources on the authority of SSBs nor on the viability of the reform avenues. Such sources include regulations, fatwas and other standards in the industry. Third, the reviewed literature has not captured the critical influence of competing stakeholders on the SSBs' ability to drive reform. Finally, the impact of the legal and theological diversity of the industry's participants is also disregarded in the literature. This study addresses these four observations, as described in the following paragraphs and in the literature review.

This study will assess the role of Shari'a supervisory boards in realigning the industry with its objectives through three avenues for reform. The assessment is carried out over six chapters following this introduction and its findings are discussed in the concluding chapter. This introductory chapter continues with an outline of the study and a review of the literature on the ability of SSBs to drive reform in the industry.

The first chapter lays the foundation for the assessment. It introduces the industry and identifies its objectives based on statements of founding theorists, regulators and banks. The importance of baselining the objectives of the industry's stakeholders is accentuated by the absence of such a perspective in the literature. The chapter then addresses the theorists' rationalisation of social objectives as derived from foundational principles,

followed by a study of the industry's track record in achieving these objectives. It finally discusses SSBs, their responsibilities and the relevance of their involvement in achieving reform.

The second chapter studies the legal authority of SSB scholars; that of *ifta'*. *Ifta'* refers to the process of deriving and issuing Islamic legal pronouncements. It is identified in the first chapter as the primary responsibility of SSBs and later chapters evaluate it as an avenue for SSBs to drive reform. An understanding of its authority is therefore necessary to understand the ability and authority of SSBs to drive reform. The chapter develops this understanding based on the authorities expounded within Islamic legal theory. It identifies three groups of *ifta'* authorities with reference to views of classical, modern and contemporary legal scholars. These authorities are presented with their prerequisite qualifications and other indicants of authority. The detailed approach to the constructs of these *ifta'* authorities allows for a depth in their assessment in the context of the industry, in comparison to existing literature on SSBs.

The third chapter continues the evaluation of the authority of SSBs by deconstructing its institutional form. To subsequently assess the ability of SSBs to realign the industry with its objectives, this chapter establishes a deeper understanding of their institutional authorities. This is achieved through an evaluation of the responsibilities and qualifications required by regulators, as well as those exercised and held by a sample of SSB scholars. This pool of evidence has not been used in existing literature on SSBs and their authority. Based on the differences between the regulations and the views of legal scholars surveyed in the second chapter, the chapter argues that the regulators have approved full *ifta'* authorities for SSBs

through a different paradigm. It further argues that the implications of the regulatory paradigm render the authority of SSBs susceptible to challenges. This difference is established in later chapters to contribute to the authority limitations affecting their ability to drive reform.

Following the establishment of the legal and institutional authorities of SSB scholars, the study assesses the scholars' ability to realign the industry with its objectives through three avenues for reform. The fourth chapter assesses the possibility of undertaking *ifta'* through the Islamic legal principle of "objectives of the law" (*maqasid al-Shari'a*) as a reform avenue. It evaluates four frameworks for *ifta'* based on the *maqasid* that then form the basis of the assessment. The frameworks are assessed in relation to factors such as shareholder commercial priorities and legal and theological differences. It refers to sources and evaluates variables not covered in the extensive literature on the *maqasid*. The chapter argues against the suitability of the *maqasid* as an avenue for reform, due to challenges relating to authority, value, practicality and opposition.

The fifth chapter assesses a second *ifta'* approach as a reform avenue based on a principle of Islamic law: legislation for the public interest (*al-masalih al-mursala*). The assessment is conducted based not only on the legal framework of the *masalih*, but on its past uses in the industry too. It considers the positions and influence of regulators, governments, management and other scholars. Along with the sources on the existing applications of the *masalih*, such positions are not covered in the extant literature. The chapter argues that a SSB's ability to drive social objectives through the *masalih* is constrained by three significant authority challenges.

The sixth chapter assesses whether collective obligations (a form of Islamic legal obligations) present reform avenues. Collective obligations have not been systematically assessed in the literature as enablers of reform. The chapter particularly focuses on the collective duty to “enjoin good and reject wrong” (*al-amr bi-l-ma‘ruf wa-l-nahi ‘an al-munkar*). It evaluates the relevance of this obligation to industry reform through examinations of legal criteria underpinning the principle. The chapter argues that the duty’s conditions restrict the authority it lends to SSBs in relation to most subjects relevant to the industry’s social objectives.

In light of the assessments of the latter three chapters, the study will argue that SSB scholars do not possess sufficient authority to realign the industry with its objectives. The influences of other stakeholders in the industry, as well as critical differences in legal positions, prevent the use of *maqasid*, *masalih* or collective obligations as alternative paths to drive the industry’s social objectives. The study will not assess in detail the reasons for the opposition of other stakeholders in the industry. It will however refer to the interplay of related ideologies and movements such as capitalism and corporatism.

### Research methodology

To assess the SSBs’ ability to drive reform in the industry, this study engages three areas of discourse: Islamic legal theory, regulation of Islamic banks and Islamic banking practices. This section will outline the study’s research methodology. It firstly covers the methodology behind the discussion of material across the three areas of discourse it engages in, including

the sampling of banks and regulators. The section then covers the values and limitations of the reference to publicly available primary source material. Within Islamic legal theory, the section will also rationalise the selection of the study's evaluative norms as reform avenues.

In this study, Islamic legal theory forms the basis of the authority of SSBs and legal approaches relevant to reform efforts. Its discussions of Islamic legal theory are discursive to serve as foundations of subsequent assessments of legal principles in the context of SSB activity. The selection of Islamic legal sources has been guided by both coverage of foundational views and representation. The former was sought through the selection of literature related to the study at a detailed subject level and by prioritising sources with influence on the topic. This is reflected in the primary reference to modern literature when discussing the applications of Islamic law in the industry. However, when establishing legal concepts and principles underpinning SSBs and legal avenues for industry reform, the study has referred to both modern and earlier literature. Earlier literature has allowed for deeper understanding of the principles and offered explications beyond that of modern literature. Finally, representation was sought through two main approaches. First was the consideration of views from industry participants as well as independent views, the former referring to SSB scholars. Second was the consideration of Twelver Shi'i literature as well as Sunni literature, in consideration of the role of Shi'i SSB scholars in at least five countries. The selection of Islamic legal sources has thus been guided by coverage of foundational views and representation.

This study has also consulted regulations and other reports and guidelines by regulators as a source of influence in the industry. The sample of regulators in this study was chosen

based on their representation of common industry practice. This was conducted by including regulators from countries with combined assets representing the majority of the industry's assets. The study's country sample represents 93% of the market when excluding Iran, which means that these regulations are relevant to the majority of Islamic banking assets globally.<sup>1</sup> The sample includes Bahrain, Indonesia, Kuwait, Malaysia, Pakistan, Qatar, Saudi Arabia, Turkey and the United Arab Emirates, as well as Oman and the United Kingdom.<sup>2</sup> Iran is excluded as its regulator does not mandate the appointment of SSBs and due to the inability to access central bank regulations, as well as lack of access to policies, fatwas and reports from leading banks such as Bank Saderat Iran and Bank Mellat.<sup>3</sup> The study therefore refers to a country sample of 11.

Industry practice is a third area covered in this study and is considered through bank practice. The sample of banks in this study was also chosen based on their representation of common industry practice. This was conducted by encompassing the largest banks by asset size in the 11 sample countries. The banks are Bank Islam Malaysia Berhad, Bank Nizwa (Oman), Bank Rakyat Indonesia Syariah, Albaraka Türk Katılım Bankası (Turkey), Dubai Islamic Bank (UAE), Kuwait Finance House, Meezan Bank (Pakistan), Qatar Islamic Bank, Al Rajhi Bank (Saudi Arabia), Al Rayan Bank (UK) and Al Salam Bank (Bahrain). The bank sample is not as representative of the market as the regulatory sample, since these 11 banks do not represent the majority of Islamic banking assets globally. Nonetheless, the sample has been

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<sup>1</sup> EY Middle East and North Africa, "World Islamic Banking Competitiveness Report 2016," accessed October 3<sup>rd</sup>, 2018, <https://www.ey.com/Publication/vwLUAssets/ey-world-islamic-banking-competitiveness-report-2016/%24FILE/ey-world-islamic-banking-competitiveness-report-2016.pdf>.

<sup>2</sup> Oman and the United Kingdom have been added to the sample at the researcher's discretion. Oman represents his home country and the United Kingdom being the location of this study.

<sup>3</sup> Wafik Grais and Matteo Pellegrini, "Corporate Governance and *Shariah* Compliance in Institutions Offering Islamic Financial Services," in *Policy Research Working Paper Series* (Washington: World Bank, 2006), 7.

selected due to their market leadership and due to the sufficient breadth of 11 data points for the study's purposes. The bank sample is used to understand their objectives, decisions and internal rules and guidelines.

This study has relied on information available in the public domain to understand the industry and assess the ability of SSBs to drive reform. Such sources include regulations, fatwas, bank reports and press releases available on the internet and in publicly available reports. This approach allowed for reference to thousands of records including fatwas, regulations, disclosures and declarations, as well as interviews with and anecdotes by SSB scholars. The value of reference to publicly available information lies in two factors. It firstly offers a substantial base of information, allowing for multiple assessments. Secondly, publicly available information is open to peer review and contestation, offering a degree of legitimacy. In comparison, information shared by SSB members in private settings is susceptible to potential attempts at enhancing their perceptions, enabled by their anonymity. The study thus referred to sources available in the public domain.

Despite its value, the sole reliance on publicly available information is subject to two key limitations. The first limitation is that fatwas and other declarations are shown in this study typically to offer limited information. This in turn limits the ability to analyse the declarations to understand SSB practice and its determinants. This is evident in the review of 1101 fatwas in the third chapter of this study, where only a minority explicitly disclosed the basis of their decisions. Most fatwas instead only stated brief pronouncements by the boards. Secondly, despite constraints relating to bias, private sources such as interviews with SSBs would have offered additional depth and breadth to the study of SSBs, their

qualifications, competence, pressures and therefore their ability to drive the reform. The study did not therefore benefit from private SSB insights. The study's principle of representing market practice in selecting the sources would have required that primary research through interviews covers members from the 11 countries forming this study's sample. The coverage of the 11 countries would have allowed for the research to complement other assessments within this study. However, resource constraints prevented conducting interviews with at least 11 SSB members. This opportunity was largely compensated with information available publicly.

The evaluation of the SSBs' ability to drive reform in the industry addresses three legal principles as reform avenues: *maqasid al-shari'a*, *al-masalih al-mursala* and *al-amr bi-l-ma'ruf wa-l-nahi 'an al-munkar*. These avenues are assessed due to two primary reasons. Firstly, the *maqasid* and *masalih* offer a potential for reform due to their fundamental link to objectives and values in Islamic doctrine. These objectives are associated with the reforms sought within the industry, as later chapters show. Secondly, the avenues represent legal principles that have not been commonly used by SSBs despite their acknowledgment by relevant stakeholders. Their limited application presents an opportunity for legal approaches beyond those that have formed the industry's current state. Both reasons are explored further below.

Beyond their potential enablement of SSB-driven reform of the industry, the three are avenues representing different areas of Islamic law with an underlying connection. The *maqasid* represent the Legislator's objectives of Islamic law, the *masalih* represent a source of law and *al-amr bi-l-ma'ruf* is a legal ruling. This study therefore addresses three avenues

that are fundamentally different in their roles within legal theory. However, the three avenues are connected across these areas. The *maqasid* represent the underlying objective of legislation, the *masalih* a tool for legislating these objectives and *al-amr* a ruling to enforce adherence to Islamic law. This position presents the three principles as a chain of achieving the objectives of Islamic laws relevant to banking. The *maqasid* are alternatively considered as sources of Islamic law<sup>4</sup>, with the *maslaha* being the ultimate objective. From this perspective, the *masalih* would be the source of the objectives that SSBs would seek to achieve. The *maqasid* would be the methodology for derivation and *al-amr* remaining its consequence and outcomes. The connection between the *maqasid* and the *masalih* is further discussed in chapter five. The three principles thus allow for the assessment of different areas of Islamic law as reform avenues.

This section has introduced the study's research methodology in relation to the three areas of discourse it engages. It identified coverage of foundational views and representation as drivers of literature selection. The section also introduced the regulator and bank sample, which was chosen on the basis of representation. It then rationalised the study's reference to publicly available primary source material. The section finally rationalised the study's evaluative norms as the research methodology framework, addressing their legal and moral interconnectedness.

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<sup>4</sup> Refer to chapter four.

## Literature review

Due to their vital role in the industry, SSBs have been a common subject of research and commentary by academics. Existing work has addressed their responsibilities, structures, performance and fatwas, among other topics. However, writings on the SSBs' role in the reform of the industry have been limited. Our review of the literature did not find other works assessing the ability of SSBs to drive reform. Instead, literature related indirectly to SSB-led reform is more prevalent and can be categorized under three topics: issues with current approaches of SSBs, the relevance of particular approaches and the need for new strategies that go beyond the remit of SSBs. The following paragraphs will demonstrate how the literature has not examined in an integrated manner the role of SSBs in driving the reform.

The first topic of literature indirectly related to SSB-led reform discusses the role of SSBs in creating the existing state of the industry. As demonstrated in the first chapter, Islamic banks have used contentious contracts and neglected financing industrial and agricultural projects and the use of partnership contracts. The first topic accordingly comprises critique of current practices of SSBs, largely on their replication of prohibited products and their neglect of risk-sharing contracts. Writings under this aspect do not address the SSBs' role in driving reform. Accordingly, this section does not review this literature. Readers can instead refer to the works of Muhammad Nejatullah Siddiqi, Abdulazeem Abozaid, Rafiq Yunus al-Masri (d. 2021) and Salih al-Husayyin (d. 2013).<sup>5</sup>

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<sup>5</sup> Some of their critique is cited in the following chapter.

The second topic in the literature indirectly related to SSB-led reform comprises arguments for the adoption of alternative approaches to *ifta'* in response to the industry's current state. The literature primarily centres on two related approaches: the termination of the use of legal stratagems and the consideration of *maqasid al-shari'a* in legislation. In order to determine whether such approaches enable SSBs to drive reform, these proposals require critical assessments. However, few such proposals include critical assessments, resulting in arguments that are detached from the dynamics of the industry. Examples of such works include those by Mahmoud El-Gamal and Haider Ala Hamoudi, discussed below. Only two papers by Zakariyah and Kamali have been identified to undertake critical assessments and are discussed subsequently. Two more works by Laldin and Moghul are then acknowledged but not identified to be sufficiently relevant to the objective and approach of this study.

El-Gamal and Hamoudi have written on the Islamic banks' replication of conventional contracts, with Hamoudi identifying it as a failure.<sup>6</sup> Following a critique of contracts used in the industry, El-Gamal calls for the abandonment of "contract-based jurisprudence."<sup>7</sup> However, he does not detail this idea nor does discuss any alternative approaches. El-Gamal thus does not engage in a critical assessment of reform through his sought abandonment of current practices.

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<sup>6</sup> Haider Ala Hamoudi, "Muhammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance," *The Cornell International Law Journal* 40: 1 (2007): 89-133.

<sup>7</sup> Mahmoud A. El-Gamal, "Incoherence of Contract-Based Islamic Financial Jurisprudence in the Age of Financial Engineering," *The Wisconsin International Law Journal* 25: 4 (2007), 15.

Hamoudi proposes four approaches to “lay the groundwork” for industry reform.<sup>8</sup>

Hamoudi’s first approach is to prioritise the Quran as a source of law and guidance. This would be to prevent the approval of contracts that replicate conventional banking products which were approved through *ifta’* based on other sources of law. Hamoudi’s second approach is of a more common application of *istihsan*<sup>9</sup> and the *masalih*. His third approach specifies their application in areas where the Quran does not forbid a practice.<sup>10</sup> Hamoudi’s fourth approach does not relate to contract structuring and jurisprudence and is instead concerned with charity and investment restrictions.<sup>11</sup> Among other challenges in his proposal, Hamoudi’s discussion of the approaches is brief and does not include critical assessments. He rarely considers challenges in their application in the context of the industry, which is relevant considering the unorthodox nature of his proposals. El-Gamal and Hamoudi’s exemplify writings that propose reform through the SSB responsibility of *ifta’* without engaging in critical assessments. The following paragraphs review the two papers that have been identified to undertake critical assessments.

The first paper critically arguing for the adoption of alternative approaches to *ifta’* is by Luqman Zakariyah. Zakariyah assesses the feasibility of legislating morality in response to its marginalisation in contemporary Islamic banking.<sup>12</sup> Zakariyah defines the legislation of

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<sup>8</sup> Hamoudi, *Muhammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance*, 126.

<sup>9</sup> *Istihsan* refers to deduction based on the scholar’s discretion and is bound by criteria specified in the field of legal theory.

<sup>10</sup> Hamoudi, *Muhammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance*, 127.

<sup>11</sup> Hamoudi, *Muhammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance*, 132-133.

<sup>12</sup> Luqman Zakariyah, “Harmonising Legality with Morality in Islamic Banking and Finance: A Quest for Maqasid Al-Shari’ah Paradigm,” *Intellectual Discourse*, 23, Special Issue (2015): 355-376. Zakariyah is an assistant professor at the Department of Fiqh and Usul al-Fiqh at the International Islamic University Malaysia.

morality as that of “recommendable actions for which the actor will be rewarded if he/she does it.”<sup>13</sup> However, Zakariyah’s proposal differs from his overarching principle and is rather in reference to the proscription of legal stratagems.<sup>14</sup> Legal stratagems are approaches through which obligatory rulings can be legally circumvented. In the context of the stratagems, Zakariyah examines *maqasid al-shari’a* as an approach through which “Islamic value[s]” can be revitalised in the industry. He does not define or discuss said value.

Zakariyah’s critical evaluation is in relation to the *maqasid* as an approach to realise Islamic values in the industry. He argues that the identification of the *maqasid* is subjective and that their application is contextual.<sup>15</sup> This means that rulings on financial contracts can be judged differently in different jurisdictions. He also identifies that such subjectivity can lead to varying legal opinions and therefore difficulty in formulating a consensus.<sup>16</sup> Zakariyah’s assessment of the viability of the *maqasid* as an *ifta’* approach is thus concluded.

Zakariyah’s evaluation of the *maqasid* as an approach to reform *ifta’* in the industry is evidently limited. Firstly, his evaluation is not performed in relation to a specified framework of legislation based on the *maqasid* and his only reference is an acknowledgement of Ibn Ashur’s work.<sup>17</sup> His analysis is accordingly not substantiated and incorrectly -as shown in chapter four- assumes that the legal theory underpinning the *maqasid* is subject to agreement. Secondly, Zakariyah does not examine existing

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<sup>13</sup> Zakariyah, “Harmonising Legality with Morality in Islamic Banking and Finance,” 369.

<sup>14</sup> Zakariyah, “Harmonising Legality with Morality in Islamic Banking and Finance,” 366, 369.

<sup>15</sup> Zakariyah, “Harmonising Legality with Morality in Islamic Banking and Finance,” 368-369.

<sup>16</sup> Zakariyah, “Harmonising Legality with Morality in Islamic Banking and Finance,” 369.

<sup>17</sup> Zakariyah, “Harmonising Legality with Morality in Islamic Banking and Finance,” 367. Ibn Ashur’s work is addressed in Chapter Four of this study. Ibn Ashur was Shaykh al-Islam in Tunisia for the Maliki school and the Shaykh of Ez-Zitouna University.

applications of the *maqasid* in the industry, despite aiming to evaluate it as a reform approach for the industry. He thereby misses an opportunity for corroborating his analysis. Thirdly, Zakariyah does not examine other factors supporting or impeding the application of the *maqasid*. As we identify in chapter four, multiple factors such as the commercial objectives of shareholder are consequential. Zakariyah's assessment of the *maqasid* is accordingly ungrounded, as his judgement is not based on a particular framework or application. It is also narrow, as he has not considered other factors influencing its suitability as a reform approach.

In addition to the *maqasid*, Zakariyah proposes the *masalih* as a further avenue for legislating morality.<sup>18</sup> However, the gaps in his assessment of the *maqasid* recur. He does not refer to a legal framework, nor does he examine existing applications or assess the *masalih's* suitability for the industry.

Zakariyah's work thus addresses two approaches examined in our study. However, his assessment is constrained by an absence of a legal grounding, omission of key sources and limited evaluation of driving factors. This is reflected in the brevity of his assessment.

A second paper within the second aspect of the adoption of alternative approaches to *ifta'* is by Mohammad Hashim Kamali.<sup>19</sup> In this paper, Kamali assesses whether the *maqasid* are a source of Islamic law, where his examples refer to the Islamic banking industry.<sup>20</sup> He

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<sup>18</sup> Zakariyah, "Harmonising Legality with Morality in Islamic Banking and Finance," 372.

<sup>19</sup> Kamali is the founding chairman and CEO of the International Institute of Advanced Islamic Studies.

<sup>20</sup> Mohammad Hashim Kamali, "Actualisation (*Taf'il*) of the Higher Purposes (*Maqasid*) of Shari'ah," *Islam and Civilisational Renewal* 8, 3 (2017), 298.

criticises a literalist legal approach adopted in the industry, portraying the *maqasid* as the required alternative.<sup>21</sup>

Following his identification of demand for applications of the *maqasid*, Kamali presents challenges with their application. He argues that the *maqasid* provide only a limited avenue for reform of the industry as they are “too theoretical to be of much help to practitioners,” explaining that they “are theoretical in that they do not have substantive rules of their own.”<sup>22</sup> Kamali further presents a view related to the outcome of chapter four of this work. He states that the adoption of an approach based on the *maqasid* requires “proactive and innovative leadership, and a supportive institutional attitude.”<sup>23</sup> His view indicates that the adoption of the *maqasid* by SSBs would not suffice to drive the reform and that SSBs would require the support of more powerful stakeholders. Kamali thus identifies the *maqasid* as a reform approach, but questions its effectiveness based on identified challenges.

While Kamali provides a critical perspective of the *maqasid*, his assessment of their relevance as an avenue for SSBs to drive reform is not comprehensive. Firstly, Kamali’s assessment has omitted other factors affecting the *maqasid*’s suitability as an approach in the industry, such as differences in objectives of stakeholders and their theological and legal views. The lack of comprehension reflects the paper’s focus on another main question. Secondly, Kamali’s argument for the importance of leadership and regulatory support is neither rationalised nor contextualised in relation to the influence of different stakeholders

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<sup>21</sup> A literalist approach is where “rules of fiqh [are followed] in a formalistic way often at the expense of their purposes.” Kamali, “Actualisation (*Taf’iil*) of the Higher Purposes (*Maqasid*) of Shari’ah,” 297.

<sup>22</sup> Kamali, “Actualisation (*Taf’iil*) of the Higher Purposes (*Maqasid*) of Shari’ah,” 297.

<sup>23</sup> Kamali, “Actualisation (*Taf’iil*) of the Higher Purposes (*Maqasid*) of Shari’ah,” 315.

in the industry. Therefore, while Kamali critically addresses the *maqasid* as an avenue for reform, his discussion is neither comprehensive nor are his arguments expounded. These constraints are a result of the paper addressing a different question. Finally, Kamali does not address reform avenues assessed in this study beyond the *maqasid*.

Other than the works of Zakariyah and Kamali, we acknowledge two other publications critically addressing reform approaches. However, these are not considered as primarily relevant papers due to the discussed shortcomings.

The first of the two works of secondary relevance is by Mohamad Akram Laldin on the parameters of applications of the *masalih* in the industry. Laldin sets to present a legal framework and acknowledges a challenge to the application of the *masalih*: the potential of its “abuse,” a reference to applications diverging from its legal criteria.<sup>24</sup> However, the acknowledgement is not expounded and he does not cover further challenges. Additionally, it implicitly posits the *masalih* as a tool for less-restrained *ifta’* (which enables replication of conventional banking products) rather than seeking SSB-driven reform.<sup>25</sup> Due to its differing context and minimal critical assessment, Laldin’s paper is not identified as a publication sufficiently related to this study.

The second of two works of secondary relevance to this study is by Umar Moghul on advancing social and environmental objectives in Islamic finance. Moghul’s first connection

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<sup>24</sup> Mohamad Akram Laldin, “Understanding the Concept of Maslahah and Its Parameters When Used in Financial Transactions,” *Journal of Islamic Business and Management* 3: 2 (2013), 151.

<sup>25</sup> Laldin, “Understanding the Concept of Maslahah and Its Parameters When Used in Financial Transactions,” 152.

to this study is through his identification of communal obligations as an avenue to drive social and environmental objectives in Islamic finance.<sup>26</sup> However, he does not discuss the obligations in the context of SSBs. The second relation to this study is Moghul's proposal of approaches for SSBs to address possible environmental externalities of finance. The approaches are nonetheless not critically assessed in relation to the context of the industry.<sup>27</sup> Therefore while Moghul addresses relevant topics, he does not seek to identify the SSBs' ability to adopt them towards reforming the industry.

This review's citation of only two papers of primary relevance reflects the dearth of literature critically examining proposals of avenues for SSBs to drive reform. This is further accentuated by the fact that Zakariyah and Kamali's contributions are largely limited to the *maqasid* and do not assess other avenues. Even within the *maqasid*, the two authors' works do not provide comprehensive assessments.

The third and final topic in the reviewed literature addresses a need for new reform strategies that do not solely concern SSBs. It assumes that SSBs cannot realign the industry with its objectives and instead proposes strategies that go beyond the SSBs' remit. Such works thus start from a premise which is the endpoint of this study. An example is a paper by Mehmet Asutay where he proposes seeking the objectives through the alternative model

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<sup>26</sup> Umar Moghul, *A Socially Responsible Islamic Finance- Character and the Common Good* (New York: Palgrave Macmillan, 2017), 273. While Umar refers to "communal obligations," this study instead uses the term "collective" obligations.

<sup>27</sup> Umar Moghul, *A Socially Responsible Islamic Finance- Character and the Common Good*, 122.

of social banks.<sup>28</sup> As such literature assumes that SSBs cannot drive reform without examining its basis, it is not covered in this review.

This review of the literature shows that the question of whether SSBs can drive reform has not been addressed. Instead, their action has been sought, its avenues have been proposed and the SSBs' role has been dismissed. The question of their ability to drive reform has not been addressed cohesively and instead, limited publications have addressed only components of the question. This study therefore contributes to research on the reform of the Islamic banking industry by studying the ability of SSBs to undertake it. This study's contribution to the research is not restricted to the main question on the role of SSBs. It includes other findings and methodological contributions that are discussed in the following paragraphs.

To address the question on the role of SSBs in driving reform in the industry, this study deconstructs the authority of SSB scholars. It examines both their responsibilities and qualifications as prescribed and practiced. The qualifications are also examined in light of Islamic legal theory. While this examination facilitates subsequent assessments, it contributes a deeper understanding of the authority of SSBs. Existing literature focuses on the qualifications or responsibilities of SSBs as prescribed by regulators or as acknowledged by the scholars. For example, Muhammad Amanullah simply compares qualifications of muftis in legal theory and regulations but does not provide an analysis of the findings nor of

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<sup>28</sup> Asutay, "Conceptualisation of the Second Best Solution in Overcoming the Social Failure of Islamic Finance," *IJUM Journal of Economics and Management* 15, 2 (2007): 167-195.

the authority of SSBs.<sup>29</sup> Zulkifli Hasan presents views of SSB scholars on their responsibilities and qualifications but does not engage in an assessment of their legal and institutional authority.<sup>30</sup> The authority of SSBs has therefore not been examined yet through an integrated approach covering their responsibilities and authorities in light of regulations, practice and legal theory. The new perspective allows for an assessment of the influence of SSBs in the industry.

This study of the SSBs' ability to drive reform also differs from existing research through its methodologies. The above review has stated that existing literature neglects critical assessments of reform approaches. The first difference is therefore the adoption of a critical approach to the process of addressing the role of SSBs. The second difference is the support of the assessments and conclusions with representative evidence, where possible. Representation has been addressed in three main areas. Firstly, when considering institutional stances, the study has used a sample encompassing up to 13 of the industry's largest institutions representing different jurisdictions. The second step towards representation has been to consider both the industry's regulations and its fatwas and practices, to capture any discrepancy between theory and practice. The third step is the consideration of diversity of doctrines and motives among the stakeholders. Doctrinal diversity has been acknowledged by addressing theological differences that relate to the proposed *ifta'* approaches. It has also been acknowledged by considering legal differences within schools and between others. Within schools, legal differences are addressed by

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<sup>29</sup> Muhammad Amanullah, "Criteria of Shari'ah supervisory committee: A comparative study between guidelines of Bangladesh Bank and Bank Negara Malaysia," *Intellectual Discourse*, 23, Special Issue (2015): 453-473.

<sup>30</sup> Zulkifli Hasan, "A survey on Shari'ah governance practices in Malaysia, GCC countries and the UK," *International Journal of Islamic and Middle Eastern Finance and Management* 4, 1 (2011), 35-38.

incorporating different stances on legal theory. Among different schools, differences have been acknowledged through the consideration of Twelver Shi'i law to account for Shi'i SSB scholars in Bahrain, Kuwait, Lebanon, Oman and Pakistan.<sup>31</sup>

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<sup>31</sup> "Sharia Board," Ithmaar Bank, accessed September 30<sup>th</sup>, 2020, [https://www.ithmaarbank.com/about-us/ithmaar\\_about\\_sharia](https://www.ithmaarbank.com/about-us/ithmaar_about_sharia); "Board of Directors & Management Team," Kuwait International Bank, accessed September 30<sup>th</sup>, 2020, <https://www.kib.com.kw/en/home/Personal/about-us.html#Shariah-Committee>; "Man Naḥn," Lebanese Islamic Bank, accessed September 30<sup>th</sup>, 2020, <http://www.lebaneseislamicbank.com/ar/pages.asp?id=18>; "Fatwā raqm 10/2013: Tamwīl Ra's al-Māl al-'āmil li-l-Sharikāt 'an Ṭarīq al-Muḍāraba," Maisarah, accessed September 30<sup>th</sup>, 2020, [https://www.maisarah-oman.com/App\\_Themes/Downloads/Fatwa%2010.pdf](https://www.maisarah-oman.com/App_Themes/Downloads/Fatwa%2010.pdf); "Shariah Advisory Committee," State Bank of Pakistan, accessed September 30<sup>th</sup>, 2020, <https://www.sbp.org.pk/IB/shariah.asp>.

## Chapter 1: Study background

This chapter lays the foundation of the assessment of the ability of Shari'a Supervisory Boards to realign the industry with its original objectives. Following an introduction to the industry, the first section establishes the objectives of the industry. The second section studies the industry's track record in achieving these objectives. The third section introduces SSBs, the group whose ability to reform the industry is studied. The fourth section presents additional views nominating SSBs to drive the reform.

### The objectives of Islamic banking

To enable the assessment of the role of SSBs in realigning the industry with its objectives, this section introduces the industry and identifies the objectives in question. It will show founding theorists and regulators to have targeted four social and economic objectives, in contrast to banks which are found to generally prioritise commercial objectives.

The twentieth century witnessed an ideological, economic and political clash of capitalism and Marxism. The clash reverberated in Muslim countries through the proponents' colonial endeavours and ideological exports.<sup>32</sup> The reverberations were in conflict with the economic interests and beliefs of many Muslims. In response, Muslim scholars and researchers presented alternative economic principles based on Islamic laws and guidance from the Sunna.<sup>33</sup> These principles addressed state control and ownership,

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<sup>32</sup> Muhammad Baqir al-Sadr, *al-Qitāḍunā* 14<sup>th</sup> ed. (Beirut: Dār al-Ta'āruf li-l-Maṭbū'āt, 1981), 10-12.

<sup>33</sup> Source of Islamic law, representing the Prophet's statements, actions or tacit approvals.

taxation, distribution of wealth, social welfare, usury and other topics. The positions were collectively pitched as the principles of an Islamic economy.

The rigidity of Islam's prohibition of usury, the need for financial services and their centrality to the economy afforded finance particular focus by researchers. This focus resulted in publications, conferences and in 1963 the formation of a financial institution based on Islamic rulings on finance.<sup>34</sup> Its formation marked the beginning of the Islamic banking industry, after which Dubai Islamic Bank was established as the first Islamic bank in 1975. In the following years, banks labelled as Islamic were established in Africa and Asia, as was the Islamic Development Bank, to which 57 countries have contributed.<sup>35</sup> These banks were and remain profit-seeking institutions.

Islamic banking is the biggest component of the Islamic financial services industry. The Islamic financial services industry comprises Islamic banking, Takaful and capital markets consisting of Sukuk and Islamic funds. Takaful is a commercial, co-operative alternative to insurance based on compliance with Islamic law. Sukuk are capital instruments that provide investors with an expected, regular return and serve as alternatives to conventional<sup>36</sup> bonds.<sup>37</sup> In 2017, Islamic banking assets across 38 countries exceeded USD 1.5 trillion,

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<sup>34</sup> Zamir Iqbal and Abbas Mirakhor, *An Introduction to Islamic Finance- Theory and practice* (Singapore: John Wiley & Sons (Asia) Pte. Ltd., 2011), 15.

<sup>35</sup> "IsDB Member Countries," Islamic Development Bank, accessed May 30<sup>th</sup>, 2022, <https://www.isdb.org/isdb-member-countries>.

<sup>36</sup> In this study, "conventional" is used to describe non-Islamic banking services or providers.

<sup>37</sup> Specifically, they are "certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or (in the ownership of) the assets of particular projects or special investment activity." Accounting and Auditing Organisation for Islamic Finance Institutions ("AAOIFI"), *Shari'ah Standards* (Manama: AAOIFI, 2017), 468.

forming 76% of the Islamic financial services industry.<sup>38</sup> The geographical distribution of the industry's assets is shown in Chart 1 below. The chart shows the Arab countries - and the GCC countries<sup>39</sup> in particular - to dominate the industry.

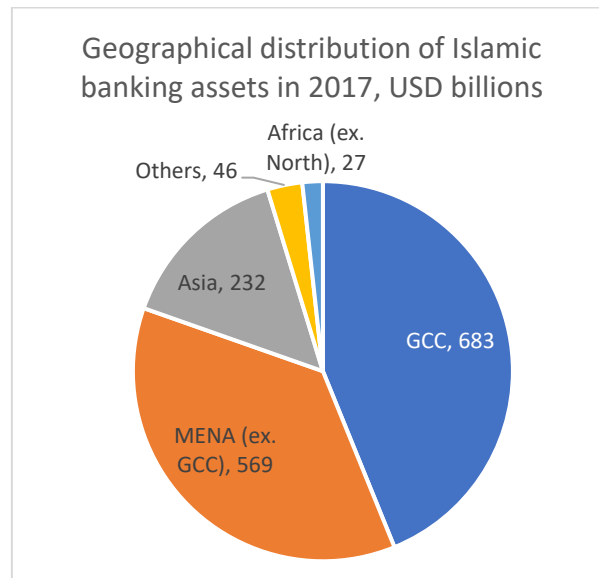


Chart 1: Geographical distribution of Islamic banking assets in 2017.<sup>40</sup> GCC refers to The Cooperation Council for the Arab States of the Gulf. MENA refers to the Middle East and North Africa.

Islamic banks offer services to address the same financing needs as conventional banks. Their services therefore encompass the retail, private, microfinancing, small and medium enterprises (SME), corporate, treasury and investment categories. The services within these categories include saving accounts, current accounts, payments, debt financing, equity financing, investment funds, brokerage and others.<sup>41</sup> However, these services are structured differently to their alternatives at conventional banks, namely through contracts sanctioned

<sup>38</sup> Islamic Financial Services Board ("IFSB"), *Islamic Financial Services Industry Stability Report 2018* (Kuala Lumpur: IFSB, 2018), 9.

<sup>39</sup> Comprising Bahrain, Kuwait, Qatar, Oman, Saudi Arabia, the United Arab Emirates.

<sup>40</sup> IFSB, *Islamic Financial Services Industry Stability Report 2018*, 9.

<sup>41</sup> "QIB," Qatar Islamic Bank, accessed May 2<sup>nd</sup>, 2018, <https://www.qib.com.qa>; "Dubai Islamic Bank," Dubai Islamic Bank, accessed May 2<sup>nd</sup>, 2018, <https://www.dib.ae/>.

in Islamic commercial law. These include partnership, loan, trade, leasing, construction and agency contracts.

The industry in question has been prominently labelled with the ever-present adjective of 'Islamic,' which is widely used by the banks, regulators, clients and others.<sup>42</sup> The intended meaning of the adjective can be understood from the objectives sought of the industry by its stakeholders. Islamic banks, their regulators and academics are three important stakeholder groups that have expressed their objectives of the industry. These objectives are explored in the following paragraphs. The academics and Islamic scholars<sup>43</sup> have served as the theorists, planners and intellectual drivers of the industry. Their thought therefore influences other stakeholders too. On the other hand, the regulators have the authority to restrict and guide the operations of the banks, shaping the trajectory of the industry and influencing the banks' objectives. As for the objectives of the banks, they are those translated directly into practice. They provide an indication of the reception of bank shareholders to the thought and direction of academics and regulators. This section will demonstrate a dichotomy in the objectives stated by the three groups, with academics and some regulators seeking an industry with proportionate commercial and social objectives, unlike banks that prioritise commercial objectives over social causes.

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<sup>42</sup> An exception to this practice is found with Turkey, which refers to the service as participation banking, reflecting a secular approach adopted by the Turkish state.

<sup>43</sup> The use of the label 'academic' in this study refers to researchers that primarily use academic titles such as Doctor, Reader, Lecturer and Professor. They are current or retired members of universities and other research institutions. The label 'scholar' refers to researchers that primarily use titles from the Muslim educational tradition, such as Shaykh, Sayyid and Mufti, either exclusively or along with academic titles.

The establishment of the banks was preceded by a period of intellectual activity where scholars and academics critiqued interest-based banks and proposed interest-free alternatives.<sup>44</sup> This intellectual activity was influential in the establishment and shaping of the banks, evident in the establishment of a financial institution by Ahmad el-Naggar<sup>45</sup>, one such academic. Its influence is also reflected in the consultation of Islamic scholars by the founders of Islamic banks, such as with the founders of Kuwait Finance House and Muhammad Baqir al-Sadr (d. 1980).<sup>46</sup> The review of the objectives of Islamic banks will therefore cover views of academics and scholars from the industry's formative period and the preceding years.

The positions of the industry's founding theorists are reviewed based on a conference paper by Mohamed Ali El Gari summarising their positions.<sup>47</sup> In the 2005 paper, El Gari compares the aspirations of the industry's founders with its current realities. El Gari is a veteran SSB scholar who has served on more than 70 SSBs.<sup>48</sup> He identifies the following six scholars and academics as having shaped the concept of Islamic banking through their writings which preceded its formation.<sup>49</sup> With the exception of Muhammad Baqir al-Sadr, El

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<sup>44</sup> Refer to the following paper for a bibliographical guide to publications preceding and following the foundation of the industry. Mohammed Akram Khan, "Economic System of Islam Bibliography of Studies in English Published During 1940-1990," (Jeddah: King Abdulaziz University, 1992), accessed November 1<sup>st</sup>, 2017, [https://iei.kau.edu.sa/Files/121/Files/152672\\_25-Bibliography1940-1990.pdf](https://iei.kau.edu.sa/Files/121/Files/152672_25-Bibliography1940-1990.pdf).

<sup>45</sup> El-Naggar's year of birth was unidentifiable.

<sup>46</sup> El-Naggar's venture is addressed in Abdelkader Chachi, "Origin and Development of Commercial and Islamic Banking Operations," *Journal of King Abdulaziz University: Islamic Economics*, 18, 2 (2005), 16-19. Kuwait Finance House's approach of al-Sadr is discussed in Abdulbari Mashal, "al-Bank al-Islāmī wa-l-Bank al-Lā-Ribawī," *al-Iqtisadi*, May 21<sup>st</sup>, 2013, <https://aliqtisadi.com/31698-البنك-الاسلامي-والبنك-اللا-الربوي/>.

<sup>47</sup> Mohamed Ali El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisīn wa-l-Wāqī' al-Mu'āšir," (paper presented at Muntadā al-Fikr al-Islāmī, Jeddah, May 2<sup>nd</sup>, 2005), accessed February 7<sup>th</sup>, 2022, <https://iifa-aifi.org/wp-content/uploads/2015/02/5-3.pdf>.

<sup>48</sup> Murat Hasan Ünal, "The Small World of Islamic Finance," (*Funds@Work*, 2016), 6. The participation in memberships of multiple boards is a phenomenon of the industry is addressed in Unal's work. It reflects potential desires for the expertise of such scholars, or the procurement of their legal opinions which they issued to other banks they serve.

<sup>49</sup> El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisīn wa-l-Wāqī' al-Mu'āšir," 3.

Gari's identification of the following as founding theorists was not disputed by the conference attendees, according to the published proceeding.<sup>50</sup> This indicates the agreement of 11 other scholars and academics with El Gari's identification of the industry's founding theorists. The views of these theorists are presented in the following paragraph. They include Muhammad Uzair (d. 2019) who wrote on interest-free banking in 1951 and 1955 and proposed an operating model. A similar model was developed by Muhammad Abdullah al-Arabi<sup>51</sup> in 1965. Aided by his economics background, Muhammad Nejatullah Siddiqi (b. 1931) in 1969 expanded the operating model by theorising additional dimensions to the bank's operations, such as its dealings with the central bank. Isah Abdu's (d. 1980) contributions were instrumental in the foundation of banks such as Kuwait Finance House and Qatar Islamic Bank. Similarly, the contributions of the aforementioned Ahmad el-Naggar were through both his writing and his establishment of a bank. Finally, al-Sadr formulated a substantial legal grounding for the services of an Islamic bank. Of their six publications, we have only been able to access al-Sadr's *al-Bank al-La Ribawi fi al-Islam*.<sup>52</sup> El Gari therefore provides a window to relevant perspectives that are otherwise inaccessible.

According to El Gari, the objectives of the six founders were the following:<sup>53</sup>

1. The replacement of prohibited transactions with permissible alternatives
2. The incorporation of the Shari'a's objectives of wealth, where the bank:
  - a. takes on the responsibility of building the earth;

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<sup>50</sup> Al-Sadr's nomination was questioned due to a view that his contributions comprised legal stratagems. Mohamed Ali El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisīn wa-l-Wāqī' al-Mu'āşir," proceedings of Muntadā al-Fikr al-Islāmī, Jeddah, May 2<sup>nd</sup>, 2005, accessed February 7<sup>th</sup>, 2022, <https://iefpedia.com/arab/?p=2606>, 26.

<sup>51</sup> Al-Arabi's year of birth was unidentifiable.

<sup>52</sup> Muhammad Baqir al-Sadr, *al-Bank al-La-Ribawī fi-l-Islām* (Beirut: Dār al-Ta'aruf li-l-Maṭbū'āt, 1978).

<sup>53</sup> El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisīn wa-l-Wāqī' al-Mu'āşir," 7-8.

- b. achieves an optimal distribution of wealth to avoid limiting its circulation among the rich;
- c. adopts goals that are of a general social nature.

El Gari then explains the three objectives. Building the earth relates to financing industrial and agricultural projects. An optimal distribution of wealth involves the use of partnership contracts and avoiding restrictions that would render only wealthy clients eligible for financing. Finally, social goals include combating poverty by collecting and distributing *zakat* (alms tax).<sup>54</sup> El Gari thus presents four main objectives of an Islamic bank in the views of its founding theorists, and in the case of el-Naggar, founder. They sought the provision of financing that complies with Islamic jurisprudence while also seeking the betterment of society through the transactions and institutions. The beneficiaries are therefore the shareholders, customers and society.

In order to corroborate El Gari's summary of the views of the theorists, we compared it with al-Sadr's *al-Bank al-La Ribawi* and a later publication by Siddiqi. Al-Sadr's proposition addressed two forms of Islamic banks, where the first indeed pursues the two main objectives stated by El Gari, whereas the second form focuses on replacing prohibited transactions with permissible alternatives.<sup>55</sup> The first source therefore supports El Gari's summary. The second source is Siddiqi's 1981 article titled "Rationale of Islamic Banking." This later article corroborates the view El-Gari attributes to him. Specifically, Siddiqi views Islamic banking as based on replacing interest with profit-sharing and that it leads to justice

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<sup>54</sup> El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisīn wa-l-Wāqī' al-Mu'āšir," 7-9.

<sup>55</sup> Al-Sadr, *al-Bank al-Lā-Ribawī fī-l-Islām*, 6-7.

and improves efficiency.<sup>56</sup> In his paper, justice refers to an equitable sharing of reward, where providers of finance (such as banks and depositors) receive returns based on their share of the project returns.<sup>57</sup> This would prevent their returns being limited to an interest rate, but it would also expose them to the project's losses. Efficiency is gained by virtue of the use of equity instead of debt, which enables investments into higher productivity assets with higher risk profiles.<sup>58</sup> Siddiqi also refers to social responsibilities including *Zakat*. The two sources thus corroborate portions of El Gari's summary of the views of founding scholars and academics.

A seventh and final perspective on the objectives of Islamic banks by theorists is that of Muhammad Umer Chapra stated in his book *Towards a Just Monetary System*, originally published in 1985. Chapra developed foundations of a banking system, covering broader economic considerations rather than only the needs of a bank. Stating that it is not a comprehensive list, he states the following goals of an Islamic banking system:

- “(i) Broad-based economic well-being with full employment and optimum rate of economic growth;
- (ii) Socio-economic justice<sup>59</sup> and equitable distribution of income and wealth;
- (iii) Stability in the value of money to enable the medium of exchange to be a reliable unit of account, a just standard of deferred payments, and a stable store of value;

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<sup>56</sup> Muhammad Nejatullah Siddiqi, “Rationale of Islamic Banking” (Jeddah: King Abdulaziz University, 1981), Accessed September 1<sup>st</sup>, 2020, [https://iei.kau.edu.sa/Files/121/Files/152672\\_06-MNSiddiqi.pdf](https://iei.kau.edu.sa/Files/121/Files/152672_06-MNSiddiqi.pdf), 40.

<sup>57</sup> Siddiqi, “Rationale of Islamic Banking,” 11-13.

<sup>58</sup> Siddiqi, “Rationale of Islamic Banking,” 8-9.

<sup>59</sup> Which includes “the prohibition of all sources of ‘unjustified’ enrichment,” such as *riba*, as well as the risk mismatch between the lender and borrower in interest-based debt contracts. Muhammad Umer Chapra, *Islam and the Economic Challenge*, (Herndon: The International institute of Islamic thought, 1992), 54, 69.

(iv) Mobilisation and investment of savings for economic development in an equitable manner such that a just return is ensured to all parties concerned;

(v) Effective rendering of all services normally expected from the banking system.”<sup>60</sup>

Chapra’s five objectives expand on those summarised by El Gari and stated by al-Sadr and Siddiqi but exclude the provision of an interest-free system. Chapra instead addresses the bank’s interest-free nature in a separate chapter on *riba*<sup>61</sup>. His objectives resonate with those of the above academics and scholars based on the Shari’a’s objectives of wealth. Specifically, his first objective reflects El Gari’s first objective on building the Earth. His second objective likewise reflects El Gari’s second objective on the optimal distribution of wealth.

Chapra’s remaining objectives are economic and financial, rendering gains to the banks’ shareholders, its customers and the wider society. His reference to a banking system rather than an individual institution indicates the necessity of collective efforts to achieve the objectives. Chapra’s proposed objectives of an Islamic bank are therefore commercial, social and economic.

The review of the objectives of Islamic banks established by seven academics and scholars from the industry’s formative period provides a consistent position. Their objectives are the provision of banking services without using contracts prohibited in Islamic

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<sup>60</sup> Chapra, *Islam and the Economic Challenge*, 33.

<sup>61</sup> “*Ribā* technically refers to the ‘premium’ that must be paid by the borrower to the lender along with the principal amount as a condition for the loan or for an extension in its maturity. In this sense, *ribā* has the same meaning and import as interest,” Chapra, *Islam and the Economic Challenge*, 55.

law, financing economically beneficial and constructive projects, facilitating an equitable distribution of reward and the use of the bank's capabilities for social initiatives. None of the consulted views negated the bank's profit objective, but neither did they prioritise it over the other objectives. An Islamic bank does not therefore only pursue the interests of shareholders.

The process of rationalising the social objectives from their foundational principles can be understood from the publications of al-Sadr, Siddiqi and Chapra which are discussed over the next four paragraphs.<sup>62</sup> The first objective of the provision of banking services compliant with Islamic law is based on the fundamental objective of compliance with Islamic law. Siddiqi and Chapra substantiate this objective through reference to Quranic verses indicating the prohibition of *Riba*.<sup>63</sup> Chapra also refers to prophetic hadiths and further discusses justice between the transacting parties as an objective of the prohibition.

The second objective of financing economically beneficial and constructive projects is viewed by the theorists as fulfilling the financing requirements of economic, commercial and industrial activities. The fulfilment of these requirements is rationalized through the legal duty of satisfying basic human needs and alleviating hardship, which in their view can be achieved through economic prosperity.<sup>64</sup>

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<sup>62</sup> El Gari does not rationalise these social objectives as they are discussed in the context of the industry's progress on their achievement, rather than their justifications, El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisīn wa-l-Wāqī' al-Mu'āšir," 2.

<sup>63</sup> Al-Sadr, *al-Bank al-Lā-Ribawī fī-l-Islām*, 8-9; Chapra, *Islam and the Economic Challenge*, 56-62; Siddiqi, "Rationale of Islamic Banking," 27.

<sup>64</sup> Al-Sadr, *al-Bank al-Lā-Ribawī fī-l-Islām*, 10; Chapra, *Islam and the Economic Challenge*, 34.

The third objective of Islamic banking, that of facilitating an equitable distribution of reward, is sought by the theorists to deliver rewards to the entrepreneur in proportion to his efforts and risks. The reward is sought in order to uphold justice in financial transactions, where justice is identified as a fundamental principle in scripture.<sup>65</sup>

Finally, the founding theorists' objective of the use of the bank's capabilities for social initiatives is not specifically discussed in the three sources. However, Chapra's discussion of the second objective indicates that a basis of this objective would be contribution to society's economic prosperity. This was indicated above to have been sought to alleviate hardship.

The four previous paragraphs have explored the bases underlying the objectives sought of the industry by founding theorists. These include legal and moral bases, such as the prohibition of *riba* and the achievement of justice among transacting parties, respectively. The theorists' objectives demonstrate an underlying logic marked by intentionality and consequentiality, where each objective is sought to achieve specific Islamic rulings or guidance, with a view of its impact on the society and other stakeholders. Their consistent reference to similar underlying objectives reflects an inherent relation between Islamic banking and the social objectives discussed in this study. It also indicates a base logic for the identification of social objectives for the industry.

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<sup>65</sup> Chapra, *Islam and the Economic Challenge*, 35-36; Siddiqi, "Rationale of Islamic Banking," 32-34.

Following the establishment of the objectives of the theorists, we next present the objectives sought by the shareholders and directors of the banks. Their objectives are typically stated on the websites of their banks. The following objectives are those stated by the largest banks in each country in the country sample used in this study. The objectives of the banks have been obtained from their mission statements or elsewhere from their introductions. Reporting on their corporate social responsibilities has provided further information. The majority of surveyed banks state commercial rather than social objectives, as shown below. The finding is aligned with the premise of banks being profit-seeking institutions.

The objectives of the 11 banks along with related information are provided in Table 1 below. The table shows that seven of the banks had purely commercial objectives, where the bank's operations would be for the shareholders' benefit. An example of a commercial objective is that of Al Rajhi Bank: "To be most [*sic*] successful bank admired for its innovative service, people, technology and Sharia compliant products, both locally and internationally."<sup>66</sup> Two banks had both commercial and non-commercial objectives and the objectives of the final two were non-commercial. An example of a non-commercial objective is that of Bank Islam Malaysia: "We are founded to provide banking and financial solutions that are based on the principles of Shariah, which focus on balancing individual [*sic*] and social needs, as well as economic activities that promote justice as well as responsibility [*sic*] to the society and planet."<sup>67</sup> The banks also stated compliance with Islamic law as a feature, either

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<sup>66</sup> "Who we are," Al Rajhi Bank, accessed August 26<sup>th</sup>, 2020, <https://www.alrajhibank.com.sa/en/alrajhi-group/about/who-we-are>.

<sup>67</sup> "Who we are," Bank Islam Malaysia Berhad, accessed August 26<sup>th</sup>, 2020, <https://www.bankislam.com/corporate-info/about-us/who-we-are/>.

within their objectives or in related information. The theorists surveyed above had proposed social objectives for Islamic banks, including financing economically beneficial and constructive projects, facilitating an equitable distribution of reward and the use of the bank's capabilities for social initiatives. The consideration of these three objectives was surveyed in the sample of 11 banks based on their objectives and other corporate information. Only three banks mentioned objectives or strategies relating to each economic growth and facilitating an equitable distribution of reward. However, all surveyed banks have corporate social responsibility activities and six of them provide *zakat* collection and distribution services.

Bank	Type of stated objective	Objectives and statements refer to:					
		Compliance with Islamic law*	Other social objectives	Corporate Social Responsibility	Zakat services	Economic growth	Equitable distribution of reward
Bank Islam Malaysia Berhad	Social	✓	Justice, society, planet	✓	✓	✓	✓
Bank Nizwa	Commercial	✓	-	✓			
Bank Rakyat Indonesia Syariah	Social	✓	Sustainable banking, microfinance, poverty eradication, welfare improvement	✓	✓		✓
Albaraka Türk Katilim Bankasi	Commercial and social	✓	Ethics, society, environment	✓		✓	
Dubai Islamic Bank	Commercial	✓	-	✓			
Kuwait Finance House	Comprehensive	✓	-	✓	✓		
Meezan Bank	Commercial	✓	Justice, society	✓	✓		✓
Qatar Islamic Bank	Commercial	✓	Ethics, society, environment	✓	✓	✓	
Al Rajhi Bank	Commercial	✓	Ethics, society	✓			
Al Rayan Bank	Commercial	✓	Ethics, society	✓	✓		
Al Salam Bank	Commercial	✓	-	✓			

Table 1: Types of objectives stated by the largest Islamic banks in each country in our sample<sup>68</sup>

\* Albaraka Türk Katilim Bankasi refers to interest-free banking rather than to Shari'a compliance

The review of the objectives of banks therefore showed those of seven of the banks to be commercial and prioritise shareholders. Of these seven, four banks refer to concerns relating to social activities. The remaining four banks profess objectives including social or ethical concerns. This demonstrates that while academics and scholars had envisaged banks

<sup>68</sup> "Who we are," Bank Islam Malaysia Berhad; "Vision," Bank Nizwa, accessed August 26<sup>th</sup>, 2020, <https://www.banknizwa.om/about/vision>; "Vision and Mission," Bank Rakyat Indonesia Syariah, accessed August 26<sup>th</sup>, 2020, [https://www.brisyariah.co.id/tentang\\_kami.php/tentang\\_kami.php?f=visimisi&l=en](https://www.brisyariah.co.id/tentang_kami.php/tentang_kami.php?f=visimisi&l=en); "Get to Know Albaraka," Albaraka Türk Katilim Bankasi, accessed August 26<sup>th</sup>, 2020, <https://www.albaraka.com.tr/en/get-to-know-albaraka.aspx>; "Our role in tomorrow," Dubai Islamic Bank, accessed August 26<sup>th</sup>, 2020, <https://www.dib.ae/about-us/vision-and-mission>; "Vision & Mission," Kuwait Finance House, accessed August 26<sup>th</sup>, 2020, <https://www.kfh.com/en/home/Personal/aboutus/Vision-Mission.html#>; "About Meezan Bank," Meezan Bank, accessed August 26<sup>th</sup>, 2020, <https://www.meezanbank.com/about-us/>; "Mission, Vision & Values," Qatar Islamic Bank, accessed August 26<sup>th</sup>, 2020, <https://www.qib.com.qa/en/mission-vision-values/>; "Who we are," Al Rajhi Bank; "Our vision and values," Al Rayan Bank, accessed August 26<sup>th</sup>, 2020, <https://www.alrayanbank.co.uk/useful-info-tools/about-us/vision-and-values/>; "VISION & MISSION," Al Salam Bank, accessed August 26<sup>th</sup>, 2020, <https://www.alsalambahrain.com/vision-and-mission/>.

with major social objectives alongside their commercial aspirations, the majority of the reviewed Islamic banks have been founded and operated prioritising commercial gains, with social benefits being allocated a secondary priority. This finding is an indication of capitalist inclinations among shareholders of Islamic banks.

Following the review of the objectives stated by academics and banks, we finally examine those stated by the national regulators of Islamic banks and the industry's main standard-setting organisations. These organisations are the Accounting and Auditing Organisation for Islamic Finance Institutions (AAOIFI) and the Islamic Financial Services Board (IFSB).

AAOIFI is the industry's main standard-setting body and has issued standards on accounting, Islamic law, ethics and governance. Founded in 1991, it is based in Bahrain and consists of an international membership from more than 45 countries.<sup>69</sup> Its members include accounting and auditing offices, banks and other financial institutions, legal firms and regulators. This wide membership reflects a wide uptake of its standards. It also publishes a journal, holds conferences and certifies several skills relevant to the industry. Through its many standards that represent contributors and are adopted by banks and regulators from around the world, AAOIFI is an influential organisation. Accordingly, this study refers to its standards in most discussions and assessments.

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<sup>69</sup> "About AAOIFI," Accounting and Auditing Organization for Islamic Finance Institutions, accessed August 25<sup>th</sup>, 2020, <http://aaoifi.com/about-aaofifi/?lang=en>.

The IFSB is another standard-setting body, focused on the protection and enhancement of the industry's stability. This is sought through prudential standards and guiding principles for the banking, capital market and insurance sectors. Founded in 2002, it is based in Malaysia and consists of 185 members including banks and other financial institutions, international intergovernmental organisations, regulators, security exchanges and other service providers.<sup>70</sup> Similar to AAOIFI, the IFSB's vast participation and adoption awards it an influence in the industry. Its publications are also key sources leveraged in this study.

Of the 11 regulators in our sample and the two international standard setting-organisations, only four have stated objectives of Islamic banks, shown below:

- AAOIFI: "IFIs [Islamic financial institutions] have been established to assist in using wealth and financial resources in a manner beneficial to investors as well as to the community at large."<sup>71</sup>
- Bank Indonesia: "The objective of Sharia (Islamic) banking is to support the implementation of national development in the framework of improving justice, cooperation, and the people's welfare equitable distribution."<sup>72</sup>
- Qatar Central Bank (QCB): Their aim is to achieve profits through means other than *riba*, develop Shari'a compliant financial intermediation tools, provide financial services that aim to develop forms of social solidarity organised on the basis of a shared benefit and building expertise.<sup>73</sup>

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<sup>70</sup> IFSB, *Islamic Financial Services Industry Stability Report 2018*, 5.

<sup>71</sup> AAOIFI, *Accounting, Auditing and Governance Standards* (Manama: AAOIFI, 2015), 953.

<sup>72</sup> Bank Indonesia, "Act Of The Republic Of Indonesia Number 21 Of 2008 Concerning Sharia (Islamic) Banking," accessed January 29<sup>th</sup>, 2020, [https://www.bi.go.id/en/tentang-bi/uu-bi/Documents/act\\_21\\_2008.pdf](https://www.bi.go.id/en/tentang-bi/uu-bi/Documents/act_21_2008.pdf), 5.

<sup>73</sup> Translated and abridged from Qatar Central Bank, "Qānūn Maṣrif Qatar al-Markazi wa-Tanzīm al-Mu'assasāt al-Māliyya al-Ṣādir bi-l-Qānūn Raqam 13 li-Sanat 2012," accessed February 6<sup>th</sup>, 2022, <http://www.qcb.gov.qa/Arabic/Legislation/Law/Pages/QCBLaw.aspx>, 57.

- State Bank of Pakistan (SBP): The vision of “Strategic Plan Islamic Banking Industry of Pakistan 2014 – 2018” is “to evolve a stable and distinct Islamic Banking System based on Shariah principles that creates value for all stakeholders particularly the users and providers of Islamic financial services.”<sup>74</sup>

The statements of AAOIFI, Bank Indonesia and SBP show them to seek an Islamic banking system that brings benefit to the wider society. While Bank Indonesia refers to justice, cooperation, and equitable distribution, AAOIFI and SBP refer to a generic benefit. In order to further understand the benefits sought from Islamic banks by these regulators, the following paragraphs examine other statements by the regulators. AAOIFI and SBP extend the benefits to shareholders too. QCB seeks benefits for shareholders and customers only. The statements therefore reflect the regulators’ desire for the industry to bestow rewards upon both its owners and their communities.

After stating that their activities be “beneficial to investors as well as to the community at large,” AAOIFI then describes the activities of the financial institutions as being “in the best interest of the wider societal content.”<sup>75</sup> The references to the community are not expanded and thus cannot be directly analysed. However, its Accounting, Auditing and Governance Standards include voluntary policies on the reduction of adverse impacts on the environment; social, development and environment-based investment quotas; par excellence customer service; micro and small business and social savings and investments; charitable activities; *waqf* (endowments) management and *Qard Hasan* (benevolent,

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<sup>74</sup> SBP, “Strategic Plan Islamic Banking Industry of Pakistan 2014 – 2018,” <http://www.sbp.org.pk/Departments/Pdf/Strategicplanpdf/Strategy%20Paper-Final.Pdf>, 1.

<sup>75</sup> AAOIFI, *Accounting, Auditing and Governance Standards*, 953.

interest-free loans). These policies relate to social, economic and environmental benefits and could therefore represent the benefits sought by AAOIFI.

The Indonesian regulator has been shown above to centre its proclaimed objectives of the industry on national and social benefits. These values of justice, cooperation and equitable distribution are not delineated further. The regulator mentions instead the system's promotion of "fairness in transaction and ethical investment." However, neither aim is defined and thus cannot be interpreted further. Nonetheless, by focusing on benefits for the wider society and forgoing reference to shareholder returns, the Indonesian regulator has presented the Islamic banking as one with a social role.

The Pakistani regulator's vision of its strategic plan sought "value for all stakeholders particularly the users and providers of Islamic financial services."<sup>76</sup> This value can be understood through the same source. In relation to value for the providers of financial services, the regulator's target of growth of the industry suggests it to be a financial return.<sup>77</sup> As for value for the users of financial services, that would be sought through financial inclusion initiatives for the rural agriculture, SMEs, low cost housing and microfinance categories.<sup>78</sup> The Pakistani regulator's strategy thus demonstrates its objective that the industry creates value for all stakeholders, including the wider, marginalised society.

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<sup>76</sup> SBP, "Strategic Plan Islamic Banking Industry of Pakistan 2014 – 2018," 1.

<sup>77</sup> SBP, "Strategic Plan Islamic Banking Industry of Pakistan 2014 – 2018," 3-6.

<sup>78</sup> SBP, "Strategic Plan Islamic Banking Industry of Pakistan 2014 – 2018," 10-11.

The three regulators<sup>79</sup> therefore echo the academics' objectives of providing services that comply with Islamic law, financing economically beneficial and constructive projects, facilitating an equitable distribution of reward and the use of the bank's capabilities for social initiatives. However, not all three address the academics' entire objectives. As for the Qatari regulator, the similarity primarily relates to the first objective of compliance with Islamic law.

The Malaysian regulator has not published an explicit objective of the Islamic banking industry. However, its position on what the adjective "Islamic" means in this regard is found in its views on the industry's principles. In its introduction of the Malaysian financial sector, it states that "the underlying principles that govern Islamic banking are mutual risk and profit sharing between parties, the assurance of fairness for all and that transactions are based on an underlying business activity or asset. These principles are supported by Islamic banking's core values whereby activities that cultivate entrepreneurship, trade and commerce and bring societal development or benefit is encouraged."<sup>80</sup> This statement envisages a benefit for the bank from sharing the user's profits, who benefits by sharing their risks with the bank and from fairness in the contract. Society benefits from economic activity that is enabled by the bank's financing (such as trade financing). The statement therefore focuses on benefits gained purely from the financing arrangement. However, the regulator's concern with the banks' social engagement is found in a separate strategy.

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<sup>79</sup> The use of the term 'regulators' will include AAOIFI and the IFSB as their standards will be treated similar to national regulations.

<sup>80</sup> "Islamic Banking & Takaful," Bank Negara Malaysia, accessed August 27<sup>th</sup>, 2020, [https://www.bnm.gov.my/index.php?ch=fs&pg=fs\\_mfs\\_bank&ac=155](https://www.bnm.gov.my/index.php?ch=fs&pg=fs_mfs_bank&ac=155).

The Malaysian regulator launched its Value-based Intermediation (VBI) strategy with the “aim to strengthen the roles and impact of Islamic banking institutions.”<sup>81</sup> The impact of the new strategy extends “to the economy, community and environment, consistent with the shareholders’ sustainable returns and long-term interests.”<sup>82</sup> The social considerations introduced in the document are the assessment of implications of activities on the society, environment and economy and “collaboration with wider stakeholders, including those with no direct business relationships such as NGOs, societies and governments.”<sup>83</sup> The introduction of these stakeholders adds to the previous statement that focused on benefits through financing arrangements. The Malaysian regulator therefore also seeks to preserve and promote the interests of these additional stakeholders. The regulator provides examples of projects that were beneficial to the banks while supporting the stakeholders, such as the construction of affordable housing, the adoption of environmental and social standards and the provision of funding and consultation to agricultural projects.<sup>84</sup> While not prescribing it as mandatory and not setting it as a direct objective, the regulator’s VBI strategy demonstrates its views of the social responsibilities of Islamic banks. The Malaysian regulator is therefore targeting objectives consistent with those of the academics.

The remaining regulators in the sample, those of Bahrain, the IFSB, Kuwait, Oman, Saudi Arabia, Turkey, the UAE and the UK, have not stated their objectives of the industry. In these jurisdictions, the objectives of the shareholders gain an added importance. The silence of the regulators suggests their acceptance of the objectives and operations of the banks, as

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<sup>81</sup> Bank Negara Malaysia (BNM), “Value-based Intermediation: Strengthening the Roles and Impact of Islamic Finance,” <https://www.bnm.gov.my/index.php?ch=57&pg=137&ac=612&bb=file>, 1.

<sup>82</sup> BNM, “Value-based Intermediation,” 1.

<sup>83</sup> BNM, “Value-based Intermediation,” 13.

<sup>84</sup> BNM, “Value-based Intermediation,” 16.

should the regulators differ, they have the power to intervene. These regulators would thus seem to accept the commercial objectives of banks in their jurisdictions. Their acceptance further reflects a capitalist foundation of regulations, the impact of which will be discussed from chapter three.

The examination has so far shown similarities between the objectives of regulators and theorists and differences to those of the banks. The similarity indicates a persistence of the views of the six theorists, as the regulations reflect the relevance of their objectives across more than four decades. Separately, the objectives and statements of the regulators and the banks show another commonality. Two regulators and three banks have expressed objectives or plans relating to the protection of the environment, as shown in the following paragraph. With the rising awareness in climate change and its consequences, the role of finance in exacerbating it has gained attention. This has led to interest in restricting the contribution of finance to the harms and deploying it towards projects that seek to limit harm to the environment. The interest has led to the development of a 'green' finance subsector.<sup>85</sup>

Two regulators and three banks have expressed objectives or plans relating to the protection of the environment. Within the regulators, the Malaysian regulator's initiatives fall under the aforementioned VBI strategy, whereas AAOIFI has standards on "reducing the impact of the IFI on the environment" and "environment based investment quotas."<sup>86</sup> As for

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<sup>85</sup> The topic is covered in Marco Migliorelli and Philippe Dessertine (eds.), *The Rise of Green Finance in Europe Opportunities and Challenges for Issuers, Investors and Marketplaces* (Cham: Springer International Publishing AG, 2019).

<sup>86</sup> AAOIFI, *Accounting, Auditing and Governance Standards*, 978-979.

the banks, two have stated generic positions of “integrat[ing] social and environmental concerns in our business operations.”<sup>87</sup> Bank Islam Malaysia states its responsibility to the planet as a principle of the Shari‘a which it is founded to address.<sup>88</sup> BRIsyariah’s plans include “financing environmentally friendly projects while prioritizing the implementation of green banking in its operational activities.”<sup>89</sup> Finally, Albaraka Türk operates a comprehensive Sustainable Banking Program with eight subjects.<sup>90</sup> It has set the environment as one subject with its own policy and management system. The banks thus also demonstrate interest in environmental sustainability through statements and through initiatives.

The objective of environmental sustainability is adopted by some researchers in addition to the banks and regulators. For example, Mehmet Asutay identifies it to be an objective of an Islamic moral economy and thus of Islamic banks.<sup>91</sup> Secondly, the authors of a report on “Islamic Finance and Sustainable and Responsible Investment” find the consideration of banks of environmental sustainability to be an objective beyond compliance with Islamic commercial law only.<sup>92</sup> Third, Umar Moghul discusses the importance of the consideration

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<sup>87</sup> “Social Responsibility,” Qatar Islamic Bank, accessed September 29<sup>th</sup>, 2020, <https://www.qib.com.qa/en/corporate-social-responsibility/>; Kuwait Finance House, *Corporate Profile 2018*, accessed September 29<sup>th</sup>, 2020, <https://www.kfh.com/dam/jcr:9c7f0416-b79a-4f5d-8d07-eb8fe43aad9a/Corporate Profile - En.pdf>, 14.

<sup>88</sup> “Who we are,” Bank Islam Malaysia Berhad.

<sup>89</sup> BRIsyariah, *Laporan Keberlanjutan 2018*, accessed January 27<sup>th</sup>, 2021, [https://www.brisyariah.co.id/images/upload/reports/c6f01e76b9737c343dfeacb9fb372a28\\_Laporan\\_Keberlanjutan.pdf](https://www.brisyariah.co.id/images/upload/reports/c6f01e76b9737c343dfeacb9fb372a28_Laporan_Keberlanjutan.pdf), 1.

<sup>90</sup> “Albaraka Türk Sustainable Banking Program,” Albaraka Türk Katilim Bankasi, accessed September 29<sup>th</sup>, 2020, <https://www.albaraka.com.tr/en/albaraka-turk-sustainable-banking-program-2.aspx>.

<sup>91</sup> Mehmet Asutay, “Conceptualising and Locating the Social Failure of Islamic Finance: Aspirations of Islamic Moral Economy vs the Realities of Islamic Finance,” *Asian and African Area Studies*, 11, 2 (2012), 105. Asutay is director of the Durham Centre for Islamic Economics and Finance.

<sup>92</sup> Riaz Ansary, Salma Sairally, Farrukh Habib and Hafas Furqani, *Islamic Finance and Sustainable and Responsible Investment (SRI): An Ethical Dimension* (Kuala Lumpur: ISRA, 2017), 63.

of environmental sustainability by Islamic banks in light of its protection in Islamic law.<sup>93</sup>

These three views are part of a growing acknowledgement by academics of environmental sustainability as an objective of the industry. However, this recognition as an additional objective is not widespread. Our review of literature in the Arabic and English languages on reform of the industry has found the focus to be on other topics discussed in the following section. The relatively recent growth in interest in environmental sustainability is likely to have contributed to the focus on other topics with longer histories.

The adoption of banks, regulators and a group of academics of objectives relating to environmental sustainability suggests that as the industry evolved, so have its objectives. As its adoption has not been universal, this study will consider environmental sustainability as an objective within El Gari's final subobjective of adopting goals of a social nature.

This section has shown that three important stakeholders seek two differing groups of objectives from Islamic banking. Academics and regulators view the objective of the industry to be the provision of banking services compliant with Islamic law, financing economically beneficial and constructive projects, facilitating an equitable distribution of reward and the use of the bank's capabilities for social initiatives. These objectives also reflect what these stakeholders view the adjective "Islamic" represents. They form the reference social objectives in this study. While these objectives are primarily but not exclusively social, banks have stated objectives that are primarily commercial. The banks therefore prioritise shareholder returns above social considerations, whereas academics and some regulators

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<sup>93</sup> Umar Moghul, *A Socially Responsible Islamic Finance- Character and the Common Good* (New York: Palgrave Macmillan, 2017), 62-63, 127. Moghul is a researcher in Islamic law and ethics and a corporate lawyer involved in the Islamic finance industry.

seek equivalent priorities. Since most of the surveyed regulators do not state their positions, the banks' commercial objectives do not contravene their regulators' stance. In economies guided by capitalist visions and in the absence of regulations directing otherwise, it is normal for banks to be driven by commercial concerns.

#### Track record

The above examination showed a continuation of objectives sought of Islamic banks by founding theorists through those of the regulators. The common reference of compliance with Islamic law and social objectives reflected what the adjective "Islamic" represents. To relate the objectives to industry practice, this section will review indicators of the progress achieved in the industry in relation to the four main objectives identified in this study: the provision of banking services compliant with Islamic law, financing economically beneficial and constructive projects, facilitating an equitable distribution of reward and the use of the bank's capabilities for social initiatives, including the more recent objective of environmental sustainability. It will show the banks to have not achieved these objectives.

The first objective sought of Islamic banks by academics, regulators and even banks is the provision of banking services compliant with Islamic law. It is of particular importance as the operations and services of conventional banks are judged to contravene Islamic rulings, such as that on the prohibition of dealing in *riba*.<sup>94</sup> Banks have directly engaged with this objective, most commonly through the appointment of specialists in commercial Islamic law

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<sup>94</sup> The rulings and principles contravened by the operations of conventional banks are not addressed in this study. Readers can refer to the works of Chapra and Siddiqi cited above.

to approve the compliance of their products with Islamic law and to monitor their applications.

These specialists are referred to as scholars, Shari'a scholars and SSB scholars. They are typically appointed to a board known as a Shari'a Supervisory Board, a Shari'a board or a Shari'a committee. 1162 SSB scholars were recorded to have occupied positions in 1389 Islamic financial institutions (comprising banks, non-banking financial institutions, *takaful* (Islamic insurance) firms and capital markets) in 2017.<sup>95</sup> The oversight of these boards serves to assure the achievement of the objective of compliance with Islamic law. Their supervision is furthered in many countries by regulatory oversight. The boards and their regulations are further addressed below and they form one of the key subjects of this study.

Despite the supervision of these scholars, the banks' achievement of compliance with Islamic law is not agreed upon universally. Critics of its compliance include Abdulazeem Abozaid, Rafiq Yunus al-Masri (d. 2021), Mahmoud El-Gamal and Salih al-Husayyin (d. 2013).<sup>96</sup> Doubts over the compliance were inevitable in light of the diversity in Islamic law, demonstrated not least by the involvement of six legal schools in the industry: the four Sunni (the Hanafi, Hanbali, Maliki and Shafi'i schools), the Twelver Shi'i (Shi'i hereafter) and the Ibadhi legal schools. This is in spite of the industry's legal scholars adopting an approach to Islamic law that seeks to overcome differences between the schools. For example,

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<sup>95</sup> Shereen Mohamed, Abdulaziz Goni and Shaima Hasan, "Islamic Finance Development Report 2018" (Dubai: Thomson Reuters, 2018), 24.

<sup>96</sup> Abdulazeem Abozaid, "Critical Review of the Tools of Ijtihād Used in Islamic Finance," *Islamic Economic Studies* 24, 1 (2016), 77-94; Rafiq Yunus al-Masri, *Mādhā fa'al al-Iqtisādiyyūn al-Muslimūn* (Damascus: Dār al-Maktabī, 2012); Mahmoud A. El-Gamal, "Incoherence of Contract-Based Islamic Financial Jurisprudence in the Age of Financial Engineering," *The Wisconsin International Law Journal* 25, 4 (2007): 605-624; Salih al-Husayyin, *al-Hay'āt al-Shar'iyya al-Wāqī' wa-Tarīq al-Taḥawwul li-Mustaqbal Afḍal* (Riyadh: Markaz al-Murabbī, 2017).

discussions of international Shari‘a committees include scholars from different legal schools and those not belonging to any. Some of the legal opinions they issue compile views from different legal schools. The most prominent acceptance of such differences is found in the Shari‘ah board of AAOIFI and in the International Islamic Fiqh Academy (IIFA). Both platforms are formed of and accepted by legal scholars from different schools.

The IIFA is an organ of the Organisation of Islamic Cooperation (OIC).<sup>97</sup> It is a council of legal scholars representing 57 countries, founded in Mecca in 1981.<sup>98</sup> Its website lists twelve objectives for the academy, including the exercise of group deliberations to establish legal positions on contemporary issues including those relating to finance.<sup>99</sup> The main avenue for the IIFA’s discussions is its conference, of which 24 have been held at irregular intervals since 1983. The participants in the conferences and other events are the IIFA’s members. The members are specialists in Islamic law that have been nominated by their governments and a minority is appointed by the IIFA’s board of directors.<sup>100</sup> These governments are also the funders of the IIFA. The nomination guidelines require the consideration of the different legal schools. It also holds separate fora and projects, some of which address matters relating to Islamic finance. The IIFA’s decisions are not automatically obligatory and can be adopted by entities such as governments and SSBs on a voluntary basis. The agendas of IIFA’s conferences commonly include topics relating to Islamic finance.

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<sup>97</sup> The OIC was established in 1969 to facilitate cooperation and solidarity among Muslim nations, with a membership of 57 states. “History,” Organisation of Islamic Cooperation, accessed August 29<sup>th</sup>, 2020, [https://www.oic-oci.org/page/?p\\_id=52&p\\_ref=26&lan=en](https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en).

<sup>98</sup> “Nabdha ‘an al-Majma’,” IIFA, accessed December 14<sup>th</sup>, 2017, <http://www.iifa-aifi.org/iifa>; “al-Duwal Al-A‘dā’,” International Islamic Fiqh Academy, accessed December 13<sup>th</sup>, 2017, <http://www.iifa-aifi.org/states>.

<sup>99</sup> “Al-Nizām al-Asāsī li-Majma’ al-Fiqh al-Islāmī al-Duwalī,” IIFA, accessed December 13<sup>th</sup>, 2017, <http://www.iifa-aifi.org/النظام-الأساسي-لمجمع-الفقه-الإسلامي>.

<sup>100</sup> “Al-Nizām al-Asāsī li-Majma’ al-Fiqh al-Islāmī al-Duwalī,” IIFA.

While the prevalence of various legal schools has led to varying legal positions in the industry, doubts over the Islamic banks' compliance with Islamic law are caused by a different factor. Islamic banks have developed products and services that replicate those offered by conventional banks and considered prohibited in Islamic law. The replication of these prohibited products -by an industry developed on the premise of compliance with Islamic law- has been a main source of scepticism. This has been exacerbated by the use of contracts deemed prohibited by the IIFA to replicate conventional products. An example of this is the organised *tawarruq*<sup>101</sup> contract. While the IIFA has prohibited its use, it has been widely adopted in the industry, forming 33%, 19% and 42% of total financing in Kuwait, Saudi Arabia and the UK, respectively.<sup>102</sup> Therefore, the compliance of Islamic banks with Islamic law is confirmed by many scholars, not least those serving on SSBs, and contested by other outsiders. The industry's achievement of the objective of providing banking services compliant with Islamic commercial law is dependent on the opinion of the beholder.

A second objective sought of the industry primarily by academics and regulators is the provision of finance to industrial and agricultural projects which are deemed to be beneficial for economies. Progress on this objective is indicated by El Gari himself in the same paper, where he acknowledges that banks have not sought its achievement.<sup>103</sup> Our review of data

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<sup>101</sup> AAOIFI defines this contract as "the process of purchasing a commodity for a deferred price determined through Musawamah (Bargaining) or Murabahah (Mark-up Sale), and selling it to a third party for a spot price so as to obtain cash," AAOIFI, *Shari'ah Standards*, 758.

<sup>102</sup> IIFA, "Qarār bi-Sha'n al-Tawarruq: Ḥaqīqatuh, Anwā'uh (al-Fiqhī al-Ma'rūf wa-l-Maṣrafi al-Munazzam)," declarations of the 19<sup>th</sup> convention of the IIFA, Sharjah, April 26-30<sup>th</sup>, 2009, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/2302.html>; "Data by Country," IFSB, accessed August 31<sup>st</sup>, 2020, [https://www.ifsb.org/psifi\\_03.php](https://www.ifsb.org/psifi_03.php). The full extent of the use of *tawarruq* in the industry is unclear as most surveyed banks and regulators do not disclose the data. The debate over its legitimacy is likely to contribute to the lack of disclosure.

<sup>103</sup> El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisīn wa-l-Wāqī' al-Mu'āṣir," 10.

published by the IFSB on the financing of these two sectors validates his view. Chart 2 below displays financing to the manufacturing and the agriculture, forestry, hunting and fishing sectors as a proportion of total financing by Islamic banks in the countries from our sample for which the IFSB has published data. Data for Bahrain, Kuwait, Oman and Turkey was not available, neither was financing of manufacturing in Qatar. The data shows financing of agriculture to be extremely negligible, with a median of 1% in our sample. Financing of manufacturing is also low, with a median of 3.8%. The data demonstrates that finance allocated to these sectors is insignificant in relation to other sectors. Banks have instead prioritised wholesale, retail, trade and personal financing. The data thus shows that the objective of financing industrial and agricultural projects has not been achieved.

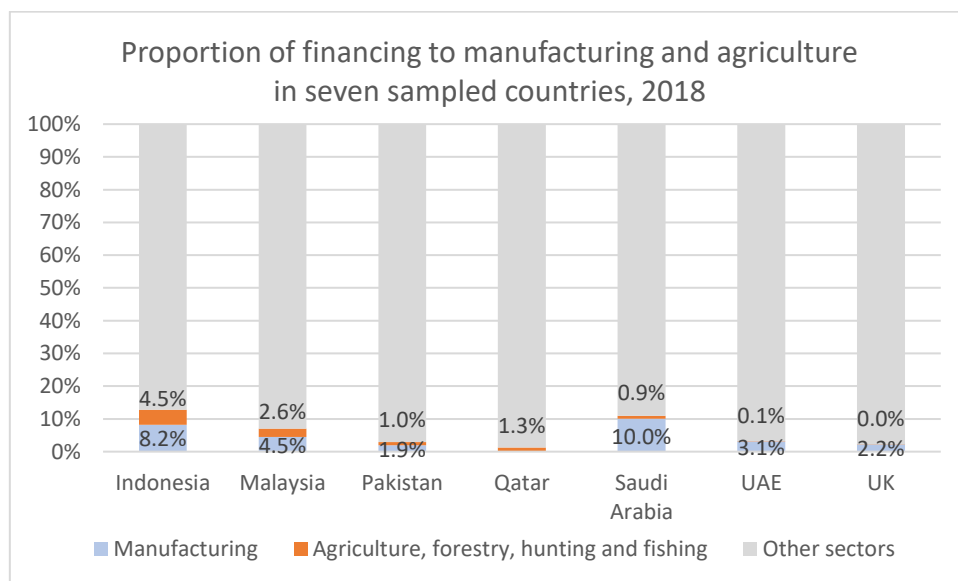


Chart 2: Financing of manufacturing and agricultural projects as a proportion of total financing by Islamic banks in 2018 in seven countries from our sample.<sup>104</sup>

A third objective sought of the industry is an optimal distribution of wealth through the use of partnership contracts and the provision of services to those with lower incomes. El Gari again states that banks have not sought to achieve this objective and that its

<sup>104</sup> "Data by Country," IFSB.

responsibility has been left to governments.<sup>105</sup> This objective consists of two indicators.

Progress on the first indicator, the use of partnership contracts, is shown in Chart 3 below.

The IFSB has published country-wise data on the uses of specific contracts by Islamic banks, including six countries from our sample.<sup>106</sup> In Kuwait, Saudi Arabia and the UK, the use of partnership contracts was extremely negligible, forming up to 1% of total financing. The use of the contracts by Indonesian, Pakistani and Malaysian banks has been more prevalent, forming 9-29% of total financing. However, even their use of partnership contracts remains eclipsed by others. The data therefore validates El Gari's assessment that banks have not pursued the objective of using partnership contracts.

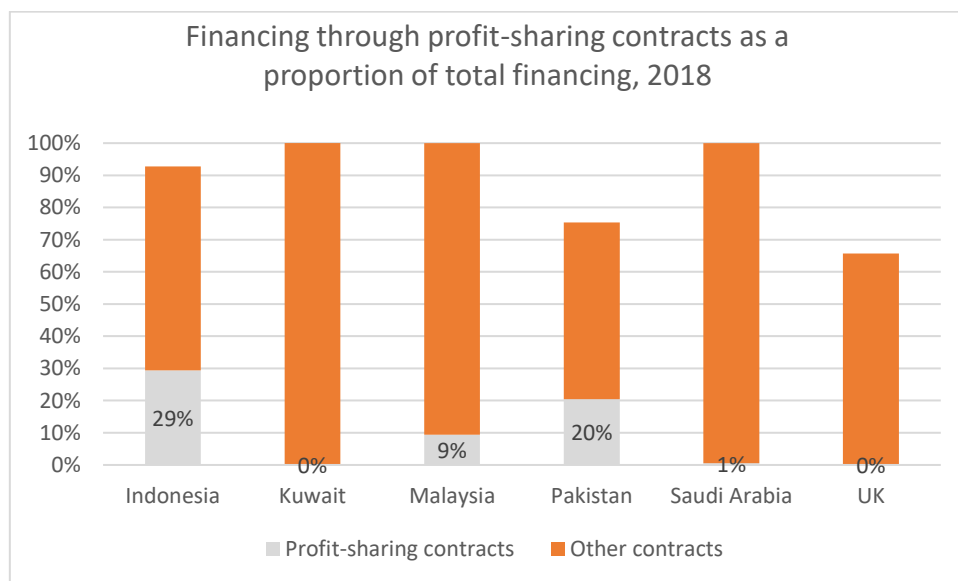


Chart 3: Financing through profit-sharing contracts as a proportion of total financing by Islamic banks in 2018 in six countries from our sample.<sup>107</sup>

<sup>105</sup> El Gari, "al-Bank al-Islāmī Bayn Fikr al-Mu'assisin wa-l-Wāqī' al-Mu'āšir," 10-11.

<sup>106</sup> The chart includes uses of the *mudaraba* and *musharaka* contracts. It excludes the diminishing *musharaka* contract where rises in the value of the asset are not shared with the bank, eliminating the profit-sharing component. See for example "Home Purchase Plan," Al Rayan Bank, accessed September 29<sup>th</sup>, 2020, <https://www.alrayanbank.co.uk/media/284789/hpp-product-information.pdf>, 7.

<sup>107</sup> "Data by Country," IFSB.

The state of the industry in relation to the three objectives discussed so far has been the basis of its description as mirroring conventional banking. The objective of compliance with Islamic law was shown to be subjective. Contracts that are contested and those that are not have both allowed Islamic banks to offer products that replicate conventional products. The second objective of contribution to economic development by financing agriculture and manufacturing was found to be neglected. As was the third objective of using profit-sharing contracts, with Islamic banks opting for debt-based contracts and others. The neglect of the second and third objectives allows banks to offer products with favourable risk-return characteristics. This indicates that they have prioritised profits over economic development and circulation of wealth in their sectoral allocations and contract choices, respectively. The prioritisation of profits also reflects the common objective in conventional banking of maximising returns to shareholders. Failure to achieve the first three objectives and, to a lesser extent, the remaining two, can thus be considered separately or in combination as an indication of the adoption of conventional objectives.

The second indicator of El Gari's third objective of an optimal distribution of wealth is to include those with lower incomes in the banks' services, also referred to as financial inclusion. Research by the International Monetary Fund (IMF) on the contribution of Islamic banking to financial inclusion in their host countries did not find their contributions to be statistically significant.<sup>108</sup> Other research into the topic has looked at the disclosure of 19 banks of their initiatives, finding a "critical silence and scarcity of disclosures by the banks

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<sup>108</sup> Sami Ben Naceur, Adolfo Barajas and Alexander Massara, *Can Islamic Banking Increase Financial Inclusion?* IMF Working Papers 15/31, 2015, 24-25.

investigated.”<sup>109</sup> The researchers expected banks to disclose initiatives in financial inclusion as they “are key venues for Islamic banks to demonstrate that their activities are in line with Islamic teachings and Sharia” and because it “signifies the importance of these issues to the company.”<sup>110</sup> The banks’ silence on financial inclusion thus indicates that they do not prioritise the issue or that they have not engaged with them.

In order to further understand the involvement of Islamic banks in financial inclusion, we surveyed the provision of micro financing by Islamic banks.<sup>111</sup> This was through an examination of their disclosures on their websites and reports released publicly on the internet. The survey covered not only banks in our country sample, but 15 additional countries, encompassing 140 banks.<sup>112</sup> Of 76 Islamic banks in the countries in our sample, 46 do not offer micro finance products, while 30 do, as shown in Chart 4 below. Of these 30 banks, Indonesia is the main host with 13. No Islamic banks in Kuwait, Oman, Qatar, the UAE and the UK offer micro financing. As for the wider survey of 140 banks, it found that 75 did not offer micro financing. Among the banks that did, the scale of their services has not been clear; most did not state the sizes of their portfolios and some combined them with financing of larger categories. Two banks disclosed the sizes of their portfolios to be smaller than USD 15,000.<sup>113</sup> These two banks and others offer micro financing as charity initiative rather than a core service. Such indicators reveal that even for the 65 banks providing micro

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<sup>109</sup> Rania Kamla and Hussain Gulzar Rammal, “Social reporting by Islamic banks: Does social justice matter?” *Accounting, Auditing & Accountability Journal* 26, 6 (2013), 16.

<sup>110</sup> Kamla and Rammal, “Social reporting by Islamic banks: Does social justice matter?” 16.

<sup>111</sup> The specification of what constitutes micro differs by country. The classification of a service as micro is therefore based on a banks’ declaration, which is based on regulations in countries where regulators acknowledge the category.

<sup>112</sup> Refer to Appendix 1 for the names of the banks offering services.

<sup>113</sup> Al Baraka Banking Group B.S.C., *Sustainability & Social Responsibility Report 2017*, <https://www.albaraka.com/media/pdf/cc/AlBarakaCSREnglishFinal.pdf>, 26, 33.

financing, it is not necessarily a comprehensive and accessible service. The findings show that micro financing has been adopted by many Islamic banks but has not become a core and common service. As the majority of surveyed banks do not offer the service, it has not become mainstream. The objective of optimal distribution of wealth is largely neglected in relation to the use of profit-sharing contracts. Neither has the objective been achieved through financial inclusion, although progress has been recorded in terms of the number of banks engaging with the cause.

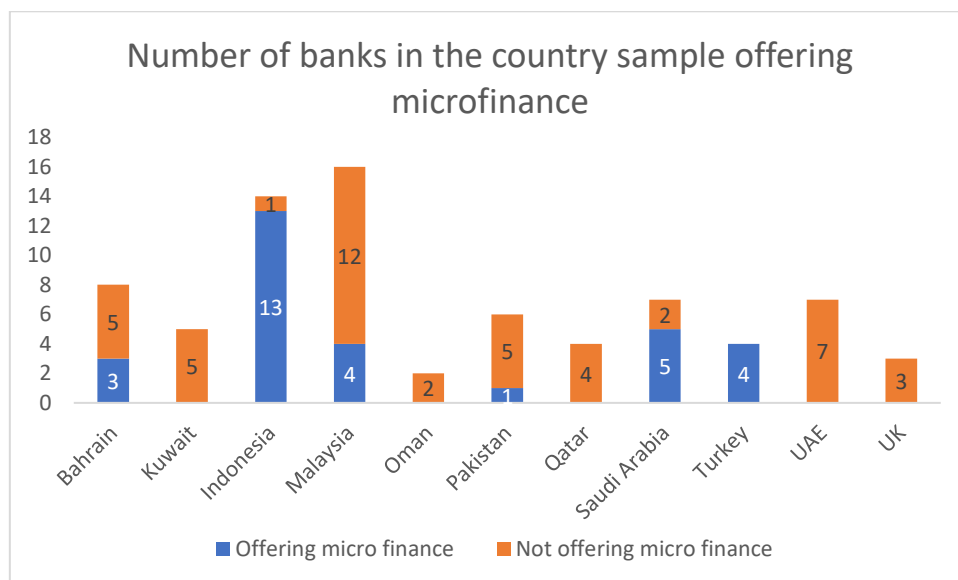


Chart 4: Number of Islamic banks in the country sample offering microfinance <sup>114</sup>

The final objective among those of early theorists summarised by El Gari is the adoption of goals that are of a general social nature, such as combating poverty by collecting and distributing *zakat*. Table 1 above shows that 6 of 11 sampled banks operated *zakat* collection services, whereas Kamla and Rammal’s sample of 19 banks included 16 stating their provision of *zakat* collection services and 18 stating charitable activities and donations.

<sup>114</sup> Refer to Appendix One for the names of the banks offering microfinance services.

The specific cause of collecting and distributing *zakat* is thus indicated to be addressed in principle. However, Kamla and Rammal, the researchers whose works they have discussed and others such as Asutay view that the banks' social engagement should extend beyond *zakat* and donations.<sup>115</sup> Kamla and Rammal sought statements by the banks disclosing services to "projects and investments that have social emphases and are geared to enhance equality and social justices in societies."<sup>116</sup> They found only 8 banks of 19 to disclose such activities while providing limited information. However, we have not found recent empirical studies on the banks' engagement with social causes through financing rather than through charity. The Malaysian and Pakistani regulators' adoption of the aforementioned strategies to address this suggests that the achievements of banks have been limited. Therefore, the narrower objective of the provision of *zakat* collection and disbursement services has been achieved by many banks. Progress on the wider objective of engagement with social causes is less apparent and further research into their achievement is required but is beyond the scope of this study.

The previous section demonstrated the recent adoption of environmental sustainability as an additional social objective by regulators, banks and some academics. Despite the growth in interest in environmental sustainability, the following two paragraphs indicate that banks have not taken actions towards its achievement.

In a study of corporate social responsibility declarations by 46 Islamic financial institutions in 2013, only a minority of 19 admitted to avoiding environmentally polluting

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<sup>115</sup> Kamla and Rammal, "Social reporting by Islamic banks: Does social justice matter?" 8, 14; Mehmet Asutay, "Conceptualisation of the Second Best Solution in Overcoming the Social Failure of Islamic Finance," 172-175.

<sup>116</sup> Kamla and Rammal, "Social reporting by Islamic banks: Does social justice matter?" 14.

activities.<sup>117</sup> In 2015, the then-CEO of HSBC Amanah in Malaysia also acknowledged that Islamic financial institutions were not considering social and environmental risks.<sup>118</sup> He noted that they were lagging in their measurement and disclosure of their environmental impact, as well as in their adoption of global initiatives. His views indeed reflect the absence of Islamic banks in organisations and agreements on the disclosure of involvement in environmentally unsustainable practices, such as CERES and the Equator Principles.<sup>119</sup> Only one bank had joined each of the Global Alliance for Banking on Values, the Partnership for Carbon Accounting Financials and the Global Reporting Initiative.<sup>120</sup> This indicates that few Islamic banks have prioritised and proactively sought to develop processes that facilitate environmental consideration.

Public disclosures also reveal Islamic banks to finance projects harmful to the environment. Firstly, banks commonly finance fossil fuel development and processing projects, particularly in the GCC.<sup>121</sup> Secondly, research by environmental agency Forests &

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<sup>117</sup> Beebee Salma Sairally, "Evaluating the corporate social performance of Islamic financial institutions: an empirical study," *International Journal of Islamic and Middle Eastern Finance and Management*, 6, 3 (2013), 248.

<sup>118</sup> Rafe Haneef, "Has Islamic Finance Bridged the Disconnect with the Real Economy?" presented at the 5<sup>th</sup> ISRA-IRTI-Durham University Strategic Roundtable Discussion, Kuala Lumpur, April 29<sup>th</sup>, 2015, 8.

<sup>119</sup> "EP Association Members & Reporting," Equator Principles, accessed September 29<sup>th</sup>, 2020, <https://equator-principles.com/members-reporting/>.

<sup>120</sup> "List of the GABV Member Banks," Global Alliance for Banking on Values, accessed September 29<sup>th</sup>, 2020, <http://www.gabv.org/wp-content/uploads/list-of-member-banks-1.pdf>; "Financial institutions taking action," Partnership for Carbon Accounting Financials, accessed September 29<sup>th</sup>, 2020, <https://carbonaccountingfinancials.com/financial-institutions-taking-action#overview-of-institutions>; "Community Members – 16 September 2020," Global Reporting Initiative, accessed September 29<sup>th</sup>, 2020, <https://www.globalreporting.org/media/mgfjezja/community-members-16-sept-2020.pdf>

<sup>121</sup> "Petronas 2020," Islamic Finance Foundation, accessed September 30<sup>th</sup>, 2020, <https://www.sukuk.com/sukuk-new-profile/petronas-global-sukuk-3893/#/?playlistId=0&videoid=0>; Nada Rifai, "Kuwait's NBK, KFH arrange \$1.2bln facility for national oil company," *Zawya*, November 5<sup>th</sup>, 2019, [https://www.zawya.com/mena/en/business/story/Kuwaits\\_NBK\\_KFH\\_arrange\\_12bln\\_facility\\_for\\_national\\_oil\\_company-ZAWYA20191105103024/](https://www.zawya.com/mena/en/business/story/Kuwaits_NBK_KFH_arrange_12bln_facility_for_national_oil_company-ZAWYA20191105103024/); Total, "Raffinerie de Jubail : Saudi Aramco Total Refining and Petrochemical Company (SATORP) Finalise le Financement pour un Montant de 8,5 milliards de Dollars," Press Release, June 25<sup>th</sup>, 2010, <https://www.total.com/media/news/press-releases/raffinerie-de-jubail-saudi-aramco-total-refining-and-petrochemical-company-satorp-finalise-le>; "Bahrain's Bapco completes multibillion-dollar financing," *Reuters*, May 19<sup>th</sup>, 2019, <https://www.reuters.com/article/bahrain-oil-financing/update-1->

Finance Islamic banks in Malaysia to have financed 15 palm oil and rubber plantations (amounting to USD 115 million) that they identified to have contributed to deforestation.<sup>122</sup> The studies, disclosures, memberships and third-party research therefore show Islamic banks to have neglected the protection of natural environments.

The assessment of the achievement of the Islamic banks of the objectives of founding theorists and regulators has thus found limited progress. The first objective of compliance with Islamic law is claimed to be achieved, but some contracts used by the banks are judged to be prohibited by many others. The contention over the contracts renders the objective to remain unachieved in the view of critics. The second objective of supporting development through financing industrial and agricultural projects was shown to be neglected, as was the third objective of an optimal distribution of wealth through the use of partnership contracts. Also forming the third objective is financial inclusion, on which limited progress has been made with a minority of surveyed banks. Progress was found to have been made with the fourth objective of the collection and disbursement of *zakat*, commonly conducted by the banks. Finally, the fifth objective of environmental sustainability was shown to have been neglected in the industry. The assessment therefore shows that Islamic banks have not

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bahrains-bapco-completes-multibillion-dollar-financing-idUSL5N22V0J1; Apicorp Sukuk Limited, *Base Prospectus*, 2019, <https://www.centralbank.ie/docs/default-source/regulation/prospectus-regulation/2019/prospectusdoc-2019-05/job20004633-baseprospectus.pdf?sfvrsn=2>; "QIB Participated in Murabaha Facility to NOGA Holding," Qatar Islamic Bank, accessed September 30<sup>th</sup>, 2020, <https://www.qib.com.qa/en/news/qib-participated-in-murabaha-facility-to-noga-holding/>; Indrajit Sen, "Bank Nizwa to arrange \$150mn South Sea Energy loan," *Oil & Gas Middle East*, March 21<sup>st</sup>, 2016, <https://www.oilandgasmiddleeast.com/article-15462-bank-nizwa-to-arrange-150mn-south-sea-energy-loan>; "Gulf Marine Services secures \$620m six-year syndicated financing," *Gulf News*, December 19<sup>th</sup>, 2015, <https://gulfnews.com/business/gulf-marine-services-secures-620m-six-year-syndicated-financing-1.1640225>.<sup>122</sup> "Explore the Data," Forests and Finance, accessed September 30<sup>th</sup>, 2020, <https://forestsandfinance.org/data/>.

achieved the objectives of founding theorists and regulators. The persistence of this state over multiple decades also shows the prevalence of the shareholders' capitalist tendencies.

### Shari'a supervisory boards

The compliance of Islamic banks with Islamic law was shown to be an objective common across all surveyed stakeholder groups. The compliance is sought through the appointment of Shari'a Supervisory Boards and through regulatory oversight. A SSB is a governance requirement unique to Islamic financial institutions and is largely composed of Islamic legal scholars. To understand the nature of the SSB's achievement of compliance, this section will present their responsibilities and the forms of regulations they are subjected to. The section will then address SSB operations, non-compliance risk, reporting and related features of SSB members. The section will show their primary responsibilities to be the approval and monitoring of the compliance of the banks with Islamic law.

The creation of SSBs is mandated by most regulators, who also shape the appointment process. SSBs are formally appointed by a bank's shareholders or its board of directors, which, in countries such as Pakistan and Qatar, is subject to the approval of the regulator.<sup>123</sup> However, even the shareholders' appointment is typically based on recommendations by the board of directors.<sup>124</sup> The involvement of the board of directors in the appointment of SSBs thus challenges their independence from the bank's management. Other regulations

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<sup>123</sup> State Bank of Pakistan ("SBP") Islamic Banking Department, "Shari'ah Governance Framework for Islamic Banking Institutions," (Karachi: State Bank of Pakistan, 2018), 3; Qatar Central Bank ("QCB"), "Corporate Governance Principles for Banks," (Doha: Qatar Central Bank, 2015), 44.

<sup>124</sup> Central Bank of Bahrain ("CBB"), "Shari'a Governance Module," (Manama: Central Bank of Bahrain, 2017), accessed September 1<sup>st</sup>, 2020, <https://www.cbb.gov.bh/wp-content/uploads/2019/01/Consultation-Module-SG-Volume-2.pdf>, SG-2.1.1; Central Bank of Kuwait ("CBK"), "Ta'limāt bi-sha'n ḥawkamat al-raqāba al-Shar'iyya fi al-bunūk al-Kuwaytiyya al-Islāmiyya," (Kuwait City: Central Bank of Kuwait, 2016), accessed September 1<sup>st</sup>, 2020, [https://www.cbk.gov.kw/ar/images/13p2-112389\\_v40\\_tcm11-112389.pdf](https://www.cbk.gov.kw/ar/images/13p2-112389_v40_tcm11-112389.pdf), 10.

relating to the appointment of SSBs include the specification of a minimum of three or five scholars and the -less common- specification of their (renewable) tenure.<sup>125</sup> SSB appointment in many countries is hence dictated by regulations.

The importance of the role of SSBs is further reflected in the regulators' specification of their responsibilities. Reflecting the relevance of these responsibilities to the topic of this study, this section examines both regulations and bank guidelines. Among the 11 regulators in our country sample, seven have done so, as shown in Table 2 below. Some banks have also published the responsibilities they stipulate. Eight of the largest banks in our country sample stated responsibilities, shown in Table 3 below. Some banks have stated fewer responsibilities as our sources are introductions to their SSB on their websites. Access to standard operating procedures and other formal statements of the responsibilities is typically restricted to internal readers. The final columns in the two tables indicate the number of regulators and banks that have stated the responsibility named in that row.

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<sup>125</sup> Bank Negara Malaysia ("BNM"), "Shariah Governance," (Kuala Lumpur: Bank Negara Malaysia, 2019, accessed September 1<sup>st</sup>, 2020, <https://www.bnm.gov.my/documents/20124/761679/Shariah+Governance+Policy+Document+2019.pdf>), 13; Central Bank of Oman ("CBO"), "Islamic Banking Regulatory Framework," (Muscat: Central Bank of Oman, 2012), accessed September 1<sup>st</sup>, 2020, <https://cbo.gov.om/sites/assets/Documents/English/LawRegulations/IBRF.pdf>, 2.2.1; SBP Islamic Banking Department, "Shari'ah Governance Framework for Islamic Banking Institutions," 3.

Responsibility	Central Bank of Bahrain	Bank Indonesia	Central Bank of Kuwait	Bank Negara Malaysia	Central Bank of Oman	State Bank Pakistan	Qatar Central Bank	Saudi Arabian Monetary Authority	Central Bank of the Republic of Turkey	Central Bank of the UAE	Financial Conduct Authority	Total
1. Confirm the compliance of products and services	✓	✓	✓	✓	✓	✓	✓					7
2. Monitor the compliance of the bank's operations	✓	✓	✓	✓	✓	✓	✓					7
3. Answer queries from management, shareholders or staff	✓	✓	✓		✓		✓					5
4. Administrative tasks relating to Shari'a audits	✓		✓		✓	✓	✓					5
5. Other reporting tasks	✓		✓		✓	✓	✓					5
6. Monitor disposal of earnings from non-compliant activities	✓		✓	✓			✓					4
7. Report non-compliance to regulator	✓				✓	✓	✓					4
8. Approve the profit/loss allocation to the investment account holders	✓		✓				✓					3
9. Review and approve <i>Zakat</i> calculations	✓		✓				✓					3
10. Obtaining fatwas from senior, national boards		✓		✓								2
11. Review the bank's memorandum of incorporation, charter and procedures for compliance					✓							1
12. Present alternatives to non-compliant products			✓									1
13. Train bank employees							✓					1

Table 2: Responsibilities of SSBs according to regulators in the country sample.<sup>126</sup> 'Compliance' is in relation to Islamic law.

<sup>126</sup> CBB, "Shari'a Governance Module," SG-2.3; Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009 Concerning Sharia Commercial Bank," 19; CBK, "Ta'limāt bi-Sha'n Ḥawkamat al-Raqāba al-Shar'iyya fī al-Bunūk al-Kuwaytiyya al-Islāmiyya," 16-18; BNM, "Shariah Governance," 7; CBO, "Islamic Banking Regulatory Framework," 2.2.2; SBP Islamic Banking Department, "Shari'ah Governance Framework for Islamic Banking Institutions," 4; QCB, "Corporate Governance Principles for Banks," 46-48.

<b>Responsibility</b>	Al Salam Bank	Bank Rakyat Indonesia Syariah	Kuwait Finance House	Bank Islam Malaysia Berhad	Bank Nizwa	Bank Meezan	Qatar Islamic Bank	Al-Rajhi Bank	Albaraka Türk Katilim Bankasi	Dubai Islamic Bank	Al Rayan Bank	Total
1. Confirm the compliance of products and services			✓	✓	✓		✓	✓		✓		6
2. Monitor the compliance of the bank's operations	✓		✓	✓	✓		✓	✓		✓		7
3. Answer queries from management, shareholders or staff				✓								1
4. Administrative tasks relating to Shari'a audits	✓			✓								2
5. Other reporting tasks	✓		✓	✓			✓					4
6. Monitor disposal of earnings from non-compliant activities							✓					1
7. Report non-compliance to regulator				✓								1
8. Approve the profit/loss allocation to the investment account holders												0
9. Review and approve <i>Zakat</i> calculations				✓								1
10. Obtaining fatwas from senior, national boards												0
11. Review the bank's memorandum of incorporation, charter and procedures for compliance												0
12. Present alternatives to non-compliant products												0
13. Train bank employees												0

Table 3: Responsibilities of SSBs of the largest Islamic banks in the country sample.<sup>127</sup> 'Compliance' is in relation to Islamic law. Bank Rakyat Indonesia Syariah's responsibilities have not been included as they are published in Bahasa Indonesian

<sup>127</sup> Al Salam Bank, "Corporate Governance Guidelines," (Manama: Al Salam Bank-Bahrain B.S.C, n.d.), accessed September 7<sup>th</sup>, 2020, <https://www.alsalambahrain.com/wp-content/uploads/2019/10/CorpGovernGuidelines.pdf>; Kuwait Finance House, "Memorandum & Articles of Association," (Kuwait City, Kuwait Finance House, 2017), accessed September 1<sup>st</sup>, 2020, [https://www.kfh.com/dam/jcr:b38aa422-9fda-4f3b-bd53-1ef831f5dbae/Articles\\_of\\_Association\\_en.pdf](https://www.kfh.com/dam/jcr:b38aa422-9fda-4f3b-bd53-1ef831f5dbae/Articles_of_Association_en.pdf), 6; "Terms of Reference of Shariah Supervisory Council ("Ssc") Bank Islam Malaysia Berhad," Bank Islam Malaysia Berhad, accessed February 14<sup>th</sup>, 2019, <http://www.bankislam.com.my/home/assets/uploads/TERMS-OF-REFERENCE-OF-THE-SSC.pdf>, 1-3; "Shari'a Board," Bank Nizwa, accessed September 7<sup>th</sup>, 2018, <http://www.banknizwa.om/about/sharia-board/>; Qatar Islamic Bank, *Corporate Governance 2019*, <https://www.qib.com.qa/wp-content/themes/qib/images/Corporate-Governance-2019-En.pdf>; "Al-Majmū'a al-Shar'iyya," Al-Rajhi Bank, accessed September 7<sup>th</sup>, 2020 <https://www.alrajhibank.com.sa/alrajhi-group/governance/al-rajhi-shariah-group?#>; "Shariah Board," Dubai Islamic Bank, accessed September 7<sup>th</sup>, 2020, <https://www.dib.ae/about-us/leadership-team/shariah-board>.

The two tables show the most common responsibilities of SSBs to be the confirmation and monitoring of the compliance of the products and services of the banks with Islamic law. The SSBs are also commonly assigned administrative and organisational responsibilities relating to oversight over the Shari‘a audit division, advising other stakeholders and contributing to reports. The SSBs’ responsibilities extend to cases when the bank does not comply with their fatwas and guidelines. Some are tasked with reporting the bank’s violations to the regulator and with ensuring resulting gains are paid to charities. The tables list other tasks. The requirement of the first two responsibilities of approving and monitoring by most banks and regulators indicates their importance. The two responsibilities have the largest impact on the banks as they dictate which products can be offered. The process of confirming or approving a product’s compliance with Islamic law is described by the regulators as a fatwa, a ruling, a decision or an opinion on a product or operation by the bank.

A fatwa is a legal opinion and its issuer is referred to as a mufti, who is usually a specialist in Islamic law. The process of deriving and issuing a fatwa is referred to as *ifta’*. The derivation process, also referred to as ‘*ijtihad*,’ involves the deduction of laws from the sources of Islamic law. The sources of Islamic law include the Quran, sunna, *qiyas* or ‘*aqI*<sup>128</sup> and *ijma*<sup>129</sup>. Sunni scholars variably consult additional sources of law such as *istihsan* and *al-*

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<sup>128</sup> *Qiyas* refers to legal deduction through analogical reasoning. It serves as the third source of law in Sunni legal theory. Ministry of Awqaf and Islamic Affairs (Kuwait), *Al-Mawsū‘a al-Fiqhiyya*- Volume 34, 1<sup>st</sup> edition. Cairo: Dār al-Şafwa li-l-Nashr wa-l-Tawzī‘, 1986. Accessed June 4<sup>th</sup>, 2020. <https://al-maktaba.org/book/11430/17688>, 91. ‘*AqI* refers to intellect, the third source of law in Shi‘i legal theory which leverages intuition and reasoning. A limited form of *qiyas* is encompassed in intellect. Muhammad Taqi al-Hakim, *al-Uşūl al-‘Amma li-l-Fiqh al-Muqāran*, 2<sup>nd</sup> ed. (Qom: al-Majma‘ al-‘ālamī li-‘ahl al-Bayt, 1997), 285-6.

<sup>129</sup> *Ijma*‘ refers to the universal consensus of Muslim scholars. Ministry of Awqaf and Islamic Affairs (Kuwait), *Al-Mawsū‘a al-Fiqhiyya*- Volume 2, 48. In Shi‘i legal theory, it refers to a consensus of scholars that reveals the view of the Prophet or an Imam. Al-Hakim, *al-Uşūl al-‘Amma li-l-Fiqh al-Muqāran*, 257.

*masalih al-mursala*<sup>130</sup>. So while *ifta'* primarily refers to the expression of the legal opinion, *ijtihad* refers to the process of its deduction. An individual who conducts *ijtihad* is referred to as a *mujtahid*. In the context of a legal scholar's competence and abilities, '*ijtihad*' also refers to a level of competence where the scholar is able to independently deduce legal opinions. Therefore, a SSB scholar is also a *mufti* and conducts *ifta'*. A SSB scholar can also be a *mujtahid* and conduct *ijtihad*. *Ifta'* is further discussed in the following section.

In addition to the confirmation and monitoring of the compliance of bank offering, a third operational responsibility stipulated by regulators and banks relates to reporting. SSBs are commonly responsible for quarterly and annual reporting to boards of directors and shareholders on the compliance of the banks' operations.<sup>131</sup> However, this disclosure obligation does not necessarily lead to a transparency in their operations. As discussed below, such reporting has not been found to be informative of the discussions and rationale of the SSBs' decisions.

Two studies were conducted assessing the disclosures of different samples of Islamic banks against criteria set by AAOIFI in their Governance Standards. While the standards are not mandatory upon all Islamic banks, they have presented a common reporting standard in the absence of details in the reporting requirements set by regulators.<sup>132</sup> El-Halaby and Hussainey found only a small majority of the 43 banks sampled in 2013 to comply with the

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<sup>130</sup> *Al-masalih al-mursala* are interests or benefits that are not established in the main sources of law but are used as the basis of legislation. The *masalih* are discussed further in chapter five.

<sup>131</sup> Refer to item 5 in table 2 above.

<sup>132</sup> "Adoption of AAOIFI Standards," AAOIFI, accessed December 10<sup>th</sup>, 2022, <https://aaoifi.com/adoption-of-aaoifi-standards/?lang=en>.

standards.<sup>133</sup> Their compliance is reflected in their disclosure of *Zakat* payments and treatment of non-compliant income. As for disclosure of additional SSB activities that intersect with social objectives, such as *waqf* (endowment) management and support for insolvent clients, they were limited to only up to 12% of the banks. Separately, Sencal and Asutay surveyed 41 banks over eight years wherein they observed a general alignment with AAOIFI's governance standard.<sup>134</sup> This alignment extended to both the content and phrasing of the disclosures, which rarely offered more details than stated by AAOIFI. The implications of these findings would have been made clearer had the researchers compared the disclosures with the banks' country-specific regulations in cases where regulators issued separate guidance. Nonetheless, the implications of the banks' minimal compliance in disclosure to AAOIFI governance standards are considered below.

The limited disclosure of SSBs in their required annual reporting leads to the key implication of an existence of a reluctance to disclose. Given the variety of the samples, periods and research methodologies, the limited disclosure among the SSBs fulfilling reporting requirements indicates the commonality of this position. We offer three possible reasons for this reluctance. First is that external reporting is not a priority for the SSBs and they therefore observe a minimal limit. Sencal and Asutay expand on this explanation by identifying that the minimal disclosure provides the operations of the bank sufficient legitimacy in the views of relevant stakeholders.<sup>135</sup> It thus is an exercise seeking to fulfil the

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<sup>133</sup> Sherif El-Halaby and Hussainey, Khaled, "Determinants of Compliance with AAOIFI Standards by Islamic Banks," *International Journal of Islamic and Middle Eastern Finance and Management* 9, 1 (2016), 155-156.

<sup>134</sup> Harun Sencal and Asutay, Mehmet, "Ethical Disclosure in the Shari'ah Annual Reports of Islamic Banks: Discourse on Shari'ah Governance, Quantitative Empirics and Qualitative Analysis," *Corporate Governance: The International Journal of Business in Society* 21, 1 (2021), 190-197.

<sup>135</sup> Sencal and Asutay, "Ethical Disclosure in the Shari'ah Annual Reports of Islamic Banks," 206.

objectives of particular stakeholders such as boards of directors, with no imperative for further disclosure. The second possible explanation of the intentional minimal disclosure is that the SSBs' efforts in relation to social objectives are insignificant to an extent that their disclosure could result in reputational risks. Third is that their legal views can cause contention, as indicated in the previous section where SSBs contradicted IIFA fatwas, leading to further reputational risks. The reference to these potential reasons seeks to introduce some of the dynamics of the operations of SSBs that will be further discussed in this study. In fact, the researchers' findings on the SSBs' disclosures are consistent with challenges encountered in this study's evaluation of their fatwas. The SSBs' reporting responsibility is thus a responsibility fulfilled with common restraint.

A fourth responsibility mandated by regulators relates to bank operations that do not comply with the rulings of SSBs. After SSB scholars approve contracts to be used in the bank's products, their execution is led by other bank employees. The execution is then reviewed for compliance with the approved contract structure by the Shari'a Audit department.<sup>136</sup> The review is necessitated by cases of non-compliant execution where components of the contract do not meet the requirements, such as those relating to asset ownership. The above table showed regulators to require SSBs to have oversight on non-compliance incidents.

While Shari'a non-compliance incidents are handled by Shari'a Audit (or review) departments, their occurrence remains connected to SSB activity. In a study of 29 Islamic

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<sup>136</sup> CBK, "Ta'limāt bi-sha'n ḥawkamat al-raqāba al-Shar'iyya fī al-bunūk al-Kuwaytiyya al-Islāmiyya," 28; SBP Islamic Banking Department, "Shari'ah Go'vernance Framework for Islamic Banking Institutions," 9.

banks in Malaysia and Indonesia over 11 years, a higher frequency of SSB meetings was associated with lower total payments compensating for income gained from non-compliant contracts.<sup>137</sup> This association reflects that meeting more frequently than the quarterly minimum allows SSBs more opportunities for operational reviews and enhancements. The higher involvement of SSBs allows them to issue more guidance to the bank's management and its Shari'a audit department, thus supporting compliance efforts within a bank. Such an outcome on a bank's compliance resonates with the regulators' requirement of SSBs to overlook non-compliance incident responses. It should be noted that Basiruddin and Ahmed's finding is limited by their study's exclusion of two other factors with primary influence on non-compliance incidents: the operations of the Shar'ia audit department and the bank's compliance policies.

The association between SSB meetings and non-compliance incidents leads to two implications. The first is that SSB scholars have the option to improve the compliance of the bank's operations with SSB rulings through more frequent reviews. The fact that some SSBs do not conduct reviews beyond the minimum requirement of quarterly meetings can also be partly explained through its impact on a bank's stability. Research by the IFSB has found that non-compliance incidents do not affect a bank's capital adequacy.<sup>138</sup> This means that non-compliant incidents are not expected to lead to unexpected losses which need to be pre-empted through advance shareholder contributions. Such contributions lead to lower proportional returns to shareholders. Therefore, with the absence of significant risk on

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<sup>137</sup> Rohaida Basiruddin and Habib Ahmed, "Corporate governance and *Shariah* non-compliant risk in Islamic banks: evidence from Southeast Asia," *Corporate Governance* 20, 2 (2020), 251-252.

<sup>138</sup> Erdem Oz et al., "Shar'ah Non-Compliance Risk in the Banking Sector: Impact on Capital Adequacy Framework of Islamic Banks," *IFSB Working Paper Series*, WP-05/03/2016, 68-70.

shareholder returns, the concern of shareholders on non-compliance is mitigated. This would thus limit their pressure upon SSB scholars in relation to non-compliance. SSBs therefore retain a degree of control on their engagement on compliance. It should be noted that the IFSB's study is limited by the absence of major incidents of non-compliance in their sample.<sup>139</sup> The reviewed cases of non-compliance have not significantly tested a bank's capital adequacy.

The second implication of the association between SSB meetings and non-compliance incidents is that despite their oversight, SSB governance does not directly dictate compliance; other departments are rather mandated with its achievement. These two implications reflect both the ability and the limitations of SSBs to influence a bank's operations.

Basiruddin and Ahmed's research had also found that payments compensating for income gained from non-compliant contracts were lower in cases where the scholars hold qualifications in accounting or finance.<sup>140</sup> This finding is a possible indication of a higher ability of understanding products, contracts and their implications by SSB scholars, which in turn would allow them to identify potential flaws in the contracts. The qualifications of the scholars are further discussed in this study's third chapter.

Beyond the commonly stipulated responsibilities, table 2 showed the Indonesian and Malaysian regulators to require banks to source fatwas from senior, national boards. Bank

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<sup>139</sup> Oz et al., "Sharī'ah Non-Compliance Risk in the Banking Sector," 7.

<sup>140</sup> Basiruddin and Ahmed, "Corporate governance and *Shariah* non-compliant risk in Islamic banks," 251-252.

Indonesia requires financial institutions to source fatwas from the Dewan Syariah Nasional (National Sharia Board) of the Indonesian Ulema Council, the country's senior government-backed clerical body.<sup>141</sup> Bank Negara Malaysia has issued "Shariah Standards" on 14 contracts commonly used in Islamic banking products which the SSBs have to follow.<sup>142</sup> The approaches of the two regulators represent one form of regulating SSBs in the industry. A second similar form requires banks to follow AAOIFI's Shari'ah Standards. A third approach adopted by other regulators in Table 2 allow SSBs to issue their own fatwas, which are overseen by a committee at the regulator. On the other hand, countries like Saudi Arabia and the UK do not regulate their SSBs.

The responsibilities of SSBs referred to in this study will thus primarily be the approval and monitoring of the compliance of the banks with Islamic law. Some of their other responsibilities will also be included in the analysis.

### Transformation of *ifta'*

The period of the foundation and development of the Islamic finance industry witnessed socio-political changes in Islamic countries. Over the last century, multiple Muslim governments sought to establish larger control over sources of religious authority, resulting in a transformation of the institutions of *ifta'*. This section will demonstrate this transformation first through a general overview of state consolidation of legal authority, followed by a review of its realization in the Islamic finance industry. It will then discuss its

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<sup>141</sup> Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34.

<sup>142</sup> "Shariah Standards & Operational Requirement," Shariah Advisory Council- Bank Negara Malaysia, accessed August 14<sup>th</sup>, 2020, [https://www.sacbnm.org/?page\\_id=3318](https://www.sacbnm.org/?page_id=3318).

implications, arguing that state control has limited the power of Shari'a scholars to make a significant change in society and in Islamic finance.

Among the different forms of consolidation of religious authority within Muslim governments, the common approach has been the establishment of *ifta'* institutions affiliated with the state and the limitation of the influence of other muftis.<sup>143</sup> Such *ifta'* institutions represent either councils of scholars such as the Indonesian Majelis Ulama Indonesia, or individual muftis, who can be supported by *ifta'* councils, such as Egypt's *Dar al-Ifta'*. States have leveraged official *ifta'* institutions to drive multiple changes in religious authority including the following three. The first change was the removal of the role of muftis from the courts, as witnessed in Egypt at the end of the 19<sup>th</sup> century.<sup>144</sup> Such a change relegates muftis from law-making in modern governments. A second change was to allow states more control over the role of religion in politics. This was orchestrated by approaches such as influencing the topics which state muftis addressed and by relegating competing views of political Islam.<sup>145</sup> The third change was the restriction of the authority of muftis other than the state mufti, as witnessed in Jordan's Law of Fatwas in 2006.<sup>146</sup> These two changes have allowed states to relegate other sources of religious authorities. The past century has thus experienced the consolidation of *ifta'* authority within the state,

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<sup>143</sup> For an overview of the changes in Egypt, refer to Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State- Muftis and Fatwas of the Dār Al-Iftā* (Leiden: Brill, 1997). For Malaysia and Indonesia, refer to Norshahril Saat, *The State, Ulama and Islam in Malaysia and Indonesia* (Amsterdam: Amsterdam University Press, 2018). For Jordan, refer to Michael Robbins and Lawrence Rubin, "The Rise of Official Islam in Jordan," *Politics, Religion & Ideology* 14, 1 (2013), 59-74.

<sup>144</sup> Skovgaard-Petersen, *Defining Islam for the Egyptian State*, 104-105.

<sup>145</sup> Saat, *The State, Ulama and Islam in Malaysia and Indonesia*, 131-170; Robbins and Rubin, "The Rise of Official Islam in Jordan," 69.

<sup>146</sup> Robbins and Rubin, "The Rise of Official Islam in Jordan," 70.

enabling their control of the authority of affiliated muftis and relegating the authority of others.

The transformation of *ifta'* within Muslim states has shaped the activities and authorities of SSBs in their countries through four main approaches. The first direct impact of state activity has been the restriction of *ifta'* within the industry to the government's representatives. To varying degrees, countries such as Indonesia, Malaysia and the UAE have restricted *ifta'* to government-appointed Shari'a boards.<sup>147</sup> These include the Majelis Ulama Indonesia and the Shari'a boards of central banks. Governments in such countries can thus prevent fatwas that diverge from their financial, economic or social directions. The second approach of state influence of legal authority in the industry has been through their requirement of central bank approval of nominations of SSB scholars.<sup>148</sup> This would allow the government to vet unqualified and undesired scholars. The third approach is their direct appointment of scholars to the IIFA, a central council for *ifta'* on Islamic finance topics.<sup>149</sup> The state's appointment allows for their selection of which views are considered in IIFA deliberations. The fourth approach of state influence is a less direct control over divergent fatwas, as indicated by the Malaysian Central Bank that a SSB "must not act in a manner that would undermine the rulings of the [central Shari'a board]."<sup>150</sup> This approach allows

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<sup>147</sup> Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34; "Shariah Standards & Operational Requirement," Shariah Advisory Council- Bank Negara Malaysia, accessed August 14<sup>th</sup>, 2020, [https://www.sacbnm.org/?page\\_id=3318](https://www.sacbnm.org/?page_id=3318); United Arab Emirates Ministry of Justice, "Federal Decree Law No. 14," accessed October 15<sup>th</sup>, 2022, [https://elaws.moj.gov.ae/mainfrominfoheader.aspx?val=EL1&anchor=Anchor7&np=&Imp=undefined&f=UAE-LC-En\\_2018-09-23\\_00014\\_Markait&fp=2%+بالانكليزية+المتحدة+العربية+الامارات+تشريع+BANKS&lawRef=S-EL1\\_2\\_714&op=UAE-MOJ\\_LC-](https://elaws.moj.gov.ae/mainfrominfoheader.aspx?val=EL1&anchor=Anchor7&np=&Imp=undefined&f=UAE-LC-En_2018-09-23_00014_Markait&fp=2%+بالانكليزية+المتحدة+العربية+الامارات+تشريع+BANKS&lawRef=S-EL1_2_714&op=UAE-MOJ_LC-)

<sup>148</sup> SBP Islamic Banking Department, "Shari'ah Governance Framework for Islamic Banking Institutions," 3; QCB, "Corporate Governance Principles for Bank, 44.

<sup>149</sup> "Al-Nizām al-Asāsī li-Majma' al-Fiqh al-Islāmī al-Duwalī," IIFA.

<sup>150</sup> BNM, "Shariah Governance," 8.

central banks a basis to question differing views and fatwas. The four approaches demonstrate how state control of legal authority in Muslim states extends to that of SSBs of Islamic banks. Its implications are further discussed below.

The consequence of this transformation in *ifta'* institutions on the Islamic finance industry is the censorship of SSB scholars. The degree of censorship is dependent on the regulations of each country, the status of the SSB scholars, the concern of the government and the nature of the topic. However, the views of SSB scholars can either be directly censored through their rejection in cases where central bank approval is necessary, or indirectly, such as through the rejection of the re-appointment of the scholars. This censorship can impact three types of SSB views and engagement. First, in countries such as Indonesia and Malaysia, differences in the legal interpretations by SSBs and the central banks are not tolerated, directly limiting their roles. Second, the censorship can curtail SSB fatwas on topics with a socio-political impact, which are of relevance to the social objectives identified in this study. This topic is further addressed in chapter five. The third area of SSB views and engagement that is censored relates to SSB activism against bank conduct or central bank policies. This censorship is relevant to SSB activity as the divergence of the practice of Islamic banks from social objectives can be driven or facilitated by central banks and shareholders. Central banks facilitate the divergence by approving or rejecting contracts that enable debt-based transactions, where in cases of their approval, shareholders can drive their adoption over partnership-based contracts. The facilitation of Central banks is observed in the approval of *Tawarruq* products by Bank Negara Malaysia, even though

another regulator, the Central Bank of Oman, has rejected it.<sup>151</sup> The topic is further discussed in chapter six. The three forms of censorship show *ifta'* in the industry to be influenced by state control of legal authority. Such control and the resulting censorship will differ significantly among jurisdictions. However, the regulations of surveyed countries indicate that a scholar in the industry is subject to potential limitations in their ability to drive changes in the industry or wider society.

This section has reviewed the transformation of *ifta'* institutions that has taken place over the past century, which is marked by the control of legal authority by Muslim states. In the context of the Islamic banking industry, this control has curtailed the authority of SSBs. The impact of this control on the SSBs' ability to drive reform in the industry will be further discussed in chapters four to six.

## Reform

In light of the limited progress achieved by Islamic banks on the objectives sought by the founding theorists and regulators, stakeholders and critics have called for its reform. The reform typically calls for a change in the practices of the banks in order to achieve one or more of the industry's objectives. A main avenue for driving the reform is proposed through the banks' SSBs. As the industry is professed to be Islamic, SSB scholars have been called upon as experts in relevant topics within Islamic law with a formal influence in the operations of the banks. This section demonstrates the relevance of SSBs in driving reform through the calls of outsiders as well as SSB scholars.

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<sup>151</sup> BNM, *Shariah Resolutions in Islamic Finance*- 2<sup>nd</sup> ed., 94-100; CBO, "Islamic Banking Regulatory Framework," 2.5.5.

The relevance of SSBs in driving reform in the industry is first exemplified through the statements of two academics and an external scholar. The first is Siddiqi, whose objectives of the industry have been examined above. Siddiqi thus provides the perspective of an academic who has followed the industry from its inception. In response to the industry's failure to achieve the objectives highlighted above and others, he calls for responses through *ifta'* using approaches different to those currently used by SSBs.<sup>152</sup> The alternative approaches, examined in this study, are sought as they allow the pursuit of the objectives. The second view is by Mehmet Asutay who first examines the industry's current state, describing it as a moral deficiency due to its divergence from the axioms of an Islamic moral economy. Among a range of solutions to this outcome, Asutay calls for the adoption of a consequentialist approach to Islamic law.<sup>153</sup> He also proposes that SSBs scholars "be trained to understand the Islamic moral economy construct being beyond financing if we are to embed developmentalism and ESG [environmental, social and governance] issues in everyday practice of Islamic finance."<sup>154</sup> The third view is by Salih al-Husayyin (d. 2013), former director of the affairs of the two Holy Mosques. Al-Husayyin found SSBs to be the only group capable of correcting the banks' trajectory as they provide Islamic banks their power.<sup>155</sup> He sought for them to discourage banks from abusing products that are very similar to conventional alternatives. The two academics and al-Husayyin thus all seek reform through the platform of the SSB. While the academics seek that through different *ifta'*

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<sup>152</sup> Mohammad Nejatullah Siddiqi, "Islamic Banking and Finance in Theory and Practice: A Survey of State of the Art," *Islamic Economic Studies* 13, 2 (2006), 24.

<sup>153</sup> Mehmet Asutay, "Maqasid al-Shariah and Islamic Finance: ESG Issues from Economists' Perspective," presented at the 5<sup>th</sup> ISRA-IRTI-Durham University Strategic Roundtable Discussion, Kuala Lumpur, April 29<sup>th</sup>, 2015, 21. Refer to the fourth chapter of this study for a background on the approach sought by Asutay.

<sup>154</sup> Asutay, "Maqasid al-Shariah and Islamic Finance," 54.

<sup>155</sup> Al-Husayyin, *al-Hay'at al-Shar'iyya al-Wāqi' wa-Tarīq al-Taḥawwul li-Mustaqbal Afḍal*, 25.

approaches, al-Husayyin more generally sought for the SSBs to stop the use of particular contracts.

Similar to the two academics -who are external to the industry-, the two SSB scholars have also sought reform through the changes in *ifta'*. Mufti Muhammad Taqi Usmani is former judge, member or chairman of several SSBs and chairman of AAOIFI's Shari'ah board. In light of the trajectory of Islamic banks that is divergent from its objectives, Usmani calls on SSBs to take action by promoting profit-sharing contracts and restricting *murabaha*, a debt-creating contract used extensively in the market.<sup>156</sup> He also calls on them to terminate products that are based on permissible contracts but allow for the creation of prohibited outcomes. He contrasts this approach with a concessionary and lenient approach adopted thus far. The second view is that of Yousef al-Shubaili, a Saudi scholar who serves on multiple SSBs including AAOIFI's Shari'ah board. He states that the fatwas of SSBs have created scepticism concerning the industry as they have produced products that replicate conventional alternatives.<sup>157</sup> He thus calls on SSBs to consider their outcomes of the applications of contracts they approve and not to only consider their forms. Both scholars therefore target the first and third objectives of the industry: the replacement of prohibited transactions with permissible alternatives and the achievement of an optimal distribution of wealth through the use of profit-sharing contracts. They target the objectives by calling for changes to the *ifta'* of SSBs.

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<sup>156</sup> Muhammad Taqi Usmani, *Maqālāt al-'Uthmānī*- vol 2 (Karachi: Maktabat Ma'ārif al-Qur'ān, 2014), 660.

<sup>157</sup> Yousef al-Shubaili, "al-Riqāba al-Shar'iyya 'ala al-Maṣārif Ḍawābiṭuhā wa-'aḥkāmuhā wa-Dawruhā fī Ḍabṭ A'mal al-Maṣārif," presented at the International Islamic Fiqh Academy's 19<sup>th</sup> summit, Sharjah, April 26-30<sup>th</sup>, 2009, 24.

In addition to the above examples of the five academics and scholars, chapters four and five of this study present views of six other academics and scholars. Their views address the first objective and the fourth relating to other social considerations. They are addressed in the context of *ifta'* based on the *maqasid* and the *masalih*.

The above views show that the five academics and scholars find that SSBs have an important role in driving the industry's realignment with its objectives. These views are consistent across outsider academics and scholars as well as insider SSB scholars. Views for SSBs to drive reform reflect their control over the industry's first objective: the provision of compliant alternatives. They have therefore been approached where alternative transactions have not been considered legitimate. The above academics and scholars also see SSBs as opening avenues to the neglect of profit-sharing contracts within the third objective. They thus seek the restriction of such avenues.

## Conclusion

Ahead of the assessment of the role of SSBs in realigning the industry with its objectives, this chapter introduced topics key to the assessment. It established the industry's objectives and examined the progress achieved. It then introduced SSBs and demonstrated their relevance in driving reform.

Based on statements by founding theorists, regulators and banks, the industry's social objectives were identified to be the provision of banking services compliant with Islamic law, financing economically beneficial and constructive projects, facilitating an equitable distribution of reward, the use of the bank's capabilities for social initiatives and

environmental sustainability. Progress on these objectives was examined based on views of non-compliance of some the industry's contracts such as *tawarruq*; the extent of the industry's financing to the manufacturing and the agriculture, forestry, hunting and fishing sectors; its use of partnerships contracts; provision of microfinancing and of *zakat* services and charitable activities. It found that the industry has not achieved its social objectives. Finally, the SSBs' *ifta'* responsibility was found to be a primary reason for their suitability to realign the industry with its objectives.

Given the centrality of *ifta'* in the SSBs' role in driving reform, chapter two assesses its legal capacity. It studies the legal authorities of *ifta'* based on Islamic legal theory, whereas the third chapter studies its authorities as sanctioned by regulators. These assessments will clarify the authority wielded by SSBs, enabling the subsequent assessment of their ability to employ it in realigning the industry with its objectives.

## Chapter 2: Authorities of a mufti

This study seeks to determine the ability of Shari'ah supervisory board (SSB) scholars to realign the industry with its objectives. These objectives include the provision of banking services compliant with Islamic law, financing economically beneficial and constructive projects, facilitating an equitable distribution of reward and the use of the bank's capabilities for social initiatives. A starting point for the assessment of their role in driving the reform is the determination of their responsibilities and authorities. These responsibilities and authorities are set by regulators, banks or both.

The previous chapter established that the main responsibilities of SSBs are twofold. The first responsibility was the verification of the compliance of products and services to be issued by the banks with Islamic law. The second is the review of the bank's operations to ensure their continued compliance with Islamic law, including with the SSB's previous approvals. These responsibilities present an institutional authority over the bank's management and its choice of products. The responsibility to assess and confirm compliance with Islamic law involves a legal capacity from the Islamic tradition, that of *ifta'*. The responsibility of *ifta'* introduces a religious authority as well as the authority provided by regulators and banks. SSBs therefore possess two authorities. As later chapters deal with *ifta'* as an avenue for SSBs to drive reform, an understanding of its authority is necessary. This chapter therefore studies the authorities of *ifta'* in legal theory. The SSBs' institutional authorities are studied in the following chapter.

This chapter studies the legal authorities of *ifta'* through the writings of legal scholars. The authorities are studied through the mufti's remit and qualifications as set by 10 scholars. Authorities set by the scholars amount to seven, which will be discussed through three overarching categories: the absolute mujtahid, the affiliate mujtahid and others. This reflects a classification used by some Sunni scholars. The chapter will then address two requirements concerning the petitioner's identification of the mufti's authority. It will show similarities in the views of the scholars on the authority and qualifications of the senior mufti. Other authorities and considerations are found to be relevant yet are covered by fewer scholars.

The absolute mujtahid

Legal scholars have classified the authority for *ifta'* into several profiles, each with its own qualifications and remit.<sup>158</sup> This section will first introduce the sources referred to in the study of the authorities of *ifta'*. It will then introduce the classification of the authority. The first authority will then be discussed through its remit and the qualifications required by the scholars. This authority is that of the absolute mujtahid, which is the highest level for scholars that disaggregate the authority of *ifta'*. Other scholars present the authority for *ifta'* as a singular authority and the level presented in this section is therefore their only authority.

The sources referred to in this study are the works of two classical scholars, an early modern scholar and seven modern positions. The sample prioritises modern views as they

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<sup>158</sup> For more on this particular classification, refer to the first chapter of Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001).

are more likely to influence current practice in the industry, while also including classical views that provide their foundations and explications. The sample further includes scholars from Sunni legal schools as well as Twelver Shi'is. The reference to a sample of ten scholars is therefore to accommodate the four subgroups.

The discourse on *ifta'* has a long history extending from the early period of Islam. Scholars have addressed it in dedicated books and in wider works of legal theory. An early, surviving statement of the qualifications is by the eponym of the Shafi'i school, Muhammad ibn Idris al-Shafi'i (d. 820). His position in two of his treatises on legal theory, *al-Umm* and *al-Risala*, is the earliest studied in this chapter. The qualifications stipulated by al-Shafi'i are not accompanied by extensive commentary. Nonetheless, they are of importance due to their early authorship and al-Shafi'i's status as an eponym of a main legal school.

The second position consulted in this study is that of Uthman ibn Abd al-Rahman Salah al-Din al-Shahrazuri (referred to as Ibn al-Salah hereafter, d. 1245). Ibn al-Salah was a senior Shafi'i scholar, whose literature on the topic includes a classification of Shafi'i scholars by level of knowledge, in essence an application of the classification in *Adab al-Mufti wa-l-Mufti*.<sup>159</sup> *Adab al-Mufti wa-l-Mufti* is a seminal work and one of the earliest books dedicated to topics on *ifta'*. The book's dedication to *ifta'* allows for more detailed expositions than other writings within general works of legal theory. Subsequent legal

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<sup>159</sup> See Uthman ibn Abd al-Rahman Salah al-Din al-Shahrazuri, *Ṭabaqāt al-Fuqahā' al-Shāfi'iyya* (Beirut: Dār al-Bashā'ir al-Islāmiyya, 1992).

scholars have cited and reiterated texts from Ibn al-Salah's *Adab al-Mufti* including scholars covered in this chapter.<sup>160</sup>

Shah Wali-Allah al-Dihlawi (d. 1762) is the third scholar whose position on a mufti's authority is examined. Al-Dihlawi was an Indian, Hanafi, revivalist scholar who sought societal reform in response to perceived deviations of other scholars.<sup>161</sup> He is identified by the fourth scholar in this sample (al-Qaradawi) as the most distinguished mujtahid of his time.<sup>162</sup> His views are cited from *'Aqd al-Jid fi Ahkam al-Ijtihad wa-l-Taqlid*, a book dedicated to topics on *ifta'*. The inclusion of al-Dihlawi after Ibn al-Salah allows for an assessment of the continuation of Ibn al-Salah's views in the early modern period by a leading scholar of a different legal school.

Al-Shafi'i, Ibn al-Salah and al-Dihlawi's positions conclude those of classical and pre-modern scholars in this study. The remaining three Sunni views are of contemporary scholars. The fourth position considered is that of Yusuf al-Qaradawi (b. 1926), a contemporary scholar and mufti. Al-Qaradawi studied and taught at al-Azhar, subsequently moving to Qatar where he founded and led Qatar University's College of Sharia & Islamic Studies.<sup>163</sup> Al-Qaradawi has stated that he not affiliated with a particular school of

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<sup>160</sup> See for example Abdullah Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiqh al-Aqalliyyāt* 3<sup>rd</sup> ed. (Dubai: Al-Muwatta Center, 2018), 142; Shah Wali-Allah Ahmad bin Abd al-Rahim al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd* (Sharjah: Dār al-Fatḥ, 1995), 59.

<sup>161</sup> "Al-Dihlawī, Shāh Walī-Allāh," al-Maktaba al-Shamela, accessed May 7<sup>th</sup>, 2018, <http://shamela.ws/index.php/author/1349>

<sup>162</sup> Yusuf al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya* (Kuwait: Dār al-Qalam, 1996), 95.

<sup>163</sup> "Yusuf al-Qaradawi," Al Jazeera, accessed February 26<sup>th</sup>, 2018, <http://www.aljazeera.net/specialfiles/pages/14e84a27-d48f-4d93-ba0d-216902d193e0>.

jurisprudence.<sup>164</sup> He has also served on seven SSBs.<sup>165</sup> In addition to his writings on varied Islamic topics, his published works cover the areas of society, politics, economics and finance from an Islamic perspective. He has written on fatwas and *ifta'* in multiple publications including *al-Ijtihad fi al-Shari'a al-Islamiya* which will be this chapter's reference to his views.<sup>166</sup> Al-Qaradawi represents a contemporary, influential voice with an exposure to the Islamic finance industry.

The fifth position is by Mauritanian politician, scholar and head of the Fatwa Council of the UAE Abdullah Bin Bayyah (b. 1935). Bin Bayyah is a board member of multiple national and international research, educational and *ifta'* institutions.<sup>167</sup> The influence of his fatwas is therefore international. His writings are in the areas of Islamic legal theory, positive law -in areas including financial transactions- and counter terrorism.<sup>168</sup> His views on the qualifications of a mufti are studied through *Sina'at al-Fatwa wa-Fiqh al-Aqalliyyat*. Bin Bayyah represents a contemporary, influential voice independent from the Islamic finance industry.

The sixth and final Sunni view is not that of a single scholar but is of the previously introduced International Islamic Fiqh Academy. The IIFA is not exclusive to Sunni scholars, but its international membership reflects the high proportion of Sunni Muslims. In its 17<sup>th</sup>

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<sup>164</sup> "Al-Qaradawi: Lā fatwā li-Shaltūt bi-l-Ta'abbud 'alā al-Ja'farī," Ahmad Ata, accessed February 26<sup>th</sup>, 2018, <https://archive.islamonline.net/?p=5449>

<sup>165</sup> "Majāl al-Iqtisād al-Islāmī," Mawqī' Samāḥat al-Shaykh Yusuf al-Qaradawi, accessed August 7<sup>th</sup>, 2020, [al-qaradawi.net/content/السيرة-الذاتية-#مجال%20الاقتصاد%20الإسلامي](http://al-qaradawi.net/content/السيرة-الذاتية-#مجال%20الاقتصاد%20الإسلامي).

<sup>166</sup> In addition to our primary reference, see for example *al-Fatwā bayn al-Indībāt wa-l-Tasayyub*.

<sup>167</sup> "Tarjamāt al-'allāma Abdullah Bin Bayyah," al-Mawqī' al-Rasmī li-l-'allāma al-Shaykh Abdullah Bin Bayyah, accessed August 7<sup>th</sup>, 2020, <http://binbayyah.net/arabic/archives/1417>.

<sup>168</sup> "Kutub li-l-Tanzīl," al-Mawqī' al-Rasmī li-l-'allāma al-Shaykh Abdullah Bin Bayyah, accessed August 7<sup>th</sup>, 2020, <http://binbayyah.net/arabic/downloadbooks>.

convention in Amman in 2006, the IIFA addressed *ifta'* and the qualifications of muftis. Its views are examined through the declarations of the 17<sup>th</sup> convention. The inclusion of the IIFA accounts for its representation of 57 Muslim countries and its international influence.

The Shi'i discourse on *ifta'* stretches from the early Islamic period when the 12 Imams represented contemporary sources of law. This is seen to an extent in their referral of enquirers in distant cities to the jurists among their companions, such as Ali ibn Musa al-Ridha's (d. 818) reference to Zakariyah ibn Adam (d. 9<sup>th</sup> century).<sup>169</sup> The occultation of the twelfth Imam in 874 led to a greater need for interpretation of the sources of law by scholars conducting *ifta'*. Scholars thus codified legal theory and addressed the topics of *ijtihad* and muftis. This is observed in the second earliest surviving book on legal theory, *al-Dhari'a ila Usul al-Shari'a* by al-Sharif Ali ibn Husayn al-Murtadha (d. 1044).<sup>170</sup> Scholars continued addressing the topic in works of legal theory over the centuries, such as al-'Allama al-Hasan al-Hilli's (d. 1325) *Nihayat al-Wusul ila 'ilm al-Usul*. This tradition underwent a change in the 14<sup>th</sup> century when scholars started writing on *ifta'* in legal treatises rather in works of legal theory. A prominent example of the new approach is *Minhaj al-Salihin* (1946) by Muhsin al-Hakim (d. 1970) and its subsequent commentaries. Literature dedicated to the topic has been a smaller phenomenon, an example of which is Murtadha al-Ansari's (d. 1864) *al-Taqlid*.

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<sup>169</sup> Al-Shaykh Muhammad ibn Muhammad al-Numan al-Mufid, *al-Ikhtisāṣ* (Beirut: Mu'assasat al-A'lamī li-al-Maṭbū'āt, 2009), 93.

<sup>170</sup> Al-Sharif Ali ibn Husayn al-Murtada, *al-Dhari'a ilā Uṣūl al-Sharī'a* (Qom: Mu'assasat al-Imām al-Ṣādiq, n.d.), 538-539.

The Shi'i positions covered are those by contemporary scholars and those recently deceased. The common opinion in modern Shi'i jurisprudence stipulates that a *marja'* be alive.<sup>171</sup> A *marja'* or *marja' al-taqlid* (lit. reference for emulation) is a modern title within the Twelver Shi'i school given to a mujtahid who takes on the duties of a mufti, where his legal views form a point of reference to his followers. Remaining a follower of a *marja'*'s opinions following his demise is permitted given that he is the *a'lam*<sup>172</sup> (most knowledgeable). The consideration of the legal positions of contemporary scholars and those deceased in recent decades is therefore pertinent to a survey of Shi'i legal positions opinions for practical applications.

The first Shi'i whose views on the qualifications of a mufti are reviewed is Ruh-Allah Musavi Khomeini (d. 1989). Khomeini's role as a *marja'* commenced in 1963, becoming more prominent upon his assumption of the leadership of the Islamic Republic of Iran.<sup>173</sup> Khomeini's leadership of the revolution precipitated a renewed legal discourse, notably on his legal-political theory on the guardianship of the jurist. Due to this theory and his role as a *marja'*, Khomeini's influence was not limited to Iranians as subjects of his leadership. His positions are studied through his jurisprudence treatise *Tahrir al-Wasila* and in the dedicated *al-Ijtihad wa-l-Taqlid* where he expounds his positions.

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<sup>171</sup> Husayn Mur'i, *Jāmi' al-Aḥkām fī al-Ḥalāl wa-l-Ḥarām* (Beirut: Dār al-Mujtaba, nd.), accessed August 7<sup>th</sup>, 2020, [https://archive.org/details/moamenquraish\\_gmail\\_1\\_20170401/page/n13/mode/2up](https://archive.org/details/moamenquraish_gmail_1_20170401/page/n13/mode/2up), 15. In this book, the author surveys the opinions of 8 modern *marajii'*. This finding is also supported by our survey of four *marajii'*, some of whom Mur'i had surveyed.

<sup>172</sup> The term and its implications are further discussed below.

<sup>173</sup> "Imam Khomeini's Biography," Daftar Ḥifẓ wa-Nashr Āthār Ḥaḍrat Ayat-Allah al-'uzmā Khāmenei, accessed June 23<sup>rd</sup>, 2018, <http://english.khamenei.ir/news/2116/Imam-Khomeini-s-Biography>.

The eighth position considered is that of Abu al-Qasim al-Khoei (d. 1992). Following his ascension to the role in 1970, al-Khoei was considered to be the superior jurist of his time and thus became the leading Shi'i *marja'*.<sup>174</sup> As a result, he remains the *marja'* for many of his surviving followers. His students transcribed many of his classes which continued for more than fifty years and it is the transcription of his classes on *taqlid* in addition to his jurisprudence commentary *Minhaj al-Salihin* that constitute the sources of this discussion. Al-Khoei and Khomeini represent in this study the sample of deceased Shi'i scholars with present followers.

The ninth position considered is that of Musa Shubayri Zanjani (b. 1928). Zanjani is a contemporary *marja'* based in Qom in Iran and is one of four surviving *marja'*s nominated by the senior *Jam'iyyat al-Mudarrisin* at the Islamic seminary in Qom following al-Khoei's demise.<sup>175</sup> Zanjani has been teaching Islamic law for fifty years and has nineteen publications in the area.<sup>176</sup> In addition to his expertise in jurisprudence, his contributions extend to the areas of biographies, manuscripts and origins of hadith, on which he has six publications. Zanjani's positions are surveyed from his jurisprudence treatise *al-Masa'il al-Shar'iyya*.

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<sup>174</sup> Jawdat al-Qazwini, *al-Marji'iyya al-Diniyya al-'ulyā 'ind al-Shi'a al-Imāmiyya, Dirāsa fī al-Taṭawwur al-Siyāsī wa-l-'ilmī* (Beirut: Dār al-Rāfidayn, 2005), 205, 276-278; "abdha Mukhtaṣara Tataḍamman Jāniban min al-Ḥayā al-'Ilmiyya al-Muzdahira li-Samāḥat Sayyidanā wa-Ustādhanā Āyat-Allah al-'Uzmā al-Marji' al-Dīnī al-A'lā al-Sayyid Abū al-Qāsim al-Kho'i," Ishaq al-Fayadh, accessed April 25<sup>th</sup> 2018, <http://www.al-khoei.us/edara/index.php?id=519>, 13-14.

<sup>175</sup> Al-Qazwini, *al-Marji'iyya al-Diniyya al-'ulyā 'ind al-Shi'a al-Imāmiyya*, 412.

<sup>176</sup> "Zandagī Nāmeḥ," Pāyghāh Itṭilā' Rasānī Daftar Ḥaḍrat Āyat-Allah al-'uzmā Shubayrī Zanjanī, accessed June 23<sup>rd</sup>, 2018, <http://zanjani.net/index.aspx?pid=10476>.

Ali al-Husayni al-Sistani (b. 1930) is the tenth and final scholar whose position on the authority of a mufti is considered. Al-Sistani is a *marja'* based in al-Najaf in Iraq who is believed to have the largest jurisprudential following, making him the most important contemporary Shi'i jurist.<sup>177</sup> Al-Sistani's teacher al-Khoei wrote to him certifying him as an absolute mujtahid at the age of 31, and he commenced his role as a *marja'* upon al-Khoei's demise in 1992.<sup>178</sup> Al-Sistani's position will be cited from his jurisprudence treatise *Minhaj al-Salihin* and from *al-Ijtihad wa-l-Taqlid wa-l-Ihtiyat*, a transcription of his classes on the topic. Al-Sistani and Zanjani represent the contemporary Shi'i scholars in this study.

Of the ten scholars, Ibn al-Salah, al-Dihlawi and al-Qaradawi have disaggregated the mufti's authority into levels based on knowledge and ability. Bin Bayyah does not directly disaggregate the authority, but he quotes five classical scholars disaggregating the authority in approaches similar to Ibn al-Salah.<sup>179</sup> The remaining scholars do not disaggregate the authority of *ifta'*. The first authority presented in this section will accordingly be the senior authority for the scholars that disaggregate it and the only authority for those that do not.

The authority of a mufti of this most senior level is reflected in the labels used by Ibn al-Salah, al-Dihlawi and al-Qaradawi: absolute, independent and sometimes plainly a mujtahid.<sup>180</sup> This mufti is authorised to derive rulings from their sources without any restriction to the views of other legal scholars. Al-Dihlawi echoes Ibn al-Salah's attribution of

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<sup>177</sup> Al-Qazwini, *al-Marji'iyya al-Diniyya al-'ulyā 'ind al-Shi'a al-Imāmiyya*, 350; Sajjad Rizvi, "Political mobilization and the Shi'i religious establishment "(marja'iyya)," *International Affairs* 86, 6 (2010), 1307-1308.

<sup>178</sup> "Al-Sīra al-Dhātiyya," Office of His Eminence Al-Sayyid Ali Al-Husseini Al-Sistani, accessed June 23<sup>rd</sup>, 2018, <https://www.sistani.org/arabic/data/1/>.

<sup>179</sup> Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiqh al-Aqalliyyāt*, 136-144.

<sup>180</sup> Uthman ibn Abd al-Rahman Salah al-Din al-Shahrazuri, *Adab al-Muftī wa-l-Mustaftī* (Madinah: Maktabat al-'ulūm wa-l-ḥikam, 1986), 87.

three authorities to this mufti: to form his own legal theory, to judge the evidence underlying the rulings of other scholars and to issue rulings on cases that have not been assessed by others.<sup>181</sup> Al-Qaradawi quotes al-Dihlawi's three, whereas Bin Bayyah quotes other scholars' references to this level without explaining its authority.<sup>182</sup> The remaining reviewed scholars implicitly follow this authorisation by not stating restrictions to the authority of a mufti at this level. The first *ifta'* authority is therefore for *ifta'* without restrictions in the process of the derivation of a ruling.

The above views on the authority of the mufti have been sourced from writings on the qualifications required for the role. These qualifications form the foundation of the authority. This study of the authority of the muftis therefore also covers their qualifications. This facilitates the later assessment of the authority of SSB scholars.

The qualifications required by the ten scholars for the first *ifta'* authority are examined in the following paragraphs and have been aggregated in Table 4. This study summarises the qualifications under four categories: prerequisites, qualifications relating to the mufti's attributes, their knowledge and their skills. A similar categorisation has been used by al-Shubaili.<sup>183</sup> As clear from the following table, not all scholars have stated positions on the 19 qualifications. Some scholars have stated more qualifications than others, with knowledge qualifications being most commonly stipulated.

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<sup>181</sup> Al-Dihlawi, *'Aqd al-Jid fī Ahkām al-Ijtihād wa-l-Taqlīd*, 23.

<sup>182</sup> Yusuf Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya* (Kuwait: Dār al-Qalam, 1996), 75; Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiqh al-Aqalliyāt*, 136-137.

<sup>183</sup> Al-Shubaili, "al-Riqāba al-Shar'iyya 'alā al-Maṣārif," 14-16.

	Qualification	Al-Shafii	Ibn al-Salah	Al-Dihlawi	Al-Qaradawi	Bin Bayyah	IIFA	Khomeini	Al-Khoei	Zanjani	Al-Sistani
Prerequisites	Belief		✓		✓	✓			✓	✓	✓
	Sanity		✓			✓			✓	✓	✓
	Maturity		✓			✓			✓	✓	✓
	Legitimacy of birth								✓	✓	✓
	Male		x						✓	✓	✓
	Life							✓	✓	✓	✓
Attributes	Adala	✓	✓		✓	✓		✓	✓	✓	✓
	Fiqh al-nafs		✓			✓		✓			✓
	Not be prone to mistakes, forgetfulness, and inattention					✓			✓	✓	✓
Knowledge of:	The Quran	✓	✓	✓	✓	✓	✓	✓			✓
	The Sunna	✓	✓	✓	✓	✓	✓	✓	✓		✓
	The principles of jurisprudence	✓	✓	✓	✓	✓	✓	✓	✓		✓
	Positions of consensus	✓	✓	✓	✓		✓	✓			✓
	The Arabic language	✓	✓	✓	✓	✓	✓	✓	✓		✓
	Branches of jurisprudence	✓	✓	x	✓	✓	✓				
	People and life				✓	✓	✓				
	The objectives of law				✓		✓				
Logic				x		✓	✓	x			
Skill	Arithmetic		✓		✓						

Table 4: Qualifications of a mufti according to the views of our sample set.<sup>184</sup> Ticks indicate a scholar's requirement of that qualification, crosses indicate his rejection of the qualification and blanks indicate the absence of a stated position on that qualification.

<sup>184</sup> Muhammad Ibn Idris al-Shāfi'i, *al-Umm* -Volume Nine (Al-Mansura: Dār al-Wafā' li-al-Ṭibā'a wa-l-Nashr wa-l-Tawzī', 2001), 72-76; Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 86-89; al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 20-23; al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 17-56; Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiqh al-Aqalliyāt*, 45-47, 135; International Islamic Fiqh Academy, "Qarār bi-Sha'n al-Iftā': Shurūṭih wa-Ādabih," declarations of the 17<sup>th</sup> convention of the IIFA, Amman, June 24-28<sup>th</sup>, 2006, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/2203.html>; Imam Sayyid Ruh-Allah Musavi Khomeini, *Tahrīr al-Wasīla* -Vol. 1 (Damascus: Embassy of the Islamic Republic of Iran, 1998), 8-12; Imam Sayyid Ruh-Allah Musavi Khomeini, *al-Ijtihād wa-l-Taqlīd* (Tehran: Mu'assasat Tanzīm wa-Nashr Āthār al-Imām al-Khomeini, 1997, 9-14; Abu al-Qasim al-Khoei, *al-Tanqīḥ fī Sharḥ al-'Urwa al-Wuthqā- al-Taqlīd* 4<sup>th</sup> ed., compiled by Mirza Ali al-Gharawi (Qom: Mu'assasat Iḥyā' Āthār al-Imām al-Khū'i,

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2009), 12-13, 180-196; Abu al-Qasim al-Khoei, *Minhāj al-Ṣāliḥīn- al-'Ibādāt* 28<sup>th</sup> ed. (Qom: Madīnat al-'ilm, 1990), 5-9; Sayyid Mus (Qom: Mu'assasat Nashr al-Faqāha, 2007) 5-8; Ali al-Husayni al-Sistani, *al-Ijtihād wa-l-Taqlīd wa-l-Iḥtiyāṭ* 2<sup>nd</sup> ed., compiled by Mu Publisher, 2016), accessed August 7<sup>th</sup>, 2020, <http://taghdirat.net/ketab/ejtehad-taghdirat.net.pdf>, 27-31, 133; Ali al-Husayni al-Sis ed. (Najaf: Dār al-Badhra, 2009), 5-6.

The first three qualifications of a mufti in the category of prerequisites, that they be a believer, sane and mature, reflect the requirement that the mufti be legally competent. Ibn al-Salah, al-Khoei, Zanjani and al-Sistani therefore stipulate legal competence, while no scholar rejects it. While the prerequisite of belief by Ibn al-Salah, al-Qaradawi and Bin Bayyah refers to being a Muslim, it refers to both Islam and being a Twelver Shi'i to al-Khoei, Zanjani and al-Sistani.<sup>185</sup> Muhammad Hasan Hito, a contemporary legal scholar at al-Azhar University, comments on the silence of the other scholars on the prerequisite of Islam as it is self-evident.<sup>186</sup> The silence of the other scholars is thus not understood to represent their acceptance of *ifta'* by non-Muslims. The remaining prerequisites, that the mufti be of a legitimate birth, a male and alive, are only required by al-Khoei, Zanjani and al-Sistani (Khomeini also states the requirement of life). Ibn al-Salah rejects the restriction of the role to men.<sup>187</sup> Therefore, legal competence is a common prerequisite, whereas the remaining prerequisites are posited only by the Shi'i references.

The second category of qualifications is the mufti's attributes, consisting of *'adala* (noun), *fiqh al-nafs* and for the mufti not to be prone to mistakes, forgetfulness and inattention. While *'adala* refers to moral probity, it represents a particular understanding of probity. Based on the statements of al-Qaradawi, Khomeini and Zanjani, we define it as devout adherence to Islam's prohibitions and obligations as an inherent disposition.<sup>188</sup> Ibn

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<sup>185</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mufti*, 86; al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 51; Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiqh al-Aqalliyāt*, 45; al-Khoei, *Minhāj al-Ṣaliḥīn*, 5-6; Zanjani, *al-Masā'il al-Shar'iyya* 5-6; al-Sistani, *Minhāj al-Ṣaliḥīn*, 6.

<sup>186</sup> Muhammad Hasan Hito, *al-Ijtihād wa-Ṭabaqāt Mujtahidī al-Shāfi'iyya* (Beirut: Mu'assasat al-Risāla, 1988), 17.

<sup>187</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mufti*, 106.

<sup>188</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 49; Khomeini, *Tahrīr al-Wasīla*, 12; Zanjani, *al-Masā'il al-Shar'iyya*, 6.

al-Salah also stipulates *‘adala* by describing it rather than explicitly using the term.<sup>189</sup> He also seeks the preservation of *murū’a*, an elevated level of dignity observed through an individual’s conduct. *‘Adala* is also required by al-Shafi’i, Bin Bayyah, al-Khoei and al-Sistani.<sup>190</sup>

Within the second category of qualifications, *fiqh al-nafs* is required by Ibn al-Salah and Bin Bayyah.<sup>191</sup> While neither scholar defines the term, contemporary scholars define it as the proficient abilities of understanding texts, deriving accurately from the texts with an intuition, differentiating between ambiguous branches and combining them with causes and principles, or as an inherent ability of derivation with ease.<sup>192</sup> Their descriptions of the attribute indicates that the absolute level of *ijtihad* requires attributes beyond knowledge of the following areas. A mufti also needs to develop the stated abilities that facilitate the application of the knowledge. While not employing the term *fiqh al-nafs*, al-Sistani and Khomeini stipulate a similar characteristic relating to the ability to derive, with al-Sistani describing it as an individual attribute and Khomeini as a power.<sup>193</sup>

The final attribute requires a mufti not to be prone to mistakes, forgetfulness, and inattention. It is required by Bin Bayyah, al-Khoei, Zanjani and al-Sistani.<sup>194</sup>

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<sup>189</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 86.

<sup>190</sup> Al-Shafi’i, *al-Umm*, 72; Bin Bayyah, *Ṣinā’at al-Fatwā wa-Fiqh al-Aqalliyāt*, 135; Khomeini, *Tahrīr al-Wasīla*, 8; al-Sistani, *Minhāj al-Ṣāliḥīn -Volume one*, 22.

<sup>191</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 86.

<sup>192</sup> Hito, *al-Ijtihād wa-Ṭabaqāt Mujtahidī al-Shāfi’iyya*, 19; Qutb al-Muntasir al-Raissouni, “Fiqh al-Nafs: Dirāsa fī al-Mafhūm, wa-l-Rāfid, wa-l-Athar,” *Majallat al-Sharī’a wa-l-Dirāsāt al-Islāmiyya* 32:110 (2017), 388-389.

<sup>193</sup> Al-Sistani, *al-Ijtihād wa-l-Taqlīd wa-l-Iḥtiyāt*, 133; Khomeini, *al-Ijtihād wa-l-Taqlīd*, 6.

<sup>194</sup> Bin Bayyah, *Ṣinā’at al-Fatwā wa-Fiqh al-Aqalliyāt*, 47; al-Khoei, *Minhāj al-Ṣāliḥīn -al-‘ibādāt*, 5-6; al-Sistani, *Minhāj al-Ṣāliḥīn -Volume one*, 6; Zanjani, *al-Masā’il al-Shar’iyya*, 6.

The three attributes are found to be not areas of contention, due to the lack of objections by other scholars. *ʿAdala* is required by most of the reviewed scholars, while fewer stipulate *fiqh al-nafs* and not being prone to mistakes, forgetfulness, and inattention.

The third category of qualifications relates to the mufti's knowledge and is considered through nine areas. This category mirrors core sources of Islamic law in Sunni legal theories, namely the Quran, Sunna, *qiyas* and *ijma'*. Zanjani does not state knowledge requirements in our source *al-Masa'il al-Shar'iyya*. This omission reflects the nature of the publication which is a legal treatise (*risala ʿamaliyya*). The legal treatises of the other Shi'i scholars' have also excluded such details, which were instead obtained from their other legal literature. The sample in this section thus consists of nine scholars.

The first qualification is knowledge of the Quran, a prime source of Islamic law. The scholars have differed in the composition of this qualification. In brief coverage, Ibn al-Salah and al-Dihlawi only require knowledge of verses relating to laws and Bin Bayyah only mentions knowledge of its exegesis.<sup>195</sup> Khomeini and al-Qaradawi stipulate a broader knowledge.<sup>196</sup> Khomeini describes a need for knowledge of the context of the revelation and of the approach of the twelve Imams to derivation based on the verses. Al-Qaradawi argues that a scholar should be able to derive rulings not only from verses that legislate directly. He also requires knowledge of the abrogating and abrogated verses. He states that the requirement of knowledge of the abrogation by preceding scholars encompasses knowledge

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<sup>195</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 86; al-Dihlawi, *Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlīd*, 20-21; Bin Bayyah, *Ṣināʿat al-Fatwā wa-Fiqh al-Aqalliyyāt*, 135.

<sup>196</sup> Khomeini, *al-Ijtihād wa-l-Taqlīd*, 12; al-Qaradawi, *al-Ijtihād fi al-Sharīʿa al-Islāmiyya*, 19.

of the ambiguous and elucidated, the general and specific and the absolute and delimited of the verses. The scholars do not require the memorisation of the verses. Al-Shafi'i and the IIFA also require knowledge of the Quran but do not expound the requirement. The scholars therefore require knowledge of the Quran to a level that enables the mufti to derive from it. This level is subject to a difference of opinions.

The second area of knowledge a mufti is required to possess is that of the Sunna, a second source of Islamic law, representing the Prophet's statements, actions or tacit approvals. As with the Quran knowledge requirement, the scholars have differed in the extent of the required knowledge of the Sunna. Bin Bayyah states that following existing literature on hadith suffices as the required level of knowledge.<sup>197</sup> Ibn al-Salah requires knowledge of the Sunna containing a legal value that forms the basis of rulings. Al-Dihlawi also requires such knowledge, as well as that of the transmitters.<sup>198</sup> Knowledge of the transmitters is also required by al-Qaradawi, Khomeini and al-Sistani.<sup>199</sup> Al-Sistani expands this in requiring knowledge of the source hadith literature, the transmission of the hadiths and the transmission of their chains. Al-Qaradawi's knowledge requirement extends beyond hadiths that legislate directly.<sup>200</sup> He also stipulates knowledge the science of hadith acceptance, of abrogating and abrogated hadiths and the context of the hadith's incidence. Al-Shafi'i and the IIFA do not expound their requirement of knowledge of the Sunna. Knowledge of the Sunna is thus a common requirement, but the scholars again differ in the

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<sup>197</sup> Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiqh al-Aqalliyyāt*, 135.

<sup>198</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 86-87; al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 20-21.

<sup>199</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 26; Khomeini, *al-Ijtihād wa-l-Taqlīd*, 12; al-Sistani, *al-Ijtihād wa-l-Taqlīd wa-l-Ihtiyāt*, 30-41.

<sup>200</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 25-31.

extent of this knowledge, ranging from Bin Bayyah's simple reference to literature, to al-Qaradawi's extensive requirements.

The third knowledge requirement is that of legal theory, which is stated by nine of the scholars. Al-Shafi'i, Ibn al-Salah and al-Dihlawi refer to the requirement as that of *qiyas*, a third source of Islamic law in Sunni jurisprudence.<sup>201</sup> However, al-Qaradawi clarifies that *qiyas* falls within legal theory and that a separation is not necessary.<sup>202</sup>

The fourth knowledge requirement reflects a fourth (and final among the main) source of Islamic law: *ijma'*. It is stated by eight of the scholars.<sup>203</sup> Al-Qaradawi explains that it is required so that the mufti avoids violating a ruling upon which consensus has been established.<sup>204</sup>

The fifth knowledge requirement of a mufti is that of language. The scholars require a mufti to be knowledgeable in the Arabic language with specifications including its vocabulary, grammar, rhetoric and morphology.<sup>205</sup> As emphasised by al-Qaradawi, the Arabic language is the language of all Islamic canon.<sup>206</sup> A comprehensive knowledge therefore enables the derivation of rulings from the Quran and Sunna.

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<sup>201</sup> al-Shafi'i, *al-Umm* -Volume Nine, 77; Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 86; al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlīd*, 20.

<sup>202</sup> Al-Qaradawi, *al-Ijtihād fi al-Sharī'a al-Islāmiyya*, 40.

<sup>203</sup> Al-Shafi'i, *al-Umm* -Volume Nine, 74; Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 86; al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlīd*, 20; al-Qaradawi, *al-Ijtihād fi al-Sharī'a al-Islāmiyya*, 35-39.

<sup>204</sup> Al-Qaradawi, *al-Ijtihād fi al-Sharī'a al-Islāmiyya*, 35.

<sup>205</sup> Al-Shafi'i, *al-Umm*, 76; Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 87; al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlīd*, 21; al-Qaradawi, *al-Ijtihād fi al-Sharī'a al-Islāmiyya*, 32-35; IIFA, "Qarār bi-Sha'n al-Iftā"; Khomeini, *al-Ijtihād wa-l-Taqlīd*, 9; al-Sistani, *al-Ijtihād wa-l-Taqlīd wa-l-Ihtiyāt*, 27.

<sup>206</sup> Al-Qaradawi, *al-Ijtihād fi al-Sharī'a al-Islāmiyya*, 32.

The requirement of the above five knowledge qualifications is a matter of agreement among the reviewed scholars. However, they are largely silent and occasionally differ on the following four knowledge areas.

The sixth knowledge area is that of the branches of jurisprudence, required only by the Sunni scholars with the exception of al-Dihlawi.<sup>207</sup> The branches of jurisprudence refer to the positive law derived by jurists. Ibn al-Salah explains that a mufti should be in a position where *ifta'* is not a difficult task and that is achieved through the memorisation of individual rulings.<sup>208</sup>

The seventh knowledge requirement is that of the objectives of law (*maqasid al-Shari'a*), stated by al-Qaradawi and the IIFA only.<sup>209</sup> Al-Qaradawi states that the purpose behind this requirement is the avoidance of a conflict between a ruling and the objectives of the law, particularly since the rulings serve the achievement of their objectives. He suggests that other scholars have not mentioned the requirement as they consider it as a product of knowledge of the Quran and Sunna. The silence of the classical and early modern scholars is also due to the concentration of discourse on the *maqasid* in the modern period. As for the Shi'i scholars, the *maqasid* are largely excluded from orthodox legal theory. The two variables will be discussed in the third chapter.

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<sup>207</sup> Al-Shafi'i, *al-Umm* -Volume Nine, 76; Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 87; al-Dihlawi, *'Aqd al-Jid fi Ahkam al-Ijtihad wa-l-Taqlid*, 21; al-Qaradawi, *al-Ijtihad fi al-Shari'a al-Islamiyya*, 53-56.

<sup>208</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 89.

<sup>209</sup> Al-Qaradawi, *al-Ijtihad fi al-Shari'a al-Islamiyya*, 43-46; IIFA, "Qarar bi-Sha'n al-Ifta'."

The eighth knowledge area is that of the people and affairs, required by al-Qaradawi, Bin Bayyah and the IIFA.<sup>210</sup> Al-Qaradawi explains that queries are ultimately based on cases faced by people and are affected by their lives and environments. A fatwa's accuracy is therefore affected by its context. Al-Qaradawi lists areas of knowledge he deems necessary for a mujtahid to possess, including economics.

The ninth and final knowledge requirement is that of logic, required by Khomeini and the IIFA and rejected by al-Qaradawi and al-Khoei.<sup>211</sup> Its rejection and neglect by the six other scholars reduces its significance in relation to the other qualifications.

In comparison to other qualifications of a mufti categorised as prerequisites and attributes, the scholars in our sample have focused on knowledge qualifications, as evident in Table 4. The focus on knowledge qualifications reflects a mufti's primary asset and the service they provide, the dispensation of knowledge in the form of fatwas. The common areas of required knowledge also reflect the nature of the knowledge they dispense; they comprise sources of Islamic law, the language of these sources and the science of deriving the laws. These refer to knowledge of the Quran, Sunna, positions of consensus, the Arabic language and legal theory, respectively. Also of importance in the view of five scholars is knowledge of the branches of jurisprudence, which reflects a mufti's knowledge of the existing legal corpus. Finally, three knowledge areas were deemed to be necessary by only two scholars, these are knowledge of people and affairs, the objectives of the law and logic.

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<sup>210</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 47-49; Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiqh al-Aqalliyāt*, 44-46; IIFA, "Qarār bi-Sha'n al-Iftā'."

<sup>211</sup> Khomeini, *al-Ijtihād wa-l-Taqlīd*, 10; IIFA, "Qarār bi-Sha'n al-Iftā'"; al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 53; al-Khoei, *al-Tanqīh fī Sharḥ al-'Urwa al-Wuthqā- al-Taqlīd*, 12.

Their neglect, and rejection in the case of logic, by other scholars reflects that there are not viewed to be of either the same form or importance by the other scholars.

The fourth and final category of qualifications is in the form of a skill, that of arithmetic, required by Ibn al-Salah and al-Qaradawi.<sup>212</sup> Ibn al-Salah rationalises its requirement through reference to topics involving arithmetic (such as as inheritance law).<sup>213</sup> Al-Qaradawi mentions the requirement in a list of scientific areas he requires contemporary mujtahids to possess a certain amount of knowledge in.

This section has presented the qualifications of the first (and most senior) mufti in the views of ten scholars. The sample of scholars represented different eras and legal schools. The scholars addressed the qualifications in varying detail and scopes. The qualifications that were common regardless of the varying scopes, eras and legal schools were *'adala* and the knowledge qualifications. The common stipulation of *'adala* and knowledge qualifications indicates an agreement on the importance of their realisation in a mufti. However, the common stipulation does not indicate a uniform position. The scholars that provided details of their knowledge requirements differed in the scope of required knowledge, particularly in the areas of the Quran and the Sunna. The qualifications posited by Sunni scholars did not differ substantially from those of Shi'i scholars. The differences were primarily in the category of prerequisites. Relating the findings to the subjects of this study, for SSB scholars to qualify for the authority of *ifṭā'* without restrictions in the process

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<sup>212</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 89; al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 48.

<sup>213</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 89.

of the derivation of a ruling, legal scholars would require them to meet the above qualifications.

Despite presenting this authority, the reviewed scholars do not uniformly consider it an achievable position. For example, Ibn al-Salah states that there can be no new absolute, independent mujtahid.<sup>214</sup> Al-Qaradawi also illustrates the exclusivity of the position by stating that individuals at that level include the jurists among the companions and successors, the eponyms of the four schools and the eponyms and founders of other schools such as Ja'far al-Sadiq (d. 765), Abd al-Rahman al-Awza'i (d. 774) and Sufyan al-Thawri (d. 778).<sup>215</sup> However, he does not portray the exclusivity of the position of the independent, unrestricted mujtahid as impenetrable. He dedicates a section in his book to the possibility of achieving the position.<sup>216</sup> His balance of exclusivity and achievability is demonstrated in his reference to the companions and eponyms of the schools, followed by a nomination of 11 scholars from the 20<sup>th</sup> century. While Ibn al-Salah and al-Qaradawi hold different positions, their views suggest that the position is not achieved by common muftis, an observation of relevance to our discussion of SSBs.

The affiliate mujtahid

The previous section has presented the authority of the absolute mujtahid, whose derivation of rulings for *ifta'* is not restricted to the principles and views of other scholars. Ibn al-Salah, al-Dihlawi, al-Qaradawi and Bin Bayyah present additional mufti profiles with

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<sup>214</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 91.

<sup>215</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 76.

<sup>216</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 109-112.

restricted authorities. The other profiles are grouped under the label of the *mujtahid muntasib*, the affiliate mujtahid. This section presents the authorities and qualifications of the four levels of the affiliate mujtahid.

The descriptions of Ibn al-Salah and al-Dihlawi of the levels of the affiliate mujtahid are similar in areas and identical in others.<sup>217</sup> Al-Dihlawi has referred to Ibn al-Salah's work and his classification is likely to have followed that of Ibn al-Salah. They differ in that al-Dihlawi has presented three levels of affiliate ijtiḥād to Ibn al-Salah's four. Al-Qaradawi acknowledges and reiterates al-Dihlawi's definitions.<sup>218</sup> However, Ibn al-Salah has described the four levels of the affiliate mujtahid without assigning them titles. This section will therefore refer to al-Dihlawi's titles.

An affiliate mujtahid of the first level is referred to as *al-mujtahid al-mutlaq al-muntasib*. The scholars have defined this mujtahid as one who achieves an ability to derive from the Quran and Sunna equivalent to that of the absolute mujtahid, yet is reliant on his imam's (the eponym of the school) legal theories.<sup>219</sup> Ibn al-Salah ranks the fatwa of the most senior affiliate mujtahid as equal to that of the absolute mujtahid, but does not mention differences in authority.<sup>220</sup> Al-Dihlawi differentiates their authority in limiting it for *al-mujtahid al-mutlaq al-muntasib* to cases where other sources do not present a ruling.<sup>221</sup> Due to its categorisation as absolute, the two scholars require *al-mujtahid al-mutlaq al-*

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<sup>217</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 91-99; al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 47-57.

<sup>218</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiya*, 75.

<sup>219</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 91; al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 23.

<sup>220</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 94.

<sup>221</sup> Al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 49.

*muntasib* to possess the same qualifications required of an absolute mujtahid.<sup>222</sup> These are the qualifications examined in the previous section.

The earlier discussion of the absolute mujtahid concluded with the views of Ibn al-Salah and al-Qaradawi on the achievability of the position. This is carried over to the senior affiliate mujtahid, *al-mujtahid al-mutlaq al-muntasib*. Ibn al-Salah debates whether the senior companions and students of al-Shafi'i and the eponym of the Hanafite school al-Nu'man Abu Hanifa (d. 767) were of the first or second level of affiliate ijihad. Similarly, al-Dihlawi ranks the senior jurists within the Shafi'i school in this level.<sup>223</sup> Their choice of such senior scholars indicates their views of the exclusivity of the achievement of the position to those perceived to have proven their expertise in the relevant sciences. The similarity in the two scholars' views of the exclusivity of the position to that of the absolute mujtahid is consistent with their requirement of the same qualifications for both authorities. Their nomination of senior scholars as affiliate mutjahids once again reflects the exclusivity of the position.

An affiliate mujtahid at the second level is referred to as *al-mujtahid fi al-madhab*, a mujtahid within his legal school. A mujtahid within a school is a follower of his imam's legal views and knowledgeable in his foundations. His authority does not permit an independent and unrestricted derivation from the sources of law. Instead, new cases that are not addressed by his imam are to be derived based on the imam's precedents, approaches and

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<sup>222</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 91; al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlid*, 48.

<sup>223</sup> Al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlid*, 48.

theories.<sup>224</sup> Implicit in their descriptions is that the mufti has no authority in cases where the imam has stated an opinion. The qualifications required by Ibn al-Salah for this level of ijtihad are similar to those required for the absolute mujtahid with allowances for shortfalls in the knowledge of the science of hadith or in the Arabic language.<sup>225</sup> Al-Dihlawi states that this mujtahid must possess knowledge of the Sunna and of legal theory to a level that would prevent them from contradicting hadith and the consensus of the predecessors and that would equip them to understand the bases of the derivations of their seniors.<sup>226</sup>

A mufti at the third level of affiliate ijtihad is knowledgeable of his imam's positions and evidence and is capable of weighing opinions<sup>227</sup> against others.<sup>228</sup> Al-Dihlawi and al-Qaradawi do not propose this level. Ibn al-Salah describes the authority of muftis of this level similar to those of the previous level.<sup>229</sup> New cases that are not addressed by predecessors are derived based on precedent views in the school. Ibn al-Salah requires this mufti to possess the attribute of *fiqh al-nafs*, knowledge of the positions and evidence of the school's imam and major scholars and the ability to weigh opinions and positions against others.<sup>230</sup> He describes the qualifications to differ from the second level of affiliate ijtihad through a diminished requirement of knowledge of legal theory or of the school's legal positions.

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<sup>224</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 94; al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlīd*, 23-24; al-Qaradawi, *al-Ijtihād fi al-Sharī'a al-Islāmiyya*, 75.

<sup>225</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 95.

<sup>226</sup> Al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlīd*, 50.

<sup>227</sup> This study will refer to the process of weighing opinions or primary texts against others as preponderance (*tarjih*).

<sup>228</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 98; al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlīd*, 24.

<sup>229</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 99.

<sup>230</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 98.

A mufti at the fourth and final level of affiliate *ijtihād* is referred to as *al-mutabahir fi al-madhab* and *mujtahid al-futya* by al-Dihlawi and *mujtahid al-fatwa wa-l-tarjih* by al-Qaradawi.<sup>231</sup> This mufti is not consistently considered a *mujtahid*, as the label is omitted by Ibn al-Salah and al-Dihlawi. The first label refers to his knowledge of his school's positions. The other labels reflect his qualification for *iftā'* by transmitting positions from his school and to his ability in preponderance. It also reflects that his authority is restricted to the transmission of a position of the imam or of a common opinion.<sup>232</sup> Ibn al-Salah accepts his exercise of a very basic level of analogical reasoning in limited cases. Al-Qaradawi does not address his authority. As for their qualifications, according to al-Dihlawi, this mufti is to possess sound understanding and knowledge of the Arabic language, the scales of preponderance and the language and meanings of the legal expositions of predecessors.<sup>233</sup> Ibn al-Salah differentiates him from the third level with diminished ability in reporting evidence and redacting analogical reasonings.<sup>234</sup> He requires him to memorise his school's legal positions and to be able to access the sources of what he does not memorise.

Ibn al-Salah, al-Dihlawi and al-Qaradawi therefore present up to four *iftā'* authorities beyond that of the absolute *mujtahid*. The authorities range from original derivation based on an imam's legal theory, to limited derivation based on an imam's precedents, approaches and theories and finally transmission of existing legal positions. The qualifications for these authorities similarly range from those of the absolute *mujtahid*; to less comprehensive

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<sup>231</sup> Al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 24; al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 75.

<sup>232</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 99; al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 55.

<sup>233</sup> Al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 55.

<sup>234</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 99.

qualifications focusing on legal theory, jurisprudence, the Arabic language and hadith; and finally to jurisprudence and the Arabic language.

Beyond the five above authorities based on the levels of *ijtihad*, scholars have proposed two other authorities for *ifta'*. These authorities are not based on the depth of knowledge and are further discussed in the following section.

#### Other authorities

The authorities of an absolute or affiliate mujtahid are dependent on the mufti's level of knowledge. Their authority for original derivation, restricted derivation or transmission is dependent on their mastery of specific sciences and his possession of attributes. Legal scholars have recognised two other authorities, one based on other knowledge indicators and another without the assumption of knowledge.

In addition to a specification of authority based on the depth of the mufti's knowledge, a mufti's authority has also been specified based on the range of their knowledge. Following his discussion of the absolute mujtahid, Ibn al-Salah clarifies that while the preceding qualifications relate to the mufti knowledgeable in all areas of law, the position of *ijtihad* can also be achieved in some areas without others.<sup>235</sup> This would be through an incomplete mastery of legal theory, supporting derivation in limited areas of Islamic law. In addition to Ibn al-Salah, al-Qaradawi, al-Khoei and al-Sistani permit petitioning a mufti whose mastery

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<sup>235</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mufti*, 89-91.

of the principles does not encompass all areas.<sup>236</sup> However, the latter two are only permissive when the mufti's fatwas correspond to those of the *a'lam* (most knowledgeable). In effect, their condition maintains the *a'lam's* authority. The four scholars therefore approve the authority of a mufti who meets the qualifications presented above but not in all areas of law. This acceptance does not compromise the requirement of qualifications from the prerequisites and attributes categories. This form of authority differs from that of the affiliate mujtahid, for whom concessions from knowledge qualifications are accepted.

The second authority considered in this section and the seventh of those covered in this chapter is not primarily concerned with individuals identified as muftis. In addition to muftis covered under the above authorities, some scholars have conditionally permitted the transmission of fatwas by other individuals. Al-Dihlawi does not consider those that transmit fatwas of other muftis as muftis themselves, but he accepts their transmissions where they refer to the source.<sup>237</sup> He adds that such transmission is common in reality since the fatwas widely issued by jurists (who have not achieved levels of *ijtihad* even if they are referred to as muftis) are transmissions based on the fatwas of a mujtahid.<sup>238</sup> From one perspective, the transmitter is similar to the mufti of the fourth level of affiliate *ijtihad* whose authority is restricted to the transmission of a position of the imam or of a common opinion. However, we argue that the difference between the two lies in that the affiliate mujtahid possesses an ability to interpret legal texts. The technical language used in legal texts is not universally accessible. A transmitter therefore only conveys a ruling, whereas the affiliate mujtahid is

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<sup>236</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 62; al-Khoei, *Minhāj al-Ṣāliḥīn -al-'ibādāt*, 9; al-Sistani, *Minhāj al-Ṣāliḥīn* -Volume one, 10.

<sup>237</sup> Al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 82.

<sup>238</sup> Al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 82.

equipped to interpret it from the literature too. In addition, the Shi'i scholars accept the transmissions of trusted individuals or those characterised by *'adala* without requiring a specific level of knowledge.<sup>239</sup> Ibn al-Salah accepts transmissions by laymen only in the exceptional circumstance of the absence of a mufti in the locale.<sup>240</sup> This authority is not therefore for the issuance of fatwas, it rather is for their transmission. However, it can be assumed by an individual in the position of *ifta'*, such as a SSB scholar, where they transmit existing opinions. It does not therefore cover new cases.

This chapter has so far covered seven authorities for *ifta'*. These range from authorities for unrestricted *ifta'* to authorities for limited transmission. The following section will address matters related to the consultation of these muftis.

#### Considerations for the petitioner

The above discussions of the authorities for *ifta'* primarily concern the mufti. The scholars covered in this study propose other criteria that concern the petitioner's consultation of these authorities. This section will present criteria relating to the identification of the mufti and the requirement of consulting the most knowledgeable mufti.

Ibn al-Salah, al-Dihlawi, Khomeini, al-Khoei, Zanjani and al-Sistani have required the ascertainment of the qualification of a mufti whose background is unknown, stating that it is

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<sup>239</sup> Khomeini, *Tahrīr al-Wasīla* -Volume one, 11; al-Khoei, *Minhāj al-Ṣāliḥīn -al-'ibādāt*, 9; Zanjani, *al-Masā'il al-Shar'iyya*, 7-8; al-Sistani, *Minhāj al-Ṣāliḥīn* -Volume one, 11-12.

<sup>240</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 104.

otherwise impermissible to rely on their fatwa.<sup>241</sup> With the exception of al-Dihlawi, the scholars state that the mufti's suitability can be verified through the proliferation of opinions of the mufti's suitability. The Shi'i scholars also accept the testimony of two trusted experts (al-Sistani refers to *'adala* rather than trustworthiness and permits a single testimony if unchallenged) and the proliferation of opinions of their suitability. Al-Khoei, Zanjani and al-Sistani also accept satisfaction of their achievement of the level of *ijtihad*, or of their status based on rational foundation such as testing the mujtahid. Therefore, not only have the scholars specified authorities and their qualifications, they have also placed a responsibility upon petitioners to ensure that they consult the appropriate authority.

A possible example of the consultation or testimony of an expert is found not in the surveyed texts but rather in two of the scholars' ascension to the position of *ifta'*. The example is the use of a form of an *ijaza*, a statement by a teacher of a student's eligibility for *ifta'*. The first section presented the example of an *ijaza* written by al-Khoei to al-Sistani and an alternative adaptation in the scholars' endorsement of Zanjani as an accepted *marja'*.

The above responsibility upon petitioners is expanded upon by five of the scholars. Al-Khoei, Zanjani and al-Sistani require petitioners to consult the most-knowledgeable mufti (*al-a'lam*) in cases where muftis disagree upon a ruling.<sup>242</sup> Khomeini accepts the premise while also permitting following multiple muftis in the case that they are of the same status

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<sup>241</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mufti*, 158; al-Dihlawi, *'Aqd al-Jid fi Ahkām al-Ijtihād wa-l-Taqlid*, 43; Khomeini, *Tahrir al-Wasila* -Volume one, 11; al-Khoei, *Minhaj al-Salihin -al-'ibadat*, 8; Zanjani, *al-Masa'il al-Shar'iyya*, 6-7; Ali al-Husayni al-Sistani, *al-Fatāwā al-Muyassara*, accessed May 4<sup>th</sup>, 2018, <https://www.sistani.org/arabic/book/19/1022/>, 10.

<sup>242</sup> Al-Khoei, *Minhaj al-Salihin -al-'ibadat*, 7; Zanjani, *al-Masa'il al-Shar'iyya*, 7; al-Sistani, *Minhaj al-Salihin* - Volume one, 6.

in terms of knowledge and piety.<sup>243</sup> This requirement is not restricted to Shi'i scholars. Ibn al-Salah initially states that a petitioner does not need to *search* for the *a'lam* and can ask any mujtahid and that it is the view of most Shafi'ites. However, he follows that if the petitioner is aware of the characteristics of muftis, he is required to prioritise between them based on several characteristics including their level of knowledge. The difference between the first statement and the second is that the first concerns the petitioner's requirement to search, whereas the second considers him aware of the mufti's attributes.<sup>244</sup> Ibn al-Salah reiterates the requirement for petitioning the *a'lam* as one of five opinions within the Shafi'ite school concerning methods of selecting a fatwa upon a difference in opinions. In a final emphasis, he prohibits seeking an alternative after receiving an initial fatwa, except if the original mufti was not the *a'lam* and the most trustworthy.<sup>245</sup> Among our reviewed scholars, al-Dihlawi is an opposing voice who permits petitioning any mujtahid as well as obtaining and choosing from the fatwas of multiple muftis for the same case.<sup>246</sup> The remaining reviewed scholars do not address the topic. This requirement restricts the universe of muftis that the petitioners can consult. While it does not affect the authority of the muftis, it can restrict the roles of those not considered to be *a'lam*.

The practical prescriptions on petitioning a mufti have not been stated by all the scholars in our sample and are more common with the Shi'i scholars. This therefore implies that the methods of identifying a mufti and the need for consulting the most learned mufti

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<sup>243</sup> Khomeini, *Tahrir al-Wasila* -Volume one, 8-9.

<sup>244</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 159-160.

<sup>245</sup> Ibn al-Salah, *Adab al-Mufti wa-l-Mustafti*, 166.

<sup>246</sup> Al-Dihlawi, *'Aqd al-Jid fi Ahkam al-Ijtihad wa-l-Taqlid*, 83-84.

are not areas of consensus. As the two requirements are in effect impediments to qualification for the position of *ifta'*, their suspension enables wider qualification.

## Conclusion

In order to assess the role of Shari'a Supervisory Boards in driving the Islamic banking industry's social objectives, this chapter has studied forms of the authority of *ifta'*, a responsibility of SSBs. Its findings will facilitate the assessment of the authority of SSB scholars in the following chapter. The chapter identified seven authorities in the views of ten scholars. These included two classical, one early modern and three contemporary Sunni scholars and four modern Shi'i scholars. The chapter's findings relate to the authorities, the qualifications and the identification of the authorities.

Four of the scholars view a plurality in the authority of *ifta'*, whereas the others view the authority as having one or two forms only. The four scholars present authorities for unrestricted *ifta'*, three forms of restricted *ifta'* and *ifta'* by transmission. Four of the scholars have also presented an authority that is not restricted in the manner of *ifta'* but is restricted in the topics regarding which the mufti can respond. The final authority was that of the transmission of fatwas, where the transmitter does not have to be considered a mufti.

The authorities have been discussed by the scholars along with their qualifications. The most prominent qualifications were those for the absolute mujtahid (which is the sole authority according to a group of the scholars). The main qualifications for this mufti

consisted of prerequisites focused on legal competence, attributes relating to character and the ability to derive and knowledge required to derive. The knowledge qualifications included that of the sources of law, legal theory, the Arabic language, jurisprudence and others. The chapter concluded with the requirement by some scholars upon the petitioners to identify a qualified mufti.

*Ifta'* can be exercised by muftis with varying authorities, according to the reviewed scholars. However, the achievement of the unrestricted and even forms of restricted *ifta'* authorities are dependent on the achievement of demanding qualifications. This is reflected in their nomination of only the senior-most jurists in Islamic legal history as qualifying for these authorities.

The findings of this study of the authorities and qualifications of muftis forms the basis of the assessment of their assessment in the context of SSB scholars in the following chapter. The chapter will evaluate the SSBs' authorities based on regulations and on practice.

## Chapter 3: Institutional Authority

Ahead of the evaluation of the ability of Shari'ah Supervisory Board scholars to drive the social objectives sought of the Islamic banking industry, the previous chapter introduced relevant legal authorities. The evaluation of the authority of SSBs allows for the assessment of the avenues for reform enabled by these authorities. The authorities in question are those for *ifta'*, which was identified in the introductory chapter to be a main responsibility of SSBs. The previous chapter therefore studied the authorities of *ifta'* in Islamic legal theory. It found that legal scholars have proposed various authorities for the mufti, each dependent on the mufti's qualification. The authorities range from those of unrestricted *ifta'* to transmissions of existing fatwas.

This chapter studies the authority of SSBs through the *ifta'* authorities granted by their regulators. Understanding their authority enables the assessment of their scope for driving the industry's reform. The authority of SSBs will be first evaluated based on regulations outlining their qualifications and responsibilities. The assessment will secondly cover fatwas issued by SSBs to identify the authorities exercised in their *ifta'*. The third evaluation will cover the construct of this authority through the qualifications required by regulators and the fourth through those possessed by a sample of SSB scholars. The implications of the above assessments will then be addressed, arguing that the regulators have allocated SSBs full *ifta'* authorities through a paradigm different to that of the surveyed legal scholars.

## Authority through regulation

The previous chapter identified some legal scholars to consider *ifta'* as a singular authority, while others classified it into several levels of authority. A mufti's possession of an authority is dependent on their achievement of qualifications, with knowledge being the primary determinant. In order to assess the SSBs' capability to drive the industry's social objectives, this chapter examines the authorities granted by the regulators and assumed by SSBs. This section will identify authorities sanctioned by 13 regulators in light of the *ifta'* authorities presented in the previous chapter. It will not cover SSB members specialised in areas other than Islamic law, such as finance and corporate law. Such specialists are permitted by some regulators such as the central banks of Malaysia and Oman to join SSBs to support their deliberations.<sup>247</sup> The section will show the majority of regulators in the sample to authorise SSBs to conduct *ifta'* with no restrictions.

The assessment of institutional authority reviews regulations by regulators from the sample used in this study, comprising Bahrain, Indonesia, Saudi Arabia, Kuwait, Malaysia, Oman, Pakistan, Qatar, Turkey, the United Arab Emirates, the United Kingdom, AAOIFI and the IFSB. The Financial Conduct Authority (UK), Saudi Arabian Monetary Authority and Central Banks of Turkey and the UAE have not issued regulations relating to SSBs.<sup>248</sup> The comparisons are therefore largely based on the nine other regulators.

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<sup>247</sup> BNM, "Shariah Governance," 10; CBO, "Islamic Banking Regulatory Framework," 2.2.1.2.

<sup>248</sup> Amjad Ali Khan and Rahat Dar, "United Arab Emirates," in *The Islamic Finance and Markets Law Review*, 2<sup>nd</sup> edition, ed. John Dewar and Hussain Munib (London: Law Business Research Ltd., 2017), 84; Darren Stubing, "Turkey | an Islamic Banking Surge," *Global Finance*, October 2017, accessed February 14<sup>th</sup>, 2019, <https://www.gfmag.com/magazine/october-2017/turkeys-islamic-banking-system>; Michael Ainley et al., "Islamic Finance in the UK: Regulation and Challenges," (London: The Financial Services Authority, 2007), 16;

The authorities for *ifta'* set by regulators upon SSBs have been identified from the responsibilities and qualifications found in their regulations. These responsibilities and qualifications are presented in Table 5 below. The table includes a column describing the type of the authority permitted by the regulator.

Regulator	Type of <i>ifta'</i> authority	Statement on the authority of SSB scholars
AAOIFI <sup>249</sup>	Dervation	<p>Conditions on Mufti (Fatwa Issuers)</p> <p>5/1 A board member shall be well versed in Fiqh (Islamic Jurisprudence), well informed of the contributions of diligent Fiqh scholars, and <u>has the ability to use the Shari'ah-accepted methods of deriving reasonable rulings on emerging issues.</u></p> <p>7. Methods and Means of Fatwa</p> <p>7/1 Fatwa should basically be founded on what has been explicitly stated in the Qur'an and the Sunnah along with what has been supported by Ijma' (consensus of Fuqaha) or proved by Qiyas (analogical deduction). After resorting to the preceding sources, the judgment of the Mufti (issuer of the Fatwa) with regard to the different viewpoints of the Fuqaha (scholars of Fiqh); i.e, Istihsan (Shari'ah approbation) and Maslahah Mursalah (public interest) may be considered as the basis for issuance of Fatwa.</p> <p>7/5 Among the means that may be used for reaching the appropriate Shari'ah ruling on a given issue are the following:</p>

Saudi Arabian Monetary Agency General Directorate of Banking Control, "Principles of Corporate Governance for Banks Operating in Saudi Arabia," (Riyadh: Saudi Arabian Monetary Agency, 2014).

<sup>249</sup> AAOIFI, *Shari'ah Standards*, (Manama: Accounting and Auditing Organisation for Islamic Finance Institutions, 2015), 739-742.

Regulator	Type of <i>ifta'</i> authority	Statement on the authority of SSB scholars
AAOIFI	Derivation ( <i>continued</i> )	<p>7/5/1 Building detailed knowledge about the issue of the Fatwa through questioning the one who seeks it, consulting other boards, resorting to experts and specialized parties, and taking into consideration the prevailing norms and tradition.</p> <p>7/5/2 Tracing the Shari'ah ruling on the issue in the different schools of Fiqh, and exerting due endeavors to ascertain if the issue encounters the existence of contradicting proofs, or it is an issue that has not been specifically dealt with in the Qur'an and the Sunnah or discussed by the Fuqaha.</p> <p>7/5/3 Making use of collective Fatwas, such as the resolutions of the Islamic Fiqh Academy, other Shari'ah Advisory Boards, seminars, and conferences.</p> <p>Fatwa issuers, while issuing the Fatwa, shall signify keenness to quote Ijma' and opinions of diligent Fuqaha from their accredited sources, as well as concentration on those opinions which have gained more accreditation in each School of Fiqh, and should resort to available Fiqh literature on principles of issuing Fatwa.</p>
IFSB <sup>250</sup>	Derivation	<p>It is reasonable to expect a member of the <i>Shari'ah</i> board to have:  strong skills in the philosophy of Islamic law (<i>Usul al-Fiqh</i>), as he or she must <u>know exactly the appropriate Fiqh methodologies for deriving juristic opinions</u></p>

<sup>250</sup> The Islamic Financial and Services Board, "Guiding Principles on Shari'ah Governance Systems for Institutions Offering Islamic Financial Services," (Kuala Lumpur: IFSB, 2009), 30.

Regulator	Type of <i>ifta'</i> authority	Statement on the authority of SSB scholars
Bank Indonesia <sup>251</sup>	No <i>ifta'</i> authority	The execution of DPS' [SSB's] task and responsibility as referred to in paragraph (1) include among others: a. <u>assessing and ensuring fulfillment of Sharia Principles</u> on operational guidelines and products issued by Bank; c. <u>obtaining fatwa (decrees) from the National Sharia Board</u> for new products that do not yet have fatwa.
Bank Negara Malaysia <sup>252</sup>	Limited, general <i>ifta'</i>	In cases where the SAC [the central bank's Shariah Advisory Council] has not made any rulings on a particular matter or <u>the Shariah committee is not able to arrive at a decision or advice</u> , the IFI shall refer to the SAC for a ruling
Central Bank of Bahrain <sup>253</sup>	General <i>ifta'</i>	The SSB must put on record, in written form, any <u>opinion that it gives on Shari'a-related issues</u> .
Central Bank of Kuwait <sup>254</sup>	Derivation	<p>مهارات عالية في الفقه وأصوله، إذ يجب أن يعرف بدقة المناهج الفقهية لاستنباط الفتاوى الشرعية، مع إلمام ودراية بأحكام ومقاصد الشريعة الإسلامية التي تنطبق على أنشطة البنك.</p> <p>To possess advanced skills in jurisprudence and its principles, as he has to <u>know with precision the legal procedures for deriving legal rulings</u>, with an awareness and understanding of the rules and objectives of Islamic law that apply to the bank's activities.*</p>

<sup>251</sup> Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009 Concerning Sharia Commercial Bank," Article 35.

<sup>252</sup> BNM, "Shariah Governance," 7.

<sup>253</sup> CBB, "Central Bank of Bahrain- Shari'a Governance Module," SG-2.3.8.

<sup>254</sup> CBK, "Ta'limāt bi-Sha'n Ḥawkamat al-Raqāba al-Shar'iyya fi al-Bunūk al-Kuwaytiyya al-Islāmiyya," 23-24.

Regulator	Type of <i>ifta'</i> authority	Statement on the authority of SSB scholars
Central Bank of Oman <sup>255</sup>	General <i>ifta'</i>	2.2.2.4 The responsibilities of the SSB shall include but will not be limited to the following: 2.2.2.4.7 <u>Provide written Shari'a opinion / ruling</u> on matters brought to its attention by the management of the Licensee through the Internal Shari'a Reviewer or taken up by the SSB itself
Qatar Central Bank <sup>256</sup>	General <i>ifta'</i>	5- SSB's Duties 5/2 <u>Form opinion and advice on sharia compliance.</u> 5/3 <u>Prepare sharia guidelines</u> ; a procedural guide including all the bank's different operations. 5/5 Validate and approve forms and content of contracts and activities of the banks 5/6 Answer questions and enquires raised by the staff, customers or shareholders
State Bank of Pakistan <sup>257</sup>	Derivation	Strong skills in Islamic jurisprudence ( <i>Usul al-Fiqh</i> ), as he <u>must know the appropriate Fiqh methodologies for deriving juristic opinion</u>

Table 5: *Ifta'* authorities identified in the regulations of two standard-setting organisations and seven national regulators

\* The English text is the researcher's translation of the original Arabic text published by the regulator.

Table 5 shows that four of the regulators have authorised SSBs to issue fatwas through derivation, four have authorised *ifta'* generally without specifying the approach and Bank Indonesia has not authorised SSBs to conduct *ifta'*. An authorisation for derivation indicates that SSBs are not restricted to the transmission of existing fatwas and are permitted to issue original fatwas. With the exception of AAOIFI, the regulations have not clarified the limits to the SSBs' authority of derivation. The previous chapter showed that the disaggregation of

<sup>255</sup> CBO, "Islamic Banking Regulatory Framework," 2.2.2.4.

<sup>256</sup> QCB, "Corporate Governance Principles for Banks," 46-47.

<sup>257</sup> SBP Islamic Banking Department, "Shari'ah Governance Framework for Islamic Banking Institutions," 12-13.

the authority of *ifta'* yields four main authorities. The first was for derivation based on the primary sources of law that is independent from the legal theory or precedents of other scholars. The second authority included reference to the primary sources while relying on the legal theory or preceding derivations of other scholars. The third authority was for the mufti to extend derivations of other scholars to the case in question. The fourth authority was for the transmission of existing fatwas. Each authority is underpinned by particular qualifications. With the exception of AAOIFI, the regulators have not specified the authorities that they have sanctioned. This applies to both regulators authorising *ifta'* by derivation and those authorising *ifta'* in general. The lack of a specification of the scope of the authorities to derive and of general *ifta'* mean that the scholars are not restricted to specific derivation or *ifta'* approaches. It also suggests that authorities granted through regulations are not based on the classification of the legal scholars.

An exception to the lack of specification of the eight regulators is AAOIFI, as evident in Table 5. AAOIFI has specified the *ifta'* approach available to SSBs in detail, referring to the sources and approaches to be used. The above excerpt of AAOIFI's approved sources and methods clearly shows it to approve a full authority for SSB scholars. It allows the mufti to exercise several approaches, including the following five. The first is *ifta'* based on evidence from the Quran and Sunna. The second is through secondary sources of law that involve rational deduction such as *istihsan* and *al-masalih al-mursala*. The third is by exercising preponderance on the opinions of other scholars. The fourth is by transmitting fatwas of other contemporary *ifta'* bodies. The fifth is by choosing positions from the legal schools based on the seniority of their authors. This wide scope permitted by AAOIFI and the lack of

restrictions of the other regulators can be considered in relation to three senior mufti authorities from the legal scholars' classifications. The absolute mujtahid, who according to six of the reviewed scholars is the only mufti authority, is authorised to conduct *ifta'* with no restrictions to their derivation. The senior affiliate mujtahid is also unrestricted in their derivation, but they relies on the legal theories of others. An alternative view restricts their authority to new cases that have not been addressed by previous scholars. The limited mujtahid is not restricted in their sources and methods, but their authority is restricted to particular areas of law in which they are specialised. The unrestricted authorities of the eight regulators can thus be compared to those of the unrestricted nature of the absolute, the senior affiliate and the limited mujtahids.

As the regulators' authorisations of the SSBs' *ifta'* have been brief and general, the following section presents additional insights into the authorities. It examines the fatwas of SSBs to determine whether the lack of restrictions by regulators on their *ifta'* reflects their practice.

This section has studied the authorities of SSBs as set by 13 regulators. It found that of the 13 regulators, eight have authorised SSBs to conduct *ifta'* with no restrictions, four have not regulated SSBs and one has restricted SSBs from issuing new fatwas. The four regulators not regulating SSBs are not preventing banks from forming SSBs. In effect, SSBs in these jurisdictions are able to conduct *ifta'* with no restrictions. Therefore, the analysis in this chapter of the eight main regulators is also related to banks operating in the jurisdictions of the four regulators that do not regulate SSBs.

## Authorities in practice

The previous section found that of 13 regulators, the statements of seven that authorise SSBs to conduct *ifta'* have been general and have not included any restrictions. The SSBs can therefore equally undertake *ifta'* through original derivations from the sources of law, by transmitting existing fatwas or through other approaches. As several of the regulations permitting unrestricted *ifta'* are brief and devoid of details, this section seeks another avenue to represent the authorities of SSBs. It assesses the authorities exercised by SSBs by examining their fatwas. The assessment will show SSBs to exercise in their *ifta'* the full extent of authority granted by regulators.

The examination of the authority of SSBs through the methods of *ifta'* apparent in their fatwas covers those of Islamic banks with the largest market shares in this study's country sample. The survey excludes Indonesian banks as they source their fatwas from the National Sharia Board.<sup>258</sup> It also excludes Malaysian and Turkish banks as no fatwas of their market leaders have been found on the public domain. This reflects common disclosure practice in the industry according to a study by Zulkifli Hasan published in 2012.<sup>259</sup> 90% of Islamic financial institutions in Hasan's sample had not disclosed their fatwas, while the majority that disclosed did so without providing an explanation or basis. The sample therefore consists of eight banks. The banks in our sample have published their fatwas in two forms: in collections of fatwas covering a stated period or as certifications of the compliance of

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<sup>258</sup> Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34.

<sup>259</sup> Zulkifli Hasan, *Shari'ah Governance in Islamic Banks* (Edinburgh: Edinburgh University Press, 2012), 215.

individual products. The collections are of greater relevance to this study as they have included more relevant details than the certificates, allowing in many cases for the assessment of whether a fatwa is based on *ijtihad* or transmission.

To identify the *ifta'* methods used by SSB scholars, their fatwas were assessed based on indicating statements forming or accompanying the fatwas. It therefore sought fatwas where the scholars explicitly reveal the basis of their decision, for example, whether it was deduced through *ijtihad* or if it was a transmission of an existing fatwa. The approach sought the collection and subsequent assessment of 10 fatwas from each source where their basis is evident. However, despite reviewing 1101 fatwas, the sample of 10 fatwas per bank was only completed in the case of two banks. This limitation was a result of two factors: the first being the banks' publication of fatwas without their bases, the second being the ambiguity of the statements that prevented the judgment of whether the presented evidence was used in a transmission or derivation. Many fatwas eliminated from the count due to this difficulty had exhibited evidence in the form of Quranic verses, hadiths, conference decisions, AAOIFI Shari'ah Standards and fatwas of other SSBs. However, the role of such evidence in the formation of the SSB's judgement is unclear in the fatwas. The ambiguity even affects fatwas where the SSBs state that it is their view, because the reader cannot determine if it is a view based on derivation or on applying established rulings to the enquiry. On the other hand, fatwas deduced through *ijtihad* were identified through the SSB's admission of derivation, justified rejection of alternative fatwas in favour of their own, justified proposal of exemptions from other fatwas and other clear admissions. The legal scholars reviewed in the previous chapter attributed the authorities of derivation from

primary sources and preponderance to the absolute mujtahid.<sup>260</sup> The authority for preponderance was also attributed to the affiliate mujtahid. The survey was also supported by instances where SSB scholars would state in the introduction of the collection that the fatwas are based on ijtihad.<sup>261</sup>

The survey of the fatwas of the eight banks has produced results for five SSBs, whereas the other three did not cite their *ifta'* methods. Of the five SSBs, four had conducted *ifta'* through derivation from the texts or other forms of ijtihad. A summary of the results is provided in Appendix 2 and examples of the types of the SSBs' fatwas are provided in Table 6 below. The results show that SSBs have conducted *ifta'* using methods from across the spectrum of authority. They have derived from the primary sources, using secondary sources such as *istihsan* and *al-masalih al-mursala*, they have chosen opinions of classical scholars over others and transmitted existing fatwas. Therefore, the practice of SSBs demonstrates the relevance of the unrestricted *ifta'* authorities they have been granted by regulators. The findings also show that the SSBs have exercised the authorities of the absolute mujtahid, the senior authority according to the surveyed legal scholars.

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<sup>260</sup> Ibn al-Salah, *Adab al-muftī wa-l-mustaftī*, 87; al-Dihlawi, *'Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 22; al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 75.

<sup>261</sup> See the example of Al Rajhi Bank below.

### Transmission

#### Al Salam Bank

يقوم الوكيل الذي يعمل بصفته الشخصية بتقديم الضمانات (الكفالة) بعقد مستقل لضمان سداد عملاء الشركة مديونياتهم حسب ما ورد في المعيار الشرعي الصادر من هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية (أيو في AAOIFI).<sup>262</sup>

The agent, acting in his personal capacity, provides guarantees in a separate contract to guarantee the customers' payment of their dues **as stated in the Shari'ah Standard published by AAOIFI.**

### Ijtihad

#### Dubai Islamic Bank

الأصل أن التعامل في هذه الوسائل غير جائز إلا عند الضرورة بضوابطها الشرعية ونظرا لما يرجح من غلبة استخدامها في غير الحالات المشروعة فإن الهيئة ترى استحسانا عدم التعامل في هذه الوسائل اتقاء للشبهات وحفاظا على سمعة البنك الإسلامي عملا بحديث رسول الله صلى الله عليه وسلم<sup>263</sup>

The principle is that dealing in these tools is impermissible except in cases of necessity in their legal boundaries, and in light of their common use in impermissible cases, the board rules against the dealing in these tools based on *istihsan*, to avoid areas of contention and in protection of the reputation of the Islamic bank and **in observation of the hadith** by the Prophet peace be upon him

### Ambiguity of method

#### Meezan Bank

The modus operandi defined above for Deposit Products **is according to the dictates of Shariah**<sup>264</sup>

### Application of existing rulings

#### Qatar Islamic Bank

لا أرى مانعا لإجراء هذه العملية في إطار بيع المرابحة الشرعية المعمول به في المصارف الإسلامية اعتمادا على إجازة بعض الفقهاء المتقدمين والمعاصرين لذلك<sup>265</sup>

I see no obstacle in executing this arrangement in the legal *Murabaha* sale conducted in Islamic banks, **relying on the permissibility opined by early and contemporary jurists**

### Other statements of the practice of ijtihad

#### Al Rajhi Bank

..فظهرت القرارات، والفتاوى الجماعية لهذه الهيئات، نتيجة دراسات موسعة، واجتهاد جماعي، من فقهاء متمرسين..<sup>266</sup>

..and so appeared the decisions and the group fatwas of these committees, as a result of wide studies and **group ijtihad** from experienced jurists..

<sup>262</sup> Al Salam Bank, "Fatāwā- tajribat Mişraf al-Salām - al-Baḥrayn fī taḥwīl bank taqlīdī ilā maşrif Islāmī," (Manama: Al Salam Bank, n.d.), accessed October 3<sup>rd</sup>, 2018, <http://iefpedia.com/arab/wp-content/uploads/2018/05/Fatwa-Salam-bank-2018.pdf>, 50.

<sup>263</sup> IIFA et al., *al- Fatāwā al-Iqtişādiyya*, accessed August 14<sup>th</sup>, 2020, <https://al-maktaba.org/book/1611/405>, 402.

<sup>264</sup> "Shariah Supervisory Board," Meezan Bank, "Shariah Supervisory Board," Meezan Bank, accessed October 3<sup>rd</sup>, 2018, <https://www.meezanbank.com/about-us/#SSB>.

<sup>265</sup> IIFA et al., *al-Fatāwā al-Iqtişādiyya*, 1088.

<sup>266</sup> Al-Rajhi Bank Sharia Group, *Qarārāt al-hay'a al-Shar'iyya bi-Maşrif al-Rājhi* (1) (Al-Riyadh: Dār Kunūz Ishbīlya li-al-Nashr wa-al-Tawzī', 2010), 5.

Table 6: Forms of fatwas published by surveyed Islamic banks

This section has established that SSBs have exercised the unrestricted authorities they have been granted by regulators. This was established following a review of 1101 published fatwas that demonstrated the SSBs' use of the various methods of *ifta'* that were discussed in the previous chapter. The finding of the previous section therefore continues to hold; since SSBs exercise the unrestricted authorities granted by the regulators, they reflect the authorities of the absolute, the senior affiliate and the limited mujtahids. Their transmissions also reflect the authorities of other levels of the affiliate mujtahid.

Following the establishment of the authorities of SSBs in light of the views of surveyed legal scholars, regulations and practice, the next section continues the analysis of the authorities granted by regulators by examining their qualification requirements.

#### Qualifying for authority

The previous sections in this chapter established that the *ifta'* authority granted to and exercised by SSBs corresponds to that of the absolute, the senior affiliate and the limited mujtahids discussed in the previous chapter. This section continues the assessment of the authority of SSBs as a foundation for the study of their ability to realign the industry with its objectives. It compares the qualifications required by regulators and by the legal scholars for the established authorities. It will show that regulators have required qualifications similar to those required by the legal scholars of the junior affiliate mujtahid.

The qualifications required of the absolute, the senior affiliate and the limited mujtahids by legal scholars were presented in the previous chapter. They comprised prerequisites, attributes, knowledge and skill. The prerequisites were those of belief, sanity and maturity, representing legal competence. Shi'i scholars had also required the mufti to be a male, contemporary and of a legitimate birth (through wedlock). Attributes comprised *'adala, fiqh al-nafs* and not being prone to mistakes, forgetfulness and inattention. The required knowledge areas were the Quran, Sunna, legal theory, the Arabic language, jurisprudence and others. The comparison of the qualifications of legal scholars with regulators will follow the same classification.

The first area of comparison between the qualifications by regulators and legal scholars is the prerequisites, comprising belief, sanity, maturity, being a male, contemporary and of a legitimate birth. The first three prerequisites have been required by more of the surveyed scholars than the latter three. This inclination is reflected in the qualifications required by the regulators through their exclusion of the latter three prerequisites. In fact, not only is the requirement of being a male excluded, but women have been appointed to SSBs.<sup>267</sup> As for the first three prerequisites, belief is only stipulated by the Malaysian and Omani central banks, whereas age is excluded by all in the sample.<sup>268</sup> The exclusion of the first two prerequisites has not had a material impact in the industry as scholars tend to be of age by

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<sup>267</sup> "Shariah Advisory Council," Bank Negara Malaysia, accessed August 13<sup>th</sup>, 2020, [http://www.bnm.gov.my/index.php?ch=en\\_about&pg=en\\_thebank&ac=439&lang=en](http://www.bnm.gov.my/index.php?ch=en_about&pg=en_thebank&ac=439&lang=en).

<sup>268</sup> BNM, "Shariah Governance," 10; CBO, "Islamic Banking Regulatory Framework," 2.2.3.

the time their educational qualifications are attained. As for belief, we have not identified any SSB scholar who is not a Muslim. The remaining prerequisite of sanity has been included by the IFSB and the Bahraini regulators through the requirements of mental fitness.<sup>269</sup> It is therefore evident that the regulations do not generally account for the prerequisites proposed by the surveyed scholars. However, neglect of the more common prerequisites of age, belief and sanity is unlikely to be material due to their customary occurrence.

The second category of qualifications is that of the mufti's attributes, including *'adala*, *fiqh al-nafs* and not being prone to mistakes and forgetfulness. *'adala* is a form of moral probity encompassing a natural disposition for the devout adherence to Islam's prohibitions and obligations. It was commonly stipulated by the scholars surveyed in the previous chapter. None of the examined regulations stipulate *'adala* specifically, but some have included other descriptions of conduct. The IFSB and the Bahraini, Indonesian, Qatari, Omani and Pakistani regulators require integrity, honesty, good reputation, character and morals.<sup>270</sup> The characteristics do not equate to the above definition of *'adala*, notably neglecting adherence to Islam's prohibitions and obligations, a more comprehensive concept extending to personal spheres such as worship, in favour of only morals and integrity. The disparity is more prominent with the Central Bank of Kuwait which only

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<sup>269</sup> CBB, "Central Bank of Bahrain- Shari'a Governance Module," SG-2.4; IFSB, "Guiding Principles," 12.

<sup>270</sup> IFSB, "Guiding Principles," 11-12; CBB, "Central Bank of Bahrain- Shari'a Governance Module," SG-2.4.6; Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34; QCB, "Corporate Governance Principles for Banks," 47; CBO, "Islamic Banking Regulatory Framework," 2.2.3.5; SBP, "Shari'ah Governance Framework for Islamic Banking Institutions," 13.

stipulates a good reputation.<sup>271</sup> The regulators' required conduct qualifications thus do not correspond to the scholars' fundamental and encompassing requirement of *'adala*.

Similar to *'adala*, *fiqh al-nafs* is not specifically mentioned by regulators. Instead, some regulators refer to capabilities regarding derivation, jurisprudence and its principles. *Fiqh al-nafs* was defined as the proficient abilities of understanding texts, deriving accurately from the texts with an intuition, differentiating between ambiguous branches and combining them with causes and principles.<sup>272</sup> The regulators' diction does not equate to *fiqh al-nafs* as defined, however, some regulations display a higher correspondence to the definition than others. AAOIFI requires a capability in derivation, but it is the only regulator to do so and even then, the term 'capability' does not reflect the described depth and proficiency.<sup>273</sup> The Central Bank of Kuwait, IFSB and the State Bank of Pakistan mention knowledge of derivation, but the key in *fiqh al-nafs* is the ability of application. Therefore, from the perspective of the attribute of *fiqh al-nafs*, it is only AAOIFI's requirement that is comparable to the qualifications of a mufti with the authority to derive.

The final attribute, that of not being prone to mistakes, forgetfulness and inattention, is required by the Central Bank of Bahrain and the IFSB. The regulators use an alternative statement, referring to "diligence, capability and soundness of judgement".<sup>274</sup> Due to its

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<sup>271</sup> CBK, "Ta'limāt bi-Sha'n Ḥawkamat al-Raqāba al-Shar'iyya fī al-Bunūk al-Kuwaytiyya al-Islāmiyya," 23-24.

<sup>272</sup> Refer to the section on the absolute mujtahid in the previous chapter.

<sup>273</sup> Refer to Table 6 above.

<sup>274</sup> CBB, "Central Bank of Bahrain- Shari'a Governance Module," SG-2.4.4; IFSB, "Guiding Principles," 11.

requirement by a minority of the surveyed scholars, its omission by the other regulators is not a generally significant divergence from the scholars' requirements.

The third category of qualifications is that of knowledge, which is supported by a general agreement among our chosen scholars. Knowledge of the Quran, Sunna, legal theory, the Arabic language and jurisprudence have been required by most of the surveyed scholars. The regulators have adopted two approaches to knowledge qualifications. The IFSB and the Bahraini, Kuwaiti, Malaysian, Omani and Pakistani regulators have stipulated the completion of an educational degree in Shari'a, jurisprudence or legal theory, emphasising the jurisprudence of transactions.<sup>275</sup> AAOIFI and the Indonesian and Qatari regulators rather refer to knowledge, skills or experience in Shari'a, jurisprudence or legal theory.<sup>276</sup> The regulators also stipulate knowledge in Islamic finance, a requirement that will be discussed below. The following paragraphs assess the two approaches to knowledge qualifications relating to *ifta'*.

In order to assess the relevance of the regulators' requirement of an educational degree to the knowledge qualifications proposed by the scholars, the content of such degrees is examined below. The examination covers the curricula of the institutions most commonly

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<sup>275</sup> IFSB, "Guiding Principles," 30; CBB, "Central Bank of Bahrain- Shari'a Governance Module," SG-2.4.4; CBK, "Ta'limāt bi-Sha'n Ḥawkamat al-Raqāba al-Shar'iyya fī al-Bunūk al-Kuwaytiyya al-Islāmiyya," 23; BNM, "Shariah Governance," 10; CBO, "Islamic Banking Regulatory Framework," 2.2.3.5; SBP, "Shari'ah Governance Framework for Islamic Banking Institutions," 12.

<sup>276</sup> AAOIFI, *Shari'ah Standards*, 739; Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34; QCB, "Corporate Governance Principles for Banks," 44.

attended by 71 SSB scholars included in a survey by Failaka Advisors.<sup>277</sup> These are al-Azhar University, the International Islamic University Malaysia (IIUM), the University of Malaya (UM), al-Imam Mohammad Ibn Saud Islamic University (IMSIU). Jamia Darululoom Karachi (“Darululoom” thereafter) and the International Islamic University Islamabad (IIUI) have been included due to their provision of degrees specified by the State Bank of Pakistan. Darululoom is also the fifth most common institution<sup>278</sup> in Failaka’s survey. The reviewed curricula are of the institutions’ bachelor’s degrees in Shari’a at al-Azhar and IMSIU, *Fiqh* and *Usul al-Fiqh* at IIUM and UM, the *Shahadat ul Aalamiyyah*<sup>279</sup> degree at Darululoom and LLM/MS Shari’ah & Law at IIUI. The degrees specific to Pakistan will be compared separately.

A summary of the curricula of the six institutions is provided in Appendix 3. The summary excludes modules that are not directly relevant to the discussion on qualifications, such as those on research skills and family studies. Elective courses related to the qualifications have been included in the cases of IIUM and UM. The summary of the undergraduate degrees shows the curricula to be generally aligned with the qualifications. The curricula include modules on the Quran, Sunna, principles of jurisprudence (legal theory), Arabic language and jurisprudence.<sup>280</sup> The positions of consensus are not taught as a separate module and their instruction is likely to depend on the depth of the institutions’

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<sup>277</sup> Failaka, *The Failaka Shariah Report 2008: Profiles of the World's Leading Scholars*, (Dubai: Failaka, 2008).

<sup>278</sup> Along with the University of Jordan.

<sup>279</sup> The *Fadhil* stage is the main stage of education at the institution. It is completed over eight years after which the student becomes eligible to apply for postgraduate classes.

<sup>280</sup> “Al-Khuṭṭa al-Dirāsiyya al-Jadīda fī Kulliyat al-Sharī’a,” IMSIU, accessed July 8<sup>th</sup>, 2018, <https://units.imamu.edu.sa/colleges/sharia/Pages/tosifatnew.aspx>; “Course List for the Major Component,” International Islamic University Malaysia, accessed February 15<sup>th</sup>, 2019, <http://www2.iium.edu.my/sites/default/files/users/15/files/RKQS%20121%20with%20new%20course%20code%20done.docx>.

jurisprudence modules. The curricula of IIUM, IMSIU and UM also include a module on the objectives of the Shari'a, a qualification proposed by two of the scholars surveyed in the previous chapter. However, the curricula do not appear to cover certain areas stipulated by the scholars. For instance, the institutions do not provide modules on the science of transmitters. While content on transmission might be included in modules on hadith, the science of transmitters is a discipline in its own right. IMSIU (the only institution of the four to provide its study programs on the public domain) includes six hours on topics in the science of transmitters in its hadith terminology module.<sup>281</sup> This brief exposure in a module dedicated to another science suggests it to be of an introductory nature, rather than a tuition to the level of mastery. Mastering the science of transmitters includes, in addition to the principles, a substantial scope for application covering thousands of transmitters over many centuries. Other than the science of transmitters, IMSIU's curriculum offers no classes on Arabic morphology and rhetoric, areas required by the scholars.<sup>282</sup> Similarly, IIUM only provides a single module in Arabic studies; 'Arabic for Islamic Studies'.<sup>283</sup>

The examination's reference to the four institutions' curricula only prevents the assessment of the depth and breadth of the modules. It does not therefore fully portray the resonance of the degrees to the qualifications set by scholars. Furthermore, lack of access to details of the course content prevents the formation of conclusive judgement on the implications of the institutions' omission of the aforementioned modules. However, the

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<sup>281</sup> "Tawṣīf Muqarrar Dirāsi," IMSIU, accessed July 31<sup>st</sup>, 2019, [https://units.imamu.edu.sa/colleges/sharia/study\\_programs/Documents/newkh/snh212p.pdf](https://units.imamu.edu.sa/colleges/sharia/study_programs/Documents/newkh/snh212p.pdf)

<sup>282</sup> "Tawṣīf Muqarrar Dirāsi," IMSIU.

<sup>283</sup> "Course List for the Major Component," IIUM.

availability of higher taught degrees and specialisations in jurisprudence and in legal theory at the four institutions is a clear indication of limits to the content of studies at the discussed bachelor's levels and their equivalents. The implications of the availability of higher degrees is demonstrated by UM's guidance on career opportunities. The university lists 'Shariah advisor', 'Islamic finance officer' and 'Islamic banking officer' as opportunities only for its Masters and PhD programs.<sup>284</sup> However, IMSIU differs in this regard and states that the bachelor's degree qualifies students for *ifta'* and SSBs.<sup>285</sup> Unlike UM, IMSIU's management's view is therefore in line with the regulators' view of the sufficiency of a bachelor's degree as a knowledge qualification. The implications of the proposed authority based on the examined degrees are discussed below.

While aforementioned regulators have stipulated bachelor's degrees and equivalents to represent knowledge qualifications, the Pakistani regulator has stipulated one of two categories of degrees. The first is *Shahadat ul Aalamiyyah*, a two-year postgraduate degree taught at traditional learning institutions and is the highest level of attainment at Darululoom.<sup>286</sup> The other is a Master of Law in Shari'a or an equivalent degree, the duration of which at IUI is one year. The postgraduate format and duration of the master's degree means that it is not designed to comprehensively build the student's knowledge in Shari'a. It rather builds on previous education through specialisation. Therefore, a comparison of the

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<sup>284</sup> "Master of Shariah," University of Malaya, accessed October 17<sup>th</sup>, 2019, <https://umcms.um.edu.my/sites/apium/master-of-shariah>; "DOCTOR OF PHILOSOPHY (PH.D)," University of Malaya, accessed October 17<sup>th</sup>, 2019, <https://apium.um.edu.my/doctorate>; "Bachelor of Shariah Fiqh & Usul," University of Malaya, accessed October 17<sup>th</sup>, 2019, <https://umcms.um.edu.my/sites/apium/bachelor-of-shariah-fiqh-amp-usul>.

<sup>285</sup> "Al-Khuṭṭa al-Dirāsiyya al-Jadīda fī Kulliyat al-Sharī'a," al-Imam Mohammad Ibn Saud Islamic University.

<sup>286</sup> "Syllabus at a Glance," Jamia Darululoom Karachi, accessed February 14<sup>th</sup>, 2019, [https://darululoomkarachi.edu.pk/jamia/ur/?page\\_id=6#XfGcxFhY](https://darululoomkarachi.edu.pk/jamia/ur/?page_id=6#XfGcxFhY).

degree without consideration of their preceding levels is unlikely to reflect a comprehensive education. However, the regulator does not specify the subject area of preceding studies and thus the comparison will only cover the stated degrees.

IIUI's LLM Shari'ah and Law degree includes modules on jurisprudence and its principles.<sup>287</sup> It offers no modules on the Quran, Sunna or Arabic language. The degree therefore appears to differ significantly from the qualifications stipulated by classical scholars. Darululoom's *Shahadat ul Aalamiyyah* covers the knowledge areas required by the scholars except for legal maxims and Arabic morphology, although their inclusion in other modules remains possible. The degree also offers a module on the principles of *ifta'*. However, the educational path to *ifta'* at Darululoom is through an additional three-year specialisation. The regulator acknowledges this specialisation by stating its preference for its achievement but does not stipulate it.<sup>288</sup> Therefore, similar to the other educational institutions above, the availability of the further specialisation at Darululoom indicates the limitation of studies at the preceding levels (forming the regulator's minimum requirements).

The previous section showed regulators to grant SSB scholars an unrestricted authority to derive. This authority corresponded to those of the absolute, senior affiliate and limited mujtahid discussed in the previous chapter. For these authorities, the surveyed scholars had

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<sup>287</sup> "Scheme of Studies LLM/MS *Shari'ah* & Law," International Islamic University, Islamabad, accessed August 13<sup>th</sup>, 2020, <https://www.iiu.edu.pk/wp-content/uploads/downloads/faculties/fsl/scheme/shariah/2019/scheme-of-studies-LLM-MS-Shariah-&-Law-240919.pdf>.

<sup>288</sup> SBP, "Shari'ah Governance Framework for Islamic Banking Institutions," 12.

required extensive qualifications and has also described the depth and comprehension of the knowledge required of the mufti. This included Ibn al-Salah's rejection of the possibility of a new absolute, independent mujtahid. It was also represented by Ibn al-Salah, al-Dihlawi and al-Qaradawi's attribution of the authority to the most senior scholars. Bin Bayyah opted for a simple requirement of achieving depth in knowledge of jurisprudence.<sup>289</sup> The comprehension of the scholars' requirements and their descriptions of the level and exclusivity of knowledge requirements illustrate a stark difference between the qualifications required by the scholars and the regulators stipulating university degrees for the same authorities. The tuition in bachelor's degrees extends for four years in which many topics are studied, as shown in the survey of the universities' course in Appendix 3. An education of this level does not compare to the mastery described by the scholars. Similarly, the Pakistani regulator accepts master's degrees without stipulating earlier studies in Islamic law. While the degrees allow for specialisation, their tuition of up to two years is more limited than that of bachelor's degrees. In addition, the regulators have not stipulated minimum grade requirements for the degrees, except for the Pakistani regulator.<sup>290</sup> Accordingly, they do not assess the candidates' proficiency in the areas required by the scholars. This allows for the qualification of candidates that have neither covered an area of knowledge comprehensively nor gained proficiency in the areas of study. A further indicator of the limited nature of these degrees is the aforementioned availability of higher degrees in Islamic law at the same institutions.

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<sup>289</sup> Bin Bayyah, *Ṣinā'at al-Fatwā wa-Fiḥ al-Aqalliyyāt*, 46.

<sup>290</sup> SBP, "Shari'ah Governance Framework for Islamic Banking Institutions," 12.

While the above examination addressed the regulatory requirement of bachelor's degrees or their equivalents, AAOIFI and the Qatari regulator's knowledge requirements are restricted to jurisprudence and do not include other educational qualifications. The requirement can either be vague and meant to incorporate relevant areas of knowledge such as the Quran and Sunna, or it can represent the regulators' actual specification of jurisprudence only. By neglecting to mention the other areas, the regulations have enabled the appointment of candidates that are educated in jurisprudence but have not necessarily mastered other required topics, such as Quranic and hadith sciences. The qualifications of AAOIFI and the Qatari regulator therefore differ from the qualifications required by the surveyed legal scholars even further.

Bank Indonesia has also only required knowledge of jurisprudence, but the limited knowledge requirement is of a lesser significance due to its unique regulatory model. Bank Indonesia requires financial institutions to source fatwas from the Dewan Syariah Nasional (National Sharia Board) of the Indonesian Ulema Council.<sup>291</sup> As a result, SSBs of Indonesian financial institutions are not authorised to derive fatwas, thus limiting the relevance of the qualifications that the surveyed legal scholars require of the absolute mujtahid.

We have argued that the qualifications required by regulators differ from those required by the legal scholars in relation to the authorities of the absolute, senior affiliate and limited mujtahid. We instead find the regulators' qualifications to resonate with those of the

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<sup>291</sup> Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34.

scholars for the junior level of the affiliate mujtahid. The qualifications of this mufti include knowledge of the Arabic language, elements from legal theory and jurisprudence.<sup>292</sup> The remit of this mufti extends to the understanding, interpretation and transmission of existing legal views. The mufti is therefore required to have a capability in jurisprudence but does not have to master all the sciences required of the absolute mujtahid. The similarity of these qualifications to those required by the regulators lies in the scholars' requirement of knowledge but not of mastery. The similarity is also evident in the focus on jurisprudence, the Arabic language and legal theory, but not on the sciences of the primary sources. Nonetheless, while the qualifications resonate, the authorities differ substantially. The junior affiliate mujtahid is not authorised to derive and is only authorised to transmit existing positions. In fact, neither is the (more senior) third level of the affiliate mujtahid authorised by the legal scholars to derive. This indicates that even a level of qualifications higher than that required by the regulators would not qualify for the authorities they currently assign SSBs. This further demonstrates the divergence in the qualifications of the regulators and surveyed legal scholars.

In addition to knowledge of jurisprudence and supporting sciences, the regulators have stipulated knowledge of the industry.<sup>293</sup> The Kuwaiti, Malaysian, Qatari and Pakistani regulators stipulate experience in the field too. This requirement is specific to the context of

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<sup>292</sup> Refer to the section on the affiliate mujtahid in the previous chapter

<sup>293</sup> AAOIFI, *Shari'ah Standards*, 739; Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34; BNM, "Shariah Governance," 10; CBB, "Central Bank of Bahrain- Shari'a Governance Module," SG-2.4; CBK, "Ta'limāt bi-Sha'n Ḥawkamat al-Raqāba al-Shar'iyya fi al-Bunūk al-Kuwaytiyya al-Islāmiyya," 23-24; IFSB, "Guiding Principles," 11-12; QCB, "Corporate Governance Principles for Banks," 44; CBO, "Islamic Banking Regulatory Framework," 2.2.3.2; SBP Islamic Banking Department, "Shari'ah Governance Framework for Islamic Banking Institutions," 12-13.

Islamic finance and is thus not directly required by the surveyed classical scholars. However, al-Qaradawi states the requirement for achieving knowledge of a topic prior to undertaking related *ifta'*.<sup>294</sup> Therefore, similar to the regulators' requirement, a mufti would need a background in Islamic finance in order to issue fatwas on it.

While the examination of qualifications referred to requirements by regulators, some banks stipulate their own for their SSB scholars. The guidelines of 11 banks were surveyed to assess the relation of the qualifications they require of their SSBs to those of their regulators of the classical scholars. The surveyed banks were the domestic market leaders in the countries in our sample. Unlike regulators, few financial institutions publish their internal requirements concerning the qualifications of SSB scholars. Therefore, only 4 of the 11 surveyed banks provide any indication regarding their SSB qualification requirements.<sup>295</sup> Bank Rakyat Indonesia Syariah states that its qualifications are set by the regulator. Bank Islam Malaysia Berhad (BIMB) and Kuwait Finance House (KFH) require university degrees in Shari'a as a minimum, with BIMB specifying the inclusion of studies in the principles of jurisprudence or Islamic commercial law. Finally, Qatar Islamic Bank requires the scholars to

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<sup>294</sup> Al-Qaradawi, *al-Ijtihād fī al-Sharī'a al-Islāmiyya*, 48-49.

<sup>295</sup> "Anggaran Dasar Pt Bank Brisyariah Tbk," BRIsyariah, accessed February 14<sup>th</sup>, 2019, [https://www.brisyariah.co.id/files/reports/Anggaran\\_Dasar\\_310518.pdf](https://www.brisyariah.co.id/files/reports/Anggaran_Dasar_310518.pdf), 69; "Terms of Reference of Shariah Supervisory Council ("Ssc") Bank Islam Malaysia Berhad," Bank Islam Malaysia Berhad; "Shari'a Board," Bank Nizwa; "Shariah Board," Dubai Islamic Bank; Islamic International Rating Agency, "Fiduciary Rating Report Albaraka Türk Katilim Bankasi A.Ş.," (Sanabis: Islamic International Rating Agency, 2016), accessed October 3<sup>rd</sup>, 2018, <https://www.albaraka.com.tr/pdf/FR-AlBaraka-Turk-2016.pdf>; Kuwait Finance House, "Memorandum & Articles of Association," 6; "Amended Articles of Association," Qatar Islamic Bank, accessed February 14<sup>th</sup>, 2019, <https://www.qib.com.qa/en/images/QIB%20Memorandum%20of%20Assocation.pdf>, 20; "Al-Majmū'a al-Shar'iyya," Al-Rajhi Bank Sharia Group; "Shariah Supervisory Board," Meezan Bank; "Sharia compliance," Al Rayan Bank, accessed October 3<sup>rd</sup>, 2018, <https://www.alrayanbank.co.uk/useful-info-tools/islamic-finance/sharia-compliance/#SSC>; Al Salam Bank, "Corporate Governance Guidelines," (Manama: Al Salam Bank-Bahrain B.S.C, n.d.), accessed October 3<sup>rd</sup>, 2018, <https://www.alsalambahrain.com/en/WHO-WE-ARE/Corporate-Governance/Documents/Corporate%20Governance%20Guidelines.pdf>.

be specialist jurists in Islamic commercial law. Aside from Bank Rakyat Indonesia Syariah, qualifications required at the three other banks are less demanding than those of their regulators, discussed above. The qualifications therefore indicate that the banks have followed the approach of their regulators rather than the classical scholars.

Following the establishment of the authorities granted to SSBs by their regulators, this section compared the qualifications required by regulators for this authority to those required by the surveyed legal scholars. The comparison addressed the eight regulators authorising their SSBs for derivation or general *ifta'* without restrictions. It found that the regulators have largely excluded the prerequisites required by the scholars. The attributes have largely been excluded too, but regulators substituted the attribute of *'adala* with other requirements of morals and integrity. The main knowledge qualifications of the regulators were university degrees, so the comparison referred to relevant university degrees. It found that the regulators' knowledge qualifications did not meet the depth and occasionally the range required by the scholars. Neither did the regulators that have not required university degrees follow the scholars' knowledge requirements. Based on the comparisons, we argued that the regulators required qualifications similar to those required by the legal scholars of the junior affiliate mujtahid. This was in spite of granting authorities that the legal scholars reserved to the absolute, senior affiliate and limited mujtahids. The two sides thus differ in their qualifications for *ifta'* authorities. As for the regulators that have not regulated SSB qualifications, they were not included in the comparison. However, the lack of regulation does not prevent the recruitment of SSBs. They thus leave the decisions of both the authorities and the qualifications of SSBs to the discretion of the shareholders or the

managers of the banks. Finally, SSB qualifications required by a sample of Islamic banks were surveyed to identify whether they follow the approach of their regulators or of the surveyed legal scholars. The publications of four banks in the sample demonstrated their stipulation of lower qualifications than their regulators.

This section addressed the qualifications of SSB scholars as set by a sample of regulators. The following section extends the assessment of SSB authority by reviewing the qualifications of current SSB scholars.

#### Qualifications in practice

To develop a basis for understanding SSBs' ability to drive reform in the industry, our assessment of their authority has so far identified the authorities that they exercise as well as those set by their regulators. In order to further understand the authority of SSBs, this section presents findings on the qualifications of SSBs from three primary sources. The first is a compendium of profiles of 99 SSB scholars, covering their employment and educational backgrounds. The second is a book by a seasoned SSB scholar who provides insights into the world of SSBs. The third is an article based on interviews with 14 SSB scholars. It will show that while many scholars have achieved qualifications exceeding those required by regulators, there remain scholars not in possession of the required levels of knowledge.

The first source for insights on the state of SSB scholarship is *The Failaka Shariah Report 2008: Profiles of the World's Leading Scholars*, which contains employment and educational

details of SSB scholars around the world. This assessment involved the aggregation of the educational backgrounds of the scholars, presented in Chart 5 below.

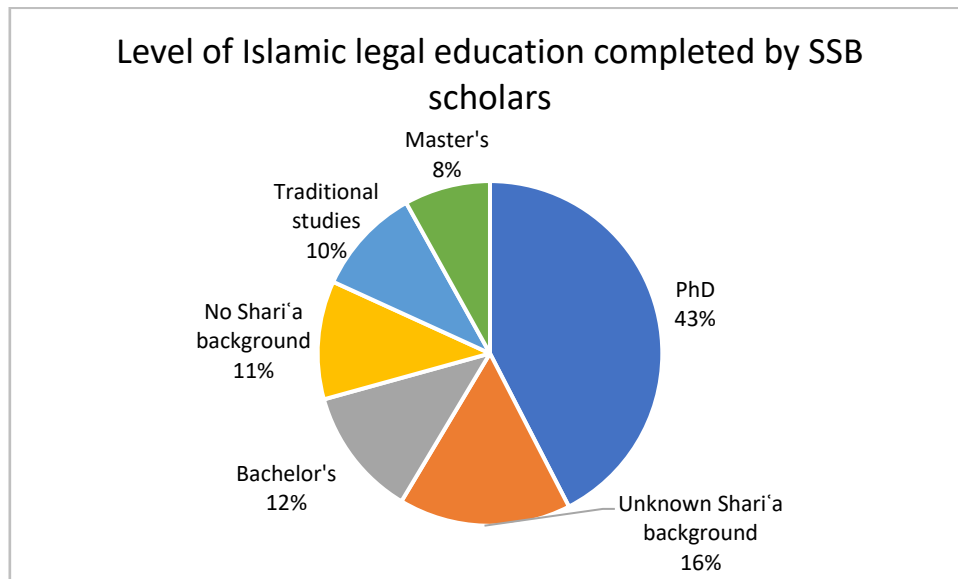


Chart 5: Educational backgrounds of 99 SSB scholars surveyed by Failaka<sup>296</sup>

Chart 5 shows the majority of SSB scholars to have achieved PhDs in topics relating to Islamic law. This indicates that the majority are qualified above the regulators' requirements. 8% of the scholars had completed master's degrees in areas relating to Islamic law, resulting in a cumulative 51% of scholars having completed degrees higher than the bachelor's degrees required by regulators. 12% had also met the regulatory bachelor's requirement. 10% of the scholars had gained their Islamic legal background by learning directly from senior scholars or in traditional educational institutions. 11% were not reported to have completed degrees in Islamic law. The education of these scholars included economics, Islamic economics, Islamic finance, education and psychology, Islamic studies, political science, commerce and law.

<sup>296</sup> Failaka, *The Failaka Shariah Report 2008*.

Based on the summary of the results from Failaka's data we present two main findings. The first is that a minority of the scholars do not meet the qualifications required by the regulators. These findings will be further discussed in the final section of this study. The second is that the regulations require qualifications lower than those held by the majority of the scholars in Failaka's sample.

A second source on the qualifications of SSB scholars is *Shariah Minds* by Mohammad Daud Bakar. Bakar is Chairman of the Shariah Advisory Council of the central bank of Malaysia and had been a member of 27 SSBs in 2010.<sup>297</sup> In *Shariah Minds*, Bakar provides insights into the operations of SSBs and defends them from common accusations. Bakar's insights into the practice of SSBs reflect and supplement the above discussion of qualifications. The implications of the regulators' acceptance of undergraduate qualifications is reflected in three anecdotes which are then discussed below. The first is his personal recollection of learning while serving on SSBs.<sup>298</sup> The second is his statement that "relevant authorities do not scrutinise further whether this academic qualification is specifically related to the study of Islamic law (commonly known as Shariah Studies) or any other disciplines, such as the study of comparative laws, the study of hadith, (the traditions of the Prophet Muhammad (PBUH) or the Quranic exegesis or even Arabic Linguistics."<sup>299</sup> His conclusion from this is that "the academic qualification and its specialisation is not as critical as the real knowledge that a person possesses for him to be considered as a potential Shariah advisor." The third is his reference of SSB members having to be replaced

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<sup>297</sup> Ünal, "The Small World of Islamic Finance," 17.

<sup>298</sup> Mohd Daud Bakar, *Shariah Minds* (Kuala Lumpur: Amanie Media, 2016), xxxii-xxxix.

<sup>299</sup> Bakar, *Shariah Minds*, 4.

due to their “limited knowledge and exposure to both the Shariah principles and product knowledge.”<sup>300</sup>

Bakar’s three anecdotes demonstrate the previous section’s argument that the qualifications required by regulators do not lead to mastery. His first anecdote reveals that his knowledge of Islamic law or of banking was incomplete upon joining SSBs. The development of his knowledge continued while he was serving on SSBs, indicating a participation in *ifta*’ prior to the achievement of mastery. His second anecdote shows that the regulators<sup>301</sup> in question adopted a flexible approach in the approval of SSB scholars. Since most of the surveyed regulators assess a scholar’s knowledge competence through a completion of a degree, their approval of holders of alternative specialisations indicates that their competence is not validated. His third anecdote indicates that the regulations facilitate the recruitment of abilities below those required by the banks. Following the second anecdote, Bakar expresses a need for certifying SSB scholars, an expression that suggests the inadequacy of existing regulations.<sup>302</sup> Bakar’s three anecdotes and latter recommendation thus demonstrate the practical implications to the regulators’ qualifications: that they admit candidates with insufficient competence to discharge the duties of SSB scholars.

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<sup>300</sup> Bakar, *Shariah Minds*, 20.

<sup>301</sup> Our interpretation of “the relevant authorities.”

<sup>302</sup> Bakar, *Shariah Minds*, 4-5.

The third source on the qualifications of practising SSB scholars is Zulkifli Hasan's research on Shari'a governance based on interviews with 14 SSB scholars. Hasan is also a SSB scholar at Affin Islamic Bank. Based on the interviews, he states that "*Shari'ah* scholars admit that they need training to improve their competence, particularly on the technical aspects of banking and finance."<sup>303</sup> Additionally, similar to Bakar, Hasan's sample of "*Shari'ah* scholars are in favour of the idea of establishing a professional body for *Shari'ah* advisors. This professional body will have the authority to grant licences for *Shari'ah* advisors, to offer professional courses and qualifications and to regulate the ethical principles of *Shari'ah* advisors."<sup>304</sup> Hasan's sample of scholars therefore identifies itself as underqualified in areas relating to banking. This is in spite of regulations requiring competence in such areas. Additionally, they favour the certification of SSB scholars. This desire, despite the existence of regulations on the qualifications of SSBs, indicates their dissatisfaction with existing regulations in the identification of a scholar's eligibility.

This section has thus found SSB scholars to acknowledge the existence of scholars lacking certain qualifications and a need for other approaches of assessing the eligibility of candidates. This was in spite of our finding that the majority of SSB scholars possess qualifications higher than those required by the surveyed regulators. The two findings suggest that the regulations governing the qualifications of SSB scholars are not enforced uniformly. This implication will be further discussed below.

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<sup>303</sup> Zulkifli Hasan, "In search of the perceptions of the Shari'ah scholars on Shari'ah governance system," *International Journal of Islamic and Middle Eastern Finance and Management* 7, 1 (2014), 29.

<sup>304</sup> Hasan, "In search of the perceptions of the Shari'ah scholars," 30.

In addition to the requirements of morals and educational degrees, the regulators have required SSB scholars to possess experience in relevant roles. This qualification has not been discussed yet as it has not featured in the qualifications of the surveyed legal scholars. The regulators' experience requirements are instead addressed in the following section.

### Judging a mufti's eligibility

To facilitate the identification of scholars qualified to assume the position of *ifta'*, some legal scholars have specified methods for judging a candidate's eligibility. These were discussed in the previous chapter. Some regulators of Islamic banks have also set criteria for the identification of qualified candidates for SSB roles. This section continues the study of the authorities of SSBs through a comparison of the identification methods of both groups. This includes both knowledge and experience qualifications, as well as the requirement of consulting the most-learned mufti. The examination of the identification methods facilitates an understanding of the construct of authority in the industry. The section will demonstrate the continued divergence in the qualities sought of candidates by regulators and legal scholars.

The regulators have set two methods to identify the eligibility of a candidate for a SSB role. The first method, adopted by AAOIFI and the Central Bank of Kuwait, relies on the scholar's reputation as an indicator of eligibility. AAOIFI states that competence is identified through "the vast reputation of the scholar or his distinguishable contributions especially in

the area of financial transactions.”<sup>305</sup> The Kuwaiti regulator similarly uses reputation to judge scholars who do not have the required educational degree.<sup>306</sup> The approaches of the two regulators share a feature with that of the surveyed legal scholars. The scholars also rely on reputations to in their requirement of identifying a qualified mufti through a proliferation of opinions of their suitability and to testimonies on their competence. However, AAOIFI and CBK differ from the scholars on two criteria. The regulators seek competence in jurisprudence rather than the suitability for *ifta*’ sought by the scholars. Jurisprudence is only one component of a mufti’s knowledge qualification, therefore the scholars seek wider qualifications. Furthermore, while CBK accepts testimonies of competence and experience in the jurisprudence of transactions, it does not specify the identity of the provider of the testimony. The scholars have described that providers of testimony are to possess the attribute of *’adala* or to both possess that attribute and to be an expert. These differences are further discussed below. AAOIFI and CBK thus broadly follow the legal scholars in suggesting reputation as a way to judge a candidate’s qualification.

The second method to identifying the eligibility of a candidate for a SSB role is adopted by the IFSB and the Bahraini, Kuwaiti, Malaysian, Omani and Pakistani regulators. These regulators require the competence of candidates to be identified through their achievement of the qualifications discussed above and those relating to experience. This approach differs from that required by the legal scholars. However, they share the principle of external

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<sup>305</sup> AAOIFI, *Shari’ah Standards*, 739.

<sup>306</sup> CBK, “*Ta’līmāt bi-Sha’n Ḥawkamat al-Raqāba al-Shar’iyya fi al-Bunūk al-Kuwaytiyya al-Islāmiyya*,” 23-24.

verification where a university degree indicates to the regulator a candidate's possession of knowledge, their experience suggests practical abilities and the testimony sought by scholars indicates a wider qualification for *ifta'*. The commonality is further discussed below.

The methods of the above regulators are therefore either objective, when relying on the attainment of educational qualifications and years of experience, or less so through judgements of reputations. Unlike the other eight regulators, the Indonesian and Qatari regulators have not specified a method for judging a scholar's competence.

The Bahraini, Kuwaiti, Indonesian, Malaysian, Omani, Qatari and Pakistani regulators also require SSB scholars to be experienced. Their requirements are shown in Table 7 below. The Indonesian, Malaysian and Qatari regulators are not specific in their experience requirements. The Bahraini and Omani regulators require experience in related areas but not necessarily in SSBs or *ifta'* in general. The Kuwaiti and Pakistani regulators require experience serving on SSBs.

Regulator	SSB experience requirements
Bank Indonesia <sup>307</sup>	At least possessing knowledge and <u>experience</u> in the field of mu'amalah sharia
Bank Negara Malaysia <sup>308</sup>	Possesses solid knowledge in Shariah with reasonable Islamic finance knowledge and <u>experience</u> of the relevant industry
Central Bank of Bahrain <sup>309</sup>	Have accumulated overall experience of at least seven years in Shari'a related scholarly pursuits (e.g. teaching, research, fatwas issuance, etc).
Central Bank of Kuwait <sup>310</sup>	خبرة عملية لا تقل عن خمسة سنوات في مجال الرقابة الشرعية. Practical experience in Shari'a supervision of no less than 5 years.
Central Bank of Oman <sup>311</sup>	Shari'a scholars must have accumulated overall experience of 10 years or more (in teaching, research, Fatwa issuance, etc.)
Qatar Central Bank <sup>312</sup>	Has sufficient <u>experience</u> and competency in the Islamic banking
State Bank of Pakistan <sup>313</sup>	i. The Shari'ah scholar members must have at least four (4) years experience of giving Shari'ah rulings including the period of Takhasus fil Ifta' ; or at least five (5) years post qualification experience in teaching or Research and Development in Islamic Banking and Finance.  ii. Majority of Shari'ah scholar members of Shari'ah Board of an IBI, including RSBM, shall have at least three (3) years' experience as Shari'ah Advisor or Member of Shari'ah Board (SB) of an Islamic Financial Institution (IFI) or deputy to a Shari'ah Advisor or member of the Shari'ah team of an IFI.

Table 7: Experience requirements of SSB scholars by seven regulators

The significance of the regulators' requirement of experience can differ according to the required area. Requiring experience in occupations involving Islamic law provides regulators with another objective indicator of a candidate's expertise in the field. Requiring experience in SSBs provides regulators with an objective indicator of their expertise in Islamic banking.

<sup>307</sup> Bank Indonesia, "Bank Indonesia Regulation Number: 11/3/Pbi/2009," Article 34

<sup>308</sup> BNM, "Shariah Governance," 10.

<sup>309</sup> CBB, "Central Bank of Bahrain- Shari'a Governance Module," SG-2.4.4.

<sup>310</sup> CBK, "Ta'limāt bi-Sha'n Ḥawkamat al-Raqāba al-Shar'iyya fi al-Bunūk al-Kuwaytiyya al-Islāmiyya," 24.

<sup>311</sup> CBO, "Islamic Banking Regulatory Framework," 2.2.3.

<sup>312</sup> QCB, "Corporate Governance Principles for Banks," 44.

<sup>313</sup> SBP, "Shari'ah Governance Framework for Islamic Banking Institutions," 12.

The requirements inform regulators of the candidate's expertise in Islamic law and banking. Such outcomes differ to those of the legal scholars. As discussed above, the scholars seek the validation of knowledge that covers not only Islamic law, but the possession of other characteristics and attributes too. On the other hand, experience indicates an ability in relevant areas such as jurisprudence but does not specify the comprehension and level of the ability.

The variation in the identification approaches of the regulators and legal scholars represents a fundamental difference. In requiring a degree, the regulators have sought an objective measure of knowledge. However, this measure does not reflect mastery of the knowledge in question nor of the level achieved. This is indicated through the absence of minimum grade requirements by regulators. Therefore, while the degree is an objective measure, it does not signify competence in the relevant areas. Neither does experience guarantee competence, as evident in the above statement and findings of Bakar and Hasan on the shortcomings of SSB scholars. Al-Shubaili, himself a SSB scholar, thus states that unqualified scholars will nonetheless occupy SSB positions.<sup>314</sup> On the other hand, the suitability for *ifta'* sought by the surveyed legal scholars includes not only their knowledge and its mastery, but also wider qualifications such as *fiqh al-nafs*. The difference is therefore in both the range and level of knowledge sought and abilities in application.

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<sup>314</sup> Al-Shubaili, "al-Raqāba al-Shar'iyya," 19.

Among the requirements on identifying an eligible mufti, the previous chapter presented an additional requirement by five of the legal scholars. The four Shi'i scholars and Ibn al-Salah require the petitioner to consult the most-knowledgeable mufti (*al-a'lam*) in cases where muftis disagree upon a ruling. The requirement is rejected or excluded by other surveyed Sunni scholars, and this position has not been directly adopted in the industry which primarily features Sunni scholars. Six of the surveyed regulators have been shown to recognise a mufti's eligibility through meeting minimum requirements. The minimum requirements were also shown to be basic in occasions, for example requiring bachelor's degrees despite the availability of higher degrees and those specialising in *ifta'* preparation. The approach of these regulators therefore contrasts with the notion of seniority. However, the Indonesian and Malaysian regulators have adopted different approaches that incorporate seniority requirements. The Indonesian model has been described above as requiring banks to source fatwas from the Dewan Syariah Nasional (National Sharia Board) of the country's senior government-backed clerical body. Their SSBs are therefore not authorised to exercise original *ifta'*. Unlike the Indonesian model, Malaysian SSBs have a scope to issue new fatwas.<sup>315</sup> However, their regulator has issued "Shariah Standards" on 14 contracts commonly used in Islamic banking products which the SSBs have to follow.<sup>316</sup> The scope of their SSBs therefore lies beyond these standards. The stipulation of reference to the central *ifta'* bodies could be motivated by other factors, whether political or desires for organisation. Nonetheless, the two regulators have concentrated authority in a higher

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<sup>315</sup> BNM, "Shariah Governance," 7.

<sup>316</sup> "Shariah Standards & Operational Requirement," Shariah Advisory Council- Bank Negara Malaysia, accessed August 14<sup>th</sup>, 2020, [https://www.sacbnm.org/?page\\_id=3318](https://www.sacbnm.org/?page_id=3318).

council, reflecting the notion of seniority. The industry therefore contains two different approaches to seniority.

The methods that regulators specify for identifying eligible candidates for SSBs thus differ from those set by the surveyed legal scholars. We have argued that the difference reflects what is to be identified. The regulators have sought to identify a scholar's possession of knowledge or expertise based on objective indicators. The legal scholars seek to identify a scholar's sufficient competence for *ifta'* based on their requirements. One group has thus prioritised objectivity whereas the other has sought competence.

The significance of this conclusion, along with those of previous sections are addressed in the following section, the last in this chapter.

#### Implications of authority

In order to determine the roles of SSBs in driving reform in the industry, this chapter has sought to understand their authority. This was conducted by assessing their authority and qualifications as set by regulators, as well as the practices of SSBs. This section examines the implications of the findings of the preceding assessments. It first evaluates this chapter's findings in light of a counter argument by a SSB scholar. It then investigates the basis of differences in the qualifications required by legal scholars and regulators. The section will argue that the *ifta'* authority legitimised by regulators forms a different paradigm to that of the surveyed legal scholars.

The first section in this chapter examined the regulations of eight regulators and found them to authorise SSBs for unrestricted *ifta'*. This authority is reserved by the reviewed legal scholars to the most capable jurists. The significance of these findings was accentuated in the second section which examined the fatwas of SSB scholars and found them to exercise this authority. We argue for their significance despite the following claim of the declining relevance of their responsibility of *ifta'*.

While *ifta'*, signifying the SSBs' production of fatwas, has been critical in the development of financing products since the inception of the industry, Abdulbari Mashal has suggested the possibility for banks to operate without the need for it. Mashal is the managing partner of Islamic finance advisory firm Raqaba and serves on AAOIFI's governance and ethics board.<sup>317</sup> Mashal has stated that the fatwa is reaching the end of its role given that the fatwas of the preceding 35 years had covered most cases in Islamic finance.<sup>318</sup> The number of new cases that require original fatwas is unlikely to match that faced by SSBs 40 years ago, as they had to address an entire industry's products and processes. Nonetheless, as the following paragraphs show, predictions of the conclusion of the role of original *ifta'* are both immaterial to the authority of SSBs and premature.

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<sup>317</sup> "Abdulbari Mashal, Ph.D.," Abdulbari Mashal, accessed November 12<sup>th</sup>, 2018, <https://www.linkedin.com/in/abdulbarimashal>.

<sup>318</sup> Abdulbari Mashal, "Al-Marḥala al-qādima tataṭallab tafīlan akbar li-al-tadqīq al-Shar'ī," *Al-Eqtisadiya*, May 1<sup>st</sup>, 2009, accessed November 12<sup>th</sup>, 2018, [http://www.aleqt.com/2009/05/01/article\\_151313.html](http://www.aleqt.com/2009/05/01/article_151313.html).

Mashal's prediction of the end for the need for *ifta'* is firstly irrelevant to the authority of SSB scholars due to the discretion provided by regulations to them to issue fatwas. As well as on new cases, SSBs can issue new fatwas on existing cases and could do so based on different applications of legal principles or on institutional or circumstantial reasons.<sup>319</sup> This possibility, despite product similarities across Islamic banks and an increasing reliance on AAOIFI Shari'ah Standards, reflects the pertinence of their authorities and its regulation. Additionally, unless the scholars are transmitting fatwas from a single source, they are likely to face cases on which legal opinions differ. Choosing legal positions over others is a form of *ijtihad* and is tied to the authorities and qualifications of the scholars. Mashal's claim therefore firstly does not reflect the discretion provided to SSBs.

Mashal's prediction can be also perceived as premature as finance is a developing field and innovations and developments of existing products could require new legal opinions prior to their adoption by Islamic financial institutions, as with cryptocurrencies. The state of regulations and the innovation in the industry thereby ensure the relevance of *ifta'* to the roles of SSBs. SSBs are therefore unlikely to be able to solely depend on existing fatwas in their judgement. Not only has this been proven through our above examination of the fatwas of eight banks, it has also been endorsed by the IFSB: "It has been widely acknowledged within the industry that there are major requirements for new *fatāwā* as the industry progresses and faces contemporary challenges. *Shari'ah* scholars in each locality

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<sup>319</sup> Khalid al-Muzaini, "Tarshīd al-'amal fī al-hay'āt al-Shar'iyya li-al-mu'assasāt al-māliyya al-Islāmiyya ma'a shiyāghat mashrū' nīzām li-al-hay'a al-'ulyā li-al-hay'āt al-Shar'iyya fi-al-mu'assasāt al-māliyya" (paper presented at the Mu'tamar al-maṣārif al-Islāmiyya bayn al-wāqi' wa-al-ma'mūl, Dā'irat al-Shu'ūn al-Islāmiyya wa-al-'amal al-Khayrī, Dubai, May 31<sup>st</sup> - June 3<sup>rd</sup>, 2009), 8.

should arrive at their own opinions that can address appropriately and effectively the specific problems of the *ummah* within their respective localities.”<sup>320</sup>

The SSBs’ authority of *ifta’* is thus sanctioned, required, funded and exercised. The primary takeaway of this assessment is therefore the SSBs’ unrestricted *ifta’* authority. However, a broader perspective of this unrestricted authority by also considering its qualifications has shown it to differ substantially between the regulators and the legal scholars surveyed in the previous chapter. In considering the qualifications with authority, the regulators’ new paradigm is identified.

While the difference between the qualifications required by regulators and legal scholars is clear, its basis is not. The legal scholars’ justification for awarding the authority is that the achievement of the qualifications yields an ability in derivation from the sources of law.<sup>321</sup> On the other hand, regulators have not set qualifications that yield such an ability. They have accepted levels of education below levels of specialisation and have not consistently required knowledge of the sources of law. Neither have they required grades that ensure a comprehension of the knowledge areas. They therefore differ from the scholars for a reason that is not expressed. Even when AAOIFI presents “The Shari’ah Basis

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<sup>320</sup> IFSB, “Guiding Principles on Corporate Governance for Institutions Offering Only Islamic Financial Services (Excluding Islamic Insurance (Takaful) Institutions and Islamic Mutual Funds),” Kuala Lumpur: IFSB, 2006, 11.

<sup>321</sup> See for example al-Dihlawi, *‘Aqd al-Jīd fī Ahkām al-Ijtihād wa-l-Taqlīd*, 21-22; Khomeini, *al-Ijtihād wa-l-Taqlīd*, 9-17.

for the Standard” that addresses the qualifications, it does not present the basis for its qualifications.<sup>322</sup> The new paradigm of the *ifta*’ authority is thus enforced but is not justified.

In the absence of an introduction to their paradigm, the basis of the regulators’ qualifications can be investigated from other perspectives. A possible basis can be found in the regulators’ commercial motives. While central banks seek to ensure the stability of the financial system, they also seek its growth.<sup>323</sup> They are therefore interested in the commercial success of the banks. 1162 SSB scholars were recorded to occupy positions at 1389 Islamic financial institutions in 2017, showing the industry to require many such specialists.<sup>324</sup> Should regulators set demanding qualifications for SSB scholars, the number of eligible candidates will decrease. A contraction in the pool of candidates impedes the formation of SSBs and thus the formation or continued operations of Islamic banks, affecting the growth of the industry. The qualifications required currently are lower than those required by the legal scholars, rendering more candidates eligible and therefore supporting the industry’s growth.

The discussion of the basis of the qualifications set by scholars is also related to a conflict of interest. Several regulators have formed higher Shari’a boards with authority over

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<sup>322</sup> AAOIFI, *Shari’ah Standards*, 749-751.

<sup>323</sup> “About CBO,” CBO, accessed August 18<sup>th</sup>, 2020, <https://www.cbo.gov.om/Pages/AboutCBO.aspx>; “Mission Statement,” BNM, accessed August 18<sup>th</sup>, 2020, [https://www.bnm.gov.my/index.php?ch=en\\_about&pg=en\\_thebank&ac=20&lang=en](https://www.bnm.gov.my/index.php?ch=en_about&pg=en_thebank&ac=20&lang=en); “Introduction,” SBP, accessed August 18<sup>th</sup>, 2020, <http://www.sbp.org.pk/about/Intro.asp>.

<sup>324</sup> Shereen Mohamed, Abdulaziz Goni and Shaima Hasan, “Islamic Finance Development Report 2018” (Dubai: Thomson Reuters, 2018), 24. We have been unable to verify the number as the authors have not stated their source. However, the ratio of scholars to Islamic financial institutions renders the count plausible. The number also corresponds to the 1141 board positions identified by Ünal in “The Small World of Islamic Finance.”

SSBs in their country, such as Bank Negara Malaysia's aforementioned Shariah Advisory Committee. Appendix 4 shows 13 of the 25 scholars serving on the higher Shari'a boards of the regulators in our sample hold positions on SSBs of commercial Islamic banks. Allowing higher boards to set regulations on SSBs in their countries results in a conflict of interest as more than half of them are active SSB scholars. They thus influence regulations that affect them and their colleagues.

The regulators' reliance on their above qualifications as indicators of adequate competence in *ifta'* demonstrates their adoption of a different authority paradigm. In this paradigm, the procurement of Islamic legal guidance for commercial purposes does not require extensive expertise. Pragmatism allows for the procurement of legal guidance from a knowledgeable alternative.

## Conclusion

This chapter has evaluated the authorities granted to and exercised by SSBs to enable the assessment of their ability to realign the industry with its objectives. It assessed their authority based on regulations outlining their qualifications and responsibilities and fatwas issued by SSBs. It then assessed the construct of this authority through the qualifications required by regulators and those possessed by a sample of SSB scholars.

The assessments led to four findings. The first is that the majority of regulators in the sample have granted SSBs unrestricted *ifta'* authority. The unrestricted nature of the

authority is equivalent to those of the absolute, senior affiliate and limited mujtahid. Secondly, SSBs were found to exercise these authorities. The third finding was that while the regulators assigned SSBs unrestricted *ifta'* authorities, the qualifications they required were similar to those assigned to junior authorities by the legal scholars. Finally, an examination of the qualifications of 71 scholars then found that while the majority achieved qualifications higher than those required by regulators, a minority had not exceeded and another had not achieved the requirement. On the basis of these findings, we argued that *ifta'* authorities in the industry are allocated through a paradigm different to that of the surveyed legal scholars. This paradigm has not been justified by the regulators, but we argued that pragmatism is its driver.

The regulators' different paradigm results in two key implications relevant to the following chapters. The first implication is that the qualifications are not universally considered to only admit competent scholars to SSBs. The views of al-Shubaili and the scholars in Hasan's sample indicate that the current state of regulation admits scholars who do not sufficiently possess the knowledge required to discharge the responsibilities of a SSB scholar. The second implication is that concerns with qualifications are likely to persist due to the absence of regulations on SSB authorities and qualifications by some regulators and due to lax enforcement by others. We accordingly argue that the above implications, as well as the influence of commercial interests, the conflict of interest in the setting of the qualifications and the absence of legal justifications for the qualifications render the legitimacy of the authority of SSBs open to challenges. The findings are further elaborated in the fourth and fifth chapters.

Chapters two and three have thus established the authorities of SSBs, allowing for the treatment of this study's main question in the following chapters. These will examine the scope for SSBs to realign the industry with its objectives, taking into consideration their authority.

## Chapter 4: *Maqasid al-Shari'a*, an avenue for reform

With the passage of four decades since the industry's inception, the portfolio of products offered by Islamic banks has grown. Their products and services mirror many of those offered by conventional banks. Objectives such as the employment of profit-sharing contracts and financing sectors with particular economic benefits have been neglected. Their conduct has instead been largely commercial, despite expectations of social engagement by theorists and regulators.<sup>325</sup> This trajectory has been enabled and driven by the managers, shareholders and regulators of Islamic banks. This study assesses whether Shari'a Supervisory Boards have the ability to realign the industry with its objectives. In order to assess this role, chapter one identified the responsibilities of SSBs. The banks and regulators stipulate upon them several responsibilities, the most important of which were the confirmation and monitoring of the compliance of the products and services of the banks with Islamic law. These responsibilities lend them an institutional authority. The first of these responsibilities also lends SSBs a legal authority, that of *ifta'*. The previous chapter found this authority to be unrestricted by regulators. This chapter and chapter five investigate the potential for the engagement of SSBs in industry reform through applications of this authority. The final chapter will continue the investigation in relation to their authority emanating from *al-amr bi-l-ma'ruf wa-l-nahi 'an al-munkar*.

This chapter examines the ability of SSBs to drive industry reform through applications of their *ifta'* authority. It focuses on *ifta'* that is based on *maqasid al-Shari'a*. This approach

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<sup>325</sup> For the objectives of Islamic banks and their track record, refer to the introductory chapter.

has been proposed to facilitate fatwas that prohibit banks from practices that counter social objectives of the industry. This chapter tests this proposal. It first introduces *maqasid al-Shari'a* in the views of legal scholars and its proposed employment in the Islamic finance industry. It then assesses proposals by scholars and academics on the methods of incorporating the *maqasid* in jurisprudence. The effectiveness of the proposals is finally evaluated. This chapter will argue that incorporating the *maqasid* in *ifta'* does not offer an effective legal approach for the achievement of the social objectives of Islamic finance. This is due to constraints relating to authority, value, practicality and opposition.

## Maqasid al-Shari'a

*Maqasid al-Shari'a* (hereafter, *maqasid*: objectives. Singular: *maqsad*) refers to the Legislator's objectives of legislation. Classical and modern scholars have proposed objectives to be sought by the Legislator, identifying them in explicit Quranic verses and hadiths and through induction. The objectives are classified as general and specific. General *maqasid* are those sought from most areas of the Shari'a, whereas specific *maqasid* are those sought from particular rulings or groups of related rulings. While the topic of the *maqasid* is of a theological origin, it has been developed in the area of legal theory. The nature, scope and extent of the importation of the *maqasid* into jurisprudence are areas of difference among scholars. Readers can refer to Ahmad al-Raissouni's<sup>326</sup> *Min A'lam al-Fikr al-Maqasidi* for a summary of the theories of classical scholars on the *maqasid*, Felicitas Opwis's<sup>327</sup> "New

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<sup>326</sup> Al-Raissouni is the president of the International Union of Muslim Scholars, an expert (member) at the IIFA and has taught and written on the *maqasid* in several books and articles. He is not involved in the Islamic finance industry.

<sup>327</sup> Opwis is an associate professor at Georgetown University, focusing on the development of Islamic legal theory. Her publications cover the *masalih*, *maqasid* and *istihsan*, among other topics.

Trends in Islamic Legal Theory: Maqāṣid al-Sharī'a as a New Source of Law?" for contributions of modern scholars and Mutazz al-Khatib's "al-Wazifa al-Maqasidiyya: Mashru'iyatuha wa-Ghayatuha" for the departure of theories on the *maqasid* from classical legal theory.<sup>328</sup>

This section will first introduce the reader to examples of views of classical and modern scholars on the *maqasid* in their general and specific forms. It will then present calls for the incorporation of the *maqasid* in ijtiḥad in the Islamic finance industry for the purpose of its reform. This background will facilitate the assessment in later sections of the scholars' legal frameworks and their effectiveness for the achievement of the social objectives of Islamic finance.

Our introduction to the *maqasid* starts with the general objectives. Scholars have identified multiple *maqasid* which readers can explore through the works of al-Raissouni and Opwis, cited above. This section presents the views of three scholars to convey the essence of proposed general *maqasid*. They include two classical scholars and a modern scholar. Al-Ghazali (d. 1111) was an early contributor to the topic and his classification remains a common point of reference. His authority is commonly attested to in works referred to in this chapter, including those by al-Qaradawi and al-Raissouni.<sup>329</sup> The second

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<sup>328</sup> Ahmad al-Raissouni, *Min A'lām al-Fikr al-Maqāṣidi* (Beirut: Dār al-Hādī, 2003), 9-64; Felicitas Opwis, "New Trends in Islamic Legal Theory: Maqāṣid al-Sharī'a as a New Source of Law?", *Die Welt des Islams* 57 (2017): 7-32; Mutazz al-Khatib, "al-Wazīfa al-Maqāṣidiyya: Mashru'iyatuhā wa-Ghāyātuhā," *Islāmiyyat al-Ma'rifa* 48 (2007), 15-23.

<sup>329</sup> Yusuf al-Qaradawi, *Fiqh al-Waṣaṭiyya al-Islāmiyya wa-l-Tajdīd* (Doha: Markaz al-Qaradāwi li-l-Waṣaṭiyya al-Islāmiyya wa-l-Tajdīd, 2009), 63; Ahmad al-Raissouni, *Nazariyyat al-Maqāṣid 'ind al-Imām al-Shāṭibi* (Herndon: International Institute of Islamic Thought, 1995), 56; Muhammad al-Tahir ibn Ashur, *Maqāṣid al-Sharī'a al-Islāmiyya*- volume 2 (Doha: Ministry of Endowments and Islamic Affairs, 2004), 87-88.

classical scholar whose view is outlined is al-Shatibi (d. 1388), an Andalusian, Maliki scholar. His key contribution was his approach to Islamic law from the premise that all divine legislation seeks to achieve the interests of people.<sup>330</sup> He is considered by contemporary advocates of the *maqasid* to have developed foundations of the field and influenced future discourse. Al-Raissouni is again one such advocate, as is Mohammad Hashim Kamali whose views are discussed below.<sup>331</sup> Finally, the modern scholar whose objectives are presented is the reformer al-Tahir ibn Ashur (d. 1973). Ibn Ashur was Shaykh al-Islam in Tunisia for the Maliki school and the Shaykh of Ez-Zitouna University. His book was one of the earliest modern writings dedicated to the *maqasid* and al-Raissouni identifies it as driving a rise in the interest of reformists in the *maqasid*.<sup>332</sup>

The *maqasid* identified by the three scholars are centred on the *maslaha* of mankind. A *maslaha* (plural *masalih*) is defined literally as a utility. It is also referred to as public interest, good or benefit in associated contexts.<sup>333</sup> In his discussion of the principle of *maslaha*, al-Ghazali states that “the very objective of the Shari‘a is to promote the well-being of the people, which lies in safeguarding their faith, their lives, their intellect, their posterity and their wealth. Whatever ensures the safeguarding of these five serves public interest and is desirable, and whatever hurts them is against public interest and its removal is desirable.”<sup>334</sup> Al-Ghazali further classifies the *maqasid* based on their importance, where

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<sup>330</sup> Abu Ishaq Ibrahim al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharī‘a*, (Beirut: Dār al-Kutub al-‘ilmiyya, 2004), 220.

<sup>331</sup> Mohammad Hashim Kamali, “*Maqāṣid al-Sharī‘ah*: The Objectives of Islamic Law,” *Islamic Studies*, 38, 2 (1999): 193-208; al-Raissouni, *Min A’lām al-Fikr al-Maqāṣidi*, 68-69.

<sup>332</sup> Al-Raissouni, *Min A’lām al-Fikr al-Maqāṣidi*, 70-71.

<sup>333</sup> The *masalih* are addressed in the following chapter.

<sup>334</sup> Abu Hamid Muhammad al-Ghazali, *al-Mustaṣfā min ‘Ilm al-Usūl* (Riyadh: Dār al-Mimān li-l-Nashr wa-l-Tawzī‘, n.d.), 328. Translated by Asyraf Wajdi Dusuki and Said Bouheraoua, “The Framework of *Maqāṣid al-Sharī‘a* and its Implication for Islamic Finance,” *Islam and Civilisational Renewal* 2, 2 (2011), 317.

he considers the preservation of the above five to be a necessity.<sup>335</sup> The overarching objective identified by al-Ghazali is thus the *maslaha* of mankind, embodied in the preservation of the five categories.

Similar to al-Ghazali, al-Shatibi views the purpose of legislation to be the wellbeing of mankind.<sup>336</sup> His breakdown of this purpose also follows that of al-Ghazali in its composition of the safeguarding of faith, lives, posterity, wealth and intellect.<sup>337</sup> His similarities with al-Ghazali continue in other categorisations of the *maqasid* and he also cites al-Ghazali in the same section.<sup>338</sup> Al-Shatibi goes beyond al-Ghazali through a development of a foundation of the *maqasid* in legal theory.

Ibn Ashur follows al-Ghazali and al-Shatibi's overview and breakdown of the *maqasid*. He states that the general objective of the Shari'a is "to maintain the order (*nizām*) of the umma and to perpetuate its well-being (*ṣalāh*) and the well-being of humankind."<sup>339</sup> He cites al-Ghazali's categorisation of the five *maqasid*, adding his interpretation.<sup>340</sup> Ibn Ashur expands on the topic by identifying *maqasid* relating to particular areas of jurisprudence. These include financial dealings, the family, the judiciary and punishments.<sup>341</sup> Al-Ghazali, al-Shatibi and Ibn Ashur have thus stated similar premises for the *maqasid*.

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<sup>335</sup> Al-Ghazali, *al-Mustasfā min 'Ilm al-Uṣūl*, 328.

<sup>336</sup> Al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharī'a*, 220.

<sup>337</sup> Al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharī'a*, 222-225.

<sup>338</sup> Al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharī'a*, 225.

<sup>339</sup> Ibn Ashur, *Maqāṣid al-Sharī'a al-Islāmiyya* -volume 3, 194. Translation by Opwis, "New Trends in Islamic Legal Theory," 19.

<sup>340</sup> Ibn Ashur, *Maqāṣid al-Sharī'a al-Islāmiyya*- volume 3, 231-240.

<sup>341</sup> He discusses *maqasid* of family law, laws on financial dealings, the judiciary and punishments. Ibn Ashur, *Maqāṣid al-Sharī'a al-Islāmiyya*- volume 3, 421-553.

Scholars have also identified specific *maqasid* relating to particular rulings or groups of related rulings, including those related to the economy and finance. Al-Ghazali and al-Shatibi are not among those who have proposed an explicit categorisation of specific *maqasid*. On the other hand, Ibn Ashur proposes the *maqasid* of wealth to be its circulation, the transparency of its dealings, its protection, assurance of its ownership and justice in its generation.<sup>342</sup> *Maqasid* relating to wealth are also addressed by other scholars such as al-Qaradawi, categorising them into generation, consumption, circulation and distribution.<sup>343</sup> Abdullah Bin Bayyah, introduced in the first chapter, views the specific *maqasid* of wealth to be its generation and its preservation, the latter consisting of sound management, saving, moderation in consumption and the prevention of its abuse.<sup>344</sup> Such *maqasid* are of relevance to applications in *ijtihād* on cases in the economy and finance. Readers can refer to the sources for more on these specific *maqasid*.<sup>345</sup>

*Maqasid al-Shari'a*, in their general and specific forms, are a regular topic in discussions on reform of Islamic finance. Many have called for *ifta'* in the industry to be conducted based on the *maqasid*. This was a result of the divergence of the activities of Islamic banks from the expectations of its founders, academics and other stakeholders. As presented in chapter one, the banks have followed an operating model similar to conventional banks and neglected social objectives. This operating model has been enabled by fatwas of the banks' SSBs approving their products, to the indignation of critics who view this as a violation of the

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<sup>342</sup> Ibn Ashur, *Maqāṣid al-Sharī'a al-Islāmiyya*- volume 3, 470.

<sup>343</sup> Yusuf al-Qaradawi, "Maqāṣid al-Sharī'a al-Muta'alliqa bi-l-Māl" (Paper presented at the 18<sup>th</sup> gathering of the European Council for Fatwa and Research, Dublin, July 2008).

<sup>344</sup> Abdallah bin Bayyah, *Maqāṣid al-Mu'āmalāt wa-Marāṣid al-Wāqi'āt*, 5<sup>th</sup> ed. (Dubai: Markaz al-Muwaṭṭa', 2018), 77-79.

<sup>345</sup> Al-Qaradawi, "Maqāṣid al-Sharī'a al-Muta'alliqa bi-l-Māl;" bin Bayyah, *Maqāṣid al-Mu'āmalāt wa-Marāṣid al-Wāqi'āt*.

spirit of Islamic rulings and guidance. *Ifta'* through the *maqasid* is pitched as a solution that would depart Islamic banks from the critiqued practices through the consideration of the objectives of the Shari'a.

Critics of the industry's trajectory have called for the consideration of the *maqasid* in *ifta'* and highlighted the bases of its necessity and its merits. The following paragraphs will present examples of such views. The examples are not a comprehensive review of the literature, as the writings on Islamic finance and the *maqasid* are too numerous to cover in this study. For example, 'Islamic Economics and Finance Pedia,' a web resource for research on Islamic finance, contains 170 papers in its section on *maqasid al-Shari'a*.<sup>346</sup> The Islamic Finance Knowledge Repository's library contains 46 further works that address the *maqasid*.<sup>347</sup> The examples below instead serve to demonstrate the calls for the consideration of the *maqasid* and their bases. The views exhibited below, while similar, can be considered to emanate from one of two bases. The first is the relation between neglect of the *maqasid* in *ifta'* and the emulation of conventional banking practices. The second basis relates to the ethical implications of such *ifta'*, reflected on the rights of consumers and society.

The examples below of calls for the consideration of the *maqasid* in *ifta'* are by academics and scholars. The cited academics are Said Bouheraoua, Asyraf Wajdi Dusuki, Hafas Furqani, Monzer Kahf, Kamali, Mohamad Akram Laldin and Younes Soualhi.

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<sup>346</sup> Islamic Economics and Finance Pedia, "Maqāṣid al-Sharī'a (Iqtisādiyyan)," accessed May 18<sup>th</sup>, 2020, <https://iefpedia.com/arab/?cat=51>.

<sup>347</sup> Islamic Finance Knowledge Repository, "Maqasid- Search Result," accessed May 18<sup>th</sup>, 2020, <https://ifikr.isra.my/library/result/30?keyword=maqasid&categoryid=>.

Bouheraoua is an Algerian Senior Researcher at the International Shariah Research Academy for Islamic Finance (ISRA), member of the Supervisory Authority at the Central Bank of Oman and director of Affin Islamic Bank.<sup>348</sup> Dusuki is a Malaysian politician and academic who has formerly lectured at the Islamic International University Malaysia, held SSB positions and researched at ISRA.<sup>349</sup> Kahf is an American-based Syrian professor and former researcher at the Islamic Development Bank's Islamic Research and Training Institute.<sup>350</sup> Kamali, an Afghan, is the founding chairman and CEO of the International Institute of Advanced Islamic Studies.<sup>351</sup> He holds several other academic posts and is also a member of SSBs. Algerian Soualhi holds several positions as a consultant, researcher, lecturer and on multiple SSBs.<sup>352</sup> Finally, the positions of the International Islamic Fiqh Academy (IIFA) and al-Shubaili are also included below. The views discussed below are therefore those of researchers in Islamic finance and other areas of Islamic law as well as SSB members.

The first driver in the writings of the academics and scholars for conducting *ifta'* based on the *maqasid* is the departure from conventional banking practices. Kahf states that without the observance of the *maqasid*, "Islamic financing, as a unique financing methodology that is value-oriented and value-based, will lose [sic] its merits and

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<sup>348</sup> Affin Islamic, "Associate Professor Dr. Said Bouheraoua," accessed May 19<sup>th</sup>, 2020, <https://www.affinislamic.com.my/About-Us/Board-Of-Directors/Dr-Said-Bouheraoua.aspx>.

<sup>349</sup> IFC Doha, "Biography," accessed May 19<sup>th</sup>, 2020, <http://www.ifcdoha.com/AR/EN/CVs/DrDusuki.html>.

<sup>350</sup> Lotus Capital, "Professor Dr. Monzer Kahf," accessed May 19<sup>th</sup>, 2020, <https://lotuscapitallimited.com/docs/ProfKahf.pdf>.

<sup>351</sup> International Institute of Advanced Islamic Studies, "Mohammad Hashim Kamali," accessed May 19<sup>th</sup>, 2020, <https://iaais.org.my/staff-sp-2037227643/professor-kamali>.

<sup>352</sup> ISRA Consulting, "PROF. DR. YOUNES SOUALHI," accessed May 19<sup>th</sup>, 2020, <https://israconsulting.my/about-us/isra-researchers/prof-dr-younes-soualhi/>.

substance.”<sup>353</sup> Kahf argues that neglect of the *maqasid* reduces the contracts to veiled replicas of prohibited alternatives, devoid of values and ethics. Islamic finance would therefore be a version of conventional banking based on different contracts with no further consideration of consumers and society. His view on the importance of the *maqasid* in differentiating Islamic from conventional banking is shared by the International Islamic Fiqh Academy, stated in the declarations of its 18<sup>th</sup> convention held in 2007.<sup>354</sup> The IIFA’s agreement on the *maqasid* as the path to address this issue of Islamic banking adds significance to the call due to the IIFA’s international composition and influence. Soualhi too holds the view that the neglect of the *maqasid* drives the convergence with conventional banking practices.<sup>355</sup> He argues for the necessity of a different operating model for the banks to accommodate products based on the *maqasid*. As for al-Shubaili, in his discussion of the roles and criteria of SSBs he calls on SSBs to apply the *maqasid* to the contracts.<sup>356</sup> He states this as a criticism of banks products and practises that mirror those of conventional banks. Kahf, the IIFA, Soualhi and al-Shubaili have thus focused their calls for *ifta’* based on the *maqasid* on its necessity for differentiation from conventional finance to retain its values.

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<sup>353</sup> Monzer Kahf, “Maqasid al Shari’ah in the Prohibition of Riba and their Implications for Modern Islamic Finance” (paper presented at the IIUM International Conference on Maqasid al Shari’ah, Kuala Lumpur, August 8-10<sup>th</sup>, 2006), 14.

<sup>354</sup> International Islamic Fiqh Academy, “Qarār bi-Sha’n al-Maqāṣid al-Shar’iyya wa-Dawrahā fī Istinbāt al-Aḥkam,” declarations of the 18<sup>th</sup> convention of the International Islamic Fiqh Academy, Putrajaya, June 9-14<sup>th</sup>, 2007, accessed April 11<sup>th</sup>, 2020, <http://www.iifa-aifi.org/2268.html>. This convention and its declarations are further discussed below.

<sup>355</sup> Younes Soualhi, “Application of Sharī’ah contracts in contemporary Islamic finance: A maqāṣid perspective,” *Intellectual Discourse* 23 (2015), 351.

<sup>356</sup> Yousef al-Shubaili, “al-Riqāba al-Shar’iyya ‘ala al-Maṣārif Ḍawābiṭuhā wa-’aḥkāmuhā wa-Dawruhā fī Ḍabṭ A’mal al-Maṣārif,” presented at the International Islamic Fiqh Academy’s 19<sup>th</sup> summit, Sharjah, April 26-30<sup>th</sup>, 2009, 24.

The second driver for conducting *ifta'* based on the *maqasid* relates to its ethical implications, centred on the rights of consumers and society. Kahf's paper addressed the moral and ethical consequences stemming from the neglect of the *maqasid*. He identifies morality to be observed by operating ethically and avoiding harmful investments.<sup>357</sup> Dusuki and Bouheraoua also seek morality, stating that the *maqasid* drive banks to operate with "high virtue and moral consciousness." Their example of this consciousness is for banks to achieve a balance between their interests and the rights of consumers and society. This balance is contrasted with a doctrine prioritising the interest of banks with no regard for other stakeholders.<sup>358</sup> Kamali also argues for the necessity of recourse to the *maqasid* in maintaining ethical objectives of the operations.<sup>359</sup> Similar to Kahf, he views that the *maqasid* are negated by contractual stipulations that circumvent legal prohibitions. This circumvention would also sacrifice the ethical substance of the unmodified contract. His examples of ethical features include the prevention of "unfair exploitation among the transaction parties" and of allocating all risks upon the borrower.<sup>360</sup> Al-Shubaili also refers to the community in his call for the *maqasid*, stating that "the roles of SSBs should not be restricted to traditional reviews of the forms of contracts, a *maqasidic* look at contracts and what benefits they bring to the community is necessary, otherwise, the interest of the bank in achieving profits would be prioritised over concerns of negative, long-term implications."<sup>361</sup> The statements of Kahf, Dusuki, Bouheraoua, Kamali and al-Shubaili

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<sup>357</sup> Kahf, "Maqasid al Shari'ah in the Prohibition of Riba," 9-10.

<sup>358</sup> Dusuki and Bouheraoua, "The Framework of *Maqāṣid al-Sharī'a*," 327.

<sup>359</sup> Mohammad Hashim Kamali, "Ethics and Finance: Perspectives of the *Sharī'ah* and its Higher Objectives (*Maqāṣid*)," *Islam and Civilisational Renewal* 3, 4 (2012), 622.

<sup>360</sup> Kamali, "Ethics and Finance," 619, 624.

<sup>361</sup> Al-Shubaili, "al-Riqāba al-Shar'iyya 'ala al-Maṣārif," 24.

therefore show their belief in the importance of the *maqasid* in achieving ethical features of Islamic contracts.

The opinions of the academics and scholars reflect their objective of the approval of banking products to be based on their observance of the *maqasid*. The key motives for this are to differentiate them from conventional operations to retain the values and ethics associated with Islamic guidance on finance. The *maqasid* are therefore considered as an avenue for the reform of the industry.

In contrast to the numerous views advocating for *ifta'* on the basis of the *maqasid*, Bakar<sup>362</sup> argues against this direct approach. He argues that the *maqasid* do not serve such a basis and that *ifta'* is dependent on scripture.<sup>363</sup> Bakar views that the *maqasid* can be the basis of civic legislation by governments through both state rules and guidelines as well as fatwas.<sup>364</sup> His view is therefore a direct answer to this chapter's assessment of the SSBs' ability to drive reform through *ifta'* based on the *maqasid*. However, Bakar does not support his view with a basis from legal theory, preventing the assessment of his view in relation to others. Due to the lack of substantiation and the singularity of this view among the reviewed literature, this chapter will continue with the assessment of the *maqasid* as an avenue for reform.

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<sup>362</sup> Mohd Daud Bakar, introduced in the previous chapter.

<sup>363</sup> Mohd Daud Bakar, *Maqasid Al-Shariah: The Face and Voice of Shariah- Embedded with Big Data Analytics & Artificial Intelligence* (Kuala Lumpur: Amanie Media Sdn Berhad, 2021), 86.

<sup>364</sup> Bakar, *Maqasid Al-Shariah: The Face and Voice of Shariah*, 87.

This section has introduced *maqasid al-Shari'a* in their general and specific forms. The examples of the general *maqasid* centred on the welfare of the individual and society. *Maqasid* specific to wealth and finance were also exhibited. The section then presented the calls and motivations of academics for the incorporation of the *maqasid* in *ijtihad* in the industry. *Maqasid* were found to be proposed as an avenue for the reform of the industry. In order to assess the viability of reform based on *ifta'* through the *maqasid*, the following section will assess legal approaches proposed by scholars for its application.

#### Legal frameworks

In order to assess the effectiveness of reforming the Islamic finance industry through observance of the *maqasid* in *ifta'*, this chapter will examine the methodology underlying such *ifta'*. The methodologies examined are legal frameworks presented by two scholars, an academic and the IIFA. Shi'i positions, which are largely excluded in discussions on the *maqasid* in the industry, will also be introduced. While not all frameworks are in the context of the industry, this section will also demonstrate the relevance of the frameworks to the industry and to proposals for its reform.

Writings on the necessity of *ifta'* on the basis of the *maqasid* for Islamic banks have largely addressed topics other than its framework. The academics and scholars have addressed the *maqasid*, their necessity and approaches for the consideration of *maqasid* in *ifta'*. Their discussion of the necessity has been shown in the previous section. Discussions of the *maqasid* include those relating to contracts used by Islamic banks, as covered in al-Qaradawi and Bin Bayyah's discussions of the *maqasid* of wealth (cited in the previous

section), as well as those by Kahf, Dusuki and Bouheraoua.<sup>365</sup> Others have written on approaches for the consideration of *maqasid* in *ifta'*. The following paragraphs provide examples of how calls for *ifta'* on the basis of the *maqasid* have not addressed the framework required for their objective.

The first of three papers recommending *ifta'* on the basis of the *maqasid* in the Islamic finance industry is by Layachi Feddad, an Algerian researcher and SSB member. Feddad proposes five ways to achieve the *maqasid* in financial transactions.<sup>366</sup> These comprise guidelines on contract formation, avoidance of legal stratagems, basing reward on risk, justice and its application, all of which he explains. However, these steps are a combination of examples, *maqasid*, legal maxims and guidance on contract formation. Feddad does not frame them in relation to other approaches to *ijtihad*. His work does not therefore present a fundamental legal framework for *ifta'* on the basis of *maqasid*.

The second of three papers recommending *ifta'* on the basis of the *maqasid* without referring to a framework is by Soualhi. Soualhi assesses the *maqasid* of contracts used in the Islamic finance industry. However, when addressing how the *maqasid* can be considered in the use of these contracts, he does not refer to a legal framework. Soualhi instead refers to fatwas such as those by AAOFI and legal maxims such as the removal of hardship.<sup>367</sup>

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<sup>365</sup> Kahf, "Maqasid al Shari'ah in the Prohibition of Riba," 11-16; Dusuki and Bouheraoua, "The Framework of *Maqāṣid al-Sharī'a*," 322-327.

<sup>366</sup> Al-Iqtisadi, "al-'ayāshi Ṣādiq Fdād," accessed May 21<sup>st</sup>, 2020, [aliqtisadi.com/شخصيات/العياشي-الصادق-فداد/](http://aliqtisadi.com/شخصيات/العياشي-الصادق-فداد/); Layachi Feddad, "Wasā'il Taḥqīq Maqāṣid al-Sharī'a fi al-Mu'amālāt al-Māliyya," (paper presented at the 6<sup>th</sup> International Shari'ah Scholars Forum, Kuala Lumpur, November 30<sup>th</sup> to December 1<sup>st</sup>, 2011).

<sup>367</sup> Soualhi, "Application of Sharī'ah contracts in contemporary Islamic finance," 336, 338.

The third example of a call for *ifta'* on the basis of the *maqasid* that does not refer to a legal framework is by Laldin and Furqani. The researchers state that “the *maqāsid* essentially invites our creativity to design contracts that would suit our needs and objectives of life.”<sup>368</sup> Rather than referring to a framework to be the basis for legislation based on the *maqasid*, they have sanctioned an unexplained “creativity.” This implies that SSBs are to develop approaches to addressing the *maqasid* in *ifta'*.

The three examples demonstrate how recommendations of consideration of the *maqasid* in the industry are not supported by enabling frameworks. Our review of legal writings on the *maqasid* has identified only one proposed framework by al-Raissouni to be situated in the context of the industry (discussed below). Other frameworks of *maqasid* situated in the industry do not relate to *ifta'*, such as Asutay and Yilmaz’s discussion on the identification of *maqasid*.<sup>369</sup> Due to this gap in the discourse on *maqasid* in the Islamic finance industry, al-Raissouni's framework will be examined in this section along with legal frameworks proposed by scholars in a general context.

Similar to those written in the context of Islamic finance, our review of the general writings on the *maqasid* found a further neglect of the development of comprehensive legal

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<sup>368</sup> Laldin and Furqani, “Maqāṣid al-Sharī’ah and the Foundational Requirements,” 188. Laldin is the executive director of the International Shariah Research Academy for Islamic Finance and a member of several SSBs. Furqani is a Malaysian lecturer at Universitas Islam Negeri Ar Raniry.

<sup>369</sup> Mehmet Asutay and Isa Yilmaz, “Re-embedding *Maqāṣid al-Sharī’ah* in the Essential Methodology of Islamic Economics,” in Mohamed El-Tahir El-Mesawi (ed.), *Maqāṣid al-Sharī’ah: Explorations and Implications* (Kuala Lumpur: Islamic Book Trust, 2018), 373-418. The authors do not develop a legal framework in this chapter; they develop nine features of a “proactive” *maqasid* framework (p. 401, *possem*). However, neither the framework nor its proactivity are defined and its concrete role in Islamic finance cannot be established. The article instead indicates that the framework serves as a basis for the identification of *maqasid* supportive of development.

frameworks. This includes the works of modern scholars in the field such as Ibn Ashur, Allal al-Fasi (d. 1974), Taha Jabir al-Alawani (d. 2016), Jasser Auda (b. 1966)<sup>370</sup>, as well as their reference, al-Shatibi. Those that develop frameworks include al-Raissouni, al-Qaradawi, the International Islamic Fiqh Academy and Kamali. This section will assess their legal frameworks, facilitating the evaluation of their suitability for driving reform in the Islamic finance industry in the following section.

This discussion will solely address Sunni positions as these legal theories of the *maqasid* conflict with Shi'i legal principles. Shi'i scholars also view the objective of the Shari'a to be the *maslaha* of humankind.<sup>371</sup> Where identified through explicit texts in the Quran and Sunna, this *maslaha* forms a basis for legislation. However, *ijtihad* based on these *masalih* is subsumed under *ijtihad* based on the texts or through *qiyas*. It is not treated as a separate approach based on the *maqasid*. On the other hand, the authority of *masalih* identified through induction is rejected. Human intellect is viewed to be incapable of deducing the *maslaha* with certainty.<sup>372</sup> Therefore, for *masalih* identified through induction, this lack of certainty invalidates their authority as a basis for legislation.<sup>373</sup>

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<sup>370</sup> See for example, Jasser Auda, *Re-envisioning Islamic Scholarship- Maqasid Methodology as a New Approach* (Swansea: Claritas Books, 2021). In this work, Auda's methodology is specific to the context of Islamic scholarship. Where he discusses scholarship pertaining to Islamic legal theory (pages 209 – 213), it is a brief comparison with legal views from a *maqasid* perspective. He dedicates one paragraph to legal derivation, proposing a scholastic approach rather than legal principles or criteria.

<sup>371</sup> Shaykh Abu-Jaafar Muhammad bin Hasan Tusi, *Al-'Udda fi Uṣūl al-Fiqh*- volume 2, edited by Muhammad Ridha al-Ansari al-Qummi (Unknown publisher, 1997), 508; al-Allamah Jamal al-Din al-Hasan ibn Yusuf al-Hilli, *Mabādi' al-Wuṣūl ilā 'Ilm al-Uṣūl* 2<sup>nd</sup> ed. (Beirut: Dār al-Aḍwā', 1986), 176.

<sup>372</sup> Al-Allamah Jamal al-Din al-Hasan ibn Yusuf al-Hilli, *Nihāyat al-Wuṣūl ilā 'Ilm al-Uṣūl* – volume 3 (Qom: Mu'assasat al-Imām al-Ṣādiq, 2008), 521-522.

<sup>373</sup> Tusi, *Al-'Udda fi Uṣūl al-Fiqh*, 649.

The Shi'i discourse on *ijtihad* on the basis of *maqasid* identified through induction is primarily treated in the area of *qiyas* in works of legal theory. Readers can therefore refer to classical treatises on legal theory such as *al-'udda fi Usul al-Fiqh* by Abu Ja'far Muhammad ibn Hasan Tusi (d. 1050) and al-Allama Jamal al-Din al-Hasan ibn Yusuf al-Hilli's (d. 1325) *Nihayat al-Wusul ila 'ilm al-Usul*.<sup>374</sup> In *Nihayat al-Wusul*, al-Hilli addresses the *maqasid* as categorised by al-Ghazali.<sup>375</sup> His discussion is under the topic of *tarjih*, tools of preponderance, rather than the *maqasid* as an independent topic, or other related topics such as *maslaha* or *istihsan*. Al-Hilli discusses the *maqasid* as an approach to preponderance between multiple factors based on their necessity. He does not propose the *maqasid* as an independent authority for *ijtihad*.

As the Sunni discourse on the *maqasid* has grown significantly in the modern period, so has the Shi'i discourse in tandem. Readers seeking an understanding of wider issues relating to the *maqasid* in Shi'i legal theory can thus refer to a modern source; *Usul al-Fiqh al-Muqaran fi ma la nass fihi* by the contemporary marja' Ja'far Sobhani (b. 1929).<sup>376</sup> The book discusses the *maqasid* in the aforementioned context of *qiyas* as well as in the context of modern proposals of applications.

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<sup>374</sup> Tusi, *Al-'Udda fi Uṣūl al-Fiqh*, 652-719; al-Hilli, *Nihāyat al-Wuṣūl ilā 'Ilm al-Uṣūl*.

Tusi was a Shi'i scholar and holder of the theological chair by the appointment of Sunni Abbasid Caliph al-Qai'm bi-Amr Allah. In addition to writing on legal theory and other areas, he is the compiler of two of the main books of hadith in the school. Al-Hilli is the author of several seminal works on legal theory, on which 29 commentaries and explanations were written. Similar to Tusi, his expertise extended to Sunni law which is reflected in their legal works.

<sup>375</sup> Al-Hilli, *Nihāyat al-Wuṣūl ilā 'Ilm al-Uṣūl* – volume 3, 350-351.

<sup>376</sup> Ja'far Sobhani, *Uṣūl al-Fiqh al-Muqāran fī mā lā Naṣ Fih* (Qom: Mu'assasat al-Imām al-Sādiq, 2004), 331-363. Muhammad Taqi al-Hakim presents a similar discussion in *al-Uṣūl al-'Ammā li-l-Fiqh al-Muqāran*, 389 in the context of the related topic of *al-masalih al-mursala*. This topic will be addressed in the following chapter.

Within the corpus of Shi'i legal theory, the previously maligned *maqasid* have witnessed an increasing invocation by its scholars. The writings of some Shi'i legal scholars show this to be a result of rising economic and social inequalities. For example, Mohammad Reza Hakimi (d. 2021) describes its necessity in combatting economic exploitation and Mortaza Motahheri (d. 1979) in preventing modern social contradictions.<sup>377</sup> The views on the *maqasid* of seven further scholars have been surveyed by Haidar Hobbollah and Abdul Jabbar al-Rifai. Their writings are discussed in the following paragraphs.

Hobbollah discusses the views of Motahheri, al-Sistani, Yousef Sane'i (d. 2020) and Hakimi on safeguarding justice as a *maqasid*.<sup>378</sup> Motahheri's views are based in a Persian book -released posthumously- on the foundations of an Islamic economy. According to Hobbollah, he argues that justice has a central role in *fiqh* and that jurists ought to have developed its legal principle. However, neither did Motahheri develop the legal position of justice. Hobbollah's second subject, al-Sistani, states that justice is one of the greatest legal maxims, in a discussion of the priorities between sustaining livestock and paying *khums*.<sup>379</sup> Sistani emphasises its importance in jurisprudence but does not expand on its role. Sane'i, in a legal discussion on the exclusivity to men of the permission to initiate divorce by paying a

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<sup>377</sup> Hakimi is an Iranian scholar and pioneer of the Shii philosophical movement known as the (Khorasani) *Tafkiki* school (see Haidar Hobbollah, "Maqasadiyyat al-'adl\ Hal Thimmat Tahawwul Juz'i fi al-Ijtihad al-Imami al-Hadith Nahw al-Maqasidiyya?" accessed June 14<sup>th</sup>, 2020, <http://Hobbollah.com/articles/مقصديّة-العدل-هل-ثمّة-/>). Ayatollah Motahheri was a philosopher and a leading figure of the Islamic revolution in Iran. Mohammad Reza Hakimi, "al-Ijtihad Bayn Ahdaf al-Din wa-Ahkam al-Din," *Qadaya Islamiyya Mu'asira* 9-10 (2000): 106-107. We have been unable to interpret the social contradictions raised by Motahheri due to language barriers and have thus referred to Hobbollah's citations in "Maqasadiyyat al-'adl."

<sup>378</sup> Hobbollah, "Maqasadiyyat al-'adl." Hobbollah is a Qom-based Lebanese scholar of jurisprudence, philosophy and comparative religion.

<sup>379</sup> Literally translated as a fifth, *khums* is an Islamic tax on material gain; Ali al-Husayni al-Sistani, in Muhammad Redha al-Sistani, *Qa'idat la Darar wa-la Dirar*, 1994, accessed June 14<sup>th</sup>, 2020, <http://taghrirat.net/ketab/qaedah-ladharar-taghrirat.net.pdf>, 325.

spouse their dowry, argues against it based on its contravention to justice.<sup>380</sup> He describes justice to be a fundamental tenet of Islam that warrants an elevated legal weight. However, his argument is situated within the divorce case and does not develop a legal framework for justice. Finally, Hakimi's writings are in Persian and we have therefore only assessed his single Arabic work on the topic.<sup>381</sup> Neither does his article nor does Hobbollah's discussion of his other works in Persian expound the incorporation of the *maqasid* in *ijtihād*. He rather stresses the centrality of justice, relating it to economics, politics and society, and implores jurists to seek the achievement of objectives of the law such as justice.<sup>382</sup> The four scholars studied by Hobbollah have thereby sought or exercised *ijtihād* based on justice as a *maqasid* of the Shari'a. However, these positions are either solitary applications or calls to other jurists to develop a comprehensive legal principle on justice.

Al-Rifai interviewed Ayatollahs Muhammad Husain Fadlullah (d. 2010) and Muhammad Mahdi Shamseddine (d. 2001), Abd al-Hadi al-Fadhli (d. 2013) and five Sunni scholars and academics on topics relating to the *maqasid*.<sup>383</sup> The interviews of the former three were not focused on the *maqasid* (as suggested by the book title); only one question referred to the *maqasid* and the others addressed related topics. The Ayatollahs' references to the *maqasid* did not include methodologies for considering the *maqasid* nor did they delineate their legal position.

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<sup>380</sup> Yousef Sane'i, *Muqārabāt fī al-Tajdīd al-Fiqhī* (Beirut: Mu'assasat al-Intishār al-'arabi, 2010), 134-135, 146-148. Sane'i was an Iranian marja'.

<sup>381</sup> Hakimi, "al-Ijtihād Bayn Ahdāf al-Dīn wa-Aḥkām al-Dīn," 105-114.

<sup>382</sup> Hakimi, "al-Ijtihād Bayn Ahdāf al-Dīn wa-Aḥkām al-Dīn," 106-112.

<sup>383</sup> Abdul Jabbar al-Rifai (ed.), *Maqāṣid al-Sharī'a* (Beirut: Dār al-Fikr al-Mu'aṣir, 2001). Al-Rifai is an Iraqi philosopher specialised in contemporary Islamic reformist thought.

The positions of the seven Shi'i scholars present three outcomes. The first is that there exists a new or growing belief in the role of the *maqasid* in jurisprudence. The second outcome is that the aforementioned legal principles preventing *ijtihad* based on the *maqasid* remain authoritative. We argue this based on the seven scholars' desire for a recognition of the *maqasid* while not proposing a legal framework and not incorporating it in additional fatwas. The seven scholars are *mujtahids* who have written on legal theory and the *maraji'* among them have issued thousands of fatwas. Expressions of desire of the recognition of the *maqasid* that are not supported by legal principles and fatwas demonstrate that the scholars prioritise the principles preventing legislation based on *masalih* deduced through induction. The third outcome is that legal considerations of the *maqasid* are only being channelled through the *maqsad* of justice. Hobbollah showed how the four scholars' concern with the *maqasid* centres on justice. They did not present a comprehensive view on the *maqasid* of the Shari'a. The scholars' concern could therefore be not for a comprehensive consideration of the *maqasid*; they could have rather identified the authority of justice due to specific evidence. In such a case, their perspectives on justice would not be extendable to other possible *maqasid*. We thus conclude that the *maqasid* are excluded from Shi'i jurisprudence. In addition, while the *maqasid* have been raised by Shi'i scholars, they have not developed legal frameworks to establish and exercise its legal authority. The assessment of *ifta'* based on the *maqasid* as a reform avenue will therefore refer only to frameworks of Sunni scholars.

The first legal framework of the *maqasid* by Sunni legal scholars is that by Ahmad al-Raissouni. Al-Raissouni has proposed principles for the consideration of the *maqasid* in

ijtihad in works such as *Nazariyyat al-Maqasid 'ind al-Imam al-Shatibi* and “I’tibar al-Maqasid fi al-Fatawa al-Maliyya.” Principles proposed in the former, published in 1995, were then professed by the other scholars surveyed in this section. The latter work is an article adapting the previous principles to the Islamic finance industry. In the article, he responds to “the weak consideration and apparent neglect in the realization of the purposes and intents of Maqasid in financial fatwas.”<sup>384</sup> The statement indicates that the *maqasid* are largely excluded from ijtihad in the industry, but where they are applied, the application is weak. This weakness is explained as an inadequate consideration of only a few general *maqasid* and their application in preponderance.<sup>385</sup> He views that their consideration should not be restricted to the five necessities (al-Ghazali’s) and other general *masalih*, but that they should be considered in every step of ijtihad.

In “I’tibar al-Maqasid fi al-Fatawa al-Maliyya,” al-Raissouni proposes “some examples and paths through which the consideration of the *maqasid* is realised.”<sup>386</sup> He states the following eight examples and paths generally at first and then discusses them in the context of Islamic finance.

1. The acquisition of knowledge of the wisdoms and *maslaha* intended in revealed texts for their consideration in derivation, *qiyas* and application;
2. The investigation of what is thought to be an objective but is not one, to dismiss and exclude it;

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<sup>384</sup> Ahmad al-Raissouni, “I’tibār al-Maqāṣid fi al-Fatāwa al-Māliyya,” *Islāmiyyat al-Ma’rifā* 70 (2012), 13.

<sup>385</sup> Al-Raissouni, “I’tibār al-Maqāṣid fi al-Fatāwa al-Māliyya,” 21.

<sup>386</sup> Al-Raissouni, “I’tibār al-Maqāṣid fi al-Fatāwa al-Māliyya,” 21.

3. The differentiation between what is in itself a purpose and what is sought for other purposes;
4. The consideration of the general *maqasid* in all applications, to ensure applications are in harmony with them;
5. The consideration of *maqasid* specific to the legislation area to which the case belongs;
6. The consideration of the *maqasid* when exercising *qiyas*;
7. The consideration of all *masalih* in the Shari'a;
8. The consideration of the consequences of the rulings.

In the first path he sets for the realisation of the *maqasid* in *ijtihad*, al-Raissouni emphasises the importance of knowing the objective and wisdom behind revealed rulings.<sup>387</sup> Where these are known, they are to be the basis of legislation. He views that identifying the harm sought to be averted in a ruling, or a benefit sought, is of no less importance and significance than the assessment of the strength of a chain of narration of a hadith. This path therefore prioritises the *maqasid* as the basis of derivation, ahead of other bases such as a text's apparent meaning. Al-Raissouni's second path for the realisation of the *maqasid* in *ijtihad* is in effect a guideline for the first path. He cites as an example of the dismissal of what is thought to be an objective the belief by some researchers that entrepreneurial risk-taking is an objective.<sup>388</sup> He instead views some applications of risk-taking to be contradictory to the *maqasid* of the preservation of wealth.

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<sup>387</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 21-22.

<sup>388</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 22-23.

Al-Raissouni's third path involves identifying the nature of a *maqṣad*. Some prohibited actions are themselves subjects of the prohibition, whereas others are prohibited due to consequential actions (the same applies to obligations).<sup>389</sup> The significance of this differentiation lies in that actions prohibited for themselves are of a higher level of prohibition. This is realised in the higher potential for relaxing prohibitions legislated for the consequences of their subjects. He provides the example of permitting the sale of what has not yet been received, which he identifies as being prohibited due to potential consequences. This permission was in cases where the sales fulfilled the needs of productive institutions. Actions that are themselves subjects of the prohibition are less likely to be relaxed in this manner. Al-Raissouni's differentiation thus has implications in the scope for the consideration of the *maqasid*.

Al-Raissouni describes the fourth path for the realisation of the *maqasid* in ijtihad as the path most observed.<sup>390</sup> His example of the consideration of the general *maqasid* in all applications is ensuring the protection of al-Ghazali's five *maqasid* (safeguarding faith, lives, intellect, posterity and wealth). He moves to more specific *maqasid* in the fifth path. So in the case of fatwas relating to sales, the mufti is to consider the *maqasid* of rulings on sales.<sup>391</sup> He gives the example of invoking the *maqasid* of the protection of wealth to restrict the disbursement of non-essential consumption loans.

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<sup>389</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 23-24.

<sup>390</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 25.

<sup>391</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 25.

Al-Raissouni's sixth path is based on his view of the priority of the consideration of the *maqasid* when exercising *qiyas* over their consideration in the understanding of and derivation from revealed texts.<sup>392</sup> This is because the results of *qiyas*, particularly when its criteria are neglected, can contradict the *maqasid*. As a path to avoid this contradiction, he cites the secondary source of law of *istihsan* to overrule the outcome of *qiyas*. This path therefore advises muftis to regulate other legal derivations.

In his seventh path, al-Raissouni prescribes the consideration of all *masalih* based on the view that the objective of the Shari'a is the protection of *masalih*.<sup>393</sup> He states that the *masalih* should be considered among evidence and tools of preponderance wherever relevant and of influence in legislation.<sup>394</sup> Al-Raissouni's ranking of the *masalih* as a tool of preponderance instead of primary derivation places the *masalih* at a secondary level. His example of such a *maslaha* is the community's need and interest in the success, expansion and strength of Islamic banking. This *maslaha* is to be considered in rulings on related topics.

Al-Raissouni's eighth and final path for the realisation of the *maqasid* in *ijtihad* is the consideration of the consequences of the rulings. This path reflects that the realisation of the harms or benefits of some actions is delayed and that a benefit realised immediately can form a harm in the future (and vice versa). Rulings should therefore consider current and future implications. He gives the example of the tolerance of prohibited transactions when a

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<sup>392</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 26-27.

<sup>393</sup> Refer to the reference to al-Ghazali's view in the previous section that the very objective of the Sharia is to promote the well-being of the people.

<sup>394</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 27.

conventional bank is acquired to be converted to an Islamic institution, in light of the long-term objective of facilitating permissible transactions.

Al-Raissouni's eight paths for the realisation of the *maqasid* in *ijtihād* represent steps and guidelines for a mufti. They include steps for dealing with the *maqasid* -both general and specific-, such as their identification, their type and application. Derivation of rulings from texts is to be based on its *maqasid*. Al-Raissouni's guidelines relate to the subjects too, whereby he calls for the consideration of the *masalih* and consequences of the subjects of *ifta'*, representing a depth in the treatment of *ifta'* subjects. His paths also address the secondary source of Islamic law of *qiyas*, giving the *maqasid* priority in cases of difference between the *maqasid* and the result of a *qiyas*.

Al-Raissouni had proposed similar guidelines for *ijtihād* based on the *maqasid* in *Nazariyyat al-Maqasid 'ind al-Imam al-Shatibi*. These guidelines will not be discussed as they are all subsumed in the eight paths above. However, they are mentioned here to contextualise the following writings on the *maqasid* by other scholars that were published following the publication of *Nazariyyat* in 1995:<sup>395</sup>

1. The interpretation of texts<sup>396</sup> and laws is not to be limited to their apparent meanings, but they are to be interpreted according to their objectives.
2. The combined consideration of general principles and specific evidence relating to the cases.
3. Seeking benefits and averting harm even if there was no specific text on that.

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<sup>395</sup> Al-Raissouni, *Nazariyyat al-Maqāṣid 'ind al-Imām al-Shāṭibi*, 363-384.

<sup>396</sup> A reference to the textual sources of Islamic law; the Quran and hadith.

4. The consideration of the consequences of the rulings.

The second scholar whose guidelines are considered is al-Qaradawi. He has also written on the *maqasid* in *Maqasid al-Shari'a al-Muta'alliqa bi-l-Mal* and in *Dirasa fi fiqh Maqasid al-Shari'a* (a study in the jurisprudence of *maqasid al-Shari'a*).<sup>397</sup> The former is the source for his aforementioned *maqasid* of wealth, whereas in the latter he discusses the approaches of three schools to the jurisprudence of the *maqasid*. The schools comprise those that suppress the texts in favour of the *masalih* and *maqasid*; centrists, to whom he attributes himself; and literalists.<sup>398</sup> Al-Qaradawi portrays the following principles as those of the centrist school in response to the two other schools. While they are not stated as guidelines for *ijtihad* based on the *maqasid*, as done by al-Raissouni, they remain of relevance as they relate to the process of *ijtihad* and are in the context of the *maqasid*. The principles are presented generally with no particular focus on Islamic finance.

1. Seeking the objective of the text prior to issuing a fatwa;
2. understanding a text in light of its reasons and circumstances;
3. differentiating between immutable objectives and changing means;
4. aligning the immutable elements of the Shari'a with the changing times; and
5. differentiating between the recognition of the meanings of acts of worship and transactions.

Al-Qaradawi states three principles that are in line with al-Raissouni's first guideline giving precedence to the intended objectives underlying each text over its apparent

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<sup>397</sup> Yusuf al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī'a* 3<sup>rd</sup> ed. (Cairo: Dār al-Shurūq, 2008).

<sup>398</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī'a*, 41.

meaning. Al-Qaradawi's first principle echoes al-Raissouni's first.<sup>399</sup> His second principle supports the first in advocating a correct understanding of the text by understanding its circumstances.<sup>400</sup> The fifth principle is an application of the first principle in the area of transactions. It emphasises that jurists are to recognise the meaning and underlying objectives of transactions.<sup>401</sup> While he does not refer to al-Raissouni in the chapter, it is probable that al-Qaradawi is aware of Raissouni's thought, for he has described al-Raissouni as the master of the *maqasid* and the heir of Ibn Ashur.<sup>402</sup>

Al-Qaradawi's remaining two principles outline bases for *ijtihad*. His third principle is to recognise that achieving the *maqasid* in some cases requires means different to those of earlier periods, even if they were based on scripture.<sup>403</sup> Jurists are thus to identify means through which they achieve the *maqasid* that are suitable for their age. He gives the example of moon sighting, where fasting the entire month of Ramadan was the objective and moon sighting being the means for determining the end of the month. Variability in the means in this case is the possibility for sighting the moon through methods different to those practiced historically, such as through the use of astrological calculations. The fourth principle is that jurists can practice *ijtihad* and renew jurisprudential opinions in all areas that are not immutable.<sup>404</sup> He does not relate this principle to the *maqasid*, nor does he provide examples of topics that can be renewed.

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<sup>399</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī'a*, 155.

<sup>400</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī'a*, 162.

<sup>401</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī'a*, 202.

<sup>402</sup> Qanāt al-Imam Yusuf al-Qaradawi, *Shahādat al-Qaradawi fī Ḥaq Ra'īs al-Ittihād al-'ālamī li-'ulamā' al-Muslimīn al-Jadīd al-Raissouni*, November 8<sup>th</sup>, 2018, <https://www.youtube.com/watch?v=lbw5OK0Wfw8>.

<sup>403</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī'a*, 174-189.

<sup>404</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī'a*, 198.

Al-Qaradawi's principles can be therefore summarised into two fundamentals. The first that jurists are to exercise *ijtihad* based on the underlying objectives of the texts. The second fundamental is that there exists a significant scope for renewing jurisprudential positions, an exercise that could be necessary to achieve the *maqasid* in changing circumstances.

The guidelines and principles of al-Raissouni and al-Qaradawi differ in purpose. While al-Raissouni presents the *maqasid* that should be observed in *ijtihad* in the Islamic finance industry, al-Qaradawi presents his principles in a polemic, general context. He delineates and defends his school's approach to observing the *maqasid* in *ijtihad*, while also demonstrating his view on the scope and necessity for renewed *ijtihad*. Nonetheless, the two scholars address the same topic and do not conflict.

The third framework for the consideration of the *maqasid* is that of the International Islamic Fiqh Academy, presented in the declarations of its 18<sup>th</sup> gathering in Malaysia in 2007. The gathering addressed the *maqasid* -among other topics- and the declarations contained eight statements on the topic. The reason for the discussion of the *maqasid* is not stated, but the context is reflected in the declarations. The IIFA called for the study of the social, economic, educational and political dimensions of the *maqasid*. It also stressed the importance of exercising the *maqasid* in applying rulings to contemporary financial contracts, in order to achieve a difference and independence from conventional financial products. The statements suggest that the topic was discussed to address issues in Islamic

finance, a common topic of discussion at the IIFA, and that it views a potential for wider applications of the *maqasid*.

IIFA's declarations included the following four guidelines on the observance of the *maqasid* in *ijtihad* as well as other statements stressing its importance.<sup>405</sup> The statements are not elaborated nor supported by examples. Neither does the IIFA release papers and discussions preceding the final declarations.

- 1) A comprehensive examination of the texts of the Shari'a and its rulings.
- 2) The consideration of the *maqasid* as a tool of preponderance in cases upon which jurists differ.
- 3) Cognisance of the ultimate consequences of the actions of individuals and applying the rulings accordingly.
- 4) The correct operationalisation of the *maqasid* does not nullify the authority of scripture and correct consensus.<sup>406</sup>

The first guideline stated in the declarations does not offer a legal principle but is likely a reference to an alignment between specific texts and principles stated generally in scripture. It reflects al-Raissouni's first that advocates knowledge of the wisdoms and *maslaha* intended in revealed texts. The IIFA's second guideline posits the *maqasid* as a secondary tool of derivation, excluding it from the interpretation of the sources of law. Here it differs

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<sup>405</sup> IIFA, "Qarār bi-Sha'n al-Maqāṣid al-Shar'iyya." For more on the IIFA, refer to chapter one.

<sup>406</sup> The IIFA states the fourth guideline in a separate statement within the same declarations. We have combined it with the preceding three guidelines for the sake of clarity.

from al-Raissouni's prioritisation of the *maqasid* in the interpretation of scripture. The fourth guideline preserving the authority of scripture and correct consensus is therefore in line with the second. The second guideline and the fourth statement emphasise the position of classical legal principles. Finally, the third guideline repeats al-Raissouni's on the consequences of the actions of the petitioner.

The guidelines presented by the IIFA differ from those of the two scholars. By excluding it from the interpretation of scripture, the IIFA adopts a more conservative approach and does not assign upon the *maqasid* the authority given by the two scholars. The difference between the IIFA and al-Raissouni can be clarified by the context of the 18<sup>th</sup> gathering. Al-Raissouni is a member of the IIFA and had lectured on the *maqasid* at the academy five months prior to the gathering.<sup>407</sup> His prominent participation explains the similarity of two of the IIFA's guidelines to his. However, the IIFA's position of the role of the *maqasid* in preponderance rather than interpretation indicates that al-Raissouni's view was rejected. This difference will be evaluated in the following section.

The fourth and final legal framework is that of Mohammad Hashim Kamali. Kamali has written on the *maqasid* and on Islamic finance, jointly and separately. He does not propose frameworks in the articles that combine the two topics.<sup>408</sup> His framework is instead found in *Shari'ah Law: An Introduction* as a methodology in a chapter on the *maqasid*.<sup>409</sup> He discusses the topic "in an effort to address one of its main weaknesses in the eyes of its

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<sup>407</sup> IIFA, "Muntadā al-Fikr al-Islāmi yunazzim muḥāḍara bi-'unwān "Manhaj al-Fikr al-Maqāṣidi,"" accessed April 11<sup>th</sup>, 2020, <http://www.iifa-aifi.org/1141.html>.

<sup>408</sup> For example such See Kamali, "Ethics and Finance"

<sup>409</sup> Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), 123-140.

critics who say that unlike the *uṣūl al-fiqh*, the *maqāṣid* lack a convincing methodology.”<sup>410</sup>

The methodology comprises three steps: the identification of the *maqāṣid*, their classification and use in *ijtihād*. It is the third step that relates to our study. Kamali describes three paths to the observance of the *maqāṣid* in *ijtihād*. The first is that rules are to be read “in the light of their broader premises and objectives.”<sup>411</sup> The application of the first path is exemplified through the permissibility of paying the monetary equivalent of a commodity for *zakaṭ*, rather than the commodity itself. This is because “the common purpose in all of these was to satisfy the need of the poor rather than to confine its payment in a particular commodity.” The second is recourse to *istihsān* when “a rigid adherence to *qiyās* in certain cases may lead to unsatisfactory results.”<sup>412</sup> The third is “the attention a mujtahid must pay to the end result and consequence of his ruling,” an example of which is the Prophet’s refusal to restore the Ka’aba to its original position to avoid pushing his people to disbelief.<sup>413</sup> His first and third steps restate al-Raissouni’s -whom he cites for his examples- aforementioned first and fourth guidelines from *Nazariyyat al-Maqāṣid ‘ind al-Imam al-Shatibi*, whereas the second restates al-Raissouni’s explanation of his third guideline.<sup>414</sup> The similarities demonstrate that Kamali’s views are situated within the scope of previous frameworks.

Kamali introduced his chapter as an effort to address criticism that the *maqāṣid* lacked a convincing methodology. His section on the methodology for the consideration of the

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<sup>410</sup> Kamali, *Shari’ah Law*, 123.

<sup>411</sup> Kamali, *Shari’ah Law*, 137.

<sup>412</sup> Kamali, *Shari’ah Law*, 138

<sup>413</sup> Kamali, *Shari’ah Law*, 138.

<sup>414</sup> Al-Raissouni, *Nazariyyat al-Maqāṣid ‘ind al-Imām al-Shāṭibi*, 376.

*maqasid* in *ijtihād* lacks the substance to counter the critique. The section covers fewer than three pages populated by examples to the three steps. Earlier frameworks, such as al-Raissouni's *Nazariyyat al-Maqasid*, which Kamali cites, comprised additional detail. In the chapter conclusion, he portrays this brevity positively: "the *maqāṣid* are not burdened with methodological technicality and literalist reading of the text. As such the *maqāṣid* integrate a degree of versatility and comprehension into the reading of *Shari'ah*."<sup>415</sup> The statement suggests that the brevity is intentional. However, in 2017 he criticised the substance of existing frameworks, saying: "the *maqasid* have remained somewhat too theoretical to be of much help to practitioners. Most of *maqasid* are theoretical in that they do not have substantive rules of their own."<sup>416</sup> The *maqasid* indeed do not have substantive rules, we thus interpret his statement as describing their frameworks. This would mean that while he supported the lack of "methodological technicality" before, he later viewed that the application of the *maqasid* necessitates further development of its legal framework. This interpretation suggests that Kamali aligned with the views of the critics to whom he had earlier referred.

While two of the four frameworks discussed above are not in the context of Islamic finance, the relevance of the frameworks to the industry is demonstrated in the writings of academics. Some academics have stated the same views held by the scholars in their examples of how the *maqasid* can be observed in the industry. These examples are not presented as frameworks, unlike those of the scholars above. For example, Laldin and

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<sup>415</sup> Kamali, *Shari'ah Law*, 139.

<sup>416</sup> Mohammad Hashim Kamali, "Actualisation (*Taf'il*) of the Higher Purposes (*Maqasid*) of *Shari'ah*," *Islam and Civilisational Renewal* 8, 3 (2017), 297.

Furqani seek that “the detailed rules are to be read within the parameters of the general framework and detailed actions are set in line with the bigger goals.”<sup>417</sup> This statement echoes al-Raissouni’s fourth principle, al-Qaradawi’s second and third and Kamali’s first. Soualhi also echoes al-Raissouni’s second guideline in *Nazariyyat*: “Both categories [of *maqasid*] must be observed when establishing a new Islamic legal ruling or issuing a fatwa.”<sup>418</sup> While the three academics have not cited al-Raissouni, they have cited al-Qaradawi and Kamali. Al-Shubaili also echoes the scholars’ guideline on the consideration of the ultimate consequences of the contracts, as well as al-Qaradawi’s first on seeking the objective of a text.<sup>419</sup> The similarity in thought and references to two of our cited scholars demonstrates the relevance and influence of the frameworks of the scholars on calls for the consideration of the *maqasid* in *ifta’* in Islamic finance.

The influence of the guidelines of the scholars is also evident in the examples academics provide of considerations of the *maqasid* in the Islamic finance industry. The examples include commentary on existing practices in the industry and descriptions of correct practices. As shown in the previous section, this was in response to the banks following an operating model similar to conventional banks and neglecting social objectives. For example, Laldin and Furqani state that “if a contract proves to be an instrument of injustice, it must be set aside,” citing Kamali.<sup>420</sup> Their article contains further similarities. Dusuki and Bouheraoua echo the scholars’ guidelines on the consideration of general *maqasid* by

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<sup>417</sup> Neither the authors nor Kamali define the sought justice. Laldin and Furqani, “Developing Islamic finance in the framework of *maqasid al-Shari’ah*,” *International Journal of Islamic and Middle Eastern Finance and Management* 6, 4 (2013), 280; Mohammad Hashim Kamali, “Maqasid al-Shari’ah Made Simple,” *Occasional Paper Series*, 13 (2008), Surrey: The International Institute of Islamic Thought.

<sup>418</sup> Soualhi, “Application of *Shari’ah* contracts in contemporary Islamic finance,” 337.

<sup>419</sup> Al-Shubaili, “al-Riqāba al-Shar’iyya ‘ala al-Maṣārif,” 24.

<sup>420</sup> Laldin and Furqani, “Developing Islamic finance in the framework of *maqasid al-Shari’ah*,” 282.

referring to al-Ghazali's five essential *maqasid* in their call for banks to avoid activities "which may cause disruption and chaos to society."<sup>421</sup> Other academics and scholars have applied the scholars' guidelines to judge products used in the industry based on their alignment with the *maqasid*. Bin Bayyah views the protection of loans from inflation to be aligned with the objective of justice.<sup>422</sup> Soualhi presents three examples in his literature review of objections by academics and scholars to the contravention of bank products to the *maqasid*.<sup>423</sup> These examples, relating to *sukuk* and products based on *ijara* and *murabaha* contracts, are of objections to contracts combined to achieve outcomes different to the nature of the individual contracts. The effects of the combined contracts mirror those of conventional products. Their objections reflect the scholars' principle on the prioritisation of underlying objectives over the apparent meanings of text and the principle on the consideration of the consequences of the rulings. These examples demonstrate an alignment between the frameworks of the scholars and the desired applications in the industry by other academics and scholars. The examples also demonstrate their belief in the possible application of the legal frameworks.

This section has presented legal frameworks for the observance of the *maqasid* in *ijtihad*. Views of two scholars, an academic and an organisation of scholars from across the Muslim world were discussed. The four shared some principles and differed on others, a key difference being the authority of the *maqasid*. Where the IIFA sets it as a tool of preponderance, the scholars grant it a priority in the interpretation of texts and over

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<sup>421</sup> Dusuki and Bouheraoua, "The Framework of *Maqāṣid al-Sharī'a*," 330.

<sup>422</sup> The objective is not defined further. Bin Bayyah, *Maqāṣid al-Mu'āmalāt wa-Marāṣid al-Wāqīāt*, 134.

<sup>423</sup> Soualhi, "Application of *Sharī'ah* contracts in contemporary Islamic finance," 336.

derivation through *qiyas*. This is a reflection of the three scholars' support for the approach and the IIFA's composition of scholars from different backgrounds. The section also showed the relevance of the frameworks to Islamic finance, even while two of the four were not written in the context of the industry. This was shown by the consistency of their frameworks with proposals for changes in industry practices through *ifta'* based on the *maqasid*.

The discussions of the frameworks of the IIFA and Kamali introduced two issues in their application. The first was a difference of opinion among scholars, the second a claim of a methodological deficiency. This section focused on the legal frameworks and did not analyse the two issues. This analysis is presented in the following section, covering issues with both the methodology and application of the frameworks.

#### Effectiveness of the frameworks

We have demonstrated the objective of academics to reform the Islamic finance industry's products and services through *ifta'* based on the *maqasid*. We then presented the legal approaches proposed by scholars for the observance of the *maqasid* in *ifta'*. However, the realisation of their proposals faces several challenges. This section will address four challenges relating to the proposed frameworks and their application, followed by a contextualisation of the challenges. It will argue that the challenges relating to the frameworks and their application restrict the role of the *maqasid* as an avenue for reform.

The first challenge is that the proposed guidelines do not represent a developed, refined or comprehensive legal framework for the *maqasid*. This relates to the four reviewed frameworks. In *Nazariyyat al-Maqasid*, al-Raissouni states that his guidelines are only the first stage of the development of a framework and that they are only an attempt to get closer to the objective.<sup>424</sup> In “I’tibar al-Maqasid,” he describes the eight paths as “some paths and examples,” again indicating a scope for further development.<sup>425</sup> These acknowledgments are also significant due to the influence of his guidelines on those of the other scholars, as shown in the previous section. Al-Qaradawi’s principles are presented as the ideal application rather a comprehensive legal framework.<sup>426</sup> The IIFA’s guidelines are stated as constituents of a larger set, but that set is not provided.<sup>427</sup> The authors of the first three frameworks thus indicate that these frameworks are not comprehensive and that their development is not complete.

Kamali, the fourth author of a *maqasid* framework, acknowledges the extent of the legal development different to the three scholars. As discussed in the previous section, in 2008 Kamali presented the brevity of his framework as an intentional advantage. However, in the same chapter he raised an issue relating to this approach: “there still remains the residual question of how arbitrariness can be avoided in the identification of *maqāṣid*.”<sup>428</sup> He then suggests a solution of collective *ijtihād*, which in turn requires the participation of the remaining scholarly community. This is shown below to itself be a challenge. Kamali had

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<sup>424</sup> Al-Raissouni, *Nazariyyat al-Maqāṣid ‘ind al-Imām al-Shāṭibi*, 362-363.

<sup>425</sup> Al-Raissouni, “I’tibār al-Maqāṣid fi al-Fatāwa al-Māliyya,” 21.

<sup>426</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī’a*, 137.

<sup>427</sup> IIFA, “Qarār bi-Sha’n al-Maqāṣid al-Shar’iyya.”

<sup>428</sup> Kamali, *Shari’ah Law*, 136.

thus accepted the methodology while acknowledging an important obstacle. In 2012, in a discussion of how financial contracts are adapted to emulate conventional bank products, he states that “readers familiar with the theory of the *maqāṣid al-sharī‘ah* would also know that this whole area of *maqāṣid* suffers from underdevelopment.”<sup>429</sup> In this case, his recognition of the underdevelopment of a legal framework is explicit. In 2017 and again in the context of Islamic finance, Kamali further acknowledged the challenges to applying the *maqasid* framework: “it also tends to fall short of providing the needed input in the form of pragmatic tools to rectify the aberrations.”<sup>430</sup> His statements present further indicators that the framework is yet to be considered fully developed or comprehensive even by its proponents. The framework’s authority is therefore likely to be at least equally problematic for non-supportive groups.

Thus the first issue with the proposed approaches is the absence of a developed legal framework. In the context of Islamic finance, the absence of a developed legal framework could form an obstacle to its international use. The industry comprises members from different countries, legal schools and ideologies. The interpretation of divine laws based on a methodology that is admitted by its proponents to yet achieve comprehension is unlikely to receive universal acceptance. The approach contrasts with the legal theory used by classical schools which have been developed and applied for centuries. Additionally, as scope for further development of the methodology exists, new developments could produce new legal principles that lead to different rulings on the contracts used in the market. The amendment of rulings is at times harmful to Islamic banks due to possible reputational, legal

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<sup>429</sup> Kamali, “Ethics and Finance,” 622.

<sup>430</sup> Kamali, “Actualisation (*Taf‘il*) of the Higher Purposes (*Maqasid*) of Shari‘ah,” 297.

and administrative costs to the amendment. This was observed when a mufti's criticism of a sukuk structure led to its replacement by other structures, which entails additional services from legal advisors.<sup>431</sup> The risk of these costs is a hinderance to the banks. The underdevelopment of the *maqasid's* legal framework is therefore a basis for resistance from other scholars and banks.

While not directly an obstacle, the second challenge to the *maqasid* as an avenue of reform relates to the sought change. Some principles in the proposed legal frameworks and some examples of applications of the *maqasid* are present in the classical legal framework commonly used in Islamic finance. The invocation of the *maqasid* in these cases will therefore be a repackaging of existing principles, as shown in the following paragraph.

The reviewed legal frameworks on the *maqasid* at times refer to existing legal principles and maxims. For example, al-Raissouni's guideline on seeking benefits and averting harm is a restatement of *al-maslaha al-mursala* as a source of law and the legal maxim of avoiding harm. *Al-maslaha al-mursala* is an "unattested *maṣlaḥa*, one which lacks concrete indication (*dalāla*) in the Qur'an, the Sunna or on account of consensus (*ijmā'*)."<sup>432</sup> As the following chapter shows, some scholars consider *al-maslaha al-mursala* as a source of law.

Furthermore, the avoidance of harm sought by al-Raissouni is a common maxim in Islamic law.<sup>433</sup> Al-Raissouni's guideline is therefore a reiteration of existing legal views. Similarly, al-

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<sup>431</sup> Daliah Merzaban, "Scholar critique spurs ijara Islamic bond," *Reuters*, April 15<sup>th</sup>, 2009, accessed June 18<sup>th</sup>, 2020, <https://www.reuters.com/article/us-islamicbanking-summit-sukuk/scholar-critique-spurs-ijara-islamic-bond-idUSTRE53COZX20090415>.

<sup>432</sup> Felicitas Opwis, "Maṣlaḥa in Contemporary Islamic Legal Theory," *Islamic Law and Society* 12, 2 (2005), 191. Opwis's work is discussed in the following chapter.

<sup>433</sup> Jalal al-Din Abd al-Rahman al-Suyuti, *Al-Ashbāh wa-l-Nazā'ir fī Qawā'id wa-Furū' Fiqh al-Shāfi'iyya* (Beirut: Dār al-Kutub al-'ilmiyya, 1990), accessed June 3<sup>rd</sup>, 2020, <https://al-maktaba.org/book/21719/80>, 83; Sayid

Raissouni, the IIFA and Kamali's guidelines on the cognisance of the ultimate consequences of the petitioner are a feature of the legal principle of *sadd al-dara'i'* (closing off the means that can lead to evil<sup>434</sup>).<sup>435</sup> *Sadd al-dara'i'* invalidates actions that, although permissible in principle, lead to corruption or prohibited outcomes.<sup>436</sup> Some examples provided by academics also rely on existing legal principles. Dusuki and Bouheraoua describe activities that contravene Ghazali's *maqasid* as those "which can endanger the lives."<sup>437</sup> However, such actions also contravene the legal maxim of avoiding harm. The legal maxim that actions are considered in accordance to the intentions similarly intersects with Feddad's reference to *maqasid* and Soualhi's examples discussed above.<sup>438</sup>

The above examples demonstrate that a jurisprudence based on the *maqasid* will not therefore always differ from existing jurisprudential frameworks. This conclusion triggers the question of: if the existing legal principles have not been applied, what additional motive do the *maqasid* bring that would bring about their application? We are yet to come across an answer to this question, as the literature primarily addresses 'why the *maqasid*' rather than our question.<sup>439</sup> The answer is likely to involve the belief uniting these legal principles; that they are the path to the achievement of the Legislator's objectives, rather

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Muhammad Hasan al-Bujnordi, *al-Qawa'id al-Fiqhiyya*- Volume 1 (Qom: Nashr al-Hādī, 1998), 211-245; Ministry of Awqaf and Islamic Affairs (Kuwait), *Al-Mawsū'a al-Fiqhiyya*- Volume 28, 180-183.

<sup>434</sup> Translated in Mawil Y. Izzi Dien, "Sadd al-Dharā'i'," in *Encyclopaedia of Islam, Second Edition*, ed. Peri J. Bearman, Thierry Bianquis, Clifford E. Bosworth, Emeri J. van Donzel, Wolfhart P. Heinrichs (Leiden: Brill, 2012), accessed April 11<sup>th</sup>, 2020, [http://dx.doi.org/10.1163/1573-3912\\_islam\\_SIM\\_6414](http://dx.doi.org/10.1163/1573-3912_islam_SIM_6414).

<sup>435</sup> Muhammad Abu Zahra, *Uṣūl al-Fiqh* (Cairo: Dār al-Fikr al-'arabi, n.d.), accessed April 11<sup>th</sup>, 2020, <https://archive.org/details/waqosfizh/mode/2up>, 288.

<sup>436</sup> IIFA, "Qarār bi-Sha'n Sadd al-Dharā'i'," declarations of the 9<sup>th</sup> convention of the IIFA, Abu Dhabi, April 1-6<sup>th</sup>, 1995, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/2004.html>.

<sup>437</sup> Dusuki and Bouheraoua, "The Framework of *Maqāṣid al-Sharī'a*," 330.

<sup>438</sup> Al-Suyuti, *al-Ashbāh wa-l-Nazā'ir*, 10; al-Bujnawardi, *al-Qawa'id al-Fiqhiyya*- Volume 3, 133-155.

<sup>439</sup> See for example Taha Jabir al-Alawani, *Maqāṣid al-Sharī'a* (Beirut: Dār al-Hādī, 2001), 129-131.

than only to compliance with His decrees. This is not to refute any originality in the guidelines, an example of which is the *maqasid's* authority to overrule a text's apparent meaning. The incremental value introduced by the *maqasid* would therefore be the escalation of the authority of these maxims in some cases. Nonetheless, the recurring components limit the value of the proposals.

A precursor to the third challenge -relating to legal differences- is the trend of the movement towards the homogeneity of legal opinions in the industry. Differences in opinions are inherent in Islamic law, emanating from differences in its sources, principles and applications. However, differences in legal opinions are not welcomed by all stakeholders in the Islamic finance industry. In the industry, *ifta'* is conducted by scholars, SSBs, regulators and organisations, creating a wide scope for legal differences. Proponents argue that the differing fatwas affect consumer confidence in the legitimacy of the banks' products, increase legal costs and limit the tradability of assets both domestically and internationally.<sup>440</sup> The latter prevents the development of secondary markets, limiting the activities of Islamic banks.<sup>441</sup> For these reasons and others, academics, scholars and institutions have advocated the standardisation of legal opinions in the industry. Examples of such efforts by Malaysian regulators and standard-setting organisations IFSB and AAOIFI have been presented by Laldin and Furqani.<sup>442</sup> Scholars have also approved forms of

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<sup>440</sup> Malaysia International Islamic Financial Centre, "Harmonisation to Enhance Islamic Finance," Kuala Lumpur: Bank Negara Malaysia, 2014, accessed September 1<sup>st</sup>, 2020, <http://askprof.mifc.com/index.php?ch=28&pg=72&ac=100&bb=uploadpdf>, 3-4; Wafica Ali Ghoul, "The Standardization Debate in Islamic Finance: A Case Study," paper presented at the 8<sup>th</sup> International Conference on Islamic Economics and Finance, Doha, December 19 – 21<sup>st</sup>, 2011, 3-4.

<sup>441</sup> Secondary markets are those where financial instruments are traded after their first issuance.

<sup>442</sup> Mohamad Akram Laldin and Hafas Furqani, "Standardisation in Islamic Finance: Moving Towards Harmonisation," *Space 4* (2015): 5-9.

standardisation, as seen in the IIFA and al-Shubaili's statements advocating standardisation in general and in the context of following the fatwas of boards conducting ijihad collectively.<sup>443</sup> The latter is a reference to groups that are larger in membership than SSBs of individual banks, such as the IIFA. The multiple reasons and influential supporters therefore make the standardisation of fatwas a key objective in the Islamic finance industry.

The third challenge is the additional legal difference caused by applications of the *maqasid*. This challenge will be discussed through three bases for differences. The first two bases relate to two guidelines stated by al-Raissouni, al-Qaradawi and Kamali. The first guideline is that the interpretation of texts is not to be limited to their apparent meanings but they are to be interpreted according to their objectives. The second guideline is the combined consideration of general principles and specific evidence relating to the cases. As shown in the first section of this chapter, the general *maqasid* are not a single, agreed-upon set. The *maqasid* proposed by some scholars and academics are influenced by circumstances and ideology, as shown in the below paragraph.

The influence of circumstances and ideology on the *maqasid* underline the third challenge relating to legal differences. This can be seen in the differences between the *maqasid* of classical, revivalist and contemporary reformist sources cited in this chapter. The *maqasid* in al-Ghazali, al-Shatibi and Ibn Ashur's views include the safeguarding of faith, lives, intellect, posterity and wealth. Kamali proposes to add "protection of the fundamental

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<sup>443</sup> IIFA, "Qarār bi-Sha'n Dawr al-Raqāba al-Shar'iyya fī Dabṭ A'māl al-Bunūk al-Islāmiyya Ahammiyatuhā, Shurūṭuhā, Ṭarīqat 'amaluhā," declarations of the 19<sup>th</sup> convention of the IIFA, Sharjah, April 26-30<sup>th</sup>, 2009, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/2297.html>.; al-Shubaili, "al-Riqāba al-Shar'iyya 'ala al-Maṣārif."

rights and liberties, economic development, and R & D [research and development] in technology and science as well as peaceful coexistence among nations.”<sup>444</sup> Kamali’s difference to the preceding scholars can be read in the contemporary context of economic inequality, the value of technological developments, oppression and war. The influence of a scholar’s experiences and ideology is thus realised in their choice of *maqasid*. In light of the two guidelines for *ijtihad* based of the *maqasid*, their experiences and ideology can become a basis for prioritisation over a text’s apparent meaning. This adds another basis for legal differences to those based on other legal principles. As explained above, while a diversity of legal outcomes is inherent in Islamic law, it is not universally welcomed in the Islamic finance industry. An approach that increases legal differences is therefore in opposition to the industry’s current direction.

The above paragraphs introduced the third challenge through general *maqasid*. The challenge of opposition to diversity within the industry can be also precipitated through specific *maqasid* relating to individual rulings. These *maqasid* are also subject to the scholars’ opinions, particularly in cases where texts are not explicit.<sup>445</sup> The attribution of different *maqasid* for the same contracts results in varying legal opinions. An example of this is evident in the prohibition and approval of short selling<sup>446</sup> through recourse to the *maqasid* by different scholars.<sup>447</sup> In such situations, a bank’s competitive advantage would

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<sup>444</sup> Kamali, *Shari’ah Law*, 127. The difference is further demonstrated by alMarakeby, “al-Ḥadātha wa-Taḥawwulāt al-Khitāb al-Maqāṣidi,” 19-20

<sup>445</sup> Al-Qaradawi, *Dirāsa fī fiqh Maqāṣid al-Sharī’a*, 161-163.

<sup>446</sup> Short selling is the sale of a borrowed security and is followed by the seller’s purchase of the security from the market to return it to the lender. A typical objective would be to profit from an anticipated decline in the security’s price.

<sup>447</sup> Mahmud Fahad Mheidat, “‘Uqūd al-Khiyārāt al-Māliyya al-Mu’āṣira bayn al-Mujjizīn wa-l-māni’īn,” accessed June 7<sup>th</sup>, 2020, <http://aliftaa.jo/Research.aspx?ResearchId=6#.Xtz7iEUzY2x>.

be dependent on the opinion endorsed by its SSB, along with the type of consumer demand. Differing assessments of specific *maqasid* therefore present an additional avenue for legal differences in the Islamic finance industry.

A third driver of diversity in legal opinions based on the *maqasid* is al-Raissouni's guideline on seeking benefits and averting harm. In such *ijtihad*, the affirmation of *masalih* (benefits) on which a ruling is to be issued is a responsibility of the jurist.<sup>448</sup> This responsibility of the affirmation is particularly relevant with *masalih* that are not based on scripture. The absence of a common text expands the possible *masalih* on which scholars can base their *ijtihad*. *Ijtihad* based on different *masalih* therefore results in a diversity of legal opinions in an industry inclined to homogeneity. This authority is discussed further in the following chapter.

The three challenges discussed above relate to the guidelines on observing the *maqasid* in *ijtihad* and their application in the Islamic finance industry. The fourth challenge is based on a theological difference. The jurisprudential treatment of the *maqasid* is built upon the premise that there is a wisdom behind the Shari'a; the benefit ('*maslaha*') of creation.<sup>449</sup> The wisdoms behind some rulings are known or can be derived, such as those relating to transactions, while others are not.<sup>450</sup> However, this is not a universal belief among Muslim theological schools. Asharite scholars have rejected this view, presenting a substantial

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<sup>448</sup> Shahab al-Din Ahmad al-Qarrafi, *Sharḥ Tanqīḥ al-Fuṣūl* (Cairo: Sharikat al-Ṭibā'a al-Fanniyya al-Muttaḥida, 1973), accessed April 11<sup>th</sup>, 2020, <https://al-maktaba.org/book/21813/445>, 447.

<sup>449</sup> Al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharī'a*, 220; Ibn Ashur, *Maqāṣid al-Sharī'a al-Islāmiyya*- volume 3, 150-159; al-Alawani, *Maqāṣid al-Sharī'a*, 123-125.

<sup>450</sup> See for example 59:7 on the distribution of property and Muhammad ibn Babawayh al-Qummi al-Saduq, *'ilal al-Sharā'i'* (Beirut: Dār al-Murtaḍā, 2006), 471-472, for the prohibition of usury.

disagreement.<sup>451</sup> They negate the theological grounding used to import the *maqasid* into legal theory. If the Shari'a is not based on a direct wisdom, the preservation of its claimed objectives is no longer an authority.<sup>452</sup> *Ifta'* based on the *maqasid* would therefore not hold authority among Asharites subscribing to this view. This theological difference on the authority of the *maqasid* presents further differences in legal opinions as such scholars would not approve fatwas based on the *maqasid*. The extent of this difference in the industry is difficult to determine as SSBs do not disclose the theological views of their scholars. This is made further difficult by the adoption of alternative positions by some Asharite scholars. In writings in areas other than theology, scholars such as al-Amidi (d. 1233), Ibn al-Hajib (d. 1249) and al-Qurtubi (d. 1273) depart from the common Asharite view in their discussions of the wisdom of the Shari'a.<sup>453</sup> Nonetheless, the theological difference further limits the support for *ijtihad* based on the *maqasid*.

The implications of the four challenges above can be further understood in light of the industry's dynamics. As discussed in the introductory chapter, Islamic banks are commercial businesses prioritising profits. Their priorities can therefore influence their nomination of SSB scholars and their practices. Differences in legal views by scholars in the industry result in banking products being approved by some SSBs and rejected by others. Banks seeking to

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<sup>451</sup> Muhammad Fakhr al-Din al-Razi, *Ma'ālim Uṣūl al-Dīn* (Beirut: Dār al-Kitāb al-'arabi, n.d.), accessed April 11<sup>th</sup>, 2020, <https://al-maktaba.org/book/6372/89#p1>, 104-105; Abd al-Rahman Adud al-Din al-Iji, *al-Mawāqif fī 'Ilm al-Kalām* (Beirut: 'ālam al-Kutub, n.d.), 331-332.

<sup>452</sup> For more on the preservation of the objectives, see al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharī'a*, 220-221.

<sup>453</sup> Muhammad Shams al-Din al-Qurtubi, *al-Jāmi' li-Aḥkām al-Qur'an*- volume 2, 2<sup>nd</sup> ed. (Cairo: Dār al-Kutub al-Miṣriyya, 1964), accessed April 11<sup>th</sup>, 2020, <https://al-maktaba.org/book/31702/540#p1>, 63-64; Uthman Abu Amr ibn al-Hajib, *Muntahā al-Wuṣūl wa-l-Amal fī 'Ilmayy al-Uṣūl wa-l-Jadal* (Beirut: Dār al-Kutub al-'ilmiyya, 1985), 184; Ali al-Amidi, *al-Iḥkām fī Uṣūl al-Aḥkām*- volume 3 (Beirut: al-Maktab al-Islāmi, n.d.), accessed April 11<sup>th</sup>, 2020, <https://al-maktaba.org/book/10801/888>, 271.

This variant Asharite position is expounded by Rami Koujah in "Divine Purposiveness and its Implications in Legal Theory: The Interplay of *Kalām* and *Uṣūl al-Fiqh*," *Islamic Law and Society* 24 (2016), 176, 179-196.

offer products rejected by scholars can appoint approving scholars to their SSBs. Oseni, Ahmad and Hassan have studied the various methods financial institutions use to obtain favourable fatwas. One such method is the “proactive search for scholars who will endorse a proposed Islamic finance product.”<sup>454</sup> This claim is based on the testimony of an investment banker, a statement by the IFSB in its principles on corporate governance, testimony of Shari‘a researchers at the IFSB, and other articles on the topic.<sup>455</sup> While we did not have access to the latter two sources, we have reviewed the first two to corroborate their claim. The claim is also supported by a statement by former SSB scholar Ali al-Salus.<sup>456</sup> Al-Salus acknowledges the existence of a group of SSB scholars “that permit for the bank what it needs.”<sup>457</sup> A proscription of market practices contravening the *maqasid*, examples of which have been provided by the academics above, would curtail profit-making opportunities for the banks. Therefore, in cases where *ifta’* based on the *maqasid* would proscribe products permitted by fatwas based on traditional legal theory, some banks are likely to support scholars using the latter. Obstacles to *ifta’* based on the *maqasid* could therefore stem from commercial interests in addition to legal differences.

A second variable demonstrating the significance of the four challenges is the group of aforementioned differences between the guidelines of al-Raissouni and the IIFA. While al-Raissouni gave precedence to the intended objectives underlying each case over other

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<sup>454</sup> Umar A. Oseni, Abu Umar Faruq Ahmad and M. Kabir Hassan, “the Legal Implications of ‘Fatwā Shopping’ in the Islamic Finance Industry: Problems, Perceptions and Prospects,” *Arab Law Quarterly* 30 (2016), 124.

<sup>455</sup> Oseni, Ahmad and Hassan, “the Legal Implications of ‘Fatwā Shopping’,” 121-125, 131.

<sup>456</sup> John Foster, “How Sharia-compliant is Islamic banking?” BBC News, December 11<sup>th</sup>, 2009 [last update], accessed June 9<sup>th</sup>, 2020, <http://news.bbc.co.uk/2/hi/business/8401421.stm>; IFSB, “Guiding Principles on Corporate Governance for Institutions Offering Only Islamic Financial Services,” Kuala Lumpur: IFSB, 2006.

<sup>457</sup> Uthman Uthman and Ali al-Salus, “al-Raqāba al-Shar‘iyya ‘alā al-Bunūk al-Islāmiyya,” *Al-Jazeera*, September 25<sup>th</sup>, 2008.

interpretations of its text, the IIFA considers the *maqasid* as a tool of preponderance rather than an approach to the interpretation of the sources of law. The IIFA's rejection of his view of the authority of the *maqasid*, following his lecture at the academy, is a rejection by a majority of the scholars in attendance. While the IIFA does not disclose the names of the scholars in attendance nor their voting decisions, the eighth clause of its statute states that decisions are taken through majority votes.<sup>458</sup> A majority decision on an alternative authority for the *maqasid* reflects the view of a diverse group of scholars from different countries, schools and ideologies. In addition, an explicit example of an opposing position is found in a separate book on *ifta'* by an IIFA member and its former vice chairman. Mufti Muhammad Taqi Usmani is former judge and a member and chairman of several SSBs and at AAOIFI. In *Usul al-ifta' wa-Adabuh*, Usmani criticises contemporary approaches to and applications of the *maqasid*.<sup>459</sup> He rejects the primacy of the *maqasid* in derivation and accepts only those explicitly stated in the Quran and Sunna. He criticises the generic employment of the term to legitimise rationally deduced *maqasid*. The position of the majority of the IIFA is thus to reject the primacy of the *maqasid* in the interpretation of scripture as part of the process of *ijtihad*.

The position of the industry's scholars and those of the IIFA on the consideration of the *maqasid* in *ijtihad* can also be observed through their fatwas. The IIFA publishes the declarations of its sessions which comprise scholars from its 57 member states. It also publishes the declarations of its thematic forums, although their attendees are not

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<sup>458</sup> IIFA, "Al-Nizām al-'Asāsi li-Majma' al-Fiqh al-Islāmi al-Duwalī" accessed June 9<sup>th</sup>, 2020, <http://www.iifa-aifi.org/>النظام-الأساسي-لمجمع-الفقهاء-الإسلامي.

<sup>459</sup> Muhammad Taqi Usmani, *Uṣūl al-Iftā' wa-Adābuh* (Karachi: Maktabat Ma'ārif al-Quran, 2011), 245-248.

disclosed. We reviewed the fatwas of the IIFA and of AAOIFI in order to identify the extent to which their fatwas were based on the *maqasid*. 61 of the IIFA's declarations have been on Islamic banking, economics and other topics related to this study. Our review of the 61 declarations found seven references to the *maqasid*, presented in Table 8.

	IIFA declarations referring to the <i>maqasid</i>
1	<p>يجب أن تحقق الصكوك الإسلامية مقاصد التشريع من حيث: تعزيز التنمية ودعم النشاطات الحقيقية وإقامة العدالة بين الطرفين.<sup>460</sup></p> <p><i>Islamic Sukuk must achieve the maqasid of legislation through: enhancing development, supporting real activities and achieving justice between the two parties.</i></p> <p>The statement is a “general guideline” and not a fatwa.</p>
2	<p>التحوط بمعناه العام، يقصد به الوقاية والحماية للمال من المخاطر، وهو بهذا المعنى يتفق مع مقاصد الشريعة الإسلامية في حفظ المال.<sup>461</sup></p> <p><i>Hedging, in its general sense, means the safeguarding and protection of wealth from dangers, and in this meaning it corresponds with maqasid al-Sharia of the protection of wealth.</i></p> <p>The statement describes hedging and is not a fatwa.</p>
3	<p>مراعاة مقاصد الشريعة الإسلامية، عند صياغة عقود التحوط، وكذلك مراعاة مآلات تلك العقود وآثارها في الجوانب المختلفة، لأن مراعاة المآلات أصل معتبر شرعاً.<sup>462</sup></p> <p><i>Consideration of the maqasid of the Islamic Shari'a, in the formation of hedging contracts, and the consideration of the consequences of these contracts and their implications in different areas, as the consideration of the consequences is a legally-sanctioned principle.</i></p> <p>The guideline stipulates the consideration of the <i>maqasid</i> and is not a fatwa. It does not expound on the stipulation.</p>

<sup>460</sup> IIFA, “Qarār bi-Sha'n Istikmāl Mawḍu' al-Ṣukūk al-Islāmiyya,” declarations of the 20<sup>th</sup> convention of the IIFA, Oran, September 13-18<sup>th</sup>, 2012, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/2348.html>.

<sup>461</sup> IIFA, “al-Taḥawwuṭ fī al-Mu'āmalāt al-Māliyya,” declarations of the 2<sup>nd</sup> Islamic Economics Forum, Dubai, April 26-27<sup>th</sup>, 2016, accessed September 1<sup>st</sup>, 2020. <https://iifa-aifi.org/ar/4365.html>.

<sup>462</sup> IIFA, “al-Taḥawwuṭ fī al-Mu'āmalāt al-Māliyya.”

IIFA declarations referring to the <i>maqasid</i> (continued)	
4	<p>التأكيد على المصارف والمؤسسات المالية الإسلامية ..... تجنب الصيغ المحرمة والمشبوهة التزاماً بالضوابط الشرعية بما يحقق مقاصد الشريعة<sup>463</sup></p> <p><i>To emphasise upon Islamic banks and financial institutions the avoidance of prohibited and suspected forms, in conformity with legal criteria, with what achieves maqasid al-Sharia</i></p> <p>The statement is a guideline and not a fatwa.</p>
5	<p>يوصي المجالس الشرعية، وهيئات الفتوى والرقابة الشرعية، والعلماء والباحثين على الجمع بين مراعاة مقاصد الشريعة الإسلامية، والضوابط الشرعية الجزئية للعقود<sup>464</sup></p> <p><i>[The IIFA] advises Shari'a boards, fatwa and Shari'a supervision boards, scholars and researchers to combine the consideration of maqasid of the Islamic Shari'a and the legal criteria specific to the contracts</i></p> <p>The statement is a guideline and not a fatwa.</p>
6	<p>ضوابط الاجتهاد والفتوى في الهيئات الشرعية: (ج) مراعاة مقاصد الشريعة ومآلات الأفعال عند بيان الحكم الشرعي.<sup>465</sup></p> <p><i>Ijtihad and fatwa criteria in Shari'a boards: c) the consideration of maqasid al-Shari'a and the consequences of actions when stating a legal ruling.</i></p> <p>The guideline stipulates the consideration of the <i>maqasid</i> and is not a fatwa. It does not expound on the stipulation.</p>
7	<p>فإن العناية بأمر هذه الأسواق هي من تمام إقامة الواجب في حفظ المال وتنميته باعتبار ذلك أحد مقاصد الشريعة<sup>466</sup></p> <p><i>For care of matters of these markets is part of the performance of the obligation relating to the protection and development of wealth, in considering it one of the maqasid [of] al-Shari'a</i></p> <p>The statement is a description of the virtues of the action and is not a fatwa.</p>

Table 8: References to *maqasid al-Shari'a* in the International Islamic Fiqh Academy's declarations and the researcher's translations and commentary

As the commentary on the seven references indicates, none of the IIFA's decisions or fatwas have been issued on the basis of the *maqasid*. This is despite the IIFA's endorsement of the *maqasid* in the same references.

<sup>463</sup> IIFA, "Qarār bi-Sha'n al-Tawarruq: Ḥaḡīqatuh, Anwā'uh (al-Fiqhī al-Ma'rūf wa-l-Maṣrafi al-Munazzam)."

<sup>464</sup> IIFA, "Qarār bi-Sha'n 'Amaliyyāt al-Taḥawwuṭ fi al-Mu'assasāt al-Māliyya al-Islāmiyya," declarations of the 24<sup>th</sup> convention of the IIFA, al-Madinah al-Munawara, November 4-6<sup>th</sup>, 2019, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/5188.html>.

<sup>465</sup> IIFA, "Qarār bi-Sha'n Dawr al-Raqāba al-Shar'iyya fī Dabṭ A'māl al-Bunūk al-Islāmiyya Ahammiyatuhā, Shurūṭuhā, Ṭarīqat 'Amaluhā."

<sup>466</sup> IIFA, "Al-Nadwa al-'Ulā li-l-Aswāq al-Māliyya," declarations of the 1<sup>st</sup> Financial Markets Forum, Rabat, October 20-24<sup>th</sup>, 1989, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/25083.html>.

AAOIFI's fatwas are presented in *al-Ma'ayir al-Shar'iyya* and *Shari'ah Standards*, a publication of more than 1300 pages, and its English translation.<sup>467</sup> Our review of *al-Ma'ayir al-Shar'iyya* found seven references to the *maqasid*, presented in Table 9. The commentary in Table 9 is based on the original Arabic text rather than AAOIFI's English translation as the latter does not always represent the original text faithfully.

AAOIFI <i>Shari'ah Standards</i> referring to <i>maqasid al-Shari'a</i>	
1	<p>مشروعية اشتراط الضمانات مستندها الأدلة الخاصة بكل نوع من أنواع الضمانات، ولما في ذلك من حفظ المال الذي هو أحد المقاصد الشرعية. p142</p> <p><i>The basis of the permissibility of stipulating guarantees in contracts is that it protects property, which is one of the objectives of Shari'ah. The other authorities mentioned in the standard in support of each kind of guarantee can be cited as authority for the permissibility of guarantees in contracts. p138</i></p> <p>The primary basis of this ruling is the specific evidence for each form of guarantees (which are the subject of the ruling). The <i>maqasid</i> are presented as an additional basis. The English translation switches the order of the authority of the two bases.</p>
2	<p>ثبتت مشروعية الاستصناع باستصناعه صلى الله عليه وسلم الخاتم والمنبر وبالاستحسان والقواعد العامة في العقود و التصرفات والمقاصد الشرعية p312</p> <p><i>The legitimacy of Istisna'a is based on the request of the Prophet (peace be upon him) that a pulpit (a platform) for preaching and a finger ring be manufactured for him.(2) An Istisna'a contract is also permissible on the basis of the principle of Istihsan (Shari'ah approbation), the general principles of contracts and transactions and the objectives of Shari'ah p313</i></p> <p>This ruling is presented as being based on four factors, one of which is the <i>maqasid</i>. The <i>maqasid</i> is the approach cited last, following the Sunna, a secondary source of law and a legal maxim.</p>
3	<p>المواطأة على المخارج الشرعية: وهي الحيل المحمودة التي لا تخالف وسائلها دليلاً شرعياً، ولا تناقض أغراضها مقاصد الشريعة، ولا تؤول إلى مفسدة خالصة أو راجحة. وحكمها الجواز. p664</p> <p><i>Muwata`ah for obtaining Shari'ah Exits, which refers to tricks that do not violate Shari'ah rules, or contradict with Shari'ah objectives, or result in any harm to others, is permissible. p656</i></p> <p>The subject's correspondence to the <i>maqasid</i> is a description. The statement does not identify the <i>maqasid</i> as the basis for the ruling.</p>
4	<p>ضوابط الفتوى: عدم توجيه المؤسسة إلى الحيل الممنوعة شرعاً التي يتجاوز بها مقتضى الأحكام الشرعية، أو تخل بمقاصد التشريع. p752</p> <p><i>Fatwa issuers shall not direct Institutions to impermissible tricks for escaping Shari'ah restrictions, or violating the objectives of Shari'ah legislation. p742</i></p> <p>The statement is a guideline and not a fatwa.</p>

<sup>467</sup> Accounting and Auditing Organisation for Islamic Finance Institutions, *al-Ma'ayir al-Shar'iyya* (Manama: AAOIFI, 2017); AAOIFI, *Shari'ah Standards* (Manama: AAOIFI, 2017).

AAOIFI Shari'ah Standards referring to <i>maqasid al-Shari'a</i>	
5	<p>مستند جواز اعتماد التوقيع ..... هو دفع الضرر الذي قد ينشأ عن حصول التزيف في هوية المتعاقدين الإنترنت. كما أن ذلك لا يتضمن محظورا شرعيا، والشريعة الإسلامية تدعو للعمل بالوسائل الفنية التي تسهم في حفظ المال الذي هو أحد المقاصد الخمسة. 6-975p</p> <p><i>Acceptability of adopting the electronic signature as a means of verifying the identities of dealers if such means is recognizable by the prevailing rules and regulations is based on the need to avoid the harm that could arise from online forgery in the dealers' identities. In addition to that, adopting electronic signature does not constitute an impermissible practice. In fact Shari'ah encourages the use of technological means to preserve peoples' wealth, because preservation of wealth constitutes one of the main five aims (Maqasid) of Shari'ah. p961</i></p> <p>The basis of the fatwa is the avoidance of harm. The correspondence with the <i>maqasid</i> is an additional variable.</p>
6	<p>حماية رأس المال بالطرق المباحة: مطلوبة شرعا، وهي تندرج ضمن مقصد «حفظ المال» في الشريعة. p1123</p> <p><i>Protecting capital by permissible means is desirable in Shari'ah as it serves the objectives of Shari'ah with regard to wealth. p1102</i></p> <p>The correspondence with the <i>maqasid</i> is an additional variable to this legal view. (The English translation renders it as the reason, whereas the Arabic source presents it as an additional variable).</p>
7	<p>مستند كون حماية رأس المال مطلوبا شرعا أمر الشارع بحفظ المال بالإشهاد والكتابة وتوثيق الديون بالرهون ونحوها. وحفظ المال أحد المقاصد الضرورية التي جاءت الشريعة برعايتها وحفظها. p1132</p> <p><i>The basis for capital protection being a desirable objective is the Divine Command to adopt ways and means to protect wealth like having witnesses and documentation of the financial contracts and securing debt with mortgages and the like. Protection of wealth is one of the essential objectives that the Shari'ah has taken care of. p1110</i></p> <p>The ruling is implied to have been derived using <i>qiyas</i>. The ruling's correspondence to the <i>maqasid</i> is presented as a description rather than basis.</p>

Table 9: References to *maqasid al-Shari'a* in AAOIFI's *al-Ma'ayir al-Shar'iyya* and *Shari'ah Standards* and the commentary by the researcher<sup>468</sup>

Of the seven references, the *maqasid* are used as a basis in fatwa in the first two. In these instances, the *maqasid* are not the sole basis but are cited among other authorities. In two other occasions -the fifth and sixth- the *maqasid* are cited as supporting variables, while the remaining references are descriptions and guidelines.

<sup>468</sup> AAOIFI, *al-Ma'ayir al-Shar'iyya*; AAOIFI, *Shari'ah Standards*. Page references have been provided following each citation.

The review of the 61 IIFA declarations showed that of hundreds of legal opinions, none were based on the *maqasid*. Among thousands of legal opinions across 58 topics, AAOIFI's *al-Ma'ayir al-Shar'iyya* had two fatwas based on the *maqasid*. In these two cases, the *maqasid* were not the sole basis but were cited among other authorities. The declarations and standards thus demonstrate that the *maqasid* played an extremely minor role in the derivation of their thousands of rulings. The finding corresponds to al-Raissouni's perspective of "a weak consideration and apparent neglect in the realization of the purposes and intents of Maqasid in financial fatwas."<sup>469</sup> In the context of the IIFA, this reinforces our argument above that its scholars rejected al-Raissouni's view of the *maqasid's* authority in the interpretation of scripture in *ijtihad*. In their guidelines reviewed above, the IIFA had set the *maqasid* a secondary role in derivation. The findings are consistent with their view. As for AAOIFI, its Shari'ah Standards committees comprise 28 scholars including those that serve on bank SSBs and others that do not.<sup>470</sup> AAOIFI states that "a standard is adopted based on consensus or the opinion of the majority. Thereafter, AAOIFI holds a public hearing to present and discuss the proposed standard with a host of scholars and practitioners who voice their views and opinions, whether in the form of deletions, additions, or amendment."<sup>471</sup> The number of scholars in the standards committees, the majority vote approach and the public hearings are factors that ensure that *al-Ma'ayir al-Shar'iyya* reflect the opinions of many scholars involved in the industry. The neglect of the *maqasid* in the *ijtihad* of both the IIFA and AAOIFI therefore reflects the degree of support by scholars both involved in the industry and otherwise. This emphasises

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<sup>469</sup> Al-Raissouni, "I'tibār al-Maqāṣid fi al-Fatāwa al-Māliyya," 13.

<sup>470</sup> AAOIFI, *Shari'ah Standards*, 32-41.

<sup>471</sup> AAOIFI, *Shari'ah Standards*, 11.

the significance of the four challenges to the adoption of the *maqasid* in ijtiḥad presented in this section. The tone of the statements of both organisations regarding the *maqasid* is positive and they contain direct and indirect endorsements of their consideration. This support is not reinforced by the organisations' consideration of the *maqasid* in ijtiḥad. This suggests that they view the consideration and achievement of the *maqasid* to be beneficial to the industry, but that it does not carry the authority for obligatory legislations.

This section has addressed challenges to the application of the proposals by academics and scholars to incorporate the *maqasid* in ijtiḥad in Islamic banks. The adoption of their proposals is constrained by issues of authority, value, practicality and opposition. The proposals' admitted lack of comprehension constrains their authority among other groups, particularly given their difference to classical legal theory. Their similarities with existing legal maxims also limit the case for their necessity. Furthermore, the potential for further diversifying legal opinions counters the movement towards standardisation in the industry. Finally, the proposals are likely to face opposition by banks prioritising commercial gains. The significance of these challenges to the use of the *maqasid* in ijtiḥad in the industry was demonstrated by its neglect by international organisations. Through these challenges and demonstrations, we have established the *maqasid's* unsuitability as an avenue to drive social objectives.

## Conclusion

This chapter assessed whether the adaptation of the *maqasid al-Shari'a* to jurisprudence provides a legal avenue to drive social objectives of Islamic finance. It examined proposals by contemporary scholars on the incorporation of the *maqasid* in *ijtihad* and examples on its application. The academics and some scholars view the incorporation of the *maqasid* in *ijtihad* as an avenue to reform the industry and achieve its social objectives. The study then assessed the viability of their proposals, identifying issues relating to the legal frameworks and others caused by the dynamics of the industry. It showed that the adoption of frameworks is constrained by issues of authority, value, practicality and opposition. These were related to challenges concerning the acceptability of the approach, opposing commercial interests and the industry's inclination to homogenous opinions.

*Ifta'* in the Islamic finance industry can be considered to be progressive due to factors such as the use of group *ijtihad*, the combination of opinions of different legal schools, the novelty of the topics and the resulting original opinions. However, an application of the *maqasid* appears to be a step beyond this progressive field. The lack of comprehension of the legal framework does not appear to have convinced enough scholars to prioritise it over the principles of jurisprudence used by traditional schools. Thus, while elevating the authority of the *maqasid* is envisaged by its proponents to address the industry's neglect of social objectives, it does not align with the views of the industry's participants.

Writings on the *maqasid* in the context of the Islamic finance industry are extensive. This chapter has sought to contribute to the corpus by adopting an evidence-based approach

covering hundreds of declarations and standards to assess the challenges to their adoption. It also evaluated the effect of legal and theological differences, covering Sunni schools as well as Shi'i positions. Finally, it evaluated opposition based on commercial motives. These analyses present a comprehensive evaluation which has not been considered in the reviewed literature.

The following chapter will continue the assessment of legal approaches to industry reform. It will assess the effectiveness of driving reform through *ifta'* using the secondary source of law of *al-maslaha al-mursala*. This chapter has referred to the *masalih* several times. The connections between the *maqasid* and the *masalih* will also be examined.

## Chapter 5: Reform, *masalih* and authority

In light of the neglect by Islamic banks of the social objectives sought of them, this study evaluates the possibility of driving reform through Shari'a Supervisory Boards (SSBs). To this end, we first established the institutional and legal authorities of SSBs, which included unrestricted *ifta'*. This authority relates to the SSBs' primary task of the approval of bank products through fatwas. The study thus commenced the evaluation of the scope for reform through *ifta'*. The previous chapter assessed *maqasid al-Shari'a* as one such approach. It argued against the viability of the approach due to issues relating to the framework's authority, value, practicality and opposition. This chapter continues the evaluation of legal approaches to reform by addressing the secondary source of Islamic law of *al-masalih al-mursala*.

The *masalih* are considered by some scholars as a secondary source of Islamic law and by others to be a form of *qiyas*, an independent source of Islamic law. The *masalih* are legislated to achieve public interests, linking them in nature to the social objectives of the industry. In this chapter, the *masalih* will be first introduced, along with the differing legal views on them. The second section will assess their past use in the Islamic banking industry. These introductions will facilitate the third section's assessment of the possibility of driving the industry's social objectives through *ifta'* based on the *masalih*. The chapter will argue that a SSB's ability to drive social objectives through the *masalih* depends on the prevalence of three significant influences. These are commercial motives of shareholders, the motives for governments to consolidate authority and the authority of the scholar and the legitimacy of their judgement.

## *Al-Masalih al-mursala*

A *maslaha* (plural *masalih*) is defined literally as a utility.<sup>472</sup> It is also used in reference to public interests, good or benefit in different contexts.<sup>473</sup> In this context of legislation, it is the *maslaha mursala* that is considered, which is an “unattested *maṣlaḥa*, one which lacks concrete indication (*dalāla*) in the Qur'an, the Sunna or on account of consensus (*ijmā'*).”<sup>474</sup> Legal scholars have set criteria to identify what constitutes a *maslaha*, as well as for its use in legislation. To facilitate the chapter's later assessment of the potential for driving the industry's social objectives, this section will introduce the *masalih*. It will cover positions of scholars across the five legal schools and will differentiate the *masalih* from the *maqasid*. It will show a classical and contemporary validation by Sunni scholars with key differences in their criteria.

The discourse on the legitimacy and scope of legislation based on the *masalih* stretches from the 10<sup>th</sup> century and hosts an array of views. To represent some variety of the views on the *masalih*, this section will provide summaries of views from the five legal schools based on six sources. A comprehensive exposition of the discourse is beyond the scope of this study. The first two sources are secondary studies by Husain Hamid Hassan (d. 2020) and

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<sup>472</sup> Madjid Khadduri, “Maṣlaḥa”, in *Encyclopaedia of Islam, Second Edition*, Peri J. Bearman, Thierry Bianquis, Clifford E. Bosworth, Emeri J. van Donzel, Wolfhart P. Heinrichs (Leiden: Brill, 2012), accessed May 11<sup>th</sup>, 2021, [http://dx.doi.org/10.1163/1573-3912\\_islam\\_SIM\\_5019](http://dx.doi.org/10.1163/1573-3912_islam_SIM_5019).

<sup>473</sup> Felicitas Opwis, “Maṣlaḥa in Contemporary Islamic Legal Theory,” *Islamic Law and Society* 12, 2 (2005), 183; Khadduri, “Maṣlaḥa.” While this is Opwis's interpretation of the term, we introduce below sources used in her monograph on the *masalih*, which might have informed her interpretation.

<sup>474</sup> Opwis, “Maṣlaḥa in Contemporary Islamic Legal Theory,” 191.

Felicitas Opwis that present views from the four Sunni schools.<sup>475</sup> These views are then linked to contemporary positions through publications by the IIFA and AAOIFI, which are also directly relevant to Islamic banking. The final two sources are works of comparative jurisprudence by Shi'i scholars Muhammad Taqi al-Hakim<sup>476</sup> (d. 2002) and Ja'far Sobhani. They outline Shi'i positions on the *masalih*. The review will demonstrate the varied and non-unanimous validation of the *masalih* by scholars across the four Sunni legal schools.

Husain Hamid Hassan was a legal specialist who worked on the codification of Islamic law into the laws of several Muslim countries and was a member of several international fiqh organisations, a SSB scholar and an adviser to Islamic banks.<sup>477</sup> His doctoral thesis at al-Azhar University, *Nazariyyat al-Maslaha fi al-Fiqh al-Islami*, studied the *masalih* in the views of scholars from the four Sunni schools based on their legal theory and fatwas.

Hassan represented the Maliki school through the views of its eponym Malik ibn Anas (d. 795) and jurists such as al-Shatibi and al-Qarrafi (d. 1285). Based on the fatwas of Malik and the legal theory of al-Shatibi, Hassan argues that they had validated a category of the *masalih* labelled *al-mula'im al-mursal*, those that are not recognised in a text but are related to others recognised by the Shari'a.<sup>478</sup> He presents al-Qarrafi's validation of *masalih* that are not directly related to another established in a text as an outlier within the

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<sup>475</sup> Husain Hamid Hassan, *Nazariyyat al-Maṣlaḥah fī al-Fiqh al-Islāmī* (Cairo: al-Maṭba'a al-Ālamiyya, 1970); Felicitas Meta Maria Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4<sup>th</sup>/10<sup>th</sup> to 8<sup>th</sup>/14<sup>th</sup> Century* (Boston: Brill, 2010).

<sup>476</sup> Al-Hakim, also cited in chapter 4, was a senior Iraqi legal scholar, academic professor and dean. His interests included literature and comparative jurisprudence.

<sup>477</sup> Research Center for Islamic Legislation and Ethics, "Dr Husain Hamid Hassan," accessed July 30<sup>th</sup>, 2020, <https://www.cilecenter.org/ar/node/1149>.

<sup>478</sup> Hassan, *Nazariyyat al-Maṣlaḥah fī al-Fiqh al-Islāmī*, 116-183, 54-60.

school.<sup>479</sup> Hassan then identifies Malik's position in those of al-Shafi'i, al-Amidi (d. 1233), al-Baydawi (d. 1286) and al-Isnawi (d. 1370) from the Shafi'i school.<sup>480</sup> While al-Shafi'i did not list the *masalih* among the sources of law, Hassan identifies his position from his views on *qiyas*. Hassan also attributes a validation of only *masalih* classified within the *al-mula'im al-mursal* category to Ahmad ibn Hanbal (d. 855), eponym of the Hanbali school. However, this attribution is not based direct fatwas or legal theories of Ibn Hanbal. It is instead based on attributions of the view to Ibn Hanbal by early Maliki and Shafi'i scholars, the application of the *masalih* by Hanbali scholars and by fatwas attributed by Maliki scholars to Ibn Hanbal.<sup>481</sup> As for the Hanafite view, Hassan cites the acceptance of later scholars Ibn al-Humam (d. 1457) and Muhibb-Allah (d. 1707) of *masalih* that are not recognised in a text but are related to others recognised by the Shari'a, a view which Ibn al-Humam attributes to the Hanafite school.<sup>482</sup> The Hanafite views are based on their discussions on *qiyas*. Hassan had thus interpreted the validation of legislation through the *masalih* by scholars from the four schools including by three of their eponyms. The validation he identified is for unattested *masalih* that are related to others revealed in the primary sources of law. As he has attributed one opinion on the *masalih* to the majority of the four schools, it is no surprise that Hassan shares the same position.<sup>483</sup>

The second source used in this study as a source for views on the *masalih* is by Felicitas Opwis. In *Maṣlaḥa and the Purpose of the Law*, Opwis studies the development of the legal

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<sup>479</sup> Hassan, *Nazariyyat al-Maṣlaḥah fī al-Fiqh al-Islāmī*, 60, 179-180.

<sup>480</sup> Hassan, *Nazariyyat al-Maṣlaḥah fī al-Fiqh al-Islāmī*, 311-326, 329-330.

<sup>481</sup> Hassan, *Nazariyyat al-Maṣlaḥah fī al-Fiqh al-Islāmī*, 469-474.

<sup>482</sup> Hassan, *Nazariyyat al-Maṣlaḥah fī al-Fiqh al-Islāmī*, 575-577.

<sup>483</sup> Hassan, *Nazariyyat al-Maṣlaḥah fī al-Fiqh al-Islāmī*, 13-14.

theory on the *masalih* from the 10<sup>th</sup> to the 14<sup>th</sup> centuries. Opwis conducts her study through the views of nine legal scholars whom she argues to have shaped the development of the theory. She argues that the legal principle of *masalih* developed from a secondary role to one with influence across many legal topics.<sup>484</sup> While Hassan prioritised the positions of the eponyms of the four Sunni schools, Opwis examines more views of their later scholars. The following selected conclusions from her book serve only to exhibit the legal views, showing varied approaches to the validation of the *masalih* by classical scholars. Readers can refer to Opwis' work for a discussion of the views.

Opwis first studies the view of the Hanafi scholar Abu Bakr al-Jassas (d. 980), identifying his acceptance of the consideration of benefits and harms in "rulings that are not tied to a concrete textual basis."<sup>485</sup> She nonetheless argues that this does not constitute a consideration of the *masalih*. This is based on al-Jassas' differentiation between the benefits and harms that a jurist can consider, and between "God's purpose in imposing His law on the believer." By defining the *masalih* on the latter, al-Jassas does not equate the jurists' rulings -through the former- to divine law. Opwis identifies fellow Hanafi scholar Abu al-Husayn al-Basri (d. 1044) to hold the same view.<sup>486</sup> Opwis thus identified the two earliest scholars she reviewed to not validate rulings based on benefits and harms as divine law.

The next three scholars reviewed by Opwis are Shafi'is that have validated the legal use of the *masalih* under differing scopes. The first among them (and third scholar in her book)

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<sup>484</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 335.

<sup>485</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 23.

<sup>486</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 40-41.

is al-Juwaini (d. 1085), whom she identifies to validate the use of *masalih* in derivation using *qiyas* through the method of suitability.<sup>487</sup> His validation is bound by the criteria that the suitable meaning not “contradict any of the fundamental principles of the law” and is only used in the absence of textual sources on the case.<sup>488</sup> The fourth scholar covered by Opwis is al-Ghazali, whom she identifies to only permit the consideration of unattested *masalih* in cases where a *maslaha* is a necessity, certain and universal.<sup>489</sup> If it was not a necessity, al-Ghazali required the *masalih* to be derived from divine texts. His other criteria include that it preserves religion, life, intellect, progeny or property.<sup>490</sup> The fifth scholar studied by Opwis is Fakhr al-Din al-Razi (d. 1210). Opwis interpreted al-Razi’s views on the consideration of the *masalih* as following al-Ghazali’s, with the exception that al-Razi did not restrict the consideration of unattested *masalih* to necessities.<sup>491</sup> In *qiyas* through the method of suitability, she interprets him to accept unattested *masalih* that distantly relate to *masalih* in preceding cases.<sup>492</sup> Opwis thus identified the three scholars to have variably validated derivation based on unattested *masalih*.

Opwis presented three of the remaining four, later scholars as having widened the scope for legal applications of the *masalih*. The sixth reviewed scholar is al-Qarrafi, whom she identified as having validated the consideration of the *masalih* through both *qiyas* and as a legal precept. As with al-Razi, Opwis identifies the validation in *qiyas* to be through the

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<sup>487</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 56. In this form of *qiyas*, the cause (*‘illa*, plural *‘ilal*) of the primary ruling would be a *maslaha* and the ruling would be extended to another qualifying case to achieve the same *maslaha*.

<sup>488</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 55-56.

<sup>489</sup> “Universal meant for him neither countable nor pertaining to a particular *maslaha* of an individual or a group,” Opwis, *Maṣlaḥa and the Purpose of the Law*, 74; Opwis, *Maṣlaḥa and the Purpose of the Law*, 73.

<sup>490</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 67-68.

<sup>491</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 128.

<sup>492</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 125-126.

method of suitability, without restricting it to necessities.<sup>493</sup> As a legal precept, *maslaha* is used “when preponderance needs to be established for one ruling or legal precept over another.”<sup>494</sup> It is also used “to permit prohibited means when they serve to attain a *maslaha*” under the principle of *sadd al-dara’i*, a significant addition to the incumbent approach through *qiyas*.<sup>495</sup> The seventh scholar reviewed by Opwis is the Hanbali Ibn Taymiyyah (d. 1328). Opwis argues that Ibn Taymiyyah considered “*maslaha* to be a guiding principle to derive rulings,” but that he did not provide a comprehensive procedural framework for its application.<sup>496</sup> She also identifies him as having validated unattested *masalih*, defining them as “a preponderant benefit against which no prohibition exists in the law.”<sup>497</sup> Opwis then reviews the Hanbali Najm al-Din al-Tufi’s (d. 1316) views, who restricts the *masalih* to “rulings concerning social or civil transactions and the like.”<sup>498</sup> In determining rulings on politico-legal topics, she identifies al-Tufi’s view that “attaining their *maslaha* [of believers] is the decisive factor.”<sup>499</sup> She also found that it “is not deduced from other legal indicants but is an indicant of the law in its own right.”<sup>500</sup> Similarly, Opwis identifies al-Shatibi, the ninth and final reviewed scholar, to have considered the *masalih* as an indicant of law.<sup>501</sup> He presents a methodology for its consideration based on *maqasid al-Shari’a*.<sup>502</sup> Opwis thus presented later developments to the legal theory of the *masalih* through al-

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<sup>493</sup> In this case, suitability is “defined as attaining *maslaha* and averting *mafsada*,” Opwis, *Maṣlaḥa and the Purpose of the Law*, 169.

<sup>494</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 170.

<sup>495</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 171.

<sup>496</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 185-6.

<sup>497</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 187.

<sup>498</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 235.

<sup>499</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 235.

<sup>500</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 235.

<sup>501</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 330.

<sup>502</sup> Opwis, *Maṣlaḥa and the Purpose of the Law*, 321-322.

Qarrafī's views of the legal precepts and al-Tufī and al-Shatībī's recognition of the *masalih* as a distinct source.

Through the works of the nine scholars, Opwis has shown a variety of approaches to the validation of the *masalih* by classical scholars. These range from al-Jassas' recognition of the *masalih* as non-divine rulings, to al-Tufī's validation as a source of law. She portrays the widened validation of the *masalih* to be a development in the legal theories over the five centuries.

Following the introduction to positions of classical legal scholars from the four Sunni schools, we present contemporary positions through the IIFA and AAOIFI. Their positions reflect those of some of the classical scholars, which are likely to have influenced them. As the statements of the IIFA and AAOIFI are of direct relevance to the Islamic finance industry, the following review of their positions also attempts to clarify their substance and implications.

In its 15<sup>th</sup> convention, held in 2004, the IIFA addressed the *masalih* among other varied topics.<sup>503</sup> In its declarations, it defined the terms *maslaha* and *al-maslaha al-mursala* and stated its criteria and avenues for its application. It defined the *maslaha* as "the preservation of the Legislator's objective of preserving faith, lives, intellect, posterity and wealth." *Al-masalih al-mursala* are those that have not been specifically acknowledged by approval or rejection by the Legislator. The criteria of a *maslaha* that can be used in

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<sup>503</sup> IIFA, "Qarār bi-Sha'n al-Maṣāliḥ al-Mursala wa-Taṭbīqātuhā al-Mu'āṣira," declarations of the 15<sup>th</sup> convention of the IIFA, Muscat, March 6-11<sup>th</sup>, 2004, accessed September 1<sup>st</sup>, 2020. <https://iifa-aifi.org/ar/2159.html>.

legislation are that it is real, universal, general, does not contradict a superior or equivalent *maslaha* and is compatible with the *maqasid*. As for its application, the IIFA stated that the rule of the Islamic ruler is bound by the *maslaha* and that it has applications in the affairs of society, such as their economic, social, educational, administrative and judicial affairs.<sup>504</sup>

In describing the scope of the application of the *masalih*, the IIFA's declarations did not directly refer to a legal application by jurists. They referred to applications by the ruler through *tatbiq* (application) and *mura'a* (consideration). However, the declarations can be understood to have referred to legislation as well as governance through its introductions and conclusions. The introduction situated the *masalih* in the context of legal rulings, stating that they are in light of "the consensus of Muslims that legal rulings are based on achieving *masalih* and averting harms."<sup>505</sup> The conclusion framed the *masalih* as part of the Shari'a, stating that "this shows the perpetuity of the Shari'a and its persisting satisfaction of the needs of communities."<sup>506</sup> The two statements therefore acknowledge the *masalih's* essence as a legal tool.

We interpret the lack of direct references to legislation based on the *masalih* to reflect the IIFA's caution against its general legitimisation. This interpretation is based on a recommendation by the IIFA stated in two other conventions. The first recommendation was stated in the 11<sup>th</sup> convention six years earlier, in a discussion on the methods of benefiting from existing fatwas in legislation on new cases. The recommendation was also

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<sup>504</sup> IIFA, "Qarār bi-Sha'n al-Maṣāliḥ al-Mursala."

<sup>505</sup> IIFA, "Qarār bi-Sha'n al-Maṣāliḥ al-Mursala."

<sup>506</sup> IIFA, "Qarār bi-Sha'n al-Maṣāliḥ al-Mursala."

reiterated in the 17<sup>th</sup> convention, two years after the discussion of the *masalih*, which addressed the criteria and manners of *ifta'*. The declarations recommended “caution from fatawa that are not based on a legal foundation and do not rely on legally sanctioned evidence, but rather rely on illusionary, invalidated *masalih*, rooted in desires and influenced by circumstances, affairs and customs that contravene the principles, rulings and objectives of the Shari'a.”<sup>507</sup> This statement explicitly shows the IIFA’s caution from abuses of the *masalih* in *ifta'*. This abuse is linked to personal and circumstantial factors. The repetition of the statement in a discussion separate to that dedicated to the *masalih* demonstrates the IIFA’s persisting caution. The following section will discuss a complementary reason for the IIFA’s diction.

The IIFA has therefore validated the use of the *masalih* that meet its criteria. Despite the caution discussed above, it has not prohibited its use in legislation in any of the three declarations.

Moving to a pronouncement from within the Islamic finance industry, AAOIFI has referred to the *masalih* in its *Shari'ah Standards* as an approach to for *ifta'* for SSBs. It states that a fatwa is to be “founded on what has been explicitly stated in the Qur`an and the Sunnah along with what has been supported by Ijma' (consensus of Fuqaha) or proved by Qiyas (analogical deduction). After resorting to the preceding sources, the judgment of the Mufti (issuer of the Fatwa) with regard to the different viewpoints of the Fuqaha (scholars

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<sup>507</sup> IIFA, “Qarār bi-Sha'n Subul al-Istifāda min al-Nawāzil (al-Fatawa),” declarations of the 11<sup>th</sup> convention of the IIFA, Manama, November 14-19<sup>th</sup>, 1998, accessed September 1<sup>st</sup>, 2020. <https://iifa-aifi.org/ar/2040.html>; IIFA, “Qarār bi-Sha'n al-Iftā'.”

of Fiqh); i.e, Istihsan (Shari'ah approbation) and *Maslahah Mursalah* (public interest) may be considered as the basis for issuance of Fatwa."<sup>508</sup> AAOIFI thus validates legislation based on the *masalih*, but only in cases where no ruling is found in the textual sources, *qiyas* and *ijma'*. AAOIFI does not provide further details on the approach.

The four sources reviewed so far demonstrate a varied validation of legislation based on *al-masalih al-mursala*. Hassan argued for a common validation of those related to subjects revealed in primary sources of law. Opwis demonstrated a validation of legislation through multiple approaches which developed through the views of several generations of scholars. The wider validation of the later scholars, such as al-Shatibi, are then seen in the IIFA and AAOIFI's positions. The IIFA's description and conditions echo those of al-Shatibi as described by Opwis. As does AAOIFI's validation of the *masalih* as a distinct, secondary source of law. Legislation based on the *masalih* can thus be found to be validated by classical and contemporary authorities, according to varying criteria and scopes.

The final two sources on legislation based on the *masalih* present Shi'i views. As with the *maqasid* in the previous chapter, the *masalih* are not considered as a source of law by Shi'i scholars and are thus not prominent in traditional works on legal theory. The below views are presented from works on comparative legal theory in which the authors comment on Sunni legal theory. The use of the *masalih* by legal authorities will also be acknowledged.

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<sup>508</sup> Accounting and Auditing Organisation for Islamic Finance Institutions, *Shari'ah Standards* (Manama: AAOIFI, 2017), 740.

Contemporary marja' Sobhani classifies legislation based on the *masalih* into four levels.<sup>509</sup> The first is the sphere of worship where he rejects the validity of such legislation. The second level relates to a ruler's legislation to realise rulings legislated in the Quran and Sunna in a universal (*kulli*) manner. An example of a universal ruling is the protection of the core of Islam, which the ruler would seek to achieve through military and monetary decisions. The ruler's decisions in such cases are based on *maslaha* but are considered as custodian rulings (*hukm wala'i*) rather than legal rulings (*hukm shar'i*). The ruling is thus attributed to the ruler rather than the Legislator, similar to the view Opwis attributed to al-Jassas. While Sobhani accepts these rulings as long as they do not violate the rulings of the Quran and Sunna, he does not equate them to the *masalih* sought by Sunni scholars. He states the difference being the Sunni scholars' consideration of the *masalih* as principles and sources of Islamic law. Sobhani's third level of legislation based on the *masalih* relates to those whose general benefit (or harm) upon Muslims is agreed upon. In this level, the benefit and importance of achieving the *maslaha* is realised via intellect and reflects a legal ruling. This realisation is not restricted to the mujtahid and the right to declare this ruling is therefore not restricted to him. Such a ruling is therefore not original, it attributes the case to existing rulings. The authority of such rulings is based in intellect (*'aql*), a source of law in Shi'i legal theory.<sup>510</sup> Sobhani emphasises that the benefit of the subject is not determined by one, two or three individuals, it rather is a realisation by multiple generations of intellectuals. Examples of such benefits and harms include preventative vaccinations and the consumption of narcotics, respectively. The fourth level is where following an existing ruling causes a difficulty to the public. In such cases, the ruler can prioritise secondary

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<sup>509</sup> Sobhani, *Uṣūl al-Fiqh al-Muqāran fī mā lā Naṣ Fih*, 200-3.

<sup>510</sup> Sobhani, *Uṣūl al-Fiqh al-Muqāran fī mā lā Naṣ Fih*, 201-202.

rulings to ease the difficulty. These decisions are considered an authority of the ruler and not a legal ruling. Sobhani has thereby validated two applications of the *masalih* for the Islamic ruler and one application for the wider Muslim populace. None of the three applications is a source of law within the authority of a mujtahid. The legislation approaches proposed through the *masalih* by Sunni scholars are thus rejected.

A second modern Shi'i position is that of Muhammad Taqi al-Hakim (d. 2002), an Iraqi legal scholar who taught at several seminaries and universities and whose interests included comparative jurisprudence. Al-Hakim comments on two Sunni views on legislation based on the *masalih*.<sup>511</sup> The first that the *masalih* are a source of law based on *ra'y* (a jurist's opinion) for when the primary sources do not address a case. His position on this view is that when a subject is certain to be a *maslahah*, the authority of such legislation is that of intellect. It therefore is not an independent source of law. He adds that achieving such certainty is rare. The second Sunni view that al-Hakim addresses is the validation of *masalih* that are not recognised in a text but are related to others recognised by the Shari'a. This is the position that Hassan espouses and attributes to the majority of scholars he covers from the four schools. Al-Hakim validates this view by subsuming it under legislation based on the Sunna as a source of law and rejects its consideration as a separate source of law.<sup>512</sup>

The views of Sobhani and al-Hakim demonstrate that the *masalih* do not form an independent source in Shi'i legal theory. Instead, a mujtahid can legislate a *maslahah* if it fits

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<sup>511</sup> Muhammad Taqi al-Hakim, *al-Uṣūl al-'Amma li-l-Fiqh al-Muqāran*- 2<sup>nd</sup> ed. (Qom: al-Majma' al-'ālamī li-'ahl al-Bayt, 1997), 367-368, 388-389.

<sup>512</sup> Al-Hakim, *al-Uṣūl al-'Amma li-l-Fiqh al-Muqāran*, 388.

the criteria of derivation from the Sunna, or adopt the judgement of a clear *maslaha* acknowledged by a majority. The scope for the legislation of a *maslaha* is therefore restricted in Shi'i legal theory.

The second area where Shi'i views on the *masalih* are discussed is legal authority. Discourse on Shi'i legal authority has gained prominence in the past five decades following the Islamic Revolution and Khomeini's views on the guardianship of the jurist (*velayat-e faqih*). Scholars have proposed multiple forms of governance where the ruler and the *maraji'* have the authority to legislate rule based on a *maslaha*.<sup>513</sup> As the holders of such authorities do not extend to other scholars such as those that would serve on SSBs, this application of the *masalih* in Shi'i thought is not considered relevant to this discussion.

Following the introduction of the *masalih* and the positions of legal scholars, the final task in this section is to clarify their distinction from the *maqasid*. As cited above, the IIFA's definition of the *maslaha* is "the preservation of the Legislator's objective of preserving faith, lives, intellect, posterity and wealth." The IIFA therefore suggests an equivalence of the *maqasid* and the *masalih* from a legislative perspective. In light of this equivalence, we will demonstrate below the differences between the two concepts through three comparisons based on their introductions in this and the preceding chapter. We will argue the *maqasid* to be further grounded in scripture but to have a wider legal use.

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<sup>513</sup> Readers can explore the models of authority in Hamid Mavani's translation of Mohsen Kadivar's classification in *Religious authority and political thought in Twelver Shi'ism: from Ali to post-Khomeini* (London: Routledge, 2013), 141-144.

The first comparison of the *maqasid* and the *masalih* is a conceptual one. The *maqasid* are the Legislator's objectives of Islamic law. The *masalih* are one such objective, albeit a major one. In the previous chapter, we stated al-Ghazali's view of the ultimate objective of the Shari'a to be the *maslaha* of mankind, which lies in the preservation of the above five objectives. The *masalih* are therefore a unit of the *maqasid* universe.

The second comparison is of the sources of the *maqasid* and the *masalih*. We referred above to three views on *masalih* that can be legislated. The first position requires the *masalih* to have been established in previous cases.<sup>514</sup> The second position validates *masalih* that are not recognised in a text but are related to others recognised by the Shari'a.<sup>515</sup> This is the position endorsed by the IIFA, based on its aforementioned criteria. The third position does not require such a relation.<sup>516</sup> The *masalih* are therefore viewed by some legal scholars to be based on scripture, but not by others.<sup>517</sup> On the other hand, the *maqasid* have been identified based on scripture.<sup>518</sup> The *masalih* are therefore a subset of the *maqasid* wherein a degree of separation from scripture is accepted.

The third comparison of the *maqasid* and the *masalih* is of their role in legislation. *Masalih* under the first two, aforementioned positions form the *'ilal* of rulings. The *maqasid* can also form the *'ilal*, but this relation is neither certain nor universal. The previous chapter demonstrated how legal scholars pitched the *maqasid* instead as a wider approach, for

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<sup>514</sup> Opwis attributes this view to al-Ghazali, who accepts unattested *masalih* in cases of necessities.

<sup>515</sup> Hassan attributed this view to scholars from the four legal schools.

<sup>516</sup> Opwis attributes this view to al-Tufi.

<sup>517</sup> Refer to the above views of Hassan and Opwis.

<sup>518</sup> Al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharī'a*, 220; Ibn Ashur, *Maqāṣid al-Sharī'a al-Islāmiyya*- volume 3, 56.

example, using it as criteria to guide *ifta'*. The *masalih* thus have a clear role in legislation as *'ilal*, whereas the *maqasid* have a wider role reflecting the underdevelopment of their legal framework.

In addition to the conceptual differences, the *maqasid* and the *masalih* followed different development trajectories. The *masalih* as a secondary source of law have featured in treatises on legal theory across the five legal schools over 10 centuries. On the other hand, legal discussions of the *maqasid* as a source of law are a modern development beyond the scope of classical legal theory.<sup>519</sup> Early discussions of the *maqasid* had not presented them as an independent source of law, they were instead included in discussions of other legal topics such as the *masalih*.<sup>520</sup>

The *maqasid* and the *masalih* therefore differ across concept, source and application. However, the extent of the differences depends on the legal scholar's definition of both principles. For example, a requirement for the *masalih* to be based on scripture would result in additional similarities to the *maqasid*. The critical difference remains in the scholars' theories on their application in legislation rather than on their definitions. The *masalih* are primarily used as forms of *qiyas* or as distinct, secondary sources of law. On the other hand, the *maqasid* are proposed as either additional criteria on legislation or as a source of law. This difference is accentuated by the contrasting depths of the legal frameworks of the two concepts, driven by a relatively recent history for the *maqasid* and a longer legal tradition for the *masalih*.

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<sup>519</sup> A prominent exception is al-Shatibi's *al-Muwāfaqāt fī Uṣūl al-Sharīa*, 219-468.

<sup>520</sup> Al-Ghazali, *Al-Mustaṣfā min 'Ilm al-Uṣūl*, 327-331.

The introduction of the *masalih* produces two key outcomes. The first is that this assessment will largely focus on the four Sunni schools as they posit roles for the *masalih* supported by legal frameworks, whereas Shi'i scholars have limited its scope for scholars such as those serving on SSBs. The second outcome is that there are three scopes for the *masalih* among Sunni scholars, where each scope is restricted by the degree of the relation to primary sources of law. The acceptability of rulings based on the *masalih* will therefore depend on that relation. Due to the IIFA's representation of scholars from 57 countries, their requirement of the *masalih's* restriction to *maqasid al-Shari'a* is of significance. It indicates a continuation of the views of classical scholars reviewed by Hassan and Opwis and a rejection of less restrictive views.

The *masalih* in the industry

A key indicant of the potential for driving the industry's social objectives through the legislation of *masalih* is their existing application. Existing fatwas can indicate the extent of the validation of the *masalih* in the industry, among other relevant considerations. This section will first introduce the *masalih's* relation to the industry. It will then review the use of the *masalih* in the fatwas of the IIFA, AAOIFI, national regulators and banks. The assessment will show that the *masalih* have been used as a basis for legislation in the industry, but not to drive its social objectives.

The first area which relates the *masalih* to the industry and its social objectives is its role as a source of law that offers the potential of new rulings, beyond what has been derived

from the Quran, Sunna, *qiyas* and *ijma'*. The relevant legal positions of these four sources have formed the basis of the industry's legal deliberations and have influenced its discourse. However, they have not been used to legislate the achievement of the social objectives. *Al-masalih al-mursala* provide an additional avenue for legislating on topics that have not been directly legislated in the primary sources. The *masalih* also relate to our subject through their alignment with the social objectives. For example, a previously identified social objective is the avoidance of negative externalities of finance, such as harms to the environment. The IIFA's declarations on the protection of the environment show how this objective resonates with some of the criteria set for the *masalih*.<sup>521</sup> The criterion that the *maslaha* be real is reflected in the IIFA's dedication of a discussion and declaration on the protection of the environment, with an outcome of fatwas and other guidance. The criterion that it be general is reflected in the IIFA's prohibition of harming the environment around the world, rather than in specific geographies. The criterion that it be compatible with the *maqasid* is reflected in the IIFA's objective of the protection of future generations. Other examples of social objectives aligned with the criteria on the *masalih* include financial inclusion. The *masalih* thus first relate to the industry through their role as a source of law.

The second indicant of the relation between the *masalih* and the industry is their use by AAOIFI, the IIFA and few other SSBs in the industry. Such uses are reviewed below based on fatwas issued based on the *masalih* by regulators and banks. The review of these fatwas seeks to identify the validation of the *masalih* in the industry and the variables determining

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<sup>521</sup> IIFA, "Qarār bi-Sha'n al-Bī'a wa-l-Hifāz 'Alayhā min Manzūr Islāmi," declarations of the 19<sup>th</sup> convention of the International Islamic Fiqh Academy, Sharjah, April 26-30<sup>th</sup>, 2009, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/2316.html>.

their applications. The review will cover the fatwas of the IIFA, AAOIFI, national regulators and banks. In line with the approach used in the previous chapter, the examined fatwas of the IIFA are the legal decisions in the 61 declarations of its conferences. AAOIFI's fatwas are those found in its *al-Ma'ayir al-Shar'iyya* and *Shari'ah Standards* spanning more than 1300 pages.<sup>522</sup> The examined regulators are those of the country sample used in this study.<sup>523</sup> The examined banks are those with the largest market shares in these 11 countries. The use of the *masalih* in legislation will therefore be based on the fatwas of three stakeholder groups.

The review sought to identify cases of legal uses of the *masalih* rather than simple use of the term *maslahah* or *masalih*, as both can be invoked in different contexts. Three primary legal uses of the *masalih* were found in the fatwas. One was their use as a sole basis for a decision, such as this case by the Malaysian regulator: "Basis of the Ruling: A guarantee of capital and/or expected profit by a third party in a *mudarabah* transaction is based on *maslahah* which is to ensure continuous investors' confidence in investing into the country's significant projects."<sup>524</sup> The regulator here only cites the *maslahah* of maintaining the attractiveness of Malaysia's projects to investors as the basis for the ruling. The second legal use of the *masalih* in the fatwas is where it is cited as one of several bases of a decision. For example, the bases of the IIFA's fatwa on the permissibility of dealing in a bill of exchange include *ijma'*, reports of the companions' practices and its achievement of the *maslahah* of

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<sup>522</sup> AAOIFI, *al-Ma'ayir al-Shar'iyya*; AAOIFI, *Shari'ah Standards*.

<sup>523</sup> Comprising Bahrain, Indonesia, Saudi Arabia, Kuwait, Malaysia, Oman, Pakistan, Qatar, Turkey, the United Arab Emirates and the United Kingdom.

<sup>524</sup> Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*- 2<sup>nd</sup> ed. (Kuala Lumpur: Bank Negara Malaysia, 2010), 39.

both parties while not inducing any harm.<sup>525</sup> The third use of the *masalih* was a legitimisation of its application. An example of this is the IIFA's aforementioned declaration, where it states that the actions of the ruler are bound by *maslaha* and that he is to consider it in running the affairs of his subjects.<sup>526</sup> It provides examples of where it is to be applied, including the economy. Even though the statement is not exclusive to Islamic finance, it is of relevance for two reasons. The first is that the IIFA has issued fatwas relating to Islamic finance that were based on the ruler or the government's right to rule based on the *maslaha*, thereby applying their statement.<sup>527</sup> Secondly, the IIFA is frequently engaged in discussions on Islamic finance and this conference addressed three financial topics.<sup>528</sup> Their reference to the role of the *masalih* in economics cannot be therefore disassociated from Islamic finance, a component of the economy. The legal uses of the *masalih* in the surveyed fatwas are therefore as sole bases of fatwas, as one of multiple bases and through statements legitimising their use.

Of the 11 regulators considered in this assessment, it is only the Malaysian central bank and the Indonesian Dewan Syariah Nasional<sup>529</sup> that have published fatwas. The fatwas of Dewan Syariah Nasional have not been reviewed due to a language barrier. None of the remaining regulators have issued fatwas which their banks would be required to follow. The Malaysian central bank is therefore the only regulator whose fatwas are reviewed in this

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<sup>525</sup> AAOIFI, *al-Ma'ayir al-Shar'iyya*, 452; AAOIFI, *Shari'ah Standards*, 452.

<sup>526</sup> IIFA, "Qarār bi-Sha'n al-Maṣāliḥ al-Mursala."

<sup>527</sup> IIFA, "Qarār bi-Sha'n al-Aswāq al-Māliyya," declarations of the 6<sup>th</sup> convention of the International Islamic Fiqh Academy, Jeddah, March 14-20<sup>th</sup>, 1990; IIFA "Qarār bi-Sha'n al-Aswāq al-Māliyya," declarations of the 7<sup>th</sup> convention of the International Islamic Fiqh Academy, Jeddah, May 9-14<sup>th</sup>, 1992, accessed September 1<sup>st</sup>, 2020, <https://iifa-aifi.org/ar/1808.html>.

<sup>528</sup> IIFA, "al-Dawra al-Khāmisa 'Ashar," accessed July 31<sup>st</sup>, 2020, <http://www.iifa-aifi.org/rr/d15om>.

<sup>529</sup> Bank Indonesia requires financial institutions to source fatwas from the Dewan Syariah Nasional (National Sharia Board) of the Indonesian Ulema Council, the country's senior government-backed clerical body. Refer to chapter 2 for a discussion of Indonesia's regulatory model.

section. As for commercial banks, the fatwas of Al Salam Bank were reviewed, along with those of Al Rajhi Bank, Dubai Islamic Bank, Kuwait Finance House and Qatar Islamic Bank published in *al-Fatawa al-Iqtisadiyya*. The fatwas of Bank Nizwa, Al Rayan Bank and Meezan Bank contain no indication of their basis.<sup>530</sup> Finally, Albaraka Türk Katilim Bankasi, Bank Islam Malaysia Berhad and Bank Rakyat Indonesia Syariah have not published fatwas. The summarised results of the examination of the institutions' use of the *masalih* are presented in Table 10. The fatwas are then presented in tables 11-14.

		Purpose of use of the <i>masalih</i> :	
	Issuing entity	Fatwa basis	Legitimation of its application
<b>International ifta' bodies</b> <sup>531</sup>	IIFA	3	1
	AAOIFI	22	1
	<i>Total</i>	25	2
<b>Regulators</b> <sup>532</sup>	Bank Negara Malaysia	5 <sup>533</sup>	0
	<i>Total</i>	5	0
<b>Banks</b> <sup>534</sup>	Al Rajhi Bank	0	0
	Dubai Islamic Bank	1	0
	Al Salam Bank	1	0
	Kuwait Finance House	1	0
	Qatar Islamic Bank	0	0
	<i>Total</i>	3	0

Table 10: Uses of the *masalih* by a sample of international *ifta'* bodies, regulators and banks, by type

<sup>530</sup> For Bank Nizwa, see for example: "Fatwa Barnamaj "al-Ijāra al-Mawṣūfa bi-l-Dhimma",," accessed July 31<sup>st</sup>, 2020, <https://www.banknizwa.om/media/1877/18112015-fatwa-ar-forward-lease-cbg.pdf>. For Al Rayan Bank, see for example: "Certificate of Approval for Personal Finance Facility," accessed July 31<sup>st</sup>, 2020, <https://www.alrayanbank.co.uk/media/291112/personal-finance-facility.pdf>. For Meezan Bank, see for example: "Shariah Approval for Deposit Products," accessed July 31<sup>st</sup>, 2020, <https://www.meezanbank.com/wp-content/themes/mbi/downloads/E-Deposit-Products-Fatwa-08.jpg>.

<sup>531</sup> IIFA, "Qarār bi-Sha'n al-Aswāq al-Māliyya;" IIFA "Qarār bi-Sha'n al-Aswāq al-Māliyya;" IIFA, "Qarār bi-Sha'n al-Mazāyā allatī Yamnaḥuhā al-Maṣraf li-'umalā' al-Ḥisāb al-Jārī min al-Manzūr al-Shar'ī," declarations of the 23<sup>rd</sup> convention of the International Islamic Fiqh Academy, al-Madinah, October 28<sup>th</sup> – November 1<sup>st</sup>, 2018; IIFA, "Qarār bi-Sha'n al-Maṣāliḥ al-Mursala;" AAOIFI, *al-Ma'ayir al-Shar'iyya*, 103, 146, 148, 339, 353, 452, 532, 571, 597, 609, 610, 676, 750, 844, 866, 909, 910, 1064, 1134, 1161, 1250, 1319.

<sup>532</sup> Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, 39, 123, 166, 169, 206.

<sup>533</sup> The third (and latest) edition of Bank Negara Malaysia's Shariah Resolutions, *Kompilasi Keputusan Syariah Dalam Kewangan Islam*, contains 14 separate references to the *masalih*. However, the document is published in Malay and its fatwas have not been included due to the language barrier.

<sup>534</sup> IIFA et al., *al-Fatāwā al-Iqtisādiyya*, accessed July 30<sup>th</sup>, 2020, <https://al-maktaba.org/book/1611,271-357,358-443,444-965>; Al Salam Bank, "Fatāwā- tajribat Miṣraf al-Salām - al-Baḥrayn," 11.

### IIFA declarations in which the *masalih* have been cited as a basis

- 1 ثالثاً: إن فكرة الأسواق المالية تقوم على أنظمة إدارية وإجرائية، ولذا يستند الالتزام بها على تطبيق قاعدة المصالح المرسلّة فيما يندرج تحت أصل شرعي عام ولا يخالف نصاً أو قاعدة شرعية، وهي لذلك من قبيل التنظيم الذي يقوم به ولي الأمر في الحرف والمرافق الأخرى، وليس لأحد مخالفة تنظيمات ولي الأمر أو التحايل عليها ما دامت مستوفية الضوابط والأصول الشرعية.<sup>535</sup>

*The concept of financial markets is based on administrative and executive systems, and their enforcement is based on the principle of al-masalih al-mursala, as long as they follow a general legal basis and do not contradict a legal text or precept. Their enforcement is therefore a form of regulation of trades and other facilities carried out by the ruler (wali al-'amr), and no one has the right to disobey or deceive the ruler's regulations as long as they fulfil the legal criteria.*

The declaration validates regulation of financial markets based on the *masalih*. No beneficiary of the decision is stated.

- 2 حصر تداول الأسهم بسماسرة مرخصين، واشتراط رسوم للتعامل في أسواقها: يجوز للجهات الرسمية المختصة أن تنظم تداول بعض الأسهم بأن لا يتم إلا بواسطة ومرخصين بذلك العمل لأن هذا من التصرفات الرسمية المحققة لمصالح مشروعة. وكذلك يجوز اشتراط رسوم لعضوية التعامل في الأسواق المالية لأن هذا من الأمور التنظيمية المنوطة بتحقيق المصالح المشروعة.<sup>536</sup>

*It is permissible for the relevant official regulators to restrict the trade of shares through the intermediation of authorised brokers, as it is a form of official regulation that achieves legitimate masalih.*

*Similarly, it is permissible to charge a membership fee for traders in financial markets as it is a regulatory matter bound by the achievement of legitimate masalih.*

The IIFA has validated the two regulations based on the objective of achieving *masalih*. While this does not include an explicit reference to *masalih mursala*, it follows the previous declaration's validation of regulation, where it referred to *masalih mursala*. No beneficiary of the decisions is stated.

- 3 المزايا التي يمنحها البنك للعميل مما له علاقة بعمليات الإيداع والسحب من الحساب الجاري تحت الطلب والنفغ فيها للطرفين، مثل: خدمة دفتر الشيكات وبطاقة الصرف الآلي؛ فحكمها الجواز شرعاً؛ لأنه تقديم مساعدة من المقرض إلى المستقرض لاستيفاء حقه المالي، على أن المنفعة التي يجزها القرض للمقرض لا تختص به وحده، بل تعم المقرض والمقرض، ولأن فيها مصلحة للطرفين من غير ضرر لواحد منهما، والشرع لا يرد بتحريم المصالح التي لا مضرة فيها، كما أن هذا النوع من المزايا ليس بمنصوص على تحريمه، ولا هو في معنى المنصوص فوجب إبقاؤه على الإباحة الأصلية.<sup>537</sup>

*[The permissibility of offering the account benefits in question is based on their compliance with criteria relating to loans, their achievement of masalih upon both parties and their compliance with other rulings.] The Shari'a does not forbid masalih that cause no harms.*

The decision is based on a validated *maslaha*, a fundamental permissibility and the absence of harms on the two transacting parties. The beneficiaries of the decision are the transacting parties.

<sup>535</sup> IIFA, "Qarār bi-Sha'n al-Aswāq al-Māliyya [1]."

<sup>536</sup> IIFA "Qarār bi-Sha'n al-Aswāq al-Māliyya [2]."

<sup>537</sup> IIFA, "Qarār bi-Sha'n al-Mazāyā allatī Yamnaḥuhā al-Maṣraf li-'umalā' al-Ḥisāb al-Jārī min al-Manzūr al-Sharī."

### IIFA declarations in which the *masalih* have been cited as a basis

4	<p>من المقرر فقهاً أن تصرف وليّ الحاكم على الرعية منوط بالمصلحة. فعليه مراعاة ذلك في قيامه بإدارة شؤونها. وعلى الأمة طاعته في ذلك. للمصلحة المرسلة تطبيقات واسعة في شؤون المجتمع، وفي المجالات الاقتصادية والاجتماعية والتربوية والإدارية والقضائية وغيرها.<sup>538</sup></p> <p><i>An affirmed position in jurisprudence is that a ruler's rule is bound by the masalih. He should thus consider it in his rule, and the people should obey him in that. Al-maslaha al-mursala has wide applications in societal affairs, and in economic, social, educational, administrative, judicial and other fields.</i></p> <p>The declaration validates the <i>masalih</i>, emphasising the context of their use in governance.</p>
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Table 11: IIFA declarations in which the *masalih* have been cited as a basis. Each row comprises the original Arabic text, the researcher's translation and comment on the declaration.

### AAOIFI standards citing the *masalih* as a basis

1	<p>يحق للدائن أن يشترط حلول الأقساط جميعها إذا تأخر المدين عن سداد قسط، وقد صدر بمقتضى ذلك قرار مجمع الفقه الإسلامي الدولي، ونصه يجوز شرعاً أن يشترط البائع بالأجل حلول الأقساط قبل مواعيدها عند تأخر المدين عن أداء بعضها ما دام المدين قد رضي بهذا الشرط عند التعاقد، وهذا شرط صحيح؛ لعدم وجود نص يمنعه، ولأنه يحقق مصلحة مشروعة للدائن. (103)</p> <p><i>"To this effect, there is a decision by the International Islamic Academy of Fiqh, the text of which reads as follows: "It is permissible for a seller on deferred credit terms sale to impose the condition that instalments become due before their original due date in case of the delay of the debtor in paying some of the instalments, so long as the debtor consented to this condition when the contract was agreed". Such a condition would be valid, as there is no Shari'ah text to the contrary, and it serves a lawful interest of the creditor."</i> (96)</p> <p>The standard is validated by a <i>maslaha</i> and by the absence of contradictory texts. The <i>maslaha</i> is that of the creditor.</p>
2	<p>مستند جواز الحصول على أجرة عن الاعتماد المستندي أنه خدمة تستلزم أعمالاً فيها مصلحة لطالب فتح الاعتماد ويحق للمصرف تحصيل مقابل عنها. (146)</p> <p><i>The basis for the permissibility of charging fees for a documentary credit is that issuing a documentary credit is a service performed in the interest of the applicant for the documentary credit, for which the Bank has the right to charge fees. (142)</i></p> <p>The standard is validated by a <i>maslaha</i>, that of the client.</p>
3	<p>المستند الشرعي للأولوية لبعض الحقوق مثل مستحقات القائمين بالتصفية، أنها أجز على عمل تقرر بحكم القضاء للمصلحة (148)</p> <p><i>The basis for the permissibility of the priority of certain rights, such as those of liquidators, is that these rights are considerations that are determined by the judiciary on the basis of public interest. (145)</i></p> <p>The standard is validated by a <i>maslaha</i>, the beneficiary of which is not specified in the (original) Arabic text.</p>

### AAOIFI standards citing the *masalih* as a basis

<sup>538</sup> IIFA, "Qarār bi-Sha'n al-Mašāliḥ al-Mursala wa-Taṭbīqātuhā al-Mu'āšira."

4	<p>مستند جواز أن يتضمن عقد الاستصناع شرطاً جزئياً على الصانع هو أن هذا الشرط فيه مصلحة للعقد وأنه وارد على مبيع في الذمة شرط فيه العمل وليس ديناً في الذمة (315)</p> <p><i>The basis for the permissibility of a penalty clause in an Istisna'a contract is that such a clause is in the interest of the contract and because it is laid down in respect to an obligation regarding items that must be produced and delivered in the future and not in respect to monetary debt. (317)</i></p> <p>The standard is validated by a <i>maslaha</i>, the actual beneficiaries of which are not specified.</p>
5	<p>يجوز للجهات الرسمية المختصة تنظيم تداول بعض الأسهم بالألا يتم إلا بواسطة سماسرة مخصوصين ومرخصين بذلك العمل، لتحقيق مصالح مشروعة (339)</p> <p><i>In the legitimate public interest, it is permissible for the relevant authorities to organise trading in shares in such a way that trading will not take place except through specific licensed stockbrokers. (341)</i></p> <p>The standard is validated by a <i>maslaha</i>, the beneficiaries of which are not specified in the (original) Arabic text.</p>
6	<p>فإن الأحكام والضوابط التي بينها الفقهاء للشركات تغطي ما يتعلق بالشركات الحديثة من أحكام، وأما النظم الإجرائية لتمثيل الشركاء وحفظ حقوقهم وتنظيم الإدارة والمحاسبة فهي من قبيل مقتضيات المصلحة التي لها اعتبارها إذا روعيت فيها الضوابط الشرعية. (353)</p> <p><i>The procedural systems relating to representation of partnership companies and bureaucratic, administrative and accounting procedures are required by Maslahah (consideration of the public good or common need), which is an acceptable source for validating human actions provided it is employed in line with the principles of Shari'ah. (353)</i></p> <p>The standard legitimises the use of <i>masalih</i> in regulation.</p>
7	<p>مستند مشروعية التعامل بالكمبيالة هو أنها إما أن تكون بمعنى الحوالة أو بمعنى القرض، وهما جائزان بالإجماع، أو تكون بمعنى السفتجة، وهي جائزة على القول الراجح، ويدل لذلك ما أثار عن عدد من الصحابة - رضي الله عنهم - من التعامل بها، فقد روي ... وروي ... وروي ...، ولأن في السفتجة مصلحة لكل من المقرض والمقترض من غير ضرر بواحد منهما ...، والشرع لا يرد بتحريم المصالح التي لا مضرة فيها، قال ...، ولأن السفتجة لم ينص على تحريمها، وليست في معنى المنصوص، فوجب إبقاؤها على الإباحة، لا سيما أن الحاجة داعية إليها (3-452)</p> <p><i>The basis for the permissibility of dealing in a bill of exchange is that it is in the meaning of Hawalah or Qard (loan) contract, which are agreed upon by Ijma' (consensus of Fuqaha), or in the meaning of Suftajah (demand note), which is valid according to the preponderant opinion. The evidence for this is the report from a number of Companions (may Allah be pleased with them) who dealt in these instruments. It is reported...</i></p> <p><i>Further, in the Suftajah is the interest of both the lender and the borrower without harm being caused to either one of them. The lender is secure against the danger of the highway in transporting his dirhams to the destined town, while the borrower benefits from the loan and is also secure against the dangers of the highway being under an obligation to pay in the said town. The Shari'ah does not lay down a prohibition for interests that do no invoke harm.</i></p> <p><i>In addition to this, there is no text that prohibits a Suftajah nor is such meaning implied by the texts. It is, therefore, necessary to maintain its permissibility, especially when there is a general need for it. (452-3)</i></p> <p>The standard is validated by multiple proofs, including the <i>maslaha</i> of both parties.</p>

8	<p>أن في اشتراط الوفاء في غير بلد القرض مصلحة للمقرض والمقترض جميعا غالبا من غير ضرر بواحد منهما مع وجود الحاجة، والشرع لا يرد بتحريم المصالح التي لا مضرة فيها، بل بمشروعيتهما، وإنما ينهى عما يضرهم، وهذه المنفعة مشتركة بينهما وهما متعاونان عليها فهي من جنس التعاون والمشاركة. (532)</p> <p><i>The stipulation of repayment in a land other than that of the Qard is in the interest of both the lender and the borrower without causing injury to either along with the existence of a need. The Shari'ah does not lay down the prohibition of interests that bear no injury. In fact it lays down their permissibility. It does prohibit those that are injurious, but here the benefit is mutual and they are cooperating to arrange this. It, therefore, belongs to the category of cooperation and participation. (527)</i></p> <p>The standard is validated by the <i>maslaha</i> of both transacting parties.</p>
9	<p>مستند تنظيم الدولة لإجراءات الحصول على الامتياز لكل من الاستطلاع والاستكشاف والاستغلال للمعادن والمياه وما في حكمها هو أن وضع هذه النظم يحقق مصلحة عامة لمنع التنازع والتزاحم، من المكتشف، والاستكشاف لها، ثم الانفراد بالامتياز لاستغلالها هو ما استدل به من اشتراطوا الإذن لإحياء الموات ومن المعلوم أن تصرف الإمام الحاكم على الرعية منوط بالمصلحة، وتقدم المصلحة العامة على المصلحة الخاصة عند التعارض (608)</p> <p><i>The right of the State to regulate survey or exploration of minerals, water and the like by offering exclusive rights of utilization, stems from the fact that <u>such an act by the State leads to realization of public interest and prevention of disputes</u>. This reasoning is adopted by the fuqhaa who argue that development of wasteland requires State permission. The basic assumption here, knowingly, is that when the State disposes of public property, its act <u>is supposed to be that of serving the cause of public interest, which should always surpass private interest</u>. (601)</i></p> <p>The standard is validated by a public <i>maslaha</i>, which is described as taking priority over private <i>masalih</i>.</p>
10	<p>مستند حق الدولة في شراء ما تحتاجه من المعدن هو أن في ذلك تحقيقا للمصلحة العامة دون إضرار بالمستفيد من الامتياز، وأن الشراء يتم بالطريقة والشروط المتاحة للأخرين (609)</p> <p><i>Eligibility of the State to purchase the quantity it requires from the output of the project is justifiable by the need to realize public interest without harming the licensee, since purchasing takes place according to the procedures and conditions available to other clients. (602)</i></p> <p>The standard is validated by a public <i>maslaha</i>.</p>
11	<p>مستند حق الدولة في تعديل عقود امتياز المعادن إذا تغيرت الظروف ما تقرر أن تصرفات ولي الأمر منوطة بتحقيق العدل والمصلحة العامة وتقديمها على المصلحة الخاصة (609-610)</p> <p><i>The State is given the right of amending concession contracts for minerals when necessary, because <u>the acts of the State are normally considered to be in pursuance of public interest, which should always surpass private interest</u>. (602)</i></p> <p>The standard is validated by a public <i>maslaha</i> as it is the basis of the ruler's rule.</p>
AAOIFI standards citing the <i>masalih</i> as a basis	

12	<p>كما يجب مراعاة انتفاء وجود الحاجة أو المصلحة الراجعة إلى تلك الذريعة، حيث جاء في القواعد الفقهية أن،  «ما حرم سدا للذريعة أخف مما حرم تحريم المقاصد (676)  <i>It also is necessary to ensure that the need or overwhelming maslaha for the pretext has ceased, in accordance with the legal precept that what has been prohibited to block a pretext is less stringent than what has been inherently prohibited</i>  The standard is bound by the protection of relevant <i>masalih</i>.</p>
13	<p>مستند الصور المقررة في المدونات الفقهية بشأن إجارة الوقف هو تحقيق المصلحة المشتركة للوقف  (844-843)  <i>Permissibility of the forms of Waqf leasing which have been indicated in Fiqh references is based on the desire to preserve the interests of the Waqf as well as the interests of all its tenants (835)</i>  The standard is validated by a shared <i>maslaha</i>.</p>
14	<p>مستند مشروعية الاستبدال هو تحقيق المصلحة لزيادة الربح وتنمية المصالح (844)  <i>Istibdal (exchange of the Waqf asset) is permissible because it achieves the interest of the Waqf, through its development and maximization of its income (835)</i>  The standard is validated by a <i>maslaha</i> which is implied to benefit the <i>waqf's</i> beneficiaries.</p>
15	<p>مستند طلب المؤسسة مبلغاً من الواعد بالاستئجار (هامش الجدية) هو الحاجة والمصلحة، وقد صدرت بشأن هذا المبلغ فتوى عن الهيئة الشرعية الموحدة للبركة (866)  <i>Permissibility for the institution to receive an amount from the party who pledges to hire its services (seriousness margin), is based on need and interest. A similar Fatwa (Shari'ah opinion) has been issued in this regard by the Unified Shari'ah Supervisory Board of Al Baraka Group. (857)</i>  The standard is validated by a <i>maslaha</i>, the beneficiaries of which are not specified, and an unexplained need.</p>
16	<p>الأصل دفع الزكاة فور وجوب أدائها، ويجوز تأخير إخراجها - بما لا يزيد لسنة - لغيبة المال، أو ربط توزيعها بجدول زمنية، أو لمصلحة ظاهرة. (910-909)  <i>In principle, Zakah is to be paid as soon as it is due, yet it can be delayed - for not more than one year – due to shortage of funds, or if its distribution is made according to a certain time schedule, or for any other obvious interest. (896)</i>  The standard is validated by an undefined <i>maslaha</i>.</p>
17	<p>يجوز نقل الزكاة إلى غير موطن المال المزكي، لمصلحة ظاهرة تقدرها الهيئات الشرعية للمؤسسات (910)  <i>Zakah funds can be transferred from place of payment to another place due to an obvious interest to be judged by the Shari'ah boards of the institutions. (897)</i>  The standard is validated by a <i>maslaha</i> that is to be defined by the institutions' SSBs.</p>
AAOIFI standards citing the <i>masalih</i> as a basis	

18	<p>إذا لم يتسبب صاحب السفلى في الهدم فإن المرجع في ذلك إلى القضاء بما يحقق المصلحة ويدراً الضرر عن الطرفين أو الأطراف (1064)</p> <p><i>If the owner of the lower storey is not responsible for the collapse, the courts have <u>decisive authority to settle the matter in the best interests of both parties and to avert harm from them.</u> (1047)</i></p> <p>The standard is validated by a <i>maslaha</i>, implied to be that of the transacting parties or more.</p>
19	<p>مستند جواز اقتطاع الاحتياطيات: أنها وبتراضي الأطراف تحقق المصلحة للمستثمرين بتقوية المركز المالي الاستثمار، ولا تقتطع من حصة المدير؛ لأن ضمان الخسارة على أرباب الأموال وليس على المدير (1134)</p> <p><i>The basis for permissibility of deducting reserve amounts (from the profits) is that it is done with the consent of the relevant parties and <u>is in the investors' interest as it strengthens the investment's financial situation.</u> (1111)</i></p> <p>The standard is validated by a <i>maslaha</i>, that of the investors.</p>
20	<p>مستند جواز تنويع الأصول الاستثمارية أن هذا التنويع يحقق المصلحة للمستثمرين، وليس من قبيل الجمع بين العقود في عقد واحد (1134)</p> <p><i>The basis for the permissibility of diversifying investment assets is that diversification <u>achieves the interest of the investors.</u> It does not fall under the prohibition of combining contracts in one contract (1111)</i></p> <p>The standard is validated by a <i>maslaha</i>, that of the investors.</p>
21	<p>الأصل: عدم جواز تحديد الربح من السلطات المختصة ما لم يحصل الاحتكار، أو لظروف طارئة، أو لمصلحة ظاهرة: فيجوز التسعير لمقدار الربح بشرط عدم الإجحاف (1161)</p> <p><i>In principle, it is impermissible for a regulator to cap profits. However, in monopoly situations, extraordinary circumstances and <u>cases of clear public interest</u>, it is permissible to fix the profit rate, provided it is not prejudicial. (1138)</i></p> <p>The standard validates exceptions to the prohibition of rate fixing on the bases of necessities, <i>masalih</i> or to mitigate monopolies.</p>
22	<p>مستند جواز تسليم البدلين (وعدم وجوب ذلك) أن التسليم فيه مصلحة للاختيار والتروي الذي هو مقصود الخيار (1250)</p> <p><i>The basis for permissibility (but not the obligability (sic)) of delivery of the two countervalues is that delivery <u>serves both selection and reconsideration</u>, which are literally the purpose of the option. (1229)</i></p> <p>The standard is validated by a <i>maslaha</i>, implied to be that of the option holder.</p>
23	<p>مستند انتقال عبء الإثبات في دعوى الخسارة إلى مدير الاستثمار خلافاً للأصل إذا تم اشتراطه في العقد فإنه يجوز في هذه الحال- أن مدير الاستثمار قد أسقط حقه ورضي، ولا يترتب عليه محذور شرعي، وإن كان الإلزام من قبل جهة رقابية أو إشرافية فهو مصلحة مرسله قررها ولي الأمر يجب الالتزام بها (1319)</p> <p><i>The basis for the transfer of the burden of proof in a loss claim to the investment manager runs contrary to the principle if it was stipulated in the contract. It is permissible if the investment manager voluntarily forfeits his right and does not entail a legal prohibition. If the compulsion was by a regulatory or supervisory entity, <u>it would be a maslaha mursala determined by the ruler, the adherence to which would be required.</u></i></p> <p>The standard validates the enforcement of an exception to a ruling on the basis of a public <i>maslaha</i> identified by the ruler.</p>

Table 12: AAOIFI standards in which the *masalih* have been cited as a basis. Each row comprises the original Arabic text, English translation and our comment on the declaration. The source for the above Arabic standards is *al-Ma'ayir al-Shar'iyya*.<sup>539</sup> The page number for each standard is cited after the text. English translations are provided from AAOIFI's *Shari'ah Standards*, with the exception of item 13.<sup>540</sup>

<b>Bank Negara Malaysia resolutions citing <i>masalih</i> as a basis</b>	
1	<i>In relation to the case of restructuring, the SAC has recognised the cross reference method to the original agreement which has been <u>terminated on the ground of maslahah</u>, which is, to avoid double payment of stamp duty. (206)</i> The resolution is validated by a <i>maslaha</i> which is implied to benefit the <i>waqf's</i> beneficiaries.
2	<i>A few contemporary scholars further opined that <u>ujrah charged on kafalah shall be permitted on the basis of maslahah and public needs</u> because in the current context, it is difficult and impractical to obtain free-of-charge guarantee. (166)</i> The standard is validated by a public <i>maslaha</i> and public needs.
3	<i>In line with <u>the need to preserve public interest (maslahah)</u> and to ensure fair treatment between the financier and customer, the SAC was referred to on the proposal to mandate Islamic financial institutions to accord <i>ibra'</i> to the customer who settled their debt obligation under sale-based contract (such as <i>bai` bithaman ajil</i> or <i>murabahah</i>) prior to the agreed settlement period. (123)</i> A public <i>maslaha</i> is suggested to be a basis for the regulation.
4	<i>A guarantee of capital and/or expected profit by a third party in a <i>mudarabah</i> transaction <u>is based on maslahah</u> which is to ensure continuous investors' confidence in investing into the country's significant projects. (39)</i> The resolution is validated by a <i>maslaha</i> , the beneficiary of which is implied to be the beneficiaries of the investment.
5	<i>Danajamin's capital management for guarantee facility services for <i>sukuk</i> and conventional bond need not be segregated <u>on the basis of maslahah</u>, so as to ensure Danajamin is able to carry its function as a guarantor in effectively stimulating growth and stability of the capital market (169)</i> The resolution is validated by a <i>maslaha</i> , the beneficiary of which is implied to be <i>Danajamin</i> and its clients.

Table 13: Bank Negara Malaysia's resolutions in which the *masalih* have been cited as a basis. Each row comprises the published English text and our brief comment on the resolution. The source for the above standards is the second edition of *Shariah Resolutions in Islamic Finance*. The page number for each standard is cited after the text.<sup>541</sup>

<sup>539</sup> AAOIFI, *al-Ma'ayir al-Shar'iyya*.

<sup>540</sup> AAOIFI, *Shari'ah Standards*.

<sup>541</sup> Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*- 2<sup>nd</sup> ed.

Bank resolutions citing the <i>masalih</i> as a basis	
1	<p>Al Salam Bank (Bahrain):  فدخول الفوائد المقبوضة في ملك البنك، وإن كان ظاهره المنع، لما يترتب عليه من مفسدة أخذ الربا، إلا أنه يحقق مصلحة أهم، هي تحول البنك الربوي إلى بنك إسلامي، وتخليص المجتمع من التعامل بالربا، ويدفع مفسدة أشد<sup>542</sup></p> <p><i>And so, the bank's receipt of interest, while apparently prohibited due to the harms of receiving usury, achieves a more important maslaha, which is the conversion of a usurious bank to an Islamic one, and ridding the society from dealing in usury, and averting a more severe harm.</i></p> <p>The resolution is validated based on a <i>maslaha</i>.</p>
2	<p>Dubai Islamic Bank (UAE):  والهيئة تأخذ بهذا الرأي بناء على الفتاوى المشار إليها تحقيقاً للمصلحة العامة وتأكيداً لفعالية البنك الإسلامي مع تطور المجتمع في العصر الحديث<sup>543</sup></p> <p><i>The board adopts this view on the basis of the aforementioned fatwas, towards the achievement of public masalih and the affirmation of the role of the Islamic bank with the society's progression in the modern age.</i></p> <p>The basis of the resolution are other legal views and the objective of achieving a <i>maslaha</i>.</p>
3	<p>Kuwait Finance House:  لا مانع شرعا من اعتماد العرف المصرفي العام المشار إليه حيث إنه لا يعارض نصا ولا قاعدة شرعية ومراعاته تحقق مصلحة لاستقرار التعامل وحفظ الحقوق<sup>544</sup></p> <p><i>There is no legal deterrent from the affirmation of the aforementioned banking custom, as it does not contravene a text or a legal precept, and its compliance achieves a maslaha in the stability of transacting and the preservation of rights.</i></p> <p>The resolution validated based on the absence of contrary texts and on the basis of the two specified <i>masalih</i>.</p>

Table 14: Resolutions of three Islamic banks in which the *masalih* have been cited as a basis. Each row comprises the original Arabic text, our English translation and our brief comment on the resolution.

The use of the *masalih* by the above institutions firstly demonstrates the validation of the *masalih* in the industry. The diversity of AAOIFI and the IIFA's members means that the validation is by scholars from different countries and schools. It reflects the relevance of the validation of the *masalih* by the classical and modern references covered in the previous section. While the previous section had exhibited the IIFA and AAOIFI's validation of the

<sup>542</sup> Al Salam Bank, "Fatāwā- tajribat Mişraf al-Salām - al-Bahrayn," 11.

<sup>543</sup> IIFA et al., *al-Fatāwā al-Iqtişādiyya*, 373.

<sup>544</sup> IIFA et al., *al-Fatāwā al-Iqtişādiyya*, 600.

*masalih* as a legal tool through statements, this section demonstrated the validation through their fatwas.

The second outcome of the review is the variance in the use of the *masalih* depending on the type of the reviewed entities. While the three surveyed regulators based multiple fatwas on the *masalih*, their use by the banks was less frequent. In contrast to the IIFA's four uses (from 61 declarations on Islamic finance and one declaration dedicated to the *masalih*), AAOIFI's 23 and Bank Negara Malaysia's five (and a potential additional 14 in the Malay third edition), the banks have only published three fatwas on the *masalih*, from a sample of 876. The more frequent users of the *masalih* have therefore been the regulators, an observation which will be analysed in the following section.

The third outcome of the review concerns the purpose of the use of *maslaha* by the reviewed entities. From the 35 identified uses of the *masalih* by the six entities, the outcome of 23 was to permit banking practices, five to permit regulatory activities and six concerned areas that are not related to finance directly (despite AAOIFI being the publisher). Among the 28 fatwas permitting banking practices or regulatory activities, none were socially reformative. For example, they do not address consequences of banking activities, financial inclusion or enhanced sharing of risks and rewards. Nor do they prevent the emulation of conventional activities. They serve to facilitate financial services and products that benefit the providers or users of banking services or both. The existing use of the *maslaha* by the surveyed entities has therefore not supported the social objectives. The implications of this use will also be discussed in the following section.

This section first identified the relation of the *masalih* to the industry, which was through their role as a source of law, the alignment of the social objectives to the *masalih*, the endorsements of researchers and their use in the industry. The review of fatwas based on the *masalih* indicated their validation in the industry and the concentration of their use by regulators rather than banks. The review also found the purpose of the use of the *masalih* to have been the facilitation of banking services rather than social objectives. These findings validate the relevance of the *masalih* in the industry. They will inform the following section's assessment of the possibility of their application to drive the industry's social objectives.

#### Authority and legitimacy

Laying the foundation for our assessment, the previous section demonstrated the use of the *masalih* in the industry in at least 35 instances. The review found a validation of the *masalih* in the industry. However, it also identified their use to be dominated by regulators and to be driving commercial and organizational, rather than social objectives. This was evident in the use of the *masalih* to enable banking and regulation only. Such use indicates an influence of commercial interests, whereas the dominant use by regulators suggests the influence of authority. Commercial influences are at times in conflict with social objectives, as demonstrated in this section. The dominance of commercial or regulatory influences could therefore pose barriers to the use of the *masalih* to drive social objectives. In order to understand the potential for such use of the *masalih*, the section will identify and assess the influences of private interests and authority. It will follow the procedure of the assessment

of the *maqasid* used in the previous chapter to firstly assess private interests in legal standardisation and profits. The section will then assess the implications of the contestation of authority between SSB scholars and governments through three facets. It will argue that the SSBs' ability to issue fatwas based on the *masalih* is dependent on the objectives of their governments and shareholders, as well as the authority of the SSBs and the legitimacy of their judgement.

The first factor assessed for its influence on driving the social objectives through *ifta'* based on the *masalih* is the industry's private interests. The uses of the *masalih* reviewed in the previous section were found to only serve banking and regulatory activities. The limited range of subjects indicates the possibility that the subjects of the *masalih* were curtailed by the issuers. The possible restrictions will be assessed below in light of the objective of legal standardisation in the industry and the banks' commercial priorities. Both factors were covered in the assessment of the *maqasid* in the previous chapter.

The previous chapter discussed the aversion in the industry to legal diversity. Standardisation was stated to strengthen consumer confidence in the legitimacy of the banks' products, reduce legal costs and facilitate asset trading. The *masalih* provide an additional source for a diversity as they could be used to rule differently to other views in the market. For example, while the IIFA ruled on the prohibition of charging a fee on *kafala*<sup>545</sup> services, the Malaysian regulator has approved charging for the service on the

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<sup>545</sup> A contract used to facilitate payment guarantees of the debtor's dues.

basis of a *maslaha*.<sup>546</sup> Such differences of views in relation to the same contracts provide a basis for the resistance in the industry against the *masalih*.

While the above concerned aversion to standardization by the industry, legal scholars have stated related views. This chapter's first section cited the IIFA's caution against "illusionary, invalidated *masalih*, rooted in desires and influenced by circumstances, affairs and customs that contravene the principles, rulings and objectives of the Shari'a."<sup>547</sup> This caution resonates with that of Muhammad Said Ramadhan al-Buti (d. 2013), former Grand Mufti of Syria, concerning the risk of deviation of Islamic law and thus Islam through exploitation of the *masalih*.<sup>548</sup> Al-Buti went on to devote more than 200 pages on legal criteria of the *masalih*. He concludes with guidance to scholars that they do not identify the *masalih* by starting from the desired result of its rulings, as well as an emphasis on the scholars' need to validate the *masalih* against his criteria.<sup>549</sup> The IIFA and al-Buti's statements imply two core messages. First is that the identification of the *masalih* requires a comprehensive understanding of the subject, its implications and the criteria of the *masalih*. This is particularly relevant in light of the above example of the Malaysian regulator basing its contravention of an IIFA ruling on the *masalih*. This example demonstrates the risk that the *masalih* be used to create a norm in the industry from what is originally an exception. The second implication of the scholars' statements is the gravity of the risk of biased

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<sup>546</sup> IIFA, "Qarār bi-Sha'n Khitāb al-Ḍamān," declarations of the 2<sup>nd</sup> convention of the International Islamic Fiqh Academy, Jeddah, December 22-28<sup>th</sup>, 1985; Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*- 2<sup>nd</sup> ed, 39.

<sup>547</sup> IIFA, "Qarār bi-Sha'n Subul al-Istifāda min al-Nawāzil (al-Fatawa)."

<sup>548</sup> Muhammad Said Ramadan al-Buti, *Ḍawābit al-Maṣlahah fī al-Sharī'a al-Islāmiyya* (Beirut: Mu'assasat al-Risāla, nd.), 13-17.

<sup>549</sup> Al-Buti, *Ḍawābit al-Maṣlahah fī al-Sharī'a al-Islāmiyya*, 413.

identifications of *masalih*. Therefore while industry players are averse to the *masalih* due to desire for standardisation, the aversion of some scholars is driven by caution.

Another factor inducing the resistance to some applications of both the *maqasid* and the *masalih* is the commercial priority of the banks. These priorities, discussed in the introductory and in the previous chapter, have been reported to have influenced the banks' nomination of SSB scholars and the practices of the scholars. For example, some banks were reported to have appointed scholars based on their approval of particular products.<sup>550</sup> These appointments would therefore determine the bank's product offering, thereby affecting their income. The pursuit of social objectives is also likely to negatively impact a bank's profits, as demonstrated below.

The negative impact of pursuing social objectives on a bank's profits can be exemplified through the objective of financial inclusion. Addressing the objective of financial inclusion requires setting minimum allocations of financing to low-income groups and opening branches in areas with lower population densities. In their study of the Prime Minister Jan-Dhan Yojna financial inclusion scheme in India, Markose, Arun and Ozili have found such initiatives to be largely unprofitable. They found that the accounts at 17 of 26 public banks offering the scheme did not achieve the average minimum account balance required to cover their operating costs.<sup>551</sup> While their sample was from a single country, it remains significant, given that the scheme had 275 million beneficiaries in 2019. The researchers'

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<sup>550</sup> Refer to the previous chapter.

<sup>551</sup> Sheri Markose, Thankom Arun & Peterson Ozili, "Financial inclusion, *at what cost?* : Quantification of economic viability of a supply side roll out," *The European Journal of Finance* (2020), 15.

contrasting finding of positive net account balances achieved by private banks does not nullify their earlier finding as public sector banks had a market share of 79.9% compared to 3.2% for private banks.<sup>552</sup> The concentration of public banks is consistent with the common governmental involvement in financial inclusion initiatives, whether it is to establish the markets or to regulate incumbent institutions.<sup>553</sup> In a separate study, Lopez and Winkler studied the sustainability of rural microfinance institutions based on a sample of 772 institutions from 80 countries. Microfinancing is a form of inclusive finance which serves customer excluded from financial services due to insignificant account balances or financing needs. Lopez and Winkler focused on rural populations in light of research of the prevalence of their exclusion.<sup>554</sup> They found that a concentration of rural customers did not affect the sustainability of the institutions. However, they found evidence that such institutions could not “make use of economies of scale and productivity effects to the same degree as [institutions] focusing on urban areas.”<sup>555</sup> The two studies have therefore shown clear implications of financial inclusion on the profitability of the banks. In the first study, most banks were loss making, whereas the second study found the opportunities for growth in profit margins to be constrained.

In addition to financial inclusion, other social objectives can also be found to limit a bank’s profits. For instance, addressing the objective of eliminating negative externalities of financing requires the preparation of supplier, community or environmental audits by

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<sup>552</sup> Markose, Arun & Ozili, “Financial inclusion, *at what cost?*” 2.

<sup>553</sup> Jonathan Conning and Christopher Udry, “Rural Financial Markets in Developing Countries,” in *Handbook of Agricultural Economics*, Volume 3, ed. Robert Evenson and Prabhu Pingali (Amsterdam: Elsevier, 2007), 2864-2868.

<sup>554</sup> Tania Lopez and Adalbert Winkler, “The challenge of rural financial inclusion – evidence from microfinance,” *Applied Economics*, 50 (14), 1555.

<sup>555</sup> Lopez and Winkler, “The challenge of rural financial inclusion,” 1566.

applicants for commercial financing. Additionally, a bank's reduction of its disbursement of financing through debt entails the use of equity financing, which increases the banks' capital requirements. These examples increase the banks' costs, their credit risks and thus their capital requirements. These factors lower the profit margins of the banks and their returns to equity. In addition, audit requirements increase the costs upon the financing applicants, presenting an advantage to the banks' competitors, impacting the banks' income. The pursuit of social objectives is therefore likely to negatively impact a bank's profits. The use of *masalih* to legislate the achievement of such objectives would thus clash with the objectives of some managers and shareholders.

The above paragraphs demonstrated the clash of the banks' commercial priorities and the social objectives of the industry. The clash is realised in the influence of a bank's stronger stakeholders -such as management or shareholders- on its SSB. We had introduced this argument in the previous chapter through the banks' appointment of scholars that issue fatwas favourable to the banks. The incidence or risk of influence of management or shareholders on SSBs is also revealed through regulations seeking to prevent it. For example, the Central Bank of Bahrain requires SSBs to "be able to exercise independent judgement without undue influence or duress, especially from the board of directors and/or management."<sup>556</sup> The Central Bank of Oman states that SSB scholars "are expected not to compromise the rigour of the Shari'a ruling process due to commercial or business pressures."<sup>557</sup> Similarly, the Malaysian regulator requires "the board [to] take reasonable steps to ensure that the Shariah committee is free from any undue influences that may

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<sup>556</sup> CBB, "Central Bank of Bahrain- Shari'a Governance Module," 2.5.2.

<sup>557</sup> CBO, "Islamic Banking Regulatory Framework," 2.2.2.9.

hamper the Shariah committee from exercising its professional objectivity and independence in deliberating issues brought before them.”<sup>558</sup> The explicit caution by the regulators from commercial pressures and those from the boards of directors indicates the existence of a risk of such influence upon SSBs. The regulators’ statements are further supported by the statements of a former SSB member and another regulator in the previous chapter. Thus is evident the existence of a restriction on fatwas with unfavourable commercial implications, such as those in question.

The regulators’ caution coupled with the negative impact on the bank’s profits demonstrate our case for opposition to the use of the *masalih* based on commercial factors. The outcome is consistent with our finding in the previous section that the use of the *masalih* by banks has been rare and only to enable the operations of the banks. This finding is consistent with the finding of the second chapter that 9 of 11 surveyed banks stated their pursuit of commercial objectives. Our assessment therefore shows multiples grounds for resistance against the use of the *masalih* due to private interests, relating both to legal standardisation and commercial priorities.

The second of three assessed restrictions to the use of the *masalih* to drive the social objectives in the industry relates to its authority structures. As shown next, a fatwa based on a *maslaha* and its consequences can intersect with a ruler’s authority. A SSB’s fatwa based on a *maslaha* is a statement of the validity of the *maslaha*, its legal value and the SSB’s right to its determination and issuance. The latter two rights of SSB scholars relate to

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<sup>558</sup> BNM, “Shariah Governance,” 8.

public spheres that are occupied by other parties, particularly the ruler, whether in the form of a government or an individual. In addition, the participation of SSBs in this public sphere exposes them to additional scrutiny. The following discussion demonstrates challenges to the SSBs' use of the *masalih* resulting from its presence in the public sphere. It will argue that a SSB's *ifta'* based on the *masalih* is dependent on the objectives of the government, the authority of the SSBs and the legitimacy of their judgement.

Legal scholars have required the benefit of the *masalih* to be public and not restricted to private interests.<sup>559</sup> A fatwa on the basis of a *maslaha* is therefore a statement that the mufti is an arbiter of public good. This statement places a mufti in competition with the authority of the ruler or government to decide, rule and enforce measures relating to the public good. This can be illustrated through the hypothetical<sup>560</sup> example of a fatwa based on a *maslaha* expressing the obligation upon banks to allocate financing for applicants with low incomes. This fatwa is not a strategic or charitable policy of that SSB's bank to engage in this financing. It is a statement that access to finance by low-income groups is insufficient to an extent requiring intervention. It also implies that the ruling entity has failed to intervene and that the scholars are addressing this legislation gap. It thus entails that the scholars have an authority over the public and that banks are required to follow their rulings. For governments that reject ceding such authorities, such statements by scholars present a motive to curtail such legislation. The two following paragraphs present indicators

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<sup>559</sup> Refer to Opwis's summary of al-Ghazali and to the IIFA's position, cited in the first section of this chapter.

<sup>560</sup> The use of a hypothetical example reflects the absence of fatwas driving social objectives through the *masalih*, a finding of the previous section.

supporting the proposition that such governments would prevent the use of the *masalih* by SSBs, based on two examples.

The first indicant of a government's resistance to the use of *masalih* by SSBs is found in the IIFA's aforementioned declarations on the *masalih*. The declarations only stated governance and the ruler as examples of venues where the *masalih* can be applied. It neglected mentioning its use in *ifta'* or *ijtihad*. We argued above that this was due to its caution from abuse of the *masalih*. In this section we argue that it is also a possible reflection of the objectives of some governments. This argument is first based on the relation of the IIFA to Muslim governments. According to its charter, the IIFA is funded by the governments, who also each appoint a scholar to represent them.<sup>561</sup> The assessment of the independence of such scholars and the significance of their relation to the government is beyond the remit of this study. Nonetheless, we posit that it is unlikely that governments will nominate scholars that will harm their interests or objectives. In fact, the IIFA has issued multiple declarations and statements aligned with the interests of particular Muslim governments. The statements are often related to political, public and foreign affairs, unrelated to the IIFA's *fiqh* specialisation. These include contentious topics beyond the remit of the IIFA.<sup>562</sup> We argue that such unwarranted solidarity indicates an alignment

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<sup>561</sup> "Al-Nizām al-Asāsī li-Majma' al-Fiqh al-Islāmī al-Duwalī," IIFA, accessed June 9<sup>th</sup>, 2017, <http://www.iifa-aifi.org/النظام-الأساسي-لمجمع-الفقه-الإسلامي>.

<sup>562</sup> IIFA, "Bayān Majma' al-Fiqh al-Islāmī al-Duwalī bi-Sha'n Maqṭal al-Ṣaḥāfī al-Sa'ūdī Jamāl Khāshigjī," press release, October 30<sup>th</sup>, 2018, <http://www.iifa-aifi.org/بيان-مجمع-الفقه-الإسلامي-الدولي-بشأن-م-م.html>; IIFA, "Bayān Ḥawl Iṭlāq Miliṭiāt al-Ḥūthī fī al-Yaman al-Muslim, Ḍulman wa-'Udwānan, Ṣārūkhan Bālistiyyan, Tijāh Makkah al-Mukarrama," press release, October 29<sup>th</sup>, 2016, <http://www.iifa-aifi.org/بيان-حول-إطلاق-مليشيات-الحوثي-في-اليمن.html>; IIFA, "Majma' al-Fiqh al-Islāmī al-Duwalī Yushīd bi-l-Taḥāluf al-Islāmī al-'Askarī li-Muḥārabat al-Irhāb," press release, December 16<sup>th</sup>, 2015, <http://www.iifa-aifi.org/مجمع-الفقه-الإسلامي-الدولي-يشيد-بالتح-باليمن.html>; IIFA, "Amīn al-Majma' Yushīd bi-Juhūd al-Mamlaka al-'Arabiyya al-Su'ūdiyya wa-Dawlat al-Imārāt al-'Arabiyya al-Muttaḥida fī al-'Ināya bi-Majma' al-Fiqh al-Islāmī al-Duwalī," accessed August 16<sup>th</sup>, 2020, <http://www.iifa-aifi.org/أمين-المجمع-يشيد-بجهود-المملكة-العربي.html>.

between the interests of the IIFA and some governments. We accordingly associate the restriction of applications of the *masalih* by some IIFA scholars to the ruler with the governments' interest in protecting their authority. Our argument does not intend that the IIFA's criteria has diverted from the legal tradition. We note that the declaration presents the ruler's right to the *masalih* through applications and examples rather than legal criteria.

The second example of the tension over the contested right to rule based on the *masalih* is an articulation of the contestation to its authority. Hasan al-Banna (d. 1949), founder of the Muslim Brotherhood, stated *al-masalih al-mursala* to be one of three areas where it is obligatory to follow the opinion of the Islamic ruler.<sup>563</sup> Al-Banna, who had sought the establishment of Islamic governments, thereby used the *masalih* to specify the ruler's authority.<sup>564</sup> Al-Qaradawi, a follower of al-Banna, expands on his "principle," providing examples of its current applications and where it should be applied. His examples of applications of the *masalih* cover numerous areas including marriage, construction, transport, medicine, labour and justice. Having stated the *masalih* as an area where Muslims need to follow the ruler's view, both al-Banna and al-Qaradawi then validate a wider use of the *masalih*.<sup>565</sup> In fact, al-Qaradawi mentions uses of the *masalih* by other modern scholars. The scholars have therefore described a ruler's authority, an area it is obligatory to obey him, while also validating the right of other scholars to the same authority. The two groups therefore share a source providing the same legitimacy to their opinions on the social good.

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<sup>563</sup> Hasan al-Banna, "Al-Usūl al-'Ishrūn li-Fahm al-Islām.. bi-Qalam al-Imām al-Shahīd Hasan al-Banna," accessed July 31<sup>st</sup>, 2020, <https://www.ikhwan.online/article/238553/الاصول-العشرين-لفهم-الاسلام-بقلم-الإمام-الشهيد-حسن-البنّا>, Yusuf al-Qaradawi, *al-Siyāsa al-Shar'iyya fī Daw' Nuṣūṣ al-Sharī'a wa-Maqāṣidihā*- 4<sup>th</sup> ed. (Cairo: Wahbah Publisher, 2011), 82.

<sup>564</sup> Ahmad al-Tilawi, "al-Dawla al-Islāmiyya fī Fikr al-Imām al-Shahīd Hasan al-Banna," accessed July 31<sup>st</sup>, 2020, <https://www.ikhwan.online/article/22725/29%20-%20282%20-البنّا-حسن-البنّا-فكر-الإمام-الشهيد-حسن-البنّا>.

<sup>565</sup> Al-Qaradawi, *al-Siyāsa al-Shar'iyya*, 103-105.

The equivalence of the extent of legitimacy from this source is therefore a challenge to any ruler seeking to maintain his authority over the arbitration of the public good. It can therefore lead to resistance against a common use of the *masalih* by other scholars. This positioning is the first indicant of the contestation of authority resulting from a SSB's legislation through the *masalih*.

The second challenge to *ifta'* based on the *masalih* due to contestations of authority relates to the scholar's legitimacy. A scholar's use of the *maslaha* is a statement of their right to identify it and rule based on it. The acceptance of the scholar's identification of the *maslaha* by those affected is based on their recognition of the scholar's legitimacy. The basis of this legitimacy is the scholar's knowledge of what constitutes public good. The possession of this knowledge can be an area of contention. For example, Sadegh Haghghat and Hobbollah call for the consultation of experts and specialists in the area of the particular *maslaha* and for adopting comprehensive visions to capture all harms and benefits of the decision.<sup>566</sup> Their position reflects the difficulty of the achievement of a ruler or scholar's mastery over knowledge relating to all areas of governance. This requirement for a validation of the *maslaha* is particularly relevant to SSBs. As specialists in Islamic law, few SSB scholars are qualified to judge on social, environmental or wider economic causes. In fact, even expertise in banking is not possessed by all scholars in the industry. As discussed in the second chapter, SSB scholars have admitted to possessing inadequate knowledge in finance and economics. These acknowledgments were presented in Hasan's interviews with

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<sup>566</sup> Haidar Hobbollah, "al-Maṣlaḥa fī al-Fiqh wa-l-Siyāsa al-Shar'īyya," *al-Ijtihād wa-l-Tajdīd* 50 (2019), 18-21; Sadegh Haghghat, "Izdiwājiyyat Dawr al-Maṣlaḥa fī al-Fiqh al-Siyāsī al-Shī'ī" trans. Nazira Ghallab, *al-Ijtihād wa-l-Tajdīd* 28-29 (2014), 27.

Haghghat is a researcher in Islamic politics.

14 SSB members as well as Haridan, Hassan and Karbhari's interviews with the SSBs of two banks.<sup>567</sup> Such admissions clearly challenge their authority over such knowledge. Its use in the determination of the *maslaha* is therefore susceptible to contestation. On the other hand, the legitimacy of the governments' judgements is less likely to be challenged. This is due to their existing authority and expertise in judgements on matters relating to societies. In some countries it is also due to the lack of accountability and the absence of avenues for popular participation. The availability of an alternative authority over the knowledge, the government's, enhances the susceptibility of the scholars' judgements to contestations.

There remains a further factor within the second challenge to *ifta'* based on the *masalih* due to contestations of authority relating to the scholar's legitimacy. *Ifta'* based on the *masalih* is a clear expression of the mufti's authority. It is particularly clear in comparison to other forms of *ifta'*, be it through the transmission of an existing opinion or through *ijtihad* based on textual sources or on preceding legal positions. Through these other methods, a fatwa's authority is derived from that of the textual sources or existing legal principles or fatwas. The second chapter identified eight surveyed regulators to have granted SSBs unrestricted *ifta'* authorities. These authorities were based on qualifications lower than those required by legal scholars for the same authorities. This has translated into a minority of SSBs having members with basic qualifications in Islamic law. While this is accepted in the industry, fatwas by SSB scholars that extend beyond the sphere of the industry situate the scholars in public spheres that are shared with other scholars, such as those of the country's

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<sup>567</sup> Zulkifli Hasan, "In search of the perceptions of the Shari'ah scholars on Shari'ah governance system," *International Journal of Islamic and Middle Eastern Finance and Management* 7, 1 (2014), 29; Nurfarahin M. Haridan, Ahmad F. S. Hassan and Yusuf Karbhari, "Governance, religious assurance and Islamic banks: Do Shariah boards effectively serve?" *Journal of Management and Governance* 22 (2018), 1028-1029.

seminaries and *ifta'* councils. The legitimacy of such SSB scholars will not be necessarily judged through the regulators' lower criteria. In such cases, the authority of SSBs to rule based on the *masalih* will be dependent on the legitimacy of their legal authority.

In addition to the examples provided above, the following four further indicate the influence of the authority structures in Islamic societies on the use of the *masalih*. First are the aforementioned statements of the IIFA focusing on their use by the ruler. Second is their rare use in the industry; with only 3 fatwas found in a sample of 876, compared to not less than 33 by the IIFA, AAOIFI and the Malaysian regulator. Third is the movement towards the consolidation of legal authority in the Islamic finance industry. The second chapter discussed the regulation of SSBs in 11 countries. Bank Indonesia requires banks to source fatwas from the Dewan Syariah Nasional and Bank Negara Malaysia requires banks to adopt its Shariah Standards on 14 contracts. The Omani and Emirati regulators have legislated the creation of central Shari'a boards with authorities to issue fatwas that are binding upon banks, but this authority has not been enforced yet.<sup>568</sup> The reclaim of legal authority within Islamic banking by the regulators representing these four governments could be driven by their desire to retain control over financial legislation and regulation.

The fourth indicator of the influence of the authority structures on the use of the *masalih* is found in an article by Laldin. Laldin serves on the Shariah Advisory Council of Bank

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<sup>568</sup> Bernardo Vizcaino, "Al-Markazī al-'Umānī Yu'assis Hay'a li-l-Riqāba al-Shar'iyya li-Da'm al-Tamwīl al-Islāmī," *Reuters*, October 8<sup>th</sup>, 2014, accessed August 20<sup>th</sup>, 2020, <https://ara.reuters.com/article/OtherMENews/idARAL6N0S31FC20141008>; Babu Das Augustine, "Islamic financial sector gets supervisory framework," *Gulf News*, November 1<sup>st</sup>, 2018, accessed August 20<sup>th</sup>, 2020, <https://gulfnews.com/business/banking/islamic-financial-sector-gets-supervisory-framework-1.2296628>.

Negara Malaysia as well as of private institutions.<sup>569</sup> When discussing the use of the *masalih* in the industry, he legitimises its use by scholars whilst adopting a restrictive approach by discussing its various criteria. His tone is least restrictive when proposing its use by regulators, describing it as “a very appropriate source for regulators and policy makers to rely upon, when necessary, in setting up standards, parameters, regulations and guidelines.”<sup>570</sup> The difference in restrictive terminology in discussing its application by the two groups reflects the SSB scholar’s higher confidence in the regulators’ authority to use it. The four indicators reflect how the public nature of the *masalih* places SSBs in an area occupied by existing authorities, resulting in a hindering contestation.

The above analysis has demonstrated the challenges to the use of the *masalih* to drive the social objectives, but it has not negated its possibility. While the analysis has discussed external factors, applications of the *masalih* concern factors relating to the subjects too. The first section discussed the views of legal scholars on the *masalih* and their criteria. It cited the IIFA’s view of the criteria that the *maslaha* be real, universal, general, compatible with the *maqasid* and to not contradict a superior or equivalent *maslaha*. The presence of such criteria means that SSBs will only consider the social objectives that meet the criteria of valid *masalih* in their view. Therefore, while the *masalih* present an avenue for driving social objectives, they do not necessarily encompass all social objectives.

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<sup>569</sup> Bank Negara Malaysia, “Shariah Advisory Council,” accessed July 31<sup>st</sup>, 2020, [https://www.bnm.gov.my/index.php?ch=en\\_about&pg=en\\_thebank&ac=439&lang=en](https://www.bnm.gov.my/index.php?ch=en_about&pg=en_thebank&ac=439&lang=en).

<sup>570</sup> Laldin, “Understanding the Concept of Maṣlaḥah,” 173.

This section has demonstrated the existence of five other variables influencing the possibility of legislating through the *masalih* in the Islamic banking industry. The five are in addition to the two and only supporting variables: the IIFA and AAOIFI's approval of legislation through the *masalih*. The first variable of this section was the industry's aversion to legal diversity, which introduces the possible resistance of shareholders and regulators. The second variable was the resistance of shareholders due to their aversion to lower profits. The third variable was the government's interest in maintaining its authority on the determination, legislation and enforcement of the public good. The fourth variable was the legitimacy of the scholars' claim over knowledge of the public good. The fifth and final variable was the legitimacy of the scholars' claim over the right to rule on it. The latter three variables are dependent on the government's interest in retaining the authority, the authority of the claim and the qualifications of the scholars in each case, respectively. The variables are not as similar across the industry as is the first. We therefore argue that *ifta'* through the *masalih* encounters obstacles that are not prevalent in *ifta'* based on textual sources, *qiyas* and transmissions of existing legal positions. The significance of the obstacles in preventing its use are dependent on the objectives of the government and shareholders, as well as the authority of the scholar and the legitimacy of their judgement.

## Conclusion

This chapter has assessed the possibility for SSBs to drive the industry's social objectives through *ifta'* based on the *masalih*. It first demonstrated the validation of the *masalih* by the IIFA and AAOIFI, in line with the views of classical scholars of the four Sunni legal schools. Classical scholars had differing views on the scope of the *masalih*, of which the IIFA had

adopted a middle position. The past use of the *masalih* in the industry was then assessed based on a sample of *ifta'* bodies, regulators and banks. It showed recurring uses of the *masalih* by the IIFA, AAOIFI and Malaysian regulator. On the other hand, the surveyed banks' use of the *masalih* was shown to be extremely rare. None of the examined uses of the *masalih* were found to target social objectives. Instead, the majority served to enable banking products and operations. Thus far, the assessment had found the *masalih* to be validated by participants in the industry. The question of the possibility of driving the social objectives through the *masalih* was therefore not about their legitimacy, but rather the legitimacy of the sought *maslaha* and the issuing entity.

The assessment then addressed the *masalih* from the perspective of their application by SSBs. It argued that the banks' commercial interests are in conflict with some social objectives. It also argued that governments seeking to protect their authority over the determination, legislation and enforcement of the public good will curtail the SSBs' authority to use the *masalih*. It finally argued that the legitimacy of some scholars could itself hinder their use of the *masalih* due to its requirement of a level of *ijtihad*. It is clear that the three challenges to the use of the *masalih* do not apply in combination to every SSB. The incidence and extent of the challenges is rather dependent on the ruling government, on the desires of the shareholders and on the credibility of the SSB. The outcome of the assessment is therefore that the *masalih's* viability as a reform approach is dependent on a SSB's authority and its resultant ability to navigate the three important influences.

The assessment and the findings of this chapter present three main contributions to the discourse on reform in the industry. First was the assessment of the proposition based on hundreds of declarations, standards and fatwas. This pool of legal evidence provided indications of the acceptance of the *masalih* in the industry through explicit and implicit content. The second contribution was the contextualisation of the *masalih* among the related power structures. Its significance lies in that the acceptability of the *masalih* extends beyond the legal discussion of its relation to scripture; it involves political considerations. Finally, it offered a more comprehensive consideration for the diversity of legal and theological views on the *masalih*.

Following the assessment of the possibility of reform through two key *ifta'* approaches, the study will next assess an alternative approach. It will test whether collective obligations result in additional obligations upon SSB scholars to drive reform. The assessment will focus on the collective obligation of *al-amr bi-l-ma'ruf and nahi 'an al-munkar*.

## Chapter 6: Commanding a Social Agenda

The study has so far evaluated the ability of SSBs to drive reform in the industry through *ifta'*, their main authority and responsibility. The evaluation covered the approaches of *maqasid al-Shari'a* and *al-masalih al-mursala*. The *maqasid* were considered in light of the frequent proposals of their effectiveness for guiding the achievement of the industry's social objectives. The *masalih* were considered due to the scope they provide for *ifta'* on the basis of valid social objectives. We argued against the viability of reform through the *maqasid* due to issues of authority, value, practicality and opposition. Reform through the *masalih* was argued to depend on the objective of the ruling government, the desires of the shareholders and the credibility of the SSB.

The evaluation of the SSBs' scope for reform has focused on the avenue of *ifta'* as it is their main authority and thus their main avenue for addressing issues in the market. Nevertheless, SSB scholars retain access to other relevant decision makers, such as the managers and regulators of the banks. The remit of these stakeholders enables them to address bank conduct. However, the SSBs' institutional responsibility to engage with these stakeholders is limited. The authority for such interaction can instead be a legal one, emanating from the collective obligation of *al-amr bi-l-ma'ruf and nahi 'an al-munkar* (commanding good and forbidding wrong. '*Al-amr bi-l-ma'ruf*' hereafter).

*Al-amr bi-l-ma'ruf* is a legal duty upon Muslims to encourage or enforce adherence to Islamic law. It is not a direct source of authority, but the realisation of its obligation places an imperative upon charged individuals to discharge it. In the case of Islamic finance and its

social objectives, their characterisation as good -or of their neglect as wrong- renders them subjects of the duty. This characterisation, along with the realisation of the pertaining conditions, places an imperative upon charged individuals to perform the duty.

This chapter will evaluate the effectiveness of *al-amr bi-al-ma'ruf* as an avenue for SSB scholars to drive the industry's social objectives. It will first investigate which collective obligations relate to SSBs and what authorities they yield. The collective obligation of *al-amr bi-al-ma'ruf* will then be introduced along with the different legal views on it. Its resulting authority upon SSBs will then be evaluated in light of their achievement of its criteria. It will argue that the duty's conditions restrict its performance in relation to most subjects relevant to the industry's social objectives.

### Collective obligations

Collective obligations (*wajibat* or *furud kifa'iyya*, or *furud 'ala al-kifaya*) are those obligatory upon a group of Muslims, who are all relieved upon a successful performance of the obligation by an individual or more. Until its performance, all charged individuals are liable. Should they neglect the duty they would be considered sinful.<sup>571</sup> This section assesses collective obligations ruled by scholars surveyed in previous chapter to determine whether SSB scholars are liable to discharge a collective obligation.

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<sup>571</sup> Abu Hamid Muhammad al-Ghazali, *al-Wasīṭ fī al-Madhhab*- vol. 7 (Cairo: Dār al-Salām, 1997), 7; Imam Sayyid Ruh-Allah Musavi Khomeini, in Sayyid Muhammad Hasan Murtazavi Langarudi, *Jawāhir al-'uṣūl*- Vol. 3 (Tehran: Mu'assasat Tanzīm wa-Nashr Āthār al-Imām al-Khomeini, 2002), 460.

Collective obligations have been legislated across the legal schools, although such rulings are uncommon. Among the legal sources consulted in this study, Khomeini and al-Sistani's legal treatises include two rulings of collective obligations. Al-Ghazali and Bin Bayyah have nominated collective obligations in other works. The obligations ruled by the four scholars are listed below:

- "Instituting proselytization using polemics (*iqāmat al-da'wa al-hijājiyya bi-l-'ilm*)"
- "Conquering with the sword"
- "Giving life to the Ka'aba through the annual Hajj"
- "Returning the *salām* greeting"
- "To remove harm caused by indigency by helping to satisfy people's basic needs"
- "Other activities that people cannot survive without and must not be neglected such as commercial transactions, marriage, plowing, cultivation and cupping"
- "The duty to testify or to assist judges in fulfilling people's rights"<sup>572</sup>
- *Al-amr bi-l-ma'ruf*<sup>573</sup>
- The performance of the rights of the deceased including the ritual washing and enshrouding<sup>574</sup>
- *Ifta'*<sup>575</sup>

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<sup>572</sup> The first seven obligations have been stated by al-Ghazali in *al-Wasīṭ fī al-Madḥḥab*- vol. 7, 5-7, and translated by Adnan Zulfīqar, "Collective Duties (*farḍ Kifāya*) In Islamic Law: The Moral Community, State Authority And Ethical Speculation In The Premodern Period," (PhD diss., University of Pennsylvania, 2018), 43-45.

<sup>573</sup> Al-Ghazali, *al-Wasīṭ fī al-Madḥḥab*- vol. 7, 6; Ali al-Husayni al-Sistani, *al-Masā'il al-Muntakhaba- al-'ibādāt wa-al-Mu'āmalāt*, unknown edition (Unknown publisher, 2001), accessed December 4<sup>th</sup>, 2019, <https://www.sistani.org/files-new/book-pdf/arabic-mmontakhab-1440.pdf>, 271; Imam Sayyid Ruh-Allah Musavi Khomeini, *Taḥrīr al-Wasīla* -Volume 1 (Damascus: Embassy of the Islamic Republic of Iran, 1998), 418.

<sup>574</sup> Al-Ghazali, *al-Wasīṭ fī al-Madḥḥab*- vol. 7, 7; Khomeini, *Taḥrīr al-Wasīla* -Volume 1, 68; Muhammad Kazim al-Yazdi, *al-'Urwa al-Wuthqā* – vol. 1, 2<sup>nd</sup> ed., ed. Ali al-Husayni al-Sistani (Qom: Maktab Āyat-Allah al-Uzmā al-Sayyid al-Sistāni Dām Ḥilluh, 2003), 283.

<sup>575</sup> "Naḥw Tarshīd al-Fatāwa 'alā al-Internet 1\_2," Abdullah Bin Bayyah, accessed August 23<sup>rd</sup>, 2020, <http://binbayyah.net/arabic/archives/275>.

The majority of the above collective obligations are unrelated to the roles of SSBs and the industry's social objectives. Those potentially relevant to SSBs or the industry's social objectives are the removal of harm caused by indigency by helping to satisfy people's basic needs, *al-amr bi-l-ma'ruf* and *ifta'*. However, as the following paragraphs will show, it is only *al-amr bi-l-ma'ruf* that results in an obligation upon SSBs based on the social objectives.

Al-Ghazali identified the removal of harm caused by indigency as a collective obligation. It is exemplified through acts like clothing the unclothed, feeding the hungry and aiding the desperate. The subjects in this collective obligation are social causes that relate to those desired to be addressed by Islamic banks. However, these basic needs require direct charity rather than repayable financing arrangements. People facing such affliction do not possess wealth to repay. Therefore, Islamic banks could address these needs through their social responsibility funds rather than their core financing services that require repayment. Even microfinance products only address the issues indirectly as they support income-generating work and do not provide direct aid.<sup>576</sup> Beyond their social responsibility funds, managers of Islamic banks are not authorised to disburse deposits and capital for such causes. Therefore, neither managers nor SSBs are in a position to discharge this collective obligation through the core services of Islamic banks.

*Al-amr bi-l-ma'ruf* is identified as a collective obligation by al-Ghazali, Khomeini and al-Sistani. This obligation relates to the industry's social objectives in cases where their neglect

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<sup>576</sup> Engku Rabiah Adawiah Engku Ali, "Successful Models of Social Finance Initiatives: Lessons from Amanah Ikhtiar Malaysia (AIM)," (paper presented at the 14<sup>th</sup> International Shari'ah Scholars Forum, Kuala Lumpur, October 31<sup>st</sup> -November 1<sup>st</sup>, 2019), 10-12.

constitutes a wrong (*munkar*) according to the obligation's criteria. Its realisation upon SSBs is dependent on several criteria that include their ability to influence the occurrence of the wrong. The realisation of the collective obligation of *al-amr bi-l-ma'ruf* is also dependent on criteria relating to the offender and the command. Due to the relevance of the obligation and its many criteria, it will be addressed in further detail in the following sections.

The third and final collective obligation relevant to SSBs is *ifta'*. As *ifta'* is an existing responsibility of SSBs, its classification as a collective obligation does not introduce an additional authority.

The realisation of a collective obligation requires charged individuals to perform it. Legal scholars surveyed in this study have identified 10 collective obligations. While three obligations relate to SSBs or the industry's social objectives, it is only *al-amr bi-l-ma'ruf* that relates to both in a manner that requires their performance. The following section therefore investigates its realisation upon SSBs and their resulting authority.

### *Al-Amr bi-l-ma'ruf*

*Al-amr bi-l-ma'ruf* is a legal duty upon Muslims to encourage or enforce adherence to the requirements of the Shari'a. It is based on multiple commands in the Quran and Sunna. The duty is also reported to have been promoted and exercised by companions, successors and caliphs. Across its long history, the duty was institutionalised by governments from the formative years of Islam to the modern period. Its rich history is inevitably reflected in numerous legal writings on the topic. Jurists across the different legal schools have variably

ruled on the duty's compulsion and its many conditions. This section will discuss the legal views on the duty and its conditions as a precursor to its consideration in the context of SSBs. It will establish the nature of the ruling of obligation and the criteria pertaining to the performer, the subject, the commanded party and the command in order to assess the validity of its obligation upon SSBs.

Legal criteria on *al-amr bi-l-ma'ruf* relate to its realisation as well as the manner of its discharge. Criteria on its realisation involve the subject, the performer and the commanded party. For instance, the duty is to be carried out in relation to an observed wrong or neglected good. The identification of this subject is viewed by groups to be defined by scripture alone and by others through either scripture or reason. Criteria relating to the commander and the recipient must also be met for the duty to become incumbent. Scholars have also set criteria on the duty's discharge relating to its manner, a topic on which legal views diverge. For example, suggested forms of the act include verbal, physical and silent advocacy. These are in turn dependent on the profile of the performer, differing for the layman, the scholar and the ruler. Such legal criteria are further discussed below to relate this collective duty to SSBs.

The chapter consults five primary sources, comprising three works by Sunni scholars and two by Shi'i scholars. An important Sunni source has been al-Ghazali's *Ihya' 'ulum al-Din* due to its detailed exposition of the duty and influence on later works on the duty. Michael Cook has demonstrated the importance of al-Ghazali's contribution by identifying its adoption

and references by various Sunni and Shi'i scholars, including nine modern instances.<sup>577</sup> A second Sunni source is a fatwa by al-Qaradawi responding to a question on who is permitted to forbid wrong through force. While the fatwa provides fewer details than the other consulted sources, it is of importance due to its author's contemporary stature. The third Sunni source is Khalid al-Sabt's *al-Amr bi-al-Ma'ruf wa-al-Nahi 'an al-Munkar*. Al-Sabt is an associate professor of Quranic studies at Imam Abdulrahman Bin Faisal University and a former preacher who has been censored by the Saudi government.<sup>578</sup> As a graduate of IMSIU and a researcher at a Saudi Islamic institution, he represents another contemporary Sunni opinion from a doctrinal and political context contrasting to al-Qaradawi's. The duty is often political and its history and literature involve clashes and contestations of authority with the ruler and government.<sup>579</sup> Al-Sabt authored his book in an authoritarian Saudi environment, an anathema to which is al-Qaradawi, who has been included in a list of terrorists by Saudi Arabia and whose books it has banned.<sup>580</sup> The consideration of the views of both authors allows for the representation of two differing poles. Al-Sabt's book is aimed at practitioners and focuses on an appointed *muhtasib* (performer of the duty). On the other hand, the consulted Shi'i sources are al-Sistani's *Minhāj al-Ṣāliḥīn* and *al-Masā'il al-Muntakhaba* and Khomeini's *Taḥrīr al-Wasīla*. The three sources are important not only due

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<sup>577</sup> Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought*, (Cambridge: Cambridge University Press, 2000), 451-455, 507-509. The book is a comprehensive study of the duty based on the Quran, its exegeses, the Sunna and biographical and legal literature. The author covers not only the five legal schools, but the Ibadhis, Zaydis and Mutazilites too. Cook is a professor of Islamic history.

<sup>578</sup> "Al-Sa'ūdiyya Tamna' al-Dā'iya Khalid al-Sabt min al-Khitāba wa-l-Imāma," *Al-Khalij al-Jadid*, accessed July 29<sup>th</sup>, 2020, <https://thenewkhalij.news/article/141842/سياسة-السعودية-تتمنع-الداعية-خالد-السبت-من-الخطابة-والإمامة>.

<sup>579</sup> Cook illustrates the duty's relation to politics throughout his book, whether it is through the organisation of the duty by the state, or clashes of the performers with the state. See for example "Confronting the state," 50-67. The primary sources used in this study also address relations with the state or its involvement, such as al-Ghazali's rejection of the need for the ruler's permission to perform the duty: Abu Hamid Muhammad al-Ghazali, *Iḥyā' 'ulūm al-Dīn* (Beirut: Dār Ibn Ḥazm, 2005), 791.

<sup>580</sup> "Wazārat al-Ta'līm al-Sa'ūdiyya Tamna' Kutub al-Qaradawi Ba'd Waḍ'ih fī "Qā'imāt al-Irhāb," *CNN*, accessed July 29<sup>th</sup>, 2020, <https://arabic.cnn.com/middle-east/2017/06/11/saudi-ministry-education-qaradawy>.

to their judgement of particulars of the duty, they are also the two *maraji's* legal treatises (*rasa'il 'amaliyya*) and are therefore applicable to their followers in their millions. The assessment will thus refer primarily to modern and contemporary sources from both schools.

The five sources are first used to introduce the duty and its conditions. *Al-amr bi-l-ma'ruf and nahi 'an al-munkar* contains four key words: *amr* (command), *ma'ruf* (good), *nahi* (forbid) and *munkar* (wrong). The duty therefore consists of an action, the command or forbiddance, in relation to a subject, the good or wrong. In the view of our five scholars, the good to be commanded is what is legally considered to be an obligation that is not being performed. A wrong to be forbidden is a legal proscription that is being violated.<sup>581</sup> The only exception to the two statements is found in Khomeini's acceptance of intellect as a determinant of the good or wrong in addition to revealed subjects. As for the command or forbiddance, al-Ghazali, al-Sistani and Khomeini state that the performer of the duty is to perform it verbally by advising the offender. Where a verbal attempt is unsuccessful, the performer is to then perform it by force of hand.<sup>582</sup> Al-Qaradawi and al-Sabt rule that the performer is to first perform it by force of hand, with verbal performance being an option for when the use of force is unsuccessful.<sup>583</sup> The duty is therefore a verbal command or physical enforcement of the obedience of a legal ruling that has been neglected.

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<sup>581</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 801; Khalid al-Sabt, *al-Amr bi-al-Ma'rūf wa-al-Nahi 'an al-Munkar (Uṣūluḥ wa-Ḍawābiḥ wa-Ādābuh)* (Unknown publisher, 1995), 27; Yusuf al-Qaradawi, "al-Amr bi-al-Ma'rūf wa-al-Nahi 'an al-Munkar," accessed July 22<sup>nd</sup>, 2020, <https://al-qaradawi.net/node/3968>; al-Sistani, *al-Masā'il al-Muntakhaba*, 271; Khomeini, *Taḥrīr al-Wasīla*, 418.

<sup>582</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 790-791; al-Sistani, *al-Masā'il al-Muntakhaba*, 273; Khomeini, *Taḥrīr al-Wasīla*, 429.

<sup>583</sup> Al-Sabt, *al-Amr bi-al-Ma'rūf*, 368-369; al-Qaradawi, "al-Amr bi-al-Ma'rūf."

The duty is considered to be obligatory by the five scholars. They also classify it as a collective obligation, save al-Qaradawi who does not mention its classification.<sup>584</sup> Al-Sistani adds that while it is a collective obligation, it is obligatory upon the individual to reject a violation through either a facial or a verbal expression.

The five scholars stipulate criteria pertaining to the duty's subject in varying scopes. They comprise the compulsion of the subject's ruling, visibility of its occurrence and common knowledge of it. The compulsion of the subject, that is that the performance of the good or avoidance of the wrong be a legal obligation, is agreed upon by the five scholars.<sup>585</sup> The three Sunni scholars also require the occurrence of the offence to be publicly visible to the duty's performer and that its ruling be commonly known.<sup>586</sup> The criterion of common knowledge of the ruling refers to it being agreed upon by the different legal schools. Al-Ghazali adds that for subjects with rulings that differ across legal schools, the performer can perform the duty upon offenders affiliated to the same legal school as their own. The criteria relating to the subject are therefore that its ruling be compulsive, and in the view of the Sunni scholars that it be commonly known and for its occurrence to be visible.

The second category of criteria relates to the performer of the duty. The criteria are that they be legally competent, aware of the ruling on the subject and able to perform the duty. Legal competence, which refers to the performer's sanity, maturity and faith, is stipulated

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<sup>584</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 782; al-Sabt, *al-Amr bi-al-Ma'rūf*, 368; al-Sistani, *al-Masā'il al-Muntakhaba*, 271; Khomeini, *Taḥrīr al-Wasīla*, 418.

<sup>585</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 801; al-Sabt, *al-Amr bi-al-Ma'rūf*, 107; al-Sistani, *al-Masā'il al-Muntakhaba*, 271; Khomeini, *Taḥrīr al-Wasīla*, 418; al-Qaradawi, "al-Amr bi-al-Ma'rūf."

<sup>586</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 802; al-Sabt, *al-Amr bi-al-Ma'rūf*, 322; al-Qaradawi, "al-Amr bi-al-Ma'rūf."

by al-Ghazali, al-Sabt and al-Sistani.<sup>587</sup> The three scholars and Khomeini also require the performer to be aware of the legal ruling on the subject.<sup>588</sup> The Sunni scholars also state that the performer must have the ability to perform (to cause the sought change).<sup>589</sup> The performer is therefore required to be legally competent, aware of the ruling on the subject and able to perform the duty.

The third category of criteria relates to the commanded party, which is typically the offender. The criteria are that they be charged with the attainment or aversion of the subject, aware of its ruling and persistent with its performance. The first criterion requires that the offender be charged with the subject and not excused from its ruling. It is stated in different forms by al-Ghazali, al-Sabt, al-Sistani and Khomeini.<sup>590</sup> The second criterion requires the offender to be aware of the ruling on the subject to validate a command upon them. Al-Sistani and Khomeini stipulate this, whereas al-Sabt rejects it and al-Ghazali requires the performer to educate the offender.<sup>591</sup> The third criterion, agreed upon by the same four scholars, is that the offence forming the subject of the duty be carried out in the present, rather than being an action that the offender has committed in the past.<sup>592</sup> The criteria relating to the offender are therefore that they be charged with the attainment or

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<sup>587</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 788; al-Sabt, *al-Amr bi-al-Ma'rūf*, 170; al-Sistani, *al-Masā'il al-Muntakhaba*, 273-4.

<sup>588</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 807; al-Sabt, *al-Amr bi-al-Ma'rūf*, 174-5; al-Sistani, *al-Masā'il al-Muntakhaba*, 272; Khomeini, *Taḥrīr al-Wasīla*, 420.

<sup>589</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 788, 795; al-Sabt, *al-Amr bi-al-Ma'rūf*, 117, 180; al-Qaradawi, "al-Amr bi-al-Ma'rūf."

<sup>590</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 804; al-Sabt, *al-Amr bi-al-Ma'rūf*, 295; al-Sistani, *al-Masā'il al-Muntakhaba*, 272; Khomeini, *Taḥrīr al-Wasīla*, 420, 428.

<sup>591</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 807; al-Sabt, *al-Amr bi-al-Ma'rūf*, 295; al-Sistani, *al-Masā'il al-Muntakhaba*, 272; Khomeini, *Taḥrīr al-Wasīla*, 420.

<sup>592</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 801; al-Sabt, *al-Amr bi-al-Ma'rūf*, 322; al-Sistani, *al-Masā'il al-Muntakhaba*, 272; Khomeini, *Taḥrīr al-Wasīla*, 424.

aversion of the subject which they are committing in the present and that they be aware of its ruling.

The fourth and final category of the criteria of the duty of *al-amr bi-l-ma'ruf* addresses the implications of the command. Al-Ghazali, al-Sistani and Khomeini view that the duty is only obligatory when the performer expects the command to correct the offence.<sup>593</sup> It is therefore not obligatory when the command is not expected to change the offender's conduct. The three scholars and al-Sabt also state that the duty is only incumbent when its performance brings no harm upon its performer.<sup>594</sup> The criteria relating to the command therefore require a likelihood of its success and an avoidance of harm upon the performer.

The views of the four scholars and al-Qaradawi, in some respects, have been shown to be largely similar. This is despite the differences of legal schools and, in the case of al-Ghazali, historical period. Of the few differences, the most important has been the mode of the performance of the duty. Al-Qaradawi and al-Sabt have required the duty to be carried out by force of hand. The similarities can be seen in their classification of the duty as a collective obligation, their definition of what constitutes a good and the four categories of criteria.

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<sup>593</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 796; al-Sistani, *al-Masā'il al-Muntakhaba*, 272; Khomeini, *Taḥrīr al-Wasīla*, 421.

<sup>594</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 795-796; al-Sabt, *al-Amr bi-al-Ma'rūf*, 117; al-Sistani, *al-Masā'il al-Muntakhaba*, 272; Khomeini, *Taḥrīr al-Wasīla*, 425.

This section has introduced the duty *al-amr bi-l-ma'ruf* and its criteria in the views of five scholars. The following section evaluates the duty's position as a reform avenue by considering these criteria in the context of SSBs.

#### Commanding good in banking

The previous section has presented views that *al-amr bi-l-ma'ruf* is a collective obligation upon Muslims to command obedience to a legal ruling that has been neglected. Situating the duty in the context of Islamic finance necessitates the presence of an offence and a performer. The performer in this assessment is the SSB scholar, as the study is concerned with their scope for driving reform in the industry. As for the offence, this section will first assess the existence of valid offences in the industry. It will accordingly assess the realisation of the duty on SSBs in light of the criteria relating to the performer, the commanded party and the command. Based on the assessment, we argue that the criteria restrict the duty's performance in relation to four of the discussed subjects.

#### A) Offences

The introductory chapter established how the industry has failed to achieve social objectives of founding theorists and some regulators and banks. In order to consider the failure to achieve these objectives as an offence in the context of *al-amr bi-l-ma'ruf*, this potential offence has to meet the criteria of the subjects of the duty. The criteria are that the ruling upon the subject to be compulsive, commonly known and accepted and for its occurrence to be visible. Examples of offences that were discussed in the introductory chapter include:

- The exclusion of people with low incomes from finance;
- The use of debt-based finance at the expense of equity finance;
- The financing of projects causing negative externalities;
- The use of prohibited contracts.

The second chapter addressed the *ifta'* authorities of SSBs and their qualifications. The discussion of 'Qualifications in practice' presented admissions of SSB scholars that their knowledge of banking is insufficient. It also quoted the chairman of the central bank of Malaysia's Shariah Advisory Committee's admission that some scholars' knowledge of Islamic law is limited. Islamic banks have a responsibility to their clients to conduct their operations in accordance with Islamic law. Chapter one showed how banks in the sample also profess that as one of their objectives. This responsibility requires the banks to enforce procedures to ensure compliance with Islamic law. Referring to scholars who do not possess the required qualifications does not guarantee or safeguard a bank's compliance. Accordingly, unqualified *ifta'* will be considered as a fifth example of an offence in this chapter. Like the other four examples, unqualified *ifta'* contravenes objectives of the industry and its relevance to clients makes it a social issue. This is reflected in a regulation by the Central Bank of Oman: "SSB members have a responsibility to the public, which relies on the credibility and independence of the SSB while using the services of the Licensee. The public includes clients, credit grantors, governments, employers, employees, investors and others who rely on the objectivity and integrity of SSB members to ensure Shari'a compliance with regard to activities of the Licensee."<sup>595</sup>

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<sup>595</sup> CBO, "Islamic Banking Regulatory Framework," 2.2.4.4.

The first criterion of the duty of *al-amr bi-l-ma'ruf* relating to its subject, the offence, is that its ruling be compulsive on the offender. In relation to the five above examples of offences in the industry, the duty would only be obligatory if their committal is legally forbidden. The five offences comprise those with compulsive rulings and otherwise. We have not identified any legal views on the first two subjects: the exclusion of people with low incomes from finance and the use of debt-based finance at the expense of equity finance. As for the judgement on financing projects causing negative externalities, if the externalities legally qualify as harms, such financing would be prohibited according to the view proscribing aiding the commitment of sin.<sup>596</sup> It is therefore dependent on the severity of the externality and the jurist's stance on aiding the commitment of sin. The fourth subject, the use of prohibited contracts, is evidently permissible in the view of the scholar who approved its use but prohibited in the view of the scholar issuing the criticism. The fifth and final subject, unqualified *ifta'*, is judged to be prohibited by legal scholars surveyed in the first chapter, such as Ibn al-Salah and the IIFA.<sup>597</sup> The rulings on the five subjects therefore differ in their compulsion. For the three offences that can qualify for compulsion, the first criterion concerning the subject is met.

The second criterion on the duty's subject, the offence, is that its ruling be agreed upon by the legal schools. The realisation of the criterion will be assessed in relation to the three

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<sup>596</sup> Legal views on the topic are found under titles of aiding the commitment of sin or *sadd al-dara'i'* (closing off the means that can lead to evil). The former is studied as a legal precept, see for example al-Bujnordi, *al-Qawa'id al-Fiqhiya*- Volume 1 (Qom: Nashr al-Hādī, 1998), 366-368. The latter is studied in legal theory and is primarily associated with the Maliki school. See for example al-Raissouni, *Nazariyyat al-Maqāṣid 'ind al-Imām al-Shāṭibi*, 90-96 for sources, legal bases and applications.

<sup>597</sup> Ibn al-Salah, *Adab al-Muftī wa-l-Mustaftī*, 101; IIFA, "Qarār bi-Sha'n al-Iftā'."

offences that have been above identified as meeting the first criterion of compulsion upon the offender. The legal judgement on the first such offence of financing of projects causing negative externalities differs according to the scholar's views on aiding the commitment of sin. It therefore is not a ruling that is agreed upon. Secondly, the use of prohibited contracts is an offence in the view of the critiquing scholar, not the scholar issuing the judgement. Third and finally, we have not identified any position accepting unqualified *ifta'* in the presence of a qualified mufti. Therefore, of the three subjects that fit the first criterion of compulsion, only one has fit the second criterion relating to the common acceptance of the subject's ruling. However, according to al-Ghazali's view that one can command an offender following the same legal school, the other two offences can nevertheless be validated as subjects of the duty. Nonetheless, the criterion that the offence's ruling be agreed upon by the legal schools significantly limits the scope of subjects in the industry regarding which the duty would be obligatory.

The final criterion relating to the subject of the duty of *al-amr bi-l-ma'ruf* is that its occurrence be visible. The industry's context consists of regulated institutions operating in public spheres with significant disclosure requirements. The legal scholars' context in setting this condition consists of individuals in private properties. The criterion is therefore unlikely to apply to the industry.

Based on the legal views of the five scholars consulted in this chapter, for the duty of *al-amr bi-l-ma'ruf* to be obligatory, a case has to meet criteria including several relating to the offence in question. In the context of SSBs, we exhibited five offences as subjects to the

duty based on our earlier discussions. While the first criterion that the subject's ruling be compulsive was met by up to three of the exhibited subjects, the second criterion limited the duty's validity to one subject only. These criteria therefore limit the obligation upon SSBs to discharge the duty. However, this section will continue with the assessment of the applicability of the remaining criteria to understand the broader relevance of the duty to the industry.

#### B) The performer

Our second category of criteria of the duty of *al-amr bi-l-ma'ruf* are those of its performer; the commander of good or forbidding of wrong. In this assessment, the performer is the SSB scholar. The conditions upon them are that they be legally competent, aware of the ruling on the subject and able to perform the duty.

The criterion of legal competence comprises the characteristics of faith, sanity and maturity. Such characteristics can be presumed of SSB scholars due to the nature of their role. The third chapter cited two regulators requiring the characteristics of faith and sanity. The performer is also required to be aware of the legal ruling on the subject. Such knowledge falls within the expertise of SSB scholars. This can be seen in its relation to the legal modules taught in the Islamic educational institutions surveyed in the second chapter. A possible exception relates to the subject of the externalities of financing. Where SSBs are not given information on the negative externalities of a project, the criterion of knowledge would not be met. However, this could be mitigated in some cases where their regulators

stipulate that SSBs are provided information on the cases by other departments.<sup>598</sup> SSBs are otherwise positioned to possess the required knowledge to perform the duty. The final criterion relating to the performer is the ability to perform the duty.<sup>599</sup> Al-Qaradawi explains this as having the ability to cause the change due to a soft or a material power.<sup>600</sup> SSB scholars' access to bank management and regulators demonstrates their ability to perform the duty based on both powers. The material power is their authority over bank staff set by the regulator or the banks' guidelines. The soft power is their ability to engage with regulators, bank management and other SSBs. This section will discuss seven avenues for performing the duty that clarify the SSB scholars' ability.

SSB scholars thus fulfil the criteria of legal competence, awareness of the ruling on the subject and ability to perform the duty.

### C) The offender

The third category of criteria of the duty of *al-amr bi-l-ma'ruf* relates to the commanded party; namely that they be charged with the attainment or aversion of the subject which they are committing in the present and that they be aware of the obligation. This section will consider parties directly committing the offence as well as others yielding a relevant influence. In relation to the aforementioned five examples of subjects of the duty, the

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<sup>598</sup> SBP Islamic Banking Department, "Shari'ah Governance Framework," 4; BNM, "Shariah Governance Framework for Islamic Financial Institutions," (Kuala Lumpur: Bank Negara Malaysia, 2010), accessed September 1<sup>st</sup>, 2020, [https://www.bnm.gov.my/documents/20124/761709/02\\_Shariah\\_Governance\\_Framework\\_20101026.pdf](https://www.bnm.gov.my/documents/20124/761709/02_Shariah_Governance_Framework_20101026.pdf), 12.

<sup>599</sup> Al-Ghazali, *Iḥyā' 'ulūm al-Dīn*, 795; Al-Sabt, *al-Amr bi-al-Ma'rūf*, 180.

<sup>600</sup> Al-Qaradawi, "al-Amr bi-al-Ma'rūf."

relevant parties are regulators, shareholders, bank directors and SSBs. Specifically, the use of prohibited contracts concerns SSBs as the offenders and regulators due to their enablement. The remaining four subjects concern the banks' directors as offenders due to their control over the banks' decisions, shareholders due to their authority of appointing and dismissing directors and regulators due to their enablement. Regulators have the authority to restrict the operations of banks and to issue fatwas to which banks are bound. The following paragraphs assess the criteria in relation to the four stakeholder groups.

The criterion that the party commanded be charged with the attainment or aversion of the subject requires them to follow a legal opinion necessitating attainment or aversion. As with the aforementioned criterion that the subject's ruling be accepted by the legal schools, legal diversity limits the achievement of this criterion. Unless it was a common ruling, the performer would need to know the legal position adopted by the offender in order to validate the command. Such knowledge is typically private. This scope for the achievement of this criterion is therefore limited by legal diversity.

The second criterion upon the party commanded is that it be aware of the subject and its ruling. Awareness of the subject refers to awareness of its existence. The targets of the command in this study are regulators, SSBs, shareholders and management. Regulators and SSBs fulfil the criterion due to knowledge of Islamic law being a qualification for their roles. While the different role of bank directors does not necessitate the same level of knowledge,

some regulators require managers to be educated in Islamic law.<sup>601</sup> Finally, we do not assume the possession of such knowledge by shareholders in the absence of supporting evidence. The criterion of awareness of the subject and its ruling therefore holds in cases involving regulators, SSBs and managers in some countries.

The third and final criterion relating to the commanded party is for the act to be committed in the present. Our subjects concern the policies, decisions and financing of the banks. These are ongoing acts. A historical act would, for example, be financing that has been repaid and completed. The persisting validity nature of these policies, decisions and financing in turn validates this criterion.

The criteria relating to the parties commanded, regulators; shareholders; bank directors and SSBs, are therefore only partially met in this case. While the criteria of awareness of the ruling and the present commitment of the offence are met, the criterion that the party commanded be charged with the attainment or aversion of the subject is unlikely to be met in many cases.

#### D) The command

The fourth and final category of criteria of the duty of *al-amr bi-l-ma'ruf* relates to the command. This category consists of two criteria: an expectation of its success in stopping

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<sup>601</sup> CBO, "Islamic Banking Regulatory Framework," 2.1.5; BNM, "Shariah Governance Framework for Islamic Financial Institutions," 12; IFSB, "Guiding Principles on Conduct of Business for Institutions Offering Islamic Financial Services," (Kuala Lumpur: IFSB, 2009), 8.

the offence and the absence of harm upon the commander or others. As SSBs are exposed to various entities, their command can occur in various settings. The expectation of its success will therefore be examined through the SSBs' different spheres of influence. This includes the SSB itself, bank directors, national regulators, the public, and in the case of some scholars, national *ifta'* institutions, international fiqh academies and standard-setting organisations.

The first setting is a scholars' board role with its access to fellow scholars, where they certify the bank's products and review its execution of their decisions and propose corrections.<sup>602</sup> This role allows a scholar to perform the duty through their formal responsibility, by preventing or supporting the bank's products and practices. The setting also permits a scholar's performance of the duty towards his colleagues on the board.

A second setting for a SSB scholar's performance of the duty is their access to the bank's management. Regulators such as the Omani and Malaysian central banks stipulate the SSB's communication with management, ensuring such a setting.<sup>603</sup> This influence is demonstrated by Zulkifli Hasan's demonstration of how he and others on the SSB of Affin Islamic Bank Berhad convinced its managers to adopt their proposed recovery policy.<sup>604</sup> Their example presents an expectation of success when commanding a bank's managers.

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<sup>602</sup> BNM, "Shariah Governance Framework for Islamic Financial Institutions," 34-35; CBO, "Islamic Banking Regulatory Framework," 2.2.2.4.

<sup>603</sup> BNM, "Shariah Governance Framework for Islamic Financial Institutions," 7; CBO, "Islamic Banking Regulatory Framework," 2.2.2.4.1.

<sup>604</sup> Zulkifli Hasan, "From Legalism to Value-Oriented Islamic Finance Practices," presented at the Durham Islamic Finance Summer School, Durham Centre for Islamic Economics and Finance, 22-26<sup>th</sup> July 2019, accessed December 4<sup>th</sup>, 2019, <https://www.facebook.com/DurhamIslamicFinance/videos/729510184144686>.

A third setting for a SSB to exercise the duty is with its national regulators, where some require SSBs to report their banks' violations of the SSB's or the regulator's fatwas.<sup>605</sup> This requirement facilitates a setting for the exercise of the duty.

A fourth setting for a SSB to exercise the duty is through public engagement, such as through the media. An example is Mufti Taqi Usmani's public critique of *sukuk* and the subsequent policy review by AAOIFI amending the issue he raised.<sup>606</sup> Since the 'Islamic' prefix is the industry's unique selling point, public challenges to it are a reputation risk to the bank or regulator in question. Stakeholders are thus sensitive to scholars' statements, presenting an expectation of success. The Bahraini regulator has curtailed this setting, stating that "where a SSB member has a dissenting opinion on a fatwa given by the SSB, he must not criticize such fatwa publicly."<sup>607</sup>

The three remaining settings are not available to all SSB scholars. They are a state's religious legislature such as its *ifta'* centre or ministry of religious affairs, international fiqh academies and the industry's standard-setting organisations. Some scholars serve in these institutions in concurrence to their roles on bank SSBs.<sup>608</sup> They participate in *ifta'* or the preparation of legal standards, allowing them to perform the duty through legal means. The views of these institutions have the potential to influence other scholars in the field, as

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<sup>605</sup> BNM, "Shariah Governance Framework for Islamic Financial Institutions," 13; CBO, "Islamic Banking Regulatory Framework," 2.2.2.1.2.

<sup>606</sup> Arabian Business, "Most sukuk 'not Islamic', body claims," November 22<sup>nd</sup>, 2007, accessed December 4<sup>th</sup>, 2019, <https://www.arabianbusiness.com/most-sukuk-not-islamic-body-claims-197156.html>; AAOIFI, untitled statement, accessed December 4<sup>th</sup>, 2019, <https://islamicmarkets.com/publications/aaofii-shariah-standard-on-sukuk>.

<sup>607</sup> Central Bank of Bahrain, "Central Bank of Bahrain- Shari'a Governance Module," (Manama: Central Bank of Bahrain, 2017), SG-2.3.33.

<sup>608</sup> Failaka, *The Failaka Shariah Report 2008: Profiles of the World's Leading Scholars*, (Dubai: Failaka, 2008).

indicated in al-Shubaili's recommendation that SSBs not contradict the fatwas of such organisations.<sup>609</sup> The settings also enable the scholars access to influential peers whom they can advise.

The above seven settings have shown a variety of commands available to SSB scholars. These commands are occasionally supported by regulations, such as the SSB scholars' access to bank management and their duty to report to the regulator. This variety of settings and the legal support indicate a basis for the success of a scholar's command. Therefore, the duty's criterion of an expectation of the success of the command in stopping the offence is open to realisation by SSB scholars.

The second criterion relating to the command is that it does not cause harm upon its performer. We have discussed in the previous two chapters reports of banks hiring scholars to achieve favourable fatwas. In light of that discussion, a relevant adverse consequence to a scholar's command would be the loss of their job. The qualification of this consequence as a harm is dependent on a scholar's circumstances. Due to the lack of reports and research on such consequences and other harms to SSB scholars, the assessment of this criterion's achievement has not been achieved.

This section introduced four categories of criteria underpinning the realisation of the duty of *al-amr bi-l-ma'ruf*. Each category comprised additional conditions, totalling 11. The relevance of each criterion to the case of the SSBs' performance of the duty to drive social

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<sup>609</sup> Al-Shubaili, "al-Raqāba al-Shar'iyya," 23, 27.

objectives was assessed. The assessment found the industry's current practices to meet some criteria and to fall short of others. Specifically, one criterion relating to the subjects rendered the duty as invalid to two of the offences carried out in the industry. Another of the subjects' criterion rendered two other offences as invalid due to differences in legal views. The criteria of the subject were therefore immediately restrictive. The criteria of the performer were met in light of the SSB scholars' current qualifications. Two criteria of the offender were met whilst the third was unmet again due to legal diversity. Finally, one criterion of the command was met while the assessment of the other was not possible. The assessment thus found legal diversity to curtail the validation of the duty in relation to most of the subjects.

## Conclusion

This chapter assessed whether collective obligations provide SSB scholars avenues to realign the industry with its objectives. It first assessed which collective obligations relate to the role of SSBs and what authorities they yield. From a list of collective obligations nominated by legal scholars, *al-amr bi-al-ma'ruf* and *ifta'* were identified to be relevant. With *ifta'* being the subject of previous chapters, this chapter then focused on *al-amr bi-al-ma'ruf*. It assessed whether *al-amr bi-al-ma'ruf* provided SSB scholars additional authorities that facilitate an avenue for reform. The assessment sought to identify whether the duty is potentially incumbent on SSB scholars in relation to five subjects: the exclusion of people with low incomes from finance; use of debt-based finance at the expense of equity finance; financing of projects causing negative externalities; use of prohibited contracts and *ifta'* by unqualified scholars.

The assessment found that for four of the five subjects, a legal obligation is unlikely to exist for SSBs to perform the duty of *al-amr bi-al-ma'ruf*. We therefore argue that the duty does not grant SSBs its authority for most most subjects relevant to the industry's social objectives. Accordingly, its facilitation of an avenue for driving reform in the industry is limited to the subject of *ifta'* by unqualified scholars, as well as specific cases where the criteria relating to the performer and the offender are met. Such cases include those where both parties refer to the same legal reference. However, of note here is that legal diversity could be a hindrance to even voluntary performance of the duty, as per the view of surveyed scholars. Finally, *al-amr bi-al-ma'ruf* could facilitate avenues for SSB scholars for subjects not discussed in this chapter.

This chapter contributes to the discourse on reform in the industry through its evaluation of collective obligations as an avenue. The extant literature on reform has not systematically considered the potential of collective obligations as a basis. The assessment continued the approach of previous chapters in contextualising the subject in relation to the industry's influences. In this case, legal diversity was identified as a major obstacle. Its significance as an obstacle alleviated the necessity for assessing other obstacles such as resistance by other stakeholders.

## Conclusion

This study has sought to determine whether Shari'a Supervisory Boards have a role in realigning the Islamic finance industry with its objectives. These objectives refer to the provision of banking services compliant with Islamic law, financing economically beneficial and constructive projects, facilitating an equitable distribution of reward, the use of the bank's capabilities for social initiatives and environmental sustainability. The SSBs' ability to realign the industry with these objectives was assessed within the parameters of their responsibilities and authority, primarily that of the approval of the banks' products through *ifta'*. The study argued that SSB scholars do not possess sufficient authority to realign the industry with its objectives. This argument was based on impediments including commercial interests in the industry, the legal diversity within the SSB group, authority constraints and other shortcomings in proposed reform avenues.

The achievements of Islamic banks have been the subject of many studies given the passage of four decades since their inception and the divergence of their performance from early visions. The progress achieved on the five objectives sought from the industry by founding scholars and academics has been limited. It is largely restricted to the objectives of compliance with Islamic law and *zakat* disbursement, with contentions persisting even in these cases. In light of this performance, critics have called for a reform of the industry to achieve its founding objectives. A key medium proposed for this reform is through SSBs, given their rule-setting role. The fatwas of SSBs ultimately dictate fundamental operations of Islamic banks.

Despite the centrality of SSBs in the calls for the industry's reform, there has been no other research on their ability to drive the sought reform. Other researchers have instead addressed related or underlying topics, such as the need for SSBs to adopt particular approaches to *ifta*'. However, there remained a gap between the critics' desire for reform and the ability of SSBs to pursue it. This study therefore sought to address this gap in the literature. To this end, it incorporated three approaches that have been neglected in other studies of industry reform. The first was the adoption of a critical approach to the process of addressing the role of SSBs. The second was the use of representative evidence through a sample of up to 11 jurisdictions. The third was the recognition of diversity among the industry's stakeholders, including diversity in motives and doctrines.

The study sought to determine whether SSBs have a role in realigning the industry with its objectives through six chapters. The first chapter established that social objective have been sought by the industry by founding theorists, regulators and some banks. It also established that the industry has minimally progressed in its achievement of the social objectives. Finally, it showed the role of SSBs in causing the industry's current trajectory and thus their potential role in realigning the industry with its objectives.

The second chapter studied the SSB scholars' *ifta*' authority in legal theory, covering their remits and qualifications. It found that from a legal theory perspective, the authorities of SSB scholars vary. The legal literature bases their authority on their qualifications, a relation producing up to seven forms of authority. However, it was only the absolute

mujtahid that is authorised to derive independently from the sources of Islamic law. Legal scholarship had attributed demanding qualifications for a mufti at this level. Scholars attaining lower qualifications were instead attributed lower authorities, such as the authority to transmit fatwas instead of deriving them.

The third chapter also studied the scholars' authority through its regulation, achievement and exercise in the industry. It argued that the legitimacy of the authority of SSBs is vulnerable to challenges. This was based on findings including the following two. First, it found that regulators had required qualifications from SSB scholars that are lower than those required by legal scholars for absolute and some affiliate mujtahid profiles. Secondly, a minority of SSB scholars were found to hold qualifications below those required by regulators, whereas others were not considered by peers to be qualified.

Regulators and scholars have not justified this disparity in requirements and in the level of qualification among SSB scholars. The third chapter identified pragmatism and conflicts of interest as its drivers. Pragmatism was identified in light of the industry's need for more than 1,000 scholars, where the reduction of eligible scholars through the stipulation of demanding qualifications requirements would impede the industry's growth. The regulators' decision on SSB qualifications is therefore aligned with the banks' interest. This alignment is a potential outcome of corporatism, a trend discussed below. Such levels of qualifications were found across the surveyed jurisdictions. However, Indonesia and Malaysia were found to have mitigated the impact of lower qualifications through centralization of *ifta'*. While this can limit consequences of unqualified *ifta'*, the motives for this move could also include

other objectives such as centralization of *ifta'* authority. Separately, a conflict of interest was identified as a determinant of the existing level of qualifications through the contribution of active SSB scholars to the formation of regulations on their qualifications. Based on these findings, the third chapter argued that concerns with qualifications are likely to persist due to the absence of regulations on SSB authorities and qualifications by some regulators and due to lax enforcement by others. The first root of authority as a challenge to SSB-driven reform was thus identified.

The following three chapters studied the scholars' ability to drive reform in the industry through specific *ifta'* approaches. The principle of *maqasid al-Shari'a* was the subject of the fourth chapter. The chapter argued that the *maqasid* do not present an avenue for reform. This was based on four challenges. First, its legal frameworks were found to be insufficiently developed. Secondly, the *maqasid's* value was questioned in light of its repetition of existing legal principles and maxims. Thirdly, the *maqasid* were demonstrated to face opposition from other SSBs due to legal and theological differences. Finally, the *maqasid* and their applications were demonstrated to face opposition from influential shareholders. Despite emphasis on the *maqasid* by multiple stakeholders, the challenges restrict their enablement of industry reform.

This study showed how opposition to social objectives can stem from commercial interests in the industry. In the case of the *maqasid*, even before the consideration of commercial interests, the principle has faced opposition from other scholars. The lack of comprehension of the legal framework does not appear to have convinced enough scholars

to prioritise it over the principles of jurisprudence used by traditional schools. The absence of sufficient support from the scholar group is therefore an impediment that precedes potential rejections by shareholders or regulators.

The fifth chapter assessed whether the framework of *al-masalih al-mursala* offered SSB scholars an avenue to realign the industry with its objectives. It argued that the *masalih's* potential as a reform approach is dependent on a SSB's ability to navigate three significant authority challenges. The first was related to shareholders and the conflict of their commercial interests with some of the social objectives. The second involved governments and their authority over the determination, legislation and enforcement of the public good. The third related to the legitimacy of some scholars in light of their qualifications. Therefore, despite their validation and preceding application in the industry, the use of the *masalih* is likely to remain beyond the authority of many SSBs of Islamic banks.

Unlike the *maqasid*, challenges to the use of the *masalih* primarily concerned commercial and regulatory opposition. With their grounded legal theory and wide validation, the *masalih* are accepted by scholars. However, their minimal use by SSBs across the 11 reviewed jurisdictions reflects the opposition of states and shareholders. As for their use by regulators, Malaysia was the only jurisdiction with multiple fatwas issued based on the *masalih*, with the other fatwas being by AAOIFI and the IIFA. This restriction reflected firstly the restricted nature of fatwas issued by regulators, but also their hesitancy in publicly using the *masalih*. This hesitancy is also a possible reflection of the aforementioned authority challenges. Even then, the regulators' use focused on enabling banking practices,

indicating a capitalist inclination. This focus was despite the availability of opportunities for reform and their relevance to the *masalih*. This finding and its supporting discussion in the fifth chapter indicate that developmental reform of the industry is not a priority to key stakeholders such as shareholders and regulators. Therefore, even the involvement of SSBs is not an enabling variable.

The sixth and final chapter assessed the possibility for SSB scholars to realign the industry with its objectives through a legal responsibility to engage influential stakeholders. The legal basis of this approach was the collective obligation of *al-amr bi-l-ma'ruf and nahi 'an al-munkar*, an approach distinct from *ifta'*. The chapter argued that for four of five industry practices assessed, the legal obligation of *al-amr bi-l-ma'ruf* is unlikely to lend SSB scholars the required authority. This was due to a disparity between the industry practices and the 11 conditions that render *al-amr bi-l-ma'ruf* obligatory. While this does not prevent the scholars from engaging the stakeholders, it is only likely to present a legal responsibility for one subject.

The review of the criteria of *al-amr bi-l-ma'ruf* indicated a core challenge in its application due to legal differences. The predominance of cases where it would not be applicable in the industry suggests a virtual irrelevance of a legal duty with clear bases in scripture. The industry and even individual SSBs are host to scholars affiliating with different legal schools and fatwas have been issued combining views from multiple schools. The entrenched nature of legal diversity in the industry therefore leads to the result that a scholar either relinquishes the duty or relinquishes some of its conditions in order to

discharge it. Despite its contradiction of criteria, the latter remains a relevant option in the industry, as the existence of unqualified scholars and therefore unqualified fatwas produce opportunities for the performance of the duty by way of education.

In each of this study's three main assessments we argued that SSBs do not possess the authority to realign the Islamic finance industry with its objectives. The study's introduction showed how the industry had diverged from its objectives despite the supervision of the scholars. This study argued that this cannot be solved through other legal approaches. We do not preclude exceptions where individual scholars issue fatwas seeking to realign the industry. The fifth and sixth chapters discussed the implications of groups of scholars possessing higher influences. The status of such individuals can overcome some of the discussed resisting influences, empowering them to issue reformative fatwas. However, these individuals and such *ifta'* are exceptions and not reflective of the group. The resisting influences remain restrictive to the wider group of SSB scholars.

This study was conducted according to the guiding principle of comprehension in addressing the research question. This was achieved first through the consideration of the authority of SSBs in light of legal theory and the practice in the industry. This allowed for an understanding of both the authority of the scholars and its constraints. This is in contrast to existing literature focused on narrower dimensions, such as the *ifta'* possibilities of specific legal frameworks. The principle of comprehension was secondly sought through the examination of thousands of regulations, fatwas and standards to form an understanding of current practice. This approach provided a baseline of the applications of sought reform

approaches. It also revealed valuable insights, such as that *ifta'* approaches nominated for reform were instead applied for other purposes. The existing discourse on reform avenues for SSBs has not leveraged the sources to this end. Finally, comprehension was sought in assessing SSBs as a stakeholder group by recognising its legal and theological diversity. This recognition is critical as almost each reform approach is subject to differing opinions that influence the extent of its uptake in the industry.

The finding of this study leads to three main implications. First, the diversion of the Islamic banking industry from the identified set of objectives took place despite SSBs issuing fatwas on every product in this period. *Ifta'* through its existing approaches and practices has therefore not led the industry to its objectives. This study argued that neither can *ifta'* through the *maqasid* or the *masalih* ready avenues for reform in the industry's current state. Given the failure of both mainstream and key alternative approaches to *ifta'*, we argue that *ifta'* in its current form is not a viable avenue for the pursuit of reform in the industry. As a result, the role of SSBs in realigning the industry with its objectives is also limited. This is in light of the main responsibilities of SSBs being *ifta'* and monitoring the application of the fatwas. While individual scholars can form and issue opinions that are conducive to achieving social objectives, the different interests in the industry are preventing their proliferation. Such opinions will need critical mass in the form of a majority on a SSB, as well as supporting shareholders or regulators.

A second implication of this study relates to the opposition of influential stakeholders in the industry as an impediment to its reform. In a free market, shareholders can prioritise

the objective of profitability and neglect the social objectives at will, a scenario relevant to this study. However, reform requires the prioritisation of social objectives. While in a free market this would rely on the adoption of these objectives by willing participants, the industry is yet to be graced by such participants in an apparent manner. This presents a parameter for reform other than that through *ifta'*, where reform is sought through an Islamic bank primarily seeking social objectives. This proposition has been posited by Asutay in his proposal of recalibration towards a social banking model, and by al-Sadr in his argument for the necessity for states to establish financial intermediaries.<sup>610</sup>

This implication is also a reflection of the capitalist nature of Islamic banks and the approach of their shareholders. The capitalist approach has resulted in Islamic legal scholars being invited only to bestow upon Islamic banks the legitimacy they need to operate. In the founding period, scholars were invited to shape the offerings and operating models of the banks. However, their current mandate does not extend far beyond the certification and monitoring of their compliance. The scholars do not shape the banks' strategies, offerings or allocations. Their input and thus their fatwas are solely solicited for the necessary legitimacy. This relation reflects a subservience of the scholars and of *ifta'* to the shareholders' capitalist logic, with an occurrence and persistence reflecting an institutional logic. It also reflects an additional constraint on *ifta'*, beyond that of the state -discussed in the first chapter.

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<sup>610</sup> Asutay, "Conceptualisation of the Second Best Solution in Overcoming the Social Failure of Islamic Finance," 184-190; al-Sadr, *Iqtiṣādunā*, 719.

While the limited solicitation of scholars is a result of shareholders' capitalist logic, it also reflects the nature of regulation and thus the legal system and the state. The regulations of the 11 reviewed jurisdictions required the input of SSB scholars to a similar extent as that required by the banks. They have not enabled the scholars a remit which would allow them to influence a bank's strategy and other determinants of its social objectives. In fact, some regulators have adopted positions which indicate further alignment with shareholder interests, as indicated in the use of the *masalih* to enable banking activities rather than to drive social objectives. Their requirement of only assurance of compliance from SSBs reflects the shareholders' need and their prudential focus. These in turn indicate that regulation is limited to the enablement and oversight of commercial activity. Despite the relevance of their views on wider dimensions of Islamic law and values, the regulators have only approved their involvement in areas aligning with their capitalist logic. The reviewed regulations have not sought wider social and economic impact, indicating their capitalist inclination. The regulators' limitation of the role of SSB scholars is also an example of the modern transformation of *ifta'* institutions.

The alignment of regulations with shareholder interests can be interpreted as a facet of corporatism. The evaluation of capitalism and corporatism are beyond the scope of this study and have thus not been addressed. However, these inclinations and movements contextualise the limitation of the role of SSB scholars. In effect, the limitation of the authority of SSB scholars could be a result of the requirements of interest groups such as major institutional investors. The implications of the growth of corporatism in Muslim countries on Islamic banking warrant a separate study. Such a study would benefit from an

examination of the co-optation of Islamic political movements by some Muslim governments and the suppression of movements by other governments.

While the above indicated the importance of the role of shareholders, a similar importance can be attributed to a bank's management. As banks are not recognised as entities independent from their shareholders in Islamic law, a bank's board of directors is the representative of shareholders. The board is responsible for decisions including the appointment of management teams. Management teams are responsible for operational decisions whereas boards of directors take decisions on strategic topics. Shareholders therefore have a limited involvement in a bank's operations, but remain accountable for a bank's decisions. The achievement of the *maqasid* and the *masalih* would therefore be sought by SSBs from these three groups, as a bank is not a charged, independent entity. Similarly, the three groups would constitute the parties commanded in the duty of *al-amr bi-l-ma'ruf*. The implication relating to the role of shareholders in reforming the industry thus relates to their appointees too. The extent of this relation is dependent on shareholder involvement.

The third and final implication of this study relates to legal diversity as an impediment to its reform. Scholars and stakeholders have regarded the approaches and fatwas that precipitated the industry's current state to be legitimate. The bases of these impediments are the legal authorities of those stakeholders, granted by governments, and the wide legitimisation of scholars. Enabling such a wide participation of scholars yields the benefits

of enabling bank operations (through operational SSBs), empowering holders of minority opinions and offering banks access to favourable legal views. Despite these advantages, this approach has not supported the industry's reform. Future research on the avenues for realigning the industry with its objectives can accordingly address the retention of the existing SSB structure or the concentration of *ifta*' authority with regulators, as is the case in Indonesia.

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## Appendices

### Appendix 1

Appendix 1a: Islamic banks offering microfinance. Source URLs accessed on September 1<sup>st</sup>, 2020.

Country	Bank	Source
Bahrain	Ebdaa Bank	<a href="https://familybankbh.com/">https://familybankbh.com/</a>
	Family Bank	<a href="https://www.ebdaabank.com/en.php">https://www.ebdaabank.com/en.php</a>
	Al Baraka Islamic Bank B.S.C.	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 26.
Bangladesh	Islami Bank Bangladesh Limited	<a href="https://www.islamibankbd.com/rds/introduction.php">https://www.islamibankbd.com/rds/introduction.php</a>
	Social Islami Bank	<a href="https://www.siblbd.com/sme/">https://www.siblbd.com/sme/</a>
	Al-Arafah Islami Bank	<a href="https://www.al-arafahbank.com/Micro-Finance.php">https://www.al-arafahbank.com/Micro-Finance.php</a>
	EXIM Bank	<a href="https://www.eximbankbd.com/about/operational_area">https://www.eximbankbd.com/about/operational_area</a>
	Shahjalal Islami Bank	<a href="https://www.sjiblbd.com/investment_sbi.php">https://www.sjiblbd.com/investment_sbi.php</a>
	First Security Islami Bank	First Security Islami Bank, <i>Annual Report 2017</i> , <a href="https://www.fsiblbd.com/fsibl_document/Directors%20Report%20English%202017.pdf">https://www.fsiblbd.com/fsibl_document/Directors%20Report%20English%202017.pdf</a> , 6.
Brunei	Bank Islam Brunei Darussalam Berhad	<a href="http://www.bibd.com.bn/personal/financing/ar-rahnu-micro-financing/">http://www.bibd.com.bn/personal/financing/ar-rahnu-micro-financing/</a>
	Bank Usahawan	<a href="https://bankusahawan.com.bn/">https://bankusahawan.com.bn/</a>
Egypt	Al Baraka Bank Egypt	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 24.
	Faisal Islamic Bank	Faisal Islamic Bank, "Al-Qawaim al-Maliyya al-Mustaqilla an al-Fatra al-Muntahiya fi 30 September 2019, <a href="https://www.faisalbank.com.eg/FIB/arabic/about-us/PDF/Shareholders%20structure/takrear/sep2019.pdf">https://www.faisalbank.com.eg/FIB/arabic/about-us/PDF/Shareholders%20structure/takrear/sep2019.pdf</a> , 57.
	ADIB Egypt	<a href="https://www.adib.ae/ar/Pages/About_ADIB_International_Presence.aspx">https://www.adib.ae/ar/Pages/About_ADIB_International_Presence.aspx</a>
Indonesia	Bank Victoria Syariah	<a href="https://bankvictoriasyariah.co.id/page/detail/bank-victoria-syariah-fokus-pada-pembiayaan-ritel">https://bankvictoriasyariah.co.id/page/detail/bank-victoria-syariah-fokus-pada-pembiayaan-ritel</a>
	BTPN Syariah	<a href="https://www.btpnsyariah.com/web/guest/profil">https://www.btpnsyariah.com/web/guest/profil</a>
	Bank Syariah Bukopin	Bank Syariah Bukopin, <i>Annual Report 2018</i> , <a href="https://www.syariahbukopin.co.id/public/uploads/report/AR_BSB_2018_Web_compressed.pdf">https://www.syariahbukopin.co.id/public/uploads/report/AR_BSB_2018_Web_compressed.pdf</a> , 93.
	Bank BNI Syariah	<a href="https://www.bnisyariah.co.id/en-us/personal/financing/micro">https://www.bnisyariah.co.id/en-us/personal/financing/micro</a>
	BRI Syariah	<a href="https://www.brisyariah.co.id/detailProduk.php?l=en&amp;f=10">https://www.brisyariah.co.id/detailProduk.php?l=en&amp;f=10</a>
	Bank Syariah Mandiri	<a href="https://www.mandirisyariah.co.id/business-banking-en/micro-banking/multipurpose-micro-financing">https://www.mandirisyariah.co.id/business-banking-en/micro-banking/multipurpose-micro-financing</a>
	Bank Aceh	Bank Aceh, "Sustainability Report 2018," 116.
	Bank BJB Syariah	Bank BJB Syariah, "Pengungkapan Informasi Kuantitatif Eksposur Risiko," 2017, <a href="http://www.bjbsyariah.co.id/uploads/laporan/1532518605_Laporan_Eksposur-min.pdf">http://www.bjbsyariah.co.id/uploads/laporan/1532518605_Laporan_Eksposur-min.pdf</a> , 1.
	Bank NTB Syariah	Bank NTB Syariah, "Informasi Exposure Risiko," 2019, <a href="https://www.bankntbsyariah.co.id/assets/laporan/Laporan_Exposure_Risiko_2019.pdf">https://www.bankntbsyariah.co.id/assets/laporan/Laporan_Exposure_Risiko_2019.pdf</a> , 1a.
	BCA Syariah	<a href="https://www.bcasyariah.co.id/produk/pembiayaan/pembiayaan-umkm-bina-usaha-rakyat-bur/">https://www.bcasyariah.co.id/produk/pembiayaan/pembiayaan-umkm-bina-usaha-rakyat-bur/</a>

Appendix 1a: Islamic banks offering microfinance. Source URLs accessed on September 1<sup>st</sup>, 2020 (continued)

Country	Bank	Source
Indonesia	Bank Mega Syariah	Bank Mega Syariah, "Pengungkapan Informasi Kuantitatif Eksposur Resiko," 2017, <a href="http://www.mega-syariah.co.id/files/reports/eksposur/Informasi_Kuantitatif_Eksposeur_Resiko_Desember_2017_.pdf">http://www.mega-syariah.co.id/files/reports/eksposur/Informasi_Kuantitatif_Eksposeur_Resiko_Desember_2017_.pdf</a>
	Bank Muamalat	Bank Muamalat, "Pengungkapan Informasi Kuantitatif Eksposur Risiko," 2018, <a href="https://www.bankmuamalat.co.id/uploads/hubungan_investor/1_pengungkapan-informasi-kuantitatif-eksposur-risiko-juni-2018.pdf">https://www.bankmuamalat.co.id/uploads/hubungan_investor/1_pengungkapan-informasi-kuantitatif-eksposur-risiko-juni-2018.pdf</a> .
	Panin Dubai Syariah Bank	<a href="https://www.paninbanksyariah.co.id/document/informasi_kuantitatif/Informasi%20Kuantitatif_PDSB_Jun_2018.pdf">https://www.paninbanksyariah.co.id/document/informasi_kuantitatif/Informasi%20Kuantitatif_PDSB_Jun_2018.pdf</a>
Jordan	Jordan Islamic Bank	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 23.
	Ethmar	<a href="http://www.ethmar.jo/DeTiles.aspx?Ing=2&amp;newsID=2">http://www.ethmar.jo/DeTiles.aspx?Ing=2&amp;newsID=2</a>
Lebanon	Al Baraka Bank Lebanon S.A.L.	<a href="https://www.al-baraka.com/en/ProductsAndServices/IndividualBanking/retail-financing/10/al-baraka-mihnati">https://www.al-baraka.com/en/ProductsAndServices/IndividualBanking/retail-financing/10/al-baraka-mihnati</a>
	Bank Muamalat Malaysia Berhad	<a href="http://www.muamalat.com.my/downloads/consumer-banking/product-disclosure-sheet/2017/3P_for_BNM_Micro_Financing_PDS.pdf">http://www.muamalat.com.my/downloads/consumer-banking/product-disclosure-sheet/2017/3P_for_BNM_Micro_Financing_PDS.pdf</a>
	CIMB Islamic Bank Berhad	<a href="https://www.cimbislamic.com/en/newsroom/2019/cimb-offers-holistic-solutions-to-smes-on-track-to-disburse-rm15-billion-to-100000-smes-in-malaysia.html">https://www.cimbislamic.com/en/newsroom/2019/cimb-offers-holistic-solutions-to-smes-on-track-to-disburse-rm15-billion-to-100000-smes-in-malaysia.html</a>
	MBSB Bank Berhad	<a href="https://www.mbsbbank.com/en/mjourney/corporate">https://www.mbsbbank.com/en/mjourney/corporate</a>
	Public Islamic Bank Berhad	<a href="https://www.publicislamicbank.com.my/Business-Banking/Financing/Microfinancing/Microfinancing">https://www.publicislamicbank.com.my/Business-Banking/Financing/Microfinancing/Microfinancing</a>
Maldives	Maldives Islamic Bank	<a href="https://www.mib.com.mv/financing/business/business-credit-guarantee-scheme">https://www.mib.com.mv/financing/business/business-credit-guarantee-scheme</a>
	Bank of Maldives	<a href="https://www.bankofmaldives.com.mv/islamic-banking/personal-banking/bml-islamic-personal-financing">https://www.bankofmaldives.com.mv/islamic-banking/personal-banking/bml-islamic-personal-financing</a>
	Al Akhdar Bank	<a href="http://www.alakhdarbank.ma/#services">http://www.alakhdarbank.ma/#services</a>
Nigeria	Jaiz Bank	<a href="https://jaizbankplc.com/jaiz-product-and-services/corporate-banking/jaiz-bank-msmes-financing/">https://jaizbankplc.com/jaiz-product-and-services/corporate-banking/jaiz-bank-msmes-financing/</a>
Pakistan	Al Baraka Bank (Pakistan) Limited	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 31.
Saudi Arabia	Al Rajhi Bank	<a href="https://www.alrajhibank.com.sa/en/alrajhi-group/media-center/press-releases/jana-center-support">https://www.alrajhibank.com.sa/en/alrajhi-group/media-center/press-releases/jana-center-support</a>
	Bank Aljazira	Bank Aljazira, "Board of Directors Report 2018," <a href="https://www.baj.com.sa/Portals/0/OpenContent/Files/604/BAJ_BOD_report-en.pdf">https://www.baj.com.sa/Portals/0/OpenContent/Files/604/BAJ_BOD_report-en.pdf</a> , 42.
	Bank Albilad	Bank Albilad, "Annual Report 2018," <a href="https://www.bankalbilad.com/Documents/boardscv2019/Albilad%20Annual%20Report%202018_English%20draft%201.pdf">https://www.bankalbilad.com/Documents/boardscv2019/Albilad%20Annual%20Report%202018_English%20draft%201.pdf</a> , 36.
	Riyad Bank	Riyad Bank, "Annual Report 2017," <a href="https://www.riyadbank.com/en/Images/Riyad-Bank-Annual-Report-2017-en_tcm8-15190.pdf">https://www.riyadbank.com/en/Images/Riyad-Bank-Annual-Report-2017-en_tcm8-15190.pdf</a> , 37.

AlAhli NCB

<https://www.alahli.com/en-us/about-us/csr/pages/alahli-job-opportunities-programs.aspx>*Continued*Appendix 1a: Islamic banks offering microfinance. Source URLs accessed on September 1<sup>st</sup>, 2020 (*continued*)

Country	Bank	Source
<b>South Africa</b>	Al Baraka Bank Limited - South Africa	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 29.
<b>Sudan</b>	Al Baraka Bank Sudan	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 27.
	Farmer's Commercial Bank	<a href="http://www.fcbsudan.com/fcbsudanNEW/EN/package.php?subcatid=27">http://www.fcbsudan.com/fcbsudanNEW/EN/package.php?subcatid=27</a>
	Omdurman National Bank	<a href="https://www.onb-sd.com/index.php/ar/pages/details/299">https://www.onb-sd.com/index.php/ar/pages/details/299</a>
	Bank of Khartoum	<a href="https://bankofkhartoum.com/sudan/microfinance/">https://bankofkhartoum.com/sudan/microfinance/</a>
	The Agricultural Bank of Sudan	<a href="http://www.abs.sd/ABS.SD/abscontl?action=handlepages2&amp;modid=21">http://www.abs.sd/ABS.SD/abscontl?action=handlepages2&amp;modid=21</a>
	Al Jazeera Sudanese Jordanian Bank	<a href="http://www.aljazeeraabank.com.sd/index.php/ar/home/services_details/18/4">http://www.aljazeeraabank.com.sd/index.php/ar/home/services_details/18/4</a>
	Saudi Sudanese Bank	<a href="http://saudisb.sd/goals/">http://saudisb.sd/goals/</a>
	United Capital Bank	<a href="https://www.bankalmal.net/index.php/ar/home/service_details/115">https://www.bankalmal.net/index.php/ar/home/service_details/115</a>
	Sudanese Egyptian Bank	<a href="http://www.sebank.sd/ar/">http://www.sebank.sd/ar/</a>
	Workers National Bank	<a href="http://wnb-sd.com/index.php/ar/aboutus/details/9">http://wnb-sd.com/index.php/ar/aboutus/details/9</a>
	Arab Sudanese Bank	Arab Sudanese Bank, "Annual Report 2018," <a href="https://www.arabsudanesebank.com/ar/2018_eng.pdf">https://www.arabsudanesebank.com/ar/2018_eng.pdf</a> , 13.
	El-Nilein Bank	<a href="http://nileinuae.com/current-accounts-3/?lang=ar">http://nileinuae.com/current-accounts-3/?lang=ar</a>
<b>Syria</b>	Al Baraka Bank Syria S.A.	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 33.
<b>Tanzania</b>	Amana Bank	<a href="https://www.amanabank.co.tz/banking/solidarity-group-financing">https://www.amanabank.co.tz/banking/solidarity-group-financing</a>
<b>Tunisia</b>	Al Baraka Bank Tunisia	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 25.
	Banque Zitouna	<a href="http://www.banquezitouna.com/fYnKl/Ar/%D8%A7%D9%84%D9%85%D8%B3%D8%AA%D8%AC%D8%AF%D8%A7%D8%AA_7_11_D73">http://www.banquezitouna.com/fYnKl/Ar/%D8%A7%D9%84%D9%85%D8%B3%D8%AA%D8%AC%D8%AF%D8%A7%D8%AA_7_11_D73</a>
<b>Turkey</b>	Albaraka Turk Katılım Bankası A.S.	Al Baraka Banking Group B.S.C., "Sustainability & Social Responsibility Report 2017," 28.
	Kuveyt Türk Participation Bank	Fitch Ratings, "Kuveyt Türk Katılım Bankası A.Ş.," <a href="https://www.kuveytturk.com.tr/medium/document-file-313.vsf">https://www.kuveytturk.com.tr/medium/document-file-313.vsf</a> , 2.
	Turkey Finans Participation Bank	Turkey Finans Participation Bank, "Annual Report 2015," <a href="https://www.turkiyefinans.com.tr/Lists/BagimsizDenetimRaporlariEN/Attachments/12/TURKIYE%20FINANS_2015_ENG.PDF">https://www.turkiyefinans.com.tr/Lists/BagimsizDenetimRaporlariEN/Attachments/12/TURKIYE%20FINANS_2015_ENG.PDF</a> , 38.
	Vakıf Participation Bank	Vakıf Participation Bank, "Annual Report 2017," <a href="https://www.vakifkatilim.com.tr/Documents/financial-reports/2017/Annual-Report-2017.pdf">https://www.vakifkatilim.com.tr/Documents/financial-reports/2017/Annual-Report-2017.pdf</a> , 21.

Appendix 1b: Islamic banks that do not offer microfinance according to product and service offerings on their websites.

Country	Bank
<b>Bahrain</b>	Bank ABC Islamic
	Ithmaar Bank
	Al Salam Bank
	KFH Bahrain
	Bahrain Islamic Bank
<b>Afghanistan</b>	Islamic Bank of Afghanistan
<b>Bangladesh</b>	Union Bank
	ICB Islamic Bank
<b>Brunei</b>	TAIB (Perbadanan Tabung Amanah Islam Brunei)
<b>Indonesia</b>	Bank Net Syariah
<b>Iraq</b>	National Islamic Bank
	Cihan Bank
	Elaf Islamic Bank
	International Islamic Bank
	Iraqi Islamic Bank
<b>Jordan</b>	Al Rajhi Bank
	Islamic International Arab Bank
	Safwa Islamic Bank
<b>Kuwait</b>	Kuwait Finance House
	Warba Bank
	Ahli United Bank
	Kuwait International Bank
	Boubyan Bank
<b>Lebanon</b>	Blom Bank
	Lebanese Islamic Bank
	Arab Finance House
<b>Malaysia</b>	Affin Islamic Bank Berhad
	Al Rajhi Banking & Investment Corporation (Malaysia) Berhad
	Alliance Islamic Bank Berhad
	AmBank Islamic Berhad
	Bank Islam Malaysia Berhad
	HSBC Amanah Malaysia Berhad
	Hong Leong Islamic Bank Berhad
	Kuwait Finance House (Malaysia) Berhad
	Maybank Islamic Berhad
	OCBC Al-Amin Bank Berhad
	RHB Islamic Bank Berhad
	Standard Chartered Saadiq Berhad

Country	Bank
<b>Mauritania</b>	Banque Populaire de Mauritanie
	Banque Al Wava Mauritanienne Islamique
	Banque El Amana
	Bank Al Mouamalat As-Sahiha
	Arreda
<b>Morocco</b>	bti Bank
	Bank al Youshr
	Umnia Bank
	Bank Assafa
<b>Oman</b>	Bank Nizwa
	Alizz Islamic Bank
<b>Pakistan</b>	Meezan Bank
	Bank Alfalah
	BankIslami
	National Bank or Pakistan
	DIB Pakistan
<b>Qatar</b>	Qatar Islamic Bank
	Masraf Al Rayan
	Barwa Bank
	Qatar International Islamic Bank
<b>Saudi Arabia</b>	Alinma Bank
	Arab National Bank
<b>Sudan</b>	First Abu Dhabi Bank
	Financial Investment Bank
	Qatar National Bank Sudan
	Tadamon Islamic Bank
	Blue Nile Mahsreg Bank
<b>Tunisia</b>	Wifak Bank
<b>United Arab Emirates</b>	Dubai Islamic Bank
	Emirates Islamic Bank
	Sharjah Islamic Bank
	Commercial Bank of Dubai
	Noor Bank
	Ajman Bank
	Al Hilal Bank
<b>United Kingdom</b>	Al Rayan Bank
	Gatehouse Bank
	Bank of London and The Middle East



## Appendix 2

### Findings of the survey of the practice of ijtiḥad in the fatwas of SSBs

Surveyed Banks	Country	Publication Form	Language	Period of fatwa issuance	Identified <i>ifṭā'</i> methods	Transmission basis	Available fatwas	Reviewed fatwas	Sample size*	Derived fatwas*	Other statements
Al Rajhi Bank	Saudi Arabia	Collection of fatwas	Arabic	1989-2009	Derivation & transmission	IIFA, scholars	826	822	10	6	1
Bank Nizwa	Oman	Individual Product certification	Arabic, English	2015	Statement of compliance	AAOIFI Shari'ah Standards	7	7	-	-	-
Dubai Islamic Bank	UAE	Collection of fatwas	Arabic	-	Derivation & transmission	Scholars	83	83	6	5	
Al Salam Bank	Bahrain	Collection of fatwas	Arabic	2009-2016	Transmission	AAOIFI, conference, scholars	54	54	2	-	-
Kuwait Finance House	Kuwait	Collection of fatwas	Arabic	Published 1986	Derivation & transmission	Scholars	532	37	10	6	-
Qatar Islamic Bank	Qatar	Collection of fatwas	Arabic	-	Derivation & transmission	Conference, scholars	79	79	7	3	-
Al Rayan Bank	UK	Individual Product certification	English	2015	Statement of compliance	-	18	18	-	-	-
Meezan Bank	Pakistan	Individual Product certification	English	2010	Statement of compliance	-	1	1	-	-	-

\*The survey targeted a sample of ten fatwas where the scholars explicitly reveal whether their decision is based on ijtiḥad or the transmission of an existing fatwa

### Appendix 3

List of modules for programs in jurisprudence (*fiqh* or *shari'a*) at universities most attended by surveyed SSB scholars

Category	Modules	Undergraduate				Higher degrees	
		Al-Azhar	IIUM	University of Malaya	IMSIU	Jamia Darululoom	IIUI
Quran	Exegesis			✓		✓	
	Exegesis: Legislating verses	✓		✓	✓		
	Quran	✓	✓	✓	✓		
	Quran memorisation		✓	✓			
Hadith	Hadith studies	✓	✓	✓		✓	
	Hadith terminology				✓		
	Hadith ascription				✓		
	Hadith: Legislative	✓		✓			
	Hadith: Multiple modules on worship, the family institution, punishment and judiciary				✓		
	Hadith: Transactions				✓		
Principles of jurisprudence	Ijtihad and <i>ifta'</i>		✓	✓	✓		
	Ijtihad and reform studies		✓				
	Interpretation of textual evidence		✓		✓		
	Methods of legal deduction		✓		✓	✓	✓
	Methods of the jurists			✓			
	Principles of jurisprudence	✓	✓		✓		
	Principles of jurisprudence: Approaches in humanities; Critical reading; History; Maxims; Schools of Thought	✓	✓				
	Studies in <i>ijma'</i> and <i>qiyas</i>			✓			
	' <i>Urf</i> (custom) and <i>maslaha</i>			✓			

Continued

List of modules for programs in jurisprudence (*fiqh* or *shari'a*) at universities most attended by surveyed SSB scholars (*continued*)

Category	Modules	Undergraduate				Higher degrees	
		Al-Azhar	IIUM	University of Malaya	IMSIU	Jamia Darululoom	IIUI
Jurisprudence	Evidence of legal rules		✓		✓		
	History of Islamic law				✓		
	Jurisprudence	✓	✓		✓	✓	✓
	Jurisprudence: Academic exercises		✓				
	Jurisprudence: Comparative	✓	✓	✓			
	Jurisprudence: Contemporary topics	✓	✓		✓		✓
	Jurisprudence: Financial contracts		✓		✓		
	Jurisprudence: Governance			✓			
	Jurisprudence: Inheritance and Endowment		✓	✓			
	Jurisprudence: Other modules on crime and punishment, family institution, food and oaths, judiciary, worship, international relations, polity		✓	✓	✓		✓
	Jurisprudence: Transactions		✓	✓	✓		
	Jurisprudence: Zakat		✓	✓			
	Jurisprudential cases		✓		✓		✓
	Legal Maxims and Juristic Variations	✓	✓	✓	✓		
The Arabic language	Arabic for Islamic Studies		✓	✓			
	Arabic language: Grammar	✓			✓		
	Arabic language: Literature	✓			✓		
	Arabic language: Morphology	✓					
	Arabic language: Rhetoric	✓					
	Semantic indication				✓		
Economics and finance	Banking and financial markets		✓	✓			
	Contemporary transactions			✓			
	Foundations of economics				✓		
	Contemporary fiscal issues and Shariah standards						✓
	Islamic economics			✓		✓	
	Islamic finance			✓			
Others	Islamic ethics		✓				
	Islam's values and characteristics				✓		
	Logic						✓
	Objectives of the Shari'ah		✓	✓	✓		

	The life of Prophet Muhammad		✓		✓	✓	
	Theology	✓	✓	✓	✓		

## Appendix 4

### Central Shari'a board scholars and the status of their concurrent roles on SSBs of commercial Islamic banks

Does the scholar serve on a SSB of a commercial Islamic bank?		
AAOIFI Shariah Drafting Committee <sup>611</sup>	Sheikh Dr. Abdul Sattar Abu Ghuddah	✓
	Sheikh Dr. Mohamed Ali Al Qari	✓
	Sheikh Dr. Yousef Abdullah Al-Shubaily	✓
Bank Negara Malaysia <sup>612</sup>	Datuk Dr. Mohd Daud Bakar	✓
	Prof. Dr. Ashraf Md. Hashim	
	Dato' A. Aziz A. Rahim	
	Prof. Dr. Mohamad Akram Laldin	✓
	Prof. Dr. Engku Rabiah Adawiah Engku Ali	
	Encik Burhanuddin Lukman	
	Dr. Marjan Mohamad	
	Encik Zainal Abidin Jamal	
	Sahibus Samahah Dato' Dr. Haji Anhar Haji Opir	
Central Bank of Oman <sup>613</sup>	Shaikh Dr. Kahlan Bin Nabhan Al Kharoosi	
	Shaikh Dr. Abdullatif bin Mahmood Al Mahmood	✓
	Dr. Said Bouheraoua	✓
	Mr. Ahmed Suhaimi bin Yahya	✓
	Dr. Yaqoob bin Mohammed Al Waily	
State Bank of Pakistan <sup>614</sup>	Mufti Irshad Ahmad Aijaz	✓
	Dr. Noor Ahmed Shahtaz	✓
	Ayatullah Shabbir Hasan Lakhani (Maisami)	
Central Bank of the UAE <sup>615</sup>	Sheikh Prof. Dr. Jassim Ali Al Shamsi	✓
	Sheikh Issam Muhamad Ishaq	✓
	Sheikh Dr. Aznan Hasan	✓
	Sheikh Dr. Usaid Muhammad Adeeb Al Kilani	
	Sheikh Dr. Ahmed Bin Abdulaziz Al Haddad	

<sup>611</sup> "Drafting Committee," AAOIFI, accessed August 17<sup>th</sup>, 2020, <http://aaoifi.com/drafting-committee/?lang=en>.

<sup>612</sup> "Shariah Advisory Council," Bank Negara Malaysia.

<sup>613</sup> "Supervisory Authority at the Central Bank of Oman," *Times of Oman*, accessed August 17<sup>th</sup>, 2020, <https://timesofoman.com/article/49160/business/supervisory-authority-at-the-central-bank-of-oman>.

<sup>614</sup> "Shariah Advisory Committee," State Bank of Pakistan, accessed August 17<sup>th</sup>, 2020, <http://www.sbp.org.pk/IB/shariah.asp>.

<sup>615</sup> "The Higher Sharia Authority at the Central Bank Held A Consultation Meeting with The Members of the Internal Sharia Control Committees Prior to Its Fifth Meeting," Central Bank of the UAE, accessed August 17<sup>th</sup>, 2020, <https://www.centralbank.ae/sites/default/files/2018-10/PressRealse16092018.pdf>.