

# Judicial Decision-Making in Islamic Banking and Finance

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**Abstract**— In response to the criticism and scant discussion of judicial decision-making in Islamic jurisprudence this paper analyzes the judicial decision-making of the jurists on Shari’ah Supervisory Boards. First the paper provides a background into Islamic banking and the legal framework of the Shari’ah. Second paper examines two methods of judicial-decision making, legalism and the economic theory, as applied to Islamic jurists. Although viewed as distinct theories, I argue that the holistic nature of the Shari’ah inevitably weaves the two methods together. Finally, the paper calls for a broader discussion on whether Western theories of judicial decision-making, and therefore concepts of legal realism, should be used to analyze Islamic jurists.

**Keywords**-judicial decision-making, *ijtihad*; legalism; *fatwa*; *fiqh*, legal theory

## I. INTRODUCTION: AN OVERVIEW OF THE SHARI’AH AND ISLAMIC BANKING

This paper aims to establish a framework and begin a dialogue for understanding, analyzing, and predicting the judicial decision-making process regulating the Islamic banking industry. The Islamic banking industry’s estimated value is over a trillion dollars and has been growing ten percent per year since the 1990’s [20]. Yet Islamic banking practices are almost entirely regulated by a select group of jurists and judicial institutions that decide whether or not a financial product, transaction, or contract is lawful under the Shari’ah [20] [48]. Generally these decisions are in the form of a single *fatwa*, or judicial opinion.

It is my understanding that the judicial decision-making of these private jurists is highly legalistic, and that a legalist method is the best way to assess and predict judicial outcomes. However I will make an attempt at critical analysis by exploring the economic theory of judicial decision-making and discussing the need for social-science based approaches founded on empirical research, as there are social and psychological factors that may influence rulings. While this article is written primarily for those seeking a deeper understanding of judicial decision-making in Islamic banking, there is also secondary purpose to the article that seeks to begin a constructive dialogue among scholars of Islamic

jurisprudence<sup>1</sup> as to whether or not a critical analysis of modern Islamic judicial decision-making is necessary, helpful, or even appropriate.

### A. *Why the Study of Judicial Decision-Making in Islamic Jurisprudence Regarding Banking and Finance is Important.*

Thus far the study of Islamic banking and finance law by Western and most Islamic scholars has focused primarily on “what” is and is not permissible under the *Shari’ah*. However there has been little research in regards to the “how” and “why” jurists are reaching these outcomes and the process that takes them to their legal conclusion. If there is something other than a legalistic approach being used the question becomes how big an influence is it and whether or not other approaches should be discussed among practitioners of, and actors in, the world of Islamic banking law.

If not adopted as a form of national governance, like in Saudi Arabia, the *Shari’ah* is binding on only those who accept it [12] [9].<sup>2</sup> For the most part it is up to the individual, or bank, to regulate his or her own actions in accordance with the *Shari’ah*. So while Islamic banks may operate globally they are expected that to follow religious guidelines of the *Shari’ah* even when engaging in business within secular nations [35]. This concept expands the jurisdiction and role of the jurist in Islamic banking, making the study of his judicial decision-making process all the more important. It also increases the importance of studying Islamic jurisprudence in Western law schools<sup>3</sup> because Islamic financial products, and the contracts that accompany them may begin to appear more frequently in Western litigation following the recent political shifts in the Middle East [35].

<sup>1</sup> Jurisprudence is the “process by means of which jurists derive sets of guidelines rules and regulations Islamic from the principles of the Qur’an and the Sunnah” [22].

<sup>2</sup> Al-Fahad discusses Saudi’s adoption of *Hanbali fiqh* under a strict, now loosened, “*Wahhabi*” interpretation.

<sup>3</sup> “As Professor W. M. Ballantyne notes, ‘Even where the Shari’a is not applied in current practice, there could be a reversion to it in any particular case. Without doubt, knowledge of the Shari’a will become increasingly important for practitioners, not only in Saudi Arabia, but in the other Muslim jurisdictions’” [35].

Although research leads me to believe that the legalist method is the primary form of judicial decision-making, testing the other models of judicial decision-making remains relevant as a means of supporting my initial belief. Therefore I am suggesting a dialogue as to whether other approaches, including economic models, applied by scholars studying decision-making of United State's federal judges should be applied to Islamic jurists who regulate the Islamic financial market [15].<sup>4</sup> Because the role of the jurist in both legal realms is essentially the same, (as in both types of jurists decide what is and is not lawful conduct within the confines of the law) it is possible that other theories used to analyze judicial decision-making through social sciences may also be applicable in understanding and predicting Islamic judicial decisions. This is important for numerous reasons, principally because the Islamic banking industry is continuously growing and intends on expanding its cliental basis to religious Muslims in secular Western nations reaching a projected worth of four trillion dollars [20] [13]. Unfortunately, businesses and investors dislike the degree of uncertainty caused by the jurist's ability to reconsider rulings [48]. Therefore in order to create more confidence in the Islamic market it is crucial that judicial decisions regarding financial products are predictable, stable, and representative of future decisions on similar legal issues [48].

In order to illustrate this point I will provide an example of how a single and unforeseen judicial decision by a prominent jurist can create a shift in the Islamic market place.

In November 2007, an Islamic finance scholar, Sheikh Muhammad Taqi Usmani, questioned whether the issuance of *sukuk*<sup>5</sup> was technically in compliance with the fundamental prohibition against interest. Usmani stated in a policy paper, "The time has come to revisit this matter, and rid *sukuk* of these blemishes." These "blemishes" include, among other things, the now-common practice of marketing asset-backed returns on the basis of the LIBOR rate benchmark, which is a "corruption" according to Usmani... Up to the time that Usmani released this statement, *sukuk* had been considered the backbone of Islamic finance and had allowed the system to grow and expand into more traditional investment arenas.

<sup>4</sup> In his research, Baum reviews legal, attitudinal, and strategic models.

<sup>5</sup> "Sukuk are investment certificates. Sometime they represent 'ownership' in the assets underlying the issue. Those with variable returns are based on *mudarabah* or *musharakah*. More popular are those with pre-determined, fixed incomes. The simplest of these is the one based on *ijarah*, i.e., lease or hire. A building (or an oil tanker) is purchased and rented out, the money capital for the purchase having been mobilized by selling certificates. Owners of these certificates would be entitled to receive a portion of the rent income" [52].

After Usmani's pronouncement, *sukuk* issuances dropped off dramatically. While many acknowledge that at least some of this decline may be attributed to the overall decline of worldwide financial markets, it is likely that Usmani's comments also contributed to the trend. Commentators, scholars, and investors were widely surprised and alarmed by how a single speech could set back progress and investment in a product that had proven so successful in recent years [48].<sup>6</sup>

The example above demonstrates the need to study and understand the decision-making process as well as the influences and motivations on this select group of jurists and judicial institutions. Understanding how Sheikh Usmani reached his decision regarding *sukuk* can be best analyzed through the legalist method as applied in Islamic jurisprudence, which I will lay out later in the paper. However one may also try and look at the Sheikh's decision through other means of critical analysis, like the economic method, to find possible motivators for the timing of the opinion. In order to present those methods of judicial decision-making it is important that the reader understand the basics of the *Shari'ah*, Islamic banking, and the jurists regulating the trade.

#### B. The *Shari'ah* Generally

First, a disclaimer. This is a very broad and simplistic overview of a fourteen hundred year old legal tradition that encompasses *all* the earthly and divine aspects of an individual's life [22]. This section is intended to give the reader a basic overview of the *Shari'ah* in order to comprehend latter analysis of the legalist method in Islamic jurisprudence. Moreover I will focus only on *Sunni* legal tradition and schools simply because Islamic banks governed by *Sunni* Islamic jurisprudence and jurists are more prevalent [33] [35].<sup>7</sup> Further research is suggested to those interested in the specific mechanisms of the *Shari'ah* mentioned here, as no single article could sufficiently articulate the workings of any legal system [16].

*Shari'ah* is can be translated in two ways: first, religiously as "God's eternal immutable will for humanity," a Divine law encompassing all the spiritual and the mundane, and second by as "Islamic law."<sup>8</sup> The former is more appropriate because while the *Shari'ah* is often legal in nature it sees a sacred component to *all* actions taken throughout ones existence and therefore *all* actions, including contracts or financial transactions, are subject to religious legal analysis and

<sup>6</sup> Sheikh Usmani's full opinion can be, and should be, downloaded from his website [53] for a better understanding of *sukuk* and the jurists role in the Islamic finance market.

<sup>7</sup> In this regard, Kettell cites [18].

<sup>8</sup> The Oxford Dictionary of Islam, unlike Christian legal traditions Islam see's no separation between the sacred and the profane, all acts are encompassed and categorized under the *Shari'ah* [26].

categorization [33]. Contrary to the Western idea of an “Islamic Law” the *Shari’ah* is not codified, nor is there a singular vision on the various legal subjects within it [41]. For the purposes of this article, and in order to avoid more complex theological issues, this article will refer to the *Shari’ah* as a holistic Islamic law given by God and exemplified through his Prophet Muhammad as understood by scholars and jurists and applied in Islamic societies throughout history. Implementation, understanding, and development of the *Shari’ah* has differed over time and often changes in various regions of the world [51]. Like other legal traditions there are different schools of thought, legal theories, and “splits in the Courts” so to speak.

Despite the perceived rigidity of religious law, individuals or institutions who choose the path of the *Shari’ah* have some leeway in following the law as it is often the case that differing judicial opinions will create areas where stricter or looser observance of a particular rule are both equally valid [12]. This is not to suggest that Islamic jurists decide “arbitrarily” as orientalist and a Supreme Court justice have suggested [47],<sup>9</sup> but rather that there is the possibility of having differing yet equally valid legal rules on a particular issue [12]. The concepts of pluralism and public choice, described by Liaquat Ali Khan as elements of the “free-markets” of Islamic jurisprudence will be discussed later as possible influences on the judicial decision-making process [12] [28].

Differing opinions are often caused by the fact that jurists in different regions may study legal theory under different schools of law [12]. In *Sunni* Islamic Jurisprudence there are four main schools of law that were developed in the early eighth and ninth centuries [51]. These four schools or *madhhabs* (literally paths) are still predominant today and the early treatises of their founders are often cited as theoretical basis in *fatwas*<sup>10</sup> regarding Islamic Banking [46]. The four schools are *Hanafi*, *Maliki*, *Hanbali*, and *Shafi’i* named after the founding jurist [31]. For the most part the schools agree on nearly every major aspect of the *Shari’ah*, however, despite reaching similar legal conclusions, their legal theories and methods of interpretation differ.<sup>11</sup> It is often the case that one

school of law is predominant in a region; such rules and theories of one school are preferred over the other schools. For example the law of Saudi Arabia is entirely based on *Hanbali fiqh*, or substantive law [9].

### 1) Fiqh

The Western idea of an Islamic law is better expressed through the term *fiqh*. *Fiqh* is the substantive aspect of the *Shari’ah* in which clear legal rules are formed and derived from the *Shari’ah* sources, and unlike the *Shari’ah*, *fiqh* is mutable [26]. *Fiqh* is the *Shari’ah* as understood and declared by the jurists and therefore it is fallible [26] [47]. It is the “science of the *Shari’ah*” and contains judicial articulations of the law set forth by God and the Prophet [33]. The categorizations of lawful and unlawful acts are most easily found in the volumes of *fiqh* written by jurists and legal scholars rather than the *Shari’ah* sources like the Qur’an where rules are more ambiguous [47] [30]. *Fiqh* should not be confused with *siyasa*, or state legislation [51] [46].

Under the *Shari’ah* all actions fall under five categories: 1.) *Wajib*- an obligatory duty, the omission of which is prohibited and punishable [33]. 2.) *Mustahab*- an action that is rewarded or recommended but omission of which is not prohibited or punishable [33]. 3.) *Mubah*- a permissible act of which the *Shari’ah* is indifferent [33]. 4.) *Makruh*- an act that is disliked and should be avoided; avoidance of the act is rewarded but commission of it is not prohibited or punishable [33]. 5.) *Haram*- an action that is prohibited and intentional commission of the act is punishable [33]. Categories one through four are *halal*, meaning they are lawful (or permissible) even if disliked, unless it is *wajib* where omission of an act is unlawful. It is the role of the jurist to define which financial products or transactions are *halal* and which are *haram* under the *Shari’ah*.

While the *Shari’ah* is often described as “jurists law,” the jurist can only seek to understand and expand applications of the law given by God and the Prophet Muhammad who comprise the sole legislative body [14]. The jurist states what the accepted law is, or should be, on a matter often deciding whether something is *halal* or *haram*. However when a novel issue arises the role of the jurist has best been best described as “searching” for the law rather than creating it, and thus a new rule is *found* instead of manufactured [55].

orthodoxy formed around those private scholars who distinguished themselves by education, dialectical skill, and popularity with students and the public who consulted them. Over the years, many schools of law emerged as students collected the lectures and legal opinions of influential jurists and eventually wrote commentaries upon them. With a sufficient number of disciples preserving and expanding the work of a particular jurist (and especially when accompanied by popular and other external support), that jurist's corpus of opinions and accompanying legal methodology became known as a ‘madhhab’” [46].

<sup>9</sup> “Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting). In reference to Justice Frankfurter referring to an Islamic jurist deciding arbitrarily beneath a tree. “Frankfurter's imagery undoubtedly was inspired by the judicial archetypes devised by Max Weber, who described uncontrolled judicial discretion as “kadi justice”” [47]. Kadi's or Qadi's are Islamic Jurists appointed to a State judgeship and were inaccurately portrayed by Orientalists as arbitrary decision makers.

<sup>10</sup> I am aware that “*Fatawa*” is the proper Arabic plural, however in order to create ease and limit confusion I opted for an Anglicized plural where the “s” creates distinction more noticeable to Western readers.

<sup>11</sup> “Over time, the legal methods and conclusions of the most influential scholars evolved into distinct schools of thought. Because Muslims never created a formal church, Islamic legal

The sources the jurists search and find the laws within are primarily the Holy Qur'an, the literal word of God, and the *Sunnah*, which are the sayings (*hadith*) and actions of the Prophet [14]. The Qur'an and the *Sunnah* are considered the primary sources of the *Shari'ah* and secondary sources, like *fiqh* manuals, cannot contradict them [14]. The Qur'an only contains roughly 500 verses with legal substance out of the 6,239 verses that make up its entirety [14].<sup>12</sup> The normative verses discuss a wide range of legal subjects that can be broken up into two general categories, *ibadat* and *mu'amalat* [14]. *Ibadat* pertains to those actions in the spiritual realm, prayer, fasting and so on. *Mu'amalat* deals with social interactions in nature like contracts, wills, and *riba* [14]. *Riba* is the concept of interest that is explicitly prohibited by God in the Qur'an and is the underlying unlawful (*haram*) custom that Islamic banks seek to avoid [26].

## 2) Secondary Sources of Law

While the Qur'an offers the basic guidelines many norms and rulings in Islamic jurisprudence are based on or explained by the *Sunnah* [14]. The substance of the *Sunnah* is comprised of sayings uttered by the Prophet, and descriptions of his conduct by his companions and family [14]. The purpose of using the *Sunnah* is to clarify and expand on the few laws provided by the Qur'an and find rules on legal issues where the Qur'an is silent. In theory the *Sunnah* cannot contradict the Qur'an for use in legal matters. The same categorizations of *ibadat* and *mu'amalat* also apply to rules derived from the *Sunnah*. More often than not the Qur'an and the *Sunnah* do not explicitly state what the law is but rather contain the basis for the rule [14]. However, if the law stated in the two primary sources is explicitly clear it is absolutely immutable by any work of a jurist [11]. Thus secondary sources are used to expand, but not contradict, the law contained in the primary sources where the jurists search for rules [14].

Secondary sources of the *Shari'ah* include: *Ijma* which is a consensus among scholars on a legal issue; *Qiya*'s which is the deduction or induction of a rule by analogy to the Qur'an and the *Sunnah*; *Maslaha*, the public good; *Urf*, customary practices; and *Istihsan* which is defined "as either (1) the preference for a recognized source of law over reasoning by analogy (*qiyas*), or (2) the preference for one reasoning by analogy over another that is considered weaker" [39]. The two most important secondary sources of law for Islamic banking are those of *fatwas* and *ijtihad* [36]. *Ijtihad* is the basis for a *fatwa*. *Fatwas* are the legal opinions of jurists responding to a particular legal question posed by a party, often a bank manager, seeking guidance on the *Shari'ah*. More often than

not, the jurist issuing a *fatwa* is not affiliated with any State institution [12]. It is typically the case that independent jurists are seen by the public as more inclined to issue honest rulings based on the *Shari'ah* than their counterpart *Qadi*'s, who are appointed by the state.<sup>13</sup>

In the case of Islamic banking, a *fatwa* would be issued by a single independent jurist, or group of jurists, who have a background on the financial matter [36]. What is, and is not, permissible under the *Shari'ah* in Islamic banking is often decided in the form of a *fatwa* [36]. A jurist may even use a predecessor's *fatwa* as a form of precedent if it is on a similar issue [14]. Thus a *fatwa* may work its way into a more substantive legal position much like an authoritative case in Common Law jurisdiction [30]. In the Islamic Banking industry it is commonplace for *fatwas* to set normative standards much like substantive law [37]. However, because of regular innovation in the financial marketplace an issue can be complex, new, and outside the realm of prior rulings. When this is the case it is likely that the jurist will engage in the process of *ijtihad*.

## 3) Ijtihad

In the simplest sense, *ijtihad* can be viewed as judicial decision-making in the absence of a clear rule within the primary and secondary *Shari'ah* sources [14]. *Ijtihad* is the process of "searching" for and "finding" the law discussed earlier, and is often described as the most difficult task a jurist can engage in [55] [28]. Like the scope of interpretation in the Common Law, *ijtihad* can be contrasted and constrained by a form of "imitation," or non-binding precedent called *taqlid* [14] [55]. *Taqlid* can be viewed as "the solidification of each legal school into predictable collections of doctrinal rules... with recognized majority and minority rules comprising the doctrine of each school...[T]aqlid eventually became so entrenched in Islamic jurisprudence that 'the text and the precedent of each school became the source of legitimacy in juristic thinking'" [47].

*Ijtihad* is often used in *fatwas* regarding Islamic banking, since many of the issues involved with Islamic financial products are relatively new and require an expansion of the *Shari'ah* to accommodate or prohibit the action in question [36]. It is crucial for the purposes of analyzing judicial decision-making in Islamic banking that the process behind *ijtihad* is understood because heavily cited *fatwas* from respected jurists often become substantive law, or *fiqh*. However because "many Islamic countries do not endorse the notion of binding precedent...there is some degree of uncertainty as to whether a financial method or instrument currently considered *Shari'ah*-compliant will remain so for the length of any given project or investment plan" [48].

<sup>12</sup> The number "500" was given by Imam Al-Ghazali who is one of the great Islamic jurists and philosophers, however to the average reader of the Quran the number seems high since many of the normative verses are repeated or overlap in presenting a general rule. Islamic Scholar John L. Esposito put the number of normative or "legal" verses in the Qur'an at 90 [26].

<sup>13</sup> The public's preference for independent jurists and the mistrust of State *qadi*'s is highlighted and discussed in depth in two interesting articles: [12] and [10].

Within this vast legal tradition lies a small subset of jurists whose *ijtihad* expands the application of the *Shari'ah* to the modern financial markets. These jurists are highly respected although not appointed by a State, and still mostly free from government interference as is often the case in modern Islamic jurisprudence [12]. These jurists not only regulate the banks in accordance with the *Shari'ah* but help shape the Islamic market as a whole. While they do not don wigs or robes, or preside over a courtroom, the history of Islamic law has shown us that they are indeed jurists who create *fiqh* through the process of *ijtihad*. In the Western sense they can be seen as informal jurists whose scholarly status allows them to say what the accepted law is on a matter as well as what it should be a new or novel issue. They act as private in-house arbitrators mediating the banks profit motives and the protective goals of the *Shari'ah* [23].<sup>14</sup> However under the *Shari'ah* they are typically referred to as private jurist and are often seen as more credible than their State counter-parts because of their distance from the perceived corruption of the government [12].<sup>15</sup>

## II. ISLAMIC BANKING FORM AND FUNCTION

The modern concept of Islamic banking in its contemporary institutional form is relatively new in comparison to the traditional commercial transactions that were Islamic in nature by their abstention from interest or overly risky trading.<sup>16</sup> Islamic Banking discussed here is roughly forty years old, and was created to serve Islamic communities investing and savings needs in the Middle East and South East Asia [52]. More recently Islamic banks have branched out into global investment banking and insurance markets with approval from the Jurists paving the way [20]. Furthermore, Islamic banking products are now growing in popularity in Western nations including the United Kingdom and United States [56] [13].

### A. Prohibitions and Guidelines

Islamic banking is most widely understood by Western financial practitioners as banking without interest (*riba*) and while the abstention of *riba* is the main concern, all other

things prohibited by the *Shari'ah* are also impermissible in the Islamic banking industry [33]. Therefore it is the opinion of those in the industry that the key defining characteristic of Islamic banking is the attempt to have a profitable economic system built on the principles of morality laid out by the *Shari'ah* [2]. Simply put interest and risky investing are prohibited because God has declared them immoral and prohibited them [32].<sup>17</sup> This moral ideal is expressed by various financial products and regulated by the jurists who balance the duality of profit motives and morality as desire for the former can often lead inhibition of the later [34].

An Islamic bank, like a Muslim person, is prohibited for investing and earning income from things that are prohibited under the *Shari'ah* including: destructive weapons, pornography, tobacco, alcohol, gambling, and prohibited animal products [33].<sup>18</sup> Most importantly Islamic banks are prohibited from overly risky investing (*gharar*) or deriving profit from financial products that contain interest (*riba*) like mortgage backed securities [52]. This is largely the reason Islamic Banks fared well in the recent financial crisis and an example of how the *Shari'ah* functions as a shield rather than a wall [48].

According to Brian Kettell, a scholar on Islamic finance, there are six key principles of Islamic financial products designed to maintain the morality required by the *Shari'ah*, they are: 1. The prohibition of predetermined loan repayments; 2. The encouraged use of profit and loss sharing; 3. The prohibition of "making money out of money," meaning all financial transactions must be asset-backed; 4. The prohibition of overly speculative investing (*gharar*); 5. Only *Shari'ah* approved contracts are permissible; 6. Contracts are to be made and performed by all parties in good faith as defined by the *Shari'ah*. The basis of these principles can be derived from various verses in the Qur'an and by acts or statements in the *Sunnah* prohibiting interest, gambling, and contracting in bad-faith [33]. One can also tell that the Islamic fiscal principles often generate more risk for the bank than what would normally be expected in the secular interest based system because of the increased amount of profit-loss sharing [33].

<sup>14</sup> "It is from this perspective that the Shari'ah supervisory board ("SSB") may be viewed as both an auditor (for the company offering the financial service or product) and a consumer advocate (for the company's clients)" [23].

<sup>15</sup> "Thus, all the four founders of the legendary schools of jurisprudence demonstrated through their personal life stories that Islamic law must be severed from the power of the government. Opinio-jurists, and not rulers, are the guardians of Islamic law. Opinions delivered in private chambers of honest and God-fearing opinio-jurists are more worthy of consideration than those issued by government judges or government opinio-jurists. The inherent mistrust of rulers informs the enterprise of Islamic law" [12].

<sup>16</sup> Like the section before this is merely a brief overview, please see [33] for a better understanding of Islamic Banking, contracts and financial products.

<sup>17</sup> 2: 275 (Y. Ali) "Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (for ever)" [32].

2:276 "Allah will deprive usury of all blessing, but will give increase for deeds of charity: For He loveth not creatures ungrateful and wicked" [32].

3:130 "O ye who believe! Devour not usury, doubled and multiplied; but fear Allah. That ye may (really) prosper" [32].

<sup>18</sup> However it is often the cases that bank can invest in companies that deal with those products as long as no more than five percent of the company's revenue is from the prohibited products, and such "unlawful" or *haram* revenue that is received by the bank is donated to charity.

### B. Islamic Financial Innovations

In order to comply with the *Shari'ah* and the prohibition on *riba* the Islamic financial industry has introduced a variety of products founded on the principles above. Some basic products include: *Murabaha* contracts which is a sale of goods or real property with a pre-agreed profit mark-up on the cost [3];<sup>19</sup> *Mudaraba* is a contract made between two parties one of whom provides the capital, the other manages the project, the profits of which are split at a pre-determined ratio; *Musharaka*, which is joint venture financing, profits and losses are shared by the investing parties based on a pre-agreed ratio and equity respectively; *Salam*, which is the “purchase of a commodity for deferred delivery in exchange for immediate payment according to specified conditions or sale of a commodity for deferred delivery in exchange for immediate payment” [1]. *Takaful*, which is essentially a charity based insurance system deemed *halal* for not being overly speculative [2]. Furthermore, despite the variety of contracting options it is estimated *Murabaha* contracts make up eighty percent of Islamic financial transactions [5]. Although these products may achieve similar goals and have similar outcomes when compared to their secular counterparts, the mechanisms that produce the profit are *Shari'ah* compliant and reflect the morality imposed by the *Shari'ah*.

Take a *Murabaha* contract for example. If used to purchase a house, it serves the same purpose as a mortgage and concludes with a similar result yet contains no interest in the contract or in the course of dealing. While the outcome may appear the same to a Western mortgagor it is the mechanics of the *Murabaha* contract that differ from a traditional mortgage and make the contract *halal* [23]. Under *Murabaha* contract, if Family X wanted to purchase a new home they would go to Bank Y which would purchase the residence at the specified price and pay, \$100,000. Bank Y would then re-sell the residence to Family X at an agreed upon profit mark-up of \$10,000. Family X would pay back Bank Y during the course of a number of installments while simultaneously purchasing the house from Bank Y. Family X would end up paying \$110,000 after all the installments were paid, and then gain full title in the house. While the *Murabaha* contract described creates a mortgage-like product, jurists unanimously agree that this is *halal*, and *riba* free, based on the principle that the terms and performance of the contract creates two sales rather than a sale of money [23]. This is based on the principle that God has “permitted trade and forbidden *riba*,” *riba* essentially being the sale of money now for money later [32].<sup>20</sup>

<sup>19</sup> “[S]eller informs [a] buyer of the cost at which the seller obtained an object of sale [which is to be resold to such buyer] and collects a profit margin either as a lump sum, or the seller may state the profit margin as a percentage or ratio of the seller's original purchase price” [3].

<sup>20</sup> 2: 275 “Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those

### C. Shari'ah Supervisory Boards

The approval of an Islamic financial instrument is two fold: first it must be lawful in the jurisdiction that the product or contract is being used; and second the product must be lawful under the *Shari'ah*, which in some Islamic countries is the only requirement [23]. The judicial decision-making governing the second element is made by *Shari'ah* Supervisory Boards (herein after “SSB”). The SSB's role is “to assure the institutions clients that the business renders services in a *Shari'ah* complaint manner” [37]. An SSB is mandatory for any Islamic financial institution [23]. Even Western institutions like the Dow Jones Indexes, Citicorp, and HSBC now have SSB's for *Shari'ah*-complaint transactions and investing [33] [50].<sup>21</sup> It should be noted however that the SSB may give deference to the rulings of other external and independent Islamic Institutions, namely the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) [37].<sup>22</sup>

The primary focus of these boards and organizations is to ensure that Islamic financial products and practices are in fact Islamic and *Shari'ah* compliant [37]. “Whenever an Islamic corporate institution wishes to structure a financial transaction in accordance with Islamic law, the firm will consult either an external or internal *Shari'ah* board. The initial consultation typically leads to multiple review sessions followed by amendments to the structure and the documentation of the agreement after each review, as well as further monitoring and consultation after the transaction if necessary” [37]. Compliance with other institutions like the AAOIFI is normally self-motivated, however seven Islamic jurisdictions, including Bahrain, Dubai and Qatar, have adopted the AAOIFI's financial regulations as law governing banking transactions.<sup>23</sup>

An SSB can be made up of one or more, regularly three, jurists [37]. They are scholars of Islamic law as well as economics and finance [37]. Members of SSB's are often, academics, former Judges or bank managers.<sup>24</sup> However certain jurisdictions have required the members of SSB have a

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who repeat (The offence) are companions of the Fire: They will abide therein (forever)” [32].

<sup>21</sup> Seniawski refers to “Chase, UBS, and Deutsche Bank's *Shari'ah* complaint ventures” [50].

<sup>22</sup> The best way for me to describe the AAOIFI or other fiqh academies is by comparing them and their work to a similar institution in the U.S, namely the American Law Institute (A.L.I.) and the Restatements.

<sup>23</sup> AAOIFI has gained assuring support for the implementation of its standards, which are now adopted in the Kingdom of Bahrain, Dubai International Financial Centre, Jordan, Lebanon, Qatar, Sudan and Syria. The relevant authorities in Australia, Indonesia, Malaysia, Pakistan, Kingdom of Saudi Arabia, and South Africa have issued guidelines that are based on AAOIFI's standards and pronouncements [1].

<sup>24</sup> Like Sheikh Usmani, mentioned earlier, who was a Supreme Court Justice in Pakistan and has held many other prestigious judicial positions [53].

minimum of five years experience issuing religious rulings [33]. There is also an implied “character and fitness” type requirement to ensure that the jurist is mentally competent and pious enough to issue religious rulings [36].

The primary role of the jurists on a SSB is to issue *fatwas* on financial transactions. However despite the presence trade standards set by groups like the AAOIFI disagreements can occur when the standards fall behind market innovation [23]. Take Sheikh Muhammad Taqi Usmani’s *fatwa* regarding *sukuk* discussed earlier in this paper; it highlights the idea that a jurist can disagree with other jurists on the permissibility of a particular product even after it has been deemed permissible by a number of other jurists and even popular among investors [48]. Naturally investors view the risk caused by legal uncertainty negatively [48]. Therefore if a disagreement or split among the jurists occurs a bank would subsequently follow the law chosen by its SSB.<sup>25</sup>

Essentially Islamic banking is an exercise in submission. The institution submits to the *Shari’ah*, as does the worshiper, the jurists guide the worshipers, and the SSB guides the institution. Just like individuals, banks are often confronted with questions regarding the lawfulness of a particular act under the *Shari’ah*. This is where the SSB will issue an opinion of law, a *fatwa*, on the matter thereby approving or disapproving of the act and subsequently creating a new regulation for the Bank to follow in order to remain *Shari’ah* compliant. This decision-making process is the subject of the following discussion and the general focus of proposed future discourse.

### III. JUDICIAL DECISION MAKING IN ISLAMIC BANKING

The questions this discussion seeks to begin answering are, how do the jurists on an SSB make their decisions, and why do they arrive at their legal conclusions. In answering I will test two possible theories used by legal scholars analyzing judges in the U.S. court systems. These two methods of analyzing judicial decision-making are legalism and the economic theory. Despite the “realist” assertion that the Islamic banking system is a reaction to Islamic revivalism, and that modern *fatwas* on the issue of finance are promulgating a political ideology [6] it is my hypothesis that the legalist and economic theories, rather than any attitudinal theory, are the most accurate descriptions of the processes used by jurists in the Islamic banking industry.

Essentially, the jurists on SSB rule on the basis of the *Shari’ah* and other influences like global politics are secondary. I am not denying the existence of possible political motives linked to ideological differences stemming from legal education in different schools or regions as research has shown that the judicial decision-making process is surrounded

by numerous influences outside the law [15] [29] [49] [40]. However, I will not be discussing attitudinal theories in any detail, mainly because the economic theory “overlaps” with other strategic, sociological, psychological, pragmatic, and organizational theories of judicial decision-making [45]. Therefore some of the aforementioned theories may be touched on impliedly [45].

#### A. The Legalist Theory

The legalist method, or legalism, as described by the renowned Judge Posner, “hypothesizes that judicial decisions are determined by “the law,” conceived of as a body of preexisting rules found stated in canonical legal materials...[T]he legalist model comes complete with a set of rules of interpretation (“canons of construction”) so that interpretation too becomes a rule-bound activity” [45]. Essentially legalism presumes that the sole, or most influential, component of judicial decision-making is the law itself. “The ideal legalist decision is the product of a syllogism in which the rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion” [45]. This theory of a rule-bound jurists is equally applicable to the Islamic legal tradition when a jurist is called on to write a *fatwa*. Although realists and skeptics of Islamic finance criticize this formalist approach, I believe the legalist method is indicative of a sincere and humble effort by the jurist to apply Divine law to modern financial problems rather than “legalistic acrobatics” circumventing the goals *Shari’ah* [4] [5].

Before a jurist can issue a *fatwa* he must meet a detailed set of procedural requirements [36]. The issue presented must be a real legal question posed by a party, in this case an Islamic bank [36] [42]. The question must be submitted to a jurist or jurists, here the SSB, who are familiar with the requirement, premise, and legal background of the issue so that they may arrive at a conclusion that reflects proper juristic form and the modern context of the current event [8]. Furthermore if the jurist is on an SSB and the questioner is the bank it will be compulsory for the bank to adhere to the decision of the *fatwa*, thus equity is required because of the immediate economic effect to the bank [36]. The traditional idea of equity has been ever present in the *Shari’ah* and remains a factor in balancing the goals of the *Shari’ah* and financial goals of the bank and its customers [38] [50]. Finally a matter of healthy body and mind, the jurist should avoid issuing a *fatwa* if he is ill, hungry, thirsty, tired, or if the weather is too hot or cold; essentially the jurist should avoid issuing a *fatwa* when any emotional or physical reactions may influence the opinion [36]. To most this idea seems like common sense. However it is actually a quite meritorious regulation, as relevant research on American trial judges have shown the affects of the physical state on the soundness of judicial decision-making process [24]. After the initial procedural requirements are met the decision-making process begins.

<sup>25</sup> The binding authority of an institution’s SSB is a regulation set forth by the AAOIFI, which member banks have agreed to follow. The presence of agencies like the AAOIFI or other *fiqh* academies is designed to create consistency among banking institutions.

### 1) The Legalist Theory in the Islamic Tradition

In order to understand the legalist method in any legal tradition, one must first understand the accepted forms of interpretation in that legal system. Accordingly in Islamic jurisprudence each *madhhab* has a characteristic legal methodology, reflecting the schools preferences on the use of texts, tradition/customs and independent reasoning [46]. The means of interpretation are applied to the two primary sources of text, the Qur'an and the *hadith*.

Today there are three primary modes of interpretation in Islamic jurisprudence comparable to Common Law traditions of statutory interpretation. They are: originalism, based on the legal and normative customs of the people city of Medina when it was under the leadership of the Prophet; textualism, based solely on the text of Qur'an and authenticated *hadith*; and purposivism or *maqasid al Shari'ah*, which is *ijtihad* based upon the purposes of the *Shari'ah* allowing legal reasoning to come directly from a general principle so long as it supports one or more purposes of the *Shari'ah* [46].<sup>26</sup>

Purposivism allowed Islamic jurists to expand the body of *fiqh* around five necessary divine purposes: religion, life, mind, family, or property [46] [28]. The use of *maqasid al-Shari'ah* became universally accepted after being advocated as a theory of interpretation by the renowned jurist Al-Ghazali [46]. It was seen as a middle ground between strict textualism and the perceived misuse of *maslaha* used by the *Shafi* and *Maliki* jurists respectively [46].<sup>27</sup> "The interpretive approaches... show that Islamic law does not permit only one interpretation in any given matter... [b]ut rather, depending on whether a scholar adopts a strict or literal approach to interpretation or a purposive or contextual approach to interpretation in exercising *ijtihad*, different yet acceptable solutions to legal problems are quite possible" [28].

Therefore if the text of the primary sources is ambiguous, a jurist on SSB has generally two approaches under the legalist theory. First he can adopt and support prior rulings on the issue. Or second, if the prior works of jurist are inapplicable, split, or incorrect he can engage in *ijtihad* using the methods of interpretation above and find the rule on his own. If the jurist chooses the latter, the legalistic steps guiding *ijtihad* have been succinctly laid out by *Shari'ah* scholar Bernard Weiss in, *Interpretation in Islamic Law: The Theory of Ijtihad*, and can be broken down as follows.

First the jurist must assess the reliability of text from which he intends to derive a rule; if the text is from the Qur'an it is reliable [55]. If he is interpreting *hadith* assessing

reliability is more complicated because the jurist must analyze the chain of narration.<sup>28</sup> After reliability has been accepted he can begin interpretation consisting of two tasks: first, the linguistic task, where the jurist determines the meaning of the words in the text; and second, the jurist must interpret the words in their proper context [55]. In doing so he may compare the text with other texts or look at the overall purpose of the text [55]. After interpreting the text the jurist "may also wish to ferret out implications, allusions, nuances, analogical deductions and elliptical elements which he believes to be part of the broader meaning of the Law" [55]. Finally after the jurist has formulated an opinion, he must ensure that the text used in forming the opinion has not been abrogated [55].

### 2) The Legalist Method in Practice: A Case Study

In order to explain the legalist method as applied in Islamic banking I will illustrate the method by using a *fatwa* issued by the SSB of the Kuwait Finance House [22].<sup>29</sup> The question posed by the bank's management was, "What is the *riba* that is prohibited by the Qur'an?" [22]. The question, albeit simple in structure, is of the utmost importance as it seeks to create a distinction between types of *riba*, therefore allowing the bank to charge a type of interest. Using the legalist method the jurist aptly answers the question in the *fatwa* below, concluding that there is only one type of *riba* and it is prohibited.

The *fatwa* begins by citing to the primary sources of the *Shari'ah*, the Qur'an and the *Sunnah*. First the jurist explains, "All the verses [in the Qur'an] in which *riba* is mentioned are unqualified, such that they do not differentiate between one form of *riba* and another. Therefore recourse must be had, in interpreting their meanings, to the commonly accepted legal meaning that was derived from the collectivity of verses and *hadith* texts on the subject" [22].

Then based on the sources the jurist goes on to define *riba* as the "excess for which no compensation is given in the contract" including "both *riba* for consumption and *riba* for planting (investment)" [22]. He further explains *riba* by shedding light on a trade done by a companion of the Prophet. However he subsequently excludes the use of the type of transaction by explaining the Prophet's disapproval of the transaction by other companions and supporting with a *hadith* condemning the practice. The *hadith* states "Gold may be exchanged for gold, but only in like quantities, and only hand to hand. Any excess will be *riba*..." The *hadith* continues with the same statement made repetitively however referring to the trade of silver, wheat, and dates in a like manner [22]. The *fatwa* continues to explain a disagreement in interpretation of

<sup>26</sup> It should also be noted that in the earlier days of Islamic jurisprudence the *Zahiri* school used a strict constructionist/literalist approach. This approach did not leave room for *ijtihad* and was widely (and in my opinion unfairly) criticized by the other schools and has thus disappeared.

<sup>27</sup> "Shafi'i operated on the premise that the textual materials at hand provided jurists with a full package of the original precepts of the supreme Law. But the early Maliks rejected this text-comprehensivist paradigm. Maliks have insisted on using non-textual evidence in the interpretive enterprise" [46].

<sup>28</sup> Despite a detailed science of studying *hadith*, chains or narration, and ways of measuring reliability, less reliable *hadith* are often used in *ijtihad* to the dismay of many Islamic jurists [17].

<sup>29</sup> This *fatwa* was collected and translated by Shayk DeLorenzo from the Kuwait Finance House, al Fatawa al Shari'yah, Question 416, p. 402.

the *hadith* above between jurists<sup>30</sup> who interpret the *hadith* literally (as in only applying to the commodities mentioned, gold, silver, etc.) and other jurists interpreting it based on the purpose of the statement (therefore applying prohibition to other commodities traded in a similar manner).

The *fatwa* then states that “the great majority of jurists, however held that the prohibition [of the *hadith*] extended further” and that detail of their arguments “may be found in the classical manuals of *fiqh*” [22]. The jurist then goes on to swear by his “life” that those jurists who differentiate between types of *riba*, thereby allowing some forms of interest, have committed “a lie against Allah and his Prophet!” and that theirs is a “personal opinion with no basis in truth, and nothing even resembling a basis!” [22].

The *fatwa* continues with a purposeivist argument suggesting that the prohibition of interest creates other avenues of investing such a *murabaha* contracts [22]. He then cites a *hadith* admonishing those who engage in interest-based transactions and includes the chain of narration to validate its authenticity [22]. Finally the *fatwa* concludes with the statement “All of the above, in support of the lender and borrower, goes to prove the care of Islam in its legislation” [22].

This *fatwa* is an example of the legalist method, in that it begins with primary sources and works its way through the secondary sources as well as the rules of interpretation and concludes favoring *taqlid* rather than *ijtihad* by openly agreeing the majority opinion on legal issue.<sup>31</sup> The Scalia-like *pathos* rebuking those who misinterpret the sacred text is an added rhetorical touch to show the severity of the jurist’s conviction in his method and possibly an attempt to persuade jurists who deviate from the strict unqualified definition of *riba* [27].

The jurist in this instance did not engage in in-depth *ijtihad*. He argued there was sufficient evidence in the Qur’an and the *Sunnah* to conclude that a clear rule existed and that making a distinction to that rule would improper interpretation of the Divine legislation. Furthermore, the discussion of differences in the opinions of *fiqh* by the schools as well as the differences in interpretation show a desire to choose between precedents (*taqlid*) rather than search for the rule independently within the primary sources of the *Shari’ah*. The jurist ultimately arrives at his conclusion by citing the “majority of jurists” and implying a purposeivist approach to interpretation of the primary sources while simultaneously justifying it through *taqlid* [22].

The choice of between the two interpretations can be described as the true decision that requires critical analysis. The jurist could have adopted either of the approaches and the decision would have remained valid. Essentially the jurist

could have found a distinction in the definition of *riba* thereby allowing the bank to use a “permissible” form of interest and derive profit from it. However keeping in principle with the legalist approach, and perhaps contrary to the banks wishes, the jurist adopted the majority approach because it has greater textual support in the primary sources of the *Shari’ah* and the substantive works of *fiqh*. He further condemns the minority approach allowing types of interest as “a lie” on the basis that it lacks any textual evidence in reaching its conclusion. This *fatwa* demonstrates the immutability of the *Shari’ah* sources and the prohibition on interest. The use of purposivism in the *fatwa* is inherently legalistic in Islamic jurisprudence (although often viewed by textualists as a front for “judicial activism” in the Common Law) as the jurist justifies his rigid interpretation by highlighting the success or *murabaha* contracts [28].

An interesting point of discussion, in that the *fatwa* does not end with the usual statement “Allah knows best,” as is typical in *fatwas* [47], but rather it ends with statement, “All of the above, in support of the lender and borrower, goes to prove the care of Islam in its legislation” [22]. This statement further emphasizes the legalistic approach chosen by the jurist in that the *fatwa*’s conclusion is supported by “Islam and its legislation,” the Qur’an and the *Sunnah*. The statement implies that the jurist found the texts so clear that it leaves no room for the alternative opinions. On the other hand, the customary “Allah knows best,” signing statement at the end of a *fatwa* is used to show the fallibility of the jurist in his interpretation; the possibility that the competing view may in fact be correct, and that, in fact, only Allah does know the true answer to the legal question [47]. The signing statement is indicative of the pluralistic nature of Islamic jurisprudence and the possibility of multiple yet equally valid opinions on a point of law [47].<sup>32</sup>

### 3) Analysis of the Legalist Method

It is my belief that the majority judicial opinions issued by SSB’s are decided under a legalist theory. For the most part the *Shari’ah* and works of *fiqh* offer some text or foundation to guide the jurists decision-making process leaving less room for outside influence. However this formalistic approach has been attacked by legal realists as leading overly formalistic ends that ignore desired functional purposes of the *Shari’ah* like social justice [4] [25]. While there may be some merit to the claim from a purposivist perspective, I believe that as formalistic end is a product of legalism, and legalism is itself product of piety, rather than a means of circumventing the *Shari’ah* for profit.

Yet even when the *Shari’ah* sources are clear the may have options in choosing between minority and majority approaches. As highlighted in the previous *fatwa* the jurist could have opted for a minority approach that would have

<sup>30</sup> Referring to *Hanbali* jurists and a subset of *Hanafi*. The group of *Hanafi* mentioned here are the minority view on the issue and reach the conclusion through a literal interpretation.

<sup>31</sup> The *fatwa* refers to *ijma* when mentioning the consensus of the majority of jurists, and refers to the *qiyas*, or analogy, in the purposivist argument of how the *hadith* applies to other commodities outside the one listed in the statement itself.

<sup>32</sup> Perhaps jurist here the jurist is unabashedly stating that the competing views are absolutely false and without merit. This issue of fallibility will be discussed further in the economic theory portion of the paper as it relates to possible motivations.

eased restrictions on the bank yet did not. The choice the jurist made, although primarily legalistic, may also have been influenced by secondary elements outside the text like money-income and piety. The weight the jurist places on these secondary influences can best be hypothesized using the economic theory as laid out by Judge Posner in How Judges Think.

### B. The Economic Theory

In Posner's seminal piece *What do Judge's and Justice's Maximize?...*, he concludes by suggesting that his economic theory of judicial decision-making should also be applied to "elected judges, to Continental European judges, to jurors, and to legislators" [44]. Answering Judge Posner's call for the re-application his theory I suggest that it may also be applicable to the jurists on the *Shari'ah* Supervisory Board of an Islamic financial institution because despite the corporate nature of an SSB, "nonpecuniary income" is a large part of the jurists' total compensation [44]. Thus I will put forward similar hypotheses that Judge Posner and others have applied to U.S. Federal judges and re-apply them to the jurists of a SSB. In doing so I will look at possible variations or additional hypotheses that apply to economic analysis of judicial decision-making in Islamic banking.

The economic theory of judicial decision-making is premised on the idea that jurists, like everyone else, are rational, self-interested, and seek to maximize their utility [45]. The economic elements of the judicial utility function include, "money income, leisure, power, prestige, reputation, self-respect, intrinsic pleasure of the work..." [45] and in the SSB's case, piety. Furthermore these elements can be manipulated by the employer thus modifying the behavior of the job-holder [45].

Because of the uniquely religious/corporate position of the jurists on the SSB I believe these elements are weighed differently than the state-appointed jurists that Posner's theory was originally applied to. First the employer's ability to manipulate behavior is greater in a private company, like a bank, than a federal judgeship with life tenure and a fixed income. Second the jurist behavior can be viewed as having two manipulators, God and the bank.<sup>33</sup> The jurist can forward or hinder the banks financial goals and conversely the bank can reward or punish the jurist [7]. Likewise the jurist can

forward or hinder the goals of the *Shari'ah* and God can reward or punish the jurist. While profit and the goals the *Shari'ah* are by no means mutually exclusive, the line at which profit becomes unlawful is defined by the *Shari'ah* and thus an inevitable conflict will occur as the lines between *halal* and *haram* drawn.

For the purposes of analysis I have assumed the jurists are more motivated to avoid punishment from God than the bank. I also believe that piety is an additional element functioning as both a motivator and constraint in its interactions with the other elements influencing the judicial decision-making process. Although piety is not mentioned in Posner's theory, no economic analysis of the Islamic jurist would be sufficient without discussing an element that has value in life and after death. Furthermore in putting forth these hypotheses the elements will overlap with one another in forming a general economic theory of judicial decision-making in Islamic banking as it is possible for a jurist to be motivated by multiple elements at once.

Finally, without empirical research it is difficult to validate these theories. The goal here is to simply approach this unique form of judicial decision-making as I believe Judge Posner would. While I am cognizant of possible errors in the economic analysis, they are due in part to limited material on the subject and the theoretical nature of economics. As Posner described, "...the heart of economic analysis of law is a mystery that is also an embarrassment: how to explain judicial behavior in economic terms..." [44]. And while the SSB is not totally "divorced" from obvious economic incentives like compensation, the dual nature of the SSB makes the value placed on these incentives ambiguous in comparison to the other nonpecuniary-income [44].

#### 1) Money Income

The first and most obvious possible influence on the judicial decision-making process is money-income [7]. Here Posner would hypothesize that the influence of money-income is greater for the jurist on the SSB because, unlike federal judges, the jurists of an SSB do not have a permanently fixed income or similar job security. However despite the SSB's corporate role and the popularity of modern cynicisms view of organized religion, I believe the motivation for and influence of money-income is outweighed by the preference for the other nonpecuniary elements, like piety.

Money-income for the jurist and money-income for the institution are firmly related. Each party, the bank and the SSB, has the ability increase or limit the other's money-income [7]. Therefore the SSB and the institution are required to function symbiotically and not competitively as strained relations between the two parties will likely decrease the money-income earned by each party. If the jurists prohibit too many transactions or contracts the bank will have less revenue to pay the jurists, or more may terminate and replace them with other jurists who the banks perceives as more equitable to the banks financial needs. On the other hand if the jurist gives way to the banks money-income motivation and adopts the

<sup>33</sup> While the idea of God as a manipulator may raise some eyebrows, I do not intend to take God's name in vain. I say it only figuratively as means of properly applying the economic model to the jurist. God's role can be seen as an manipulator as God has the ability to modify constrain and motivate behaviors of the believer even if such modification is at odds with the employer. God is "*Al Mughni*" (the "Enricher") "*Ar Razzâq*" ("the Provider"), "*Al Mughith*" ("the Sustainer"). Because there are two manipulators a religious duty may come into conflict with secular work duty. For example a Muslim's religious duty to fast during Ramadan and her duty to work swiftly at her job may conflict. Whether she fasts or not depends on which reward she desires and modifies her behavior for.

motivation as his own he might be setting aside the *Shari'ah* at the expense of other elements. If the latter is the case the jurist may be gaining money-income and lose piety or prestige both of which may be seen as having greater value in the long term. What is more likely is that if a jurist declares a transaction impermissible the SSB will subsequently assist the bank in finding a *Shari'ah* compliant solution. Thus equity may require that a jurist function more like an arbitrator and less like clerk with a *halal* stamp of approval.

Therefore, the likelihood the jurist will appease a bank and deem the impermissible *halal* is small because the other competing elements (prestige, piety, reputation etc.) combined and the jurists desire to secure a pleasurable afterlife will outweigh the motivation for money-income. However, leniency is also an accepted legalistic concept based in Islamic law's view of equity as established under the legalist method as a maxim or "golden rule." The maxim creates the legal presumption that everything is permissible except what is explicitly forbidden by the *Shari'ah* [20] [3]. This presumption is what I call the "presumption of permissibility," and it is prominent in Islamic banking [2]. This presumption encourages judicial restraint before prohibiting transactions, because unless the basis of the transaction is clearly prohibited by the primary sources it will be allowed. The point of mentioning this legal presumption is to re-affirm the idea that even if the jurist appears lenient it is still likely adherence to the *Shari'ah* and its legal presumptions motivating the ruling rather than money-income [20].

## 2) Prestige

Because of the highly privatized nature of Islamic jurisprudence prestige should be quite important to Islamic jurists [12]. In a sense, prestige would help the jurist develop a following of believers who rely on the jurist's rulings for guidance [12]. Thus prestige may increase the jurist's power and therefore the jurist can subsequently achieve other more ideological or political goals once a following is secured [12]. However the span of prestige appears limited, as *fatwas* regarding financial transactions and contracts reach a limited audience of interested individuals. Therefore the ability of a jurist on a SSB to gain a significant religious following is muddled by the complex and profane nature of financial transactions and their governing law. Consequently it is more likely the jurist would be motivated to obtain prestige within his particular institution or the Islamic banking industry rather than for any grand political ambitions.

Prestige is distinct from popularity because one who motivated by popularity wants to be "liked" by his peers, where as someone who is seeking prestige wants to be respected [44]. For example, if one of the jurists on an SSB is seen as a "yes-man" he may win friends among some of the bank managers but he is unlikely to gain any prestige amongst fellow jurist or scholars of Islamic law. Similarly, if a jurist is perceived as having a preference for money-income it may lead to criticism from more respected scholars and a loss of prestige as highlighted by the two *fatwas* cited earlier in the

paper. The loss prestige of would limit the precedential power of his *fatwas* and may subsequently bar them from entering a position of substantive law. Therefore a jurist may be motivated to uphold the principles of the *Shari'ah* against money-income in order to maintain his prestige.

In the alternative a jurist who is perceived as more lenient may gain favor among the bank managers of other institutions opening the door to possible memberships on other SSB's. However this is not prestige, and is something more akin to popularity as it likely to garner little respect from other jurists or academics. While popularity may play some role as an element here, I believe the desire to be popular in private sector differs in its former application to federal judges because of popularities close relation to money-income in commercial settings. Essentially, if a jurist desires to earn a reputation as being exceedingly lenient and "liked" for his leniency, his desire for popularity may be motivated by money-income rather than the desire to win friends among bankers.

Furthermore the jurist's prestige is important for the bank. Because the bank seeks religious clientele the prestige of the jurists on its SSB arguably serves as a marketing tool [37]. One can assume that more prestigious the members of the SSB, the more *Shari'ah*-compliant and trustworthy the institution will appear to religious account holders, investors, and partners. Therefore if the jurists are seen as profit motivated "yes-men," than groups of the religious public, potential investors, will become more skeptical of the Islamic banking system than they already are [4]. Because prestige is important to both the jurist and the bank it is likely the jurist will be given more deference by the bank when developing a product or issuing a *fatwa*, thereby increasing the jurist's prestige among other members of the Islamic banking industry and subsequently protecting himself from the criticism of other jurists and academics.

## 3) Power

Like prestige, a jurist's power or the lack thereof, in and outside an institution may motivate his rulings. However unlike a more public jurist, *fatwas* issued by an SSB garner less attention because they are directed at a very specific audience. Thus the concept of a "power trip" may be more popular among federal judges or *qadi's* and is less likely to occur in the private domain of an SSB [44].<sup>34</sup> However this does not mean jurists who specialize in banking are less motivated to gain power, but rather that power, like the other elements, is valued and manipulated differently. For the purposes of economic analysis there are two types of power that may motivate a ruling: power outside the institution, and power within the institution.

<sup>34</sup> A "power trip" is when the judge attempts to "change the world" through a ruling. Because the judicial decision made by the jurists on an SSB in are tailored to a very specific questioner and are generally in reference to a financial transaction there is unlikely a greater policy motives influencing the decision-making process.

First power outside the institution, the less influential of the two. In highlighting the role power outside the institution I will focus Sheikh Usmani's *fatwa* regarding *sukuk* discussed early in the paper. Sheikh Usmani has acquired prestige and is a heavily cited authority in the world of Islamic banking [48]. Because of this prestige he also has a sufficient amount of power outside his respective institution such that he can influence the Islamic market place with a single *fatwa* [48].<sup>35</sup> While it is unlikely that the Sheikh's *fatwa* regarding *sukuk* was motivated by a self-interest in maximizing this power it is clear that he has gained authority in the industry and such authority may be a desirable form of nonpecuniary-income to other jurists. We can assume, however, that if a similar *fatwa* regarding *sukuk* were issued by a less-prestigious jurist, it would have had less influence outside the institution in the "free market" of Islamic jurisprudence [12] [28]. Therefore we can further hypothesize that if such power outside a jurist's respective institution is desirable a jurist may be motivated to attain more prestige and power so their *fatwas* receive recognition and gain wider influence.

The effect to which the desire to maximize this type of power functions as a motivator for Islamic jurists is arguable. Essentially the question is to what extent do less powerful jurists of an SSB want the same amount of power as someone like Sheikh Usmani. In answering the question, I believe the jurists are pious such that the desire for power outside the institution would be secondary when issuing a ruling as the key goal is to uphold the Divine law, rather than increase the jurist's fortitude in the financial world. In a sense piety requires humbleness, and a humble jurist cannot, or should not, be motivated by power when interpreting God's law. Thus the jurists' motivation for power outside the institution is limited.

However the second type of power, power inside the institution is likely to play a greater role in the judicial decision-making process. Because of the *fatwa*'s non-binding nature in the "free-market" of Islamic law, as well as the accepted fallibility and pluralism of *ijtihad*, the jurist's power is most often limited to the institution that has posed the question [37] [28]. Therefore it is more likely that the jurist is motivated to maintain enough power in his institution so that his position on the SSB remains a relevant and authoritative. Thus power within an institution is more influential and may motivate a jurist to prohibit a transaction so that the institution will continue seek approval of a reformed version of that transaction. Because the prohibition forces the bank and the SSB to seek a compromise later, the prohibition temporarily increases the jurist's power within the institution during the latter advisory period.

On the other hand, if the jurist outright approves of a transaction his work is complete in regards to that transaction and power within the institution is less relevant. Conclusively, a jurist may be motivated at times to prohibit transactions in order to gain power within the institution rather than power outside the institution. This type of power is desirable simply

for the reason that people may enjoy more authoritative positions in the workplace as it increases ones self-worth. Yet because the desire for power is constrained by a jurist's preference to be pious I believe the power element is limited in its influence. Finally a Posnerian argument against the idea that a jurist has motivation to prohibit a transaction in order to increase power within the institution may be that increased power would subsequently decrease the jurist's leisure time.

#### 4) Leisure

Under the economic model of judicial decision-making leisure is a form of nonpecuniary income, and an increase in leisure would decrease pecuniary income [44]. According to Posner the leisure preference may be the reason federal judges place so much emphasis on judicial economy [45]. Likewise a jurist on SSB might also approve a transaction or contract for the leisure time it would create after because the approval process would end and there would be little or no need for any follow up meetings or review.

Like the federal judges Posner analyzed, Islamic jurists may also like a bit of down time, therefore issuing shorter *fatwas* or deeming a product or transaction permissible may be motivated by the desire to increase judicial efficiency and possibly leisure time. Understandably, the more power the jurist is afforded the more responsibility he would have, and subsequently less leisure time would be available to him. Therefore we can also assume that the motivation for power and the motivation for leisure are normally at odds with one another in the judicial decision-making process. Thus one may contrast the motivation for power to prohibit a transaction, with the motivation for leisure time and the approval of a transaction or issue a shorter *fatwa*.

Yet the hypothesis regarding leisure time and short *fatwas* may be more correlative than anything indicative as a leisure preference in the SSB. Rather issuing shorter *fatwas* may be an indicator of the legalist method as issuing shorter *fatwas* is recommended and has historically been practiced in Islamic jurisprudence [36]. Therefore a series of short *fatwas* may be more consistent with the legalist method. However this does not rule out the motivation to approve a contract or transaction in order to increase leisure time afterwards. Conclusively a leisure preference may motivate a jurist to approve transactions but the leisure preference is constrained by the preference for money-income, power, and piety.

#### 5) Piety

Piety is the final and most valued element to be discussed. Although not addressed by Posner, I am positive of piety's role as both a motivator and constraint in religious jurisprudence. For purpose of this section piety will be defined the modification of acts according to one's conscious fear of God, the Day of Judgment, and the hereafter. Piety is likely to motivate the religious jurists behavior even if it is directly at odds with other pecuniary interests. Above all the other elements in the economic model, I believe piety has the

<sup>35</sup> In this regard, Robbins cites [54].

greatest influence in the Islamic jurist decision-making process.

Like the other elements in Posner's theory, piety does have an economic value in this world, yet it is distinct because the full value of a piety preference is not recognized until after death. The value of piety in this world is the value of piety in one's reputation and one's intrinsic value of themselves. Thus a religious jurist is more likely to value himself and his work if his work is motivated by a piety preference. For this reason the element of piety encompasses Posner's elements of reputation, self-respect, and intrinsic pleasure of the work [45].

Piety also has extrinsic economic and commercial value. Ideally a jurist of religious law would like to be known for his piety above all other characteristics. Piety is what makes the jurist credible to his questioner and motivates the questioner to ask that jurist in particular [12]. Piety is a necessary trait because it suggests that the jurist is worthy of stating Divine law and that his opinion is worthy of being followed [12]. In this way, piety functions like reputation, yet contains the added benefit of increasing one's credibility and character for truthfulness.

Furthermore, the ultimate goal of all Muslims is to attain paradise in the hereafter, the acts one commits have a value after death. Because a Muslim is judged by the totality of his deeds, any bad deed will have a lasting effect that will greatly outweigh any temporal economic gain achieved in this world [32].<sup>36</sup> Therefore if a Muslim jurist strives to be pious, any ruling that is intentionally misleading presented under the guise of piety could have grave consequences in the next life where this world's money-income has no value.

Thus piety motivates the jurist to be honest, to uphold the *Shari'ah*, and to avoid hypocrisy, something viewed harshly in Islamic theology [32].<sup>37</sup> Most importantly, piety constrains urges motivated by money-income, power, and prestige, so that they become sinful temptations rather than economic motivators. It is my belief that piety's presence as an element minimizes the value the jurist places on the other elements and motivates the jurist to adhere to the legalist method because legalism limits the jurist's spiritual liability and insulates the judicial decision-making process from impropriety.

#### IV. CONCLUSION

<sup>36</sup> 11:15-16 "Those who desire the life of the present and its glitter, - to them we shall pay (the price of) their deeds therein, - without diminution. They are those for whom there is nothing in the Hereafter but the Fire: vain are the designs they frame therein, and of no effect and the deeds that they do!" [32].

<sup>37</sup> 4:142, 145 "The hypocrites - they think they are over-reaching Allah, but He will over-reach them: When they stand up to prayer, they stand without earnestness, to be seen of men, but little do they hold Allah in remembrance... The hypocrites will be in the lowest depths of the Fire: no helper wilt thou find for them..." [32].

Because of the influence of piety described in the prior section, I believe the legalist theory is the best method of understanding judicial decision-making of the jurists on an SSB. Although this conclusion may appear circular, it is not. It follows logically that if the jurist is motivated by piety he conforms to the legalist method in an attempt to limit his liability before God. If the jurist deviates from the legalist methods there is the possibility of transgression, and because legalism limits opportunities to deviate it provides the safest path of judicial decision-making. Thus the preference for piety makes legalism a more attractive means of decision-making. This conclusion is supported by research conducted on federal judges indicating that where the law is clear legalism is used and rulings are consistent [21]. Here I believe the *Shari'ah* and subsequent works of *fiqh* are generally clear such that the jurist is rightly guided by the texts.

Therefore, I fundamentally disagree with the idea that the formality of legalism is being misused for Capitalist purposes. Piety restricts the jurist to his texts and canons of interpretation; anything outside the *Shari'ah* sources would "taint" the opinion, an opinion that by its nature is intended to be an expression of God's law [12]. A pious jurist is aware of these temptations and adheres to the *Shari'ah* by avoiding them through legalism. The *Shari'ah* is not only the law dictated by the jurist, but the *Shari'ah* dictates the jurist's behavior including decision-making process. The *Shari'ah* is holistic, all acts, including judicial decision-making are subject to legal categorization, and often sorted by the intent of the actor. Because Allah is the ultimate enforcer of the *Shari'ah* any intentionally misleading opinions are subject to judgment on the final day. As the famous *hadith* states "The one who performs *ijtihad* and reaches the right answer will receive two rewards [from God], and the one who performs *ijtihad* and reaches the wrong answer will receive one reward [from God]" [46].<sup>38</sup> The caveat is that the *ijtihad* must be performed sincerely. Again, it is the intent of the jurist that matters. Therefore one can assume that feigning the use of *ijtihad* in order to promote impermissible acts would be punished in the hereafter.

Thus legalism and its formalistic nature provide a safe avenue of judicial decision-making that is the process most often used among the jurists of an SSB. Does the all-encompassing nature of the *Shari'ah* protect itself from intentional misinterpretation motivated by economic or political gains? I believe ideally yes, it should. However this presumes private jurists and legal scholars have behaved in accordance with the Divine law when issuing rulings throughout history, and there is evidence to suggest that this was not always the case [12].<sup>39</sup>

Therefore the question becomes whether or not modern Islamic jurisprudence should become subject to the same critiques of legal realism that is now prevalent in the U.S.

<sup>38</sup> In this regard, Quraishi cites [43].

<sup>39</sup> Ali Khan discusses the charges made by orientalist Joseph Schacht that Islamic law had fraudulently copied earlier Judeo-Christian and Grecian legal traditions.

legal system. However unlike questions posed in the U.S. as to whether or not judges are or should be influenced by religious belief, the question here is whether or not Islamic judges are influenced by anything other than religious belief [19].

Although other scholars have attacked the sincerity of the Islamic banking industry's attempt to uphold the *Shari'ah*, their claims are overly cynical and improper as they lack any empirical data to support them. Thus a solution to this disagreement necessarily calls for the type of empirical research used to probe the minds of federal judges [15].

Moreover, would such a critical analysis help or reshape our understanding of *fiqh*? Would it create a rise demand for the now dead school of literalism (*Zahiri madhhab*) as a means of insulating the *Shari'ah* from outside influence [46]?<sup>40</sup> Would realism create the same cynicism and skepticism now confronting the U.S. judiciary? There are two short answers. First, if one thinks the psychological and social-science based approaches to understanding judicial decision-making have been successful or beneficial in promoting justice in the court system then perhaps it could be helpful to the Islamic legal realm. On the other hand if one thinks these forms of legal realism have subjected the judiciary to unwarranted criticism of being political actors then perhaps now is not the best time to critically analyze Islamic jurists. Essentially, the question is should the idea of an objective and pious Islamic jurist as described in this paper be forever tarnished by legal realism and critical legal studies, as the ideal of the objective U.S. judge was "slain" and "killed again" by legal realists and critically legal studies [19]?

I leave the answers to these questions up to the jurists themselves and all those passionate about Islamic law and finance. After the most recent financial crisis it has become apparent that market integrity is needed. In many cases Islamic finance provides solutions that will help restore market integrity. In the Islamic financial institution integrity rests with the *Shari'ah* board and its jurists. Therefore, in my opinion the study of their decision making process is needed to maintaining the integrity of *Shari'ah* compliance. However, in the end the most sincere answer always is "Allah knows best."

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<sup>40</sup> "The *Zahiri* position was well summed up by the famous Andalusian *Zahiri* scholar Ibn Hazm: 'whoever gives a legal decision on the basis of his personal opinion will be making decisions without knowledge, for there is no knowledge about religious matters outside the knowledge of the Qur'an and the Traditions [of the Prophet Muhammad].' Applying only the apparent meaning of those texts, *Zahiris* believed, will protect the Law of God from corruption by human whim" [46].

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