

Fethullah Gülen, Islamic Banking and Global Finance

A paper prepared for the *Fourth Conference on
International Corporate Responsibility*
Doha, Qatar, 16-18 Nov 2008

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Abstract

Fethullah Gülen, a leader of interfaith and intercultural dialogue, writes of “humanity’s vicegerency” that includes “reaping the bounties of the Earth ... within the framework of the Creator’s orders and rules.” What might this mean for international business ethics in general, and the expansion of Islamic banking practices and global financial ethics in particular? Fortrightness and transparency are critical in the contemporary development and spread of what are nominated Islamic or shariah-compliant financial products and services. This paper seeks to explore the advantages of acceptably disparate analyses of shariah-compliance, by suggesting how a Gülen-like religion-state *symphonia* can evolve. The resulting arrangement of financial affairs would thus allow for real diversity in banking options for all sorts of clients, carving out a space for secular and religious-based institutions, alike, in the global marketplace.

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Humanity's vicegerency encompasses reaping the bounties of the Earth and the Heavens for the benefit of humanity, trying to raise the hue, form, and flavor of life to a more humane level within the framework of the Creator's orders and rules.

– Fethullah Gülen¹

Introduction – Fethullah Gülen

Fethullah Gülen, a provocative Turkish leader of interfaith and intercultural dialogue, was recently voted the world's top public intellectual. In an online poll conducted during May-June 2008 by the journal *Foreign Policy* and *Prospect* magazine, Gülen received by far the most electronic ballots over the four-week voting period, which attracted altogether more than 500,000 submissions from around the world. Interestingly, while Gülen's win was described as a "landslide", the top 10 vote-getters were all Muslim (e.g. Muhammad Yunus, of Grameen Bank

¹ Fethullah Gülen, *Toward a Global Civilization of Love and Tolerance* (2004b), at 124 [partial paraphrase of a lengthy passage concerning "Humanity and Its Responsibilities"]. Passage in full is also available online at <http://en.fgulen.com/love-and-tolerance/270-the-ideal-human/1829-humanity-and-its-responsibilities.html>. Last accessed on 17 August 2008.

and Nobel Peace Prize fame, took second place; and the novelist Orhan Pamuk, another Turk who, like Gülen, currently lives in the United States, secured fourth place).²

Gülen lives today in Pennsylvania, and has thousands of followers—sometimes labeled *Fetullahcilar* or disciples of Fethullah—around the world.³ He teaches a moderate form of Islam that seeks to reach out in interfaith dialogue, particularly with representatives of the other Abrahamic faiths (the various branches of Judaism and Christianity), though curiously he is sometimes said to be aligned with the Muslim Brotherhood or as operating to “de-secularize” Turkey in order to establish an Islamic state. On the best current evidence those sorts of attributions seem quite mistaken.⁴ Rather, he embraces democracy as consistent with the Islamic teaching of public consultation, and resiles from claiming that a theocracy or indeed any single form or type of government is mandated by Islam. In that regard, his position parallels the

² The description of the poll and final list of top 100 public intellectuals is available in *Foreign Policy* (July/August 2008) and online at http://www.foreignpolicy.com/story/cms.php?story_id=4349. For an interview with Gülen after the tally, see http://www.foreignpolicy.com/story/cms.php?story_id=4408 (online only). Both online addresses last accessed and available to non-subscribers as of 16 August 2008. Gülen likewise has been given a relatively lengthy and, from all appearances, impartial Wikipedia entry (in English and Turkish), with substantial bibliographic and external links lists, at http://en.wikipedia.org/wiki/Fethullah_Gulen.

³ A variety of profiles and news stories have been published about Gülen and his followers’ activities over the years. See e.g. the Oxford Analytica profile, published in the *International Herald Tribune* (Jan 18, 2008), available online at <http://www.iht.com/articles/2008/01/18/europe/19oxan-Turkishpreacherprofile.php>. Also see “Islamic evangelists” in *The Economist* (Jul 6th 2000), available online (to subscribers or for fee) at http://www.economist.com/world/international/displaystory.cfm?story_id=4755. More recent items in the same weekly newspaper include “A farm boy on the world stage” and “How far they have travelled” (both in the Mar 6th 2008 print editions of *The Economist*) and available online at http://www.economist.com/world/international/displaystory.cfm?story_id=10808433 and http://www.economist.com/world/international/displaystory.cfm?story_id=10808408. The first and latter two online items are free of charge; all four items last accessed on 16 August 2008.

⁴ See e.g. the claim made by Filiz Baskan: “Like other Muslim Brotherhood organizations, the Fethullah Gülen Community used the opportunities created by a market-oriented economic model to obtain substantial economic power” in his essay “The Political Economy of Islamic Finance in Turkey: The Role of Fethullah Gülen and Asya Finans,” in C.M. Henry and R. Wilson (eds.), *The Politics of Islamic Finance* (Edinburgh University Press, 2004), at 219. For all that, even Baskan notes that what he calls the Fethullah Gülen Community “keeps itself separated from political Islam,” at 218. In addition, a case was filed against Gülen by a public prosecutor in the Ankara State Security Court in 2000 under the Counterterrorism Law, claiming he was “establishing an illegal organization to undermine the secular structure of the state with the aim of replacing it with a state based on Shariah law....” He was subsequently acquitted by the Criminal Court, sitting in review of the Security Court, and that acquittal was itself upheld by the Appeals Court in 2008.

ancient Orthodox Christian doctrine of *symphonia*—that church (or mosque or synagogue) is separate from, yet operates in harmony with, the state—neither seeking to direct or interfere with the other, and similarly reflects key aspects of contemporary constitutional jurisprudence on the separation of religion and state. Gülen thus eschews any personal political ambitions.

For all that, it is certainly accurate to note that Gülen’s followers have established and operate quite a few private schools around the world,⁵ and finance them largely on the basis of very generous donations (*zakat*) made by those same followers, many of whom own and manage their own (mostly SMEs) business enterprises, ranging from financial and insurance institutions to clothing manufacturers and retailers to chemical companies to major media outlets.

Though the scope and value of these various enterprises are wide and deep, for purposes of focusing on international corporate responsibility, this paper will look at just one sector, banking, and the Islamic influences on the operation of a financial institution that aims to attain Gülen’s overall goals: *hizmet* (“religiously motivated labor” to create social capital), *himmet* (giving of one’s resources and protecting the value of work), and *ihlas* (“seeking God’s appreciation for every action”), combined to create a well-ordered society that reflects “the morality of conviction and the morality of responsibility” and thereby “transform this world for the sake of the other world” (Yavuz 2003a, 186).

⁵ Most are primary and secondary schools, plus a handful of (i.e. fewer than 10) universities. Exactly how many so-called “Gülen schools” exist seems controversial: one survey notes ~300 (100 in Turkey, the rest mostly throughout Central Asia); another suggests the figure is 500+ in some 90 countries; while a third claims there are more than 2000 such schools across 52 countries and 5 continents. On one point there is general agreement: the schools do not directly teach religion in any classes, but seek to have teachers model an upright life in their manners, speech and behaviors. Beyond that, the schools focus on teaching the sciences and mathematics, with the language of instruction typically being English. See e.g. M. Hakan Yavuz, “The Gülen Movement: The Turkish Puritans,” in M.H. Yavuz and J.L. Esposito (eds.), *Turkish Islam and the Secular State* (Syracuse University Press, 2003), esp. at 38-41.

Islamic Banking – Turkey

In Turkey, what is elsewhere called “Islamic” or “shariah-compliant” banking is handled by what are nominated “participation” banks. (In order to maintain the constitutionally-mandated secular order, Arabic/Islamic terminologies are avoided within Turkey. In their place, plain descriptive language, in Turkish and English, is more typically utilized.) Legislation creating participation, or interest-free, retail and commercial banking, came into force in February 1984, the first such banks in point of fact being founded with foreign capital in 1985. Eleven years later, in 1996, Bank Asya (Asya Finans Kurumu AŞ) became Turkey’s third indigenous private finance house and participation bank, bringing the total of all participation banks to six.⁶ This last bank is of special interest because it (along with its insurance subsidiary, Işık Sigorta) is associated with Gülen (Baskan 2004, 224-226 & 236).

Participation, or interest-free, banks like Bank Asya, typically collect funds through two sorts of deposit accounts, and lend funds through three forms of financing accounts. All account operations are subject *sub silentio* to interpretation and application of shariah, or Islamic law, with the following emphases: *riba* or interest on a money loan is forbidden; financing of activities that are *haram* (such as gambling or alcohol) is forbidden; profit-sharing is encouraged; and financing of *halal* or permitted personal and commercial activities based upon sharing of risks is encouraged.

⁶ Depending on how one counts after some economic maneuverings due to difficult times in 2001, that number may today be but four. To make matters legally more complex, since 2005 Turkish Bank Act legislation has required participation banks to operate in essence as a bank within a bank—participation banking within a conventional bank’s operational and supervisory framework. Those contentious matters are not here addressed.

In addition to any paid-in capital and further sums from sales of its securities, funds available to and utilized by the bank in its business operations are collected through current accounts and profit-sharing accounts. Current accounts are callable or demand accounts, and attract no gains or losses: there is no risk, and hence no reward for “parking” one’s money in a current account. Still, doing so guarantees one will always have access to all funds deposited at any time, and deposits are insured against insolvency of the bank. Profit-sharing accounts, on the other hand, are non-demand or time-bound deposits (i.e. one must give designated prior notice of intent to withdraw monies) that attract or share in profit returns (and losses) based on their varying maturities (ranging from one month to more than one year). One then can participate in the bank’s profits (and share in the losses) in accordance with the formula attaching to the account per the amount of one’s money and commitment of one’s time involved, with the usual caveat that past performance is no guarantee of future returns, and deposits are not (fully) insured.

When it comes to lending monies, three basic forms of financing accounts (with some variations and permutations) characterize the monies provided clients of the bank for personal and commercial purposes. *Murabaha* accounts represent monies used by the bank to purchase an asset, which it then sells-on to the client at an agreed mark-up: the mark-up being a function of the nominal amount at stake plus the time interval for repayment. *Ijara* accounts represent monies invested by the bank in purchasing an asset, which it then leases to the client at an agreed rate; at the end of the term, the client usually (with some limited exceptions) makes some final, agreed payment to take ownership of the asset that had been leased. *Mudaraba* accounts represent monies invested by the bank in the setting-up or continuing operations of a business,

which is being run and managed by the client, with profits and losses being shared between the bank and client at some agreed rate. (*Mudaraba* is effectively a partnership, wherein one partner invests only capital while the other has only “sweat equity” to tender, with profit-and-loss sharing on the basis of an upfront formula that recognizes the asymmetrical contributions of the partners. A less common variation on this last account is *musharaka* or “on par” partnership, in which both the bank and the client invest time, skills and monies in the setting-up and running or continuing operations of a business, with profits and losses being shared proportionally against all resources expended.)

In addition, there are investment products similar to bonds, often called *sukuk*—an increasingly popular yet quite controversial market vehicle,⁷ particularly suited to project financing, whereby investors receive returns based on cash-flow generated by productive real (usually tangible) assets that underlie and are [fractionally] owned by the holders of the paper (and so at least facially differentiating *sukuk* from conventional bonds). Also, to replace traditional insurance products that run afoul of shariah norms, there are *takaful* agreements, similar to “mutual aid” fund vehicles that can more properly underwrite personal and commercial risks.

Finally, Bank Asya itself might be called a hybrid bank rather than a pure shariah-compliant bank. This is not only because of the legislation footnoted above, requiring

⁷ See e.g. Y. Chang, S. Kim & J. Choi, “Sukuk tough to issue” and N. Khan, P. McViety & L.B. Corstius, “Scholarly debate drives reform”. Both items in the print edition of *International Financial Law Review* (August 2008), 33-35 & 36-37, and are available online (subscription or for fee only) at <http://www.iflr.com/default.asp?page=10&PUBID=33&ISS=24890&SID=709747> and <http://www.iflr.com/default.asp?page=10&PUBID=33&ISS=24890&SID=709748>. Both items last accessed on 17 August 2008.

participation banks to operate within a more conventional banking framework for regulatory purposes. Rather, just as Gülen presents a moderate face of Islam to the religious world, Bank Asya presents a moderated set of interest-free products and services to its clientele (and its shareholders—the bank went public in 2006). For unlike more strictly interpreted and applied norms of interest-free banking, Bank Asya also offers some consumer and commercial products and services, like credit cards and overdraft protections, which do indeed attract what can only sensibly be described and calculated as interest charges on the use of monies advanced by the bank. As a result, one might say it operates an interest-based “window” in an otherwise interest-free banking structure, a mirror-reflection of several major western banks like Standard Chartered and HSBC that today operate “Islamic windows” alongside their regular interest-based product and service lines (cf. Elfakhani, Zbib & Ahmed 2007, 118).

Islamic Banking – Globalized

It is not perhaps immediately apparent just how all these, sometimes quite complexly structured, deposit and financing and investment or insurance accounts significantly differ from western, interest-based, accounts; or why they might properly be called shariah-compliant while traditional banking methods are not; or even assuming they are functionally different, whether they are economically viable. Indeed, some writers have called Islamic economics and Islamic banking spurious, excoriating its products and practitioners.⁸ We need not decide those issues, here. I am neither a Turk nor a Muslim, and do not mean either to defend or criticize such products and services and their tendered justifications. I do mean to attempt fairly to describe

⁸ For strong, yet academic, external critique, see e.g. Timur Kuran, *Islam and Mammon: The Economic Predicaments of Islamism* (Princeton University Press, 2004). Within the Islamic banking community, there have also been significant criticisms, particularly of newer complex products, like *non-ijara sukuk* issues and hedge fund total-return swaps.

these accounts, and to suggest how more forthright and better framed communications by financial institutions offering them might alleviate significant worries and concerns of potential clients and regulators, alike. For all these account products and services are by no means limited to Turkey or GCC countries or those around the world with majority Muslim populations. Indeed, these products and services are becoming more widely available, particularly throughout North America and Western Europe (consider as but one example the recent establishment of the Islamic Bank of Britain), where neither government regulation nor legal remedy would appear clearly to apply or suffice to guard against negligence, deceit and fraud in those transactions.

This is prospectively disconcerting because the alternative financial products and services in question are arguably to be welcomed, and doubly unfortunate because any resulting harm to investors and consumers will likely undermine the entire sector no less the individual transaction. In 1997, there were already 176 Islamic banks and financial institutions around the world (Kahf 1999, 453). But growth in the sector has been great; as noted by Jaun Solé in a recent IMF Working Paper, “there are currently more than 300 Islamic financial institutions spread over 51 countries, plus well over 250 mutual funds that comply with Islamic principles. Over the last decade, this industry has experienced growth rates of 10-15 percent per annum—a trend that is expected to continue” (Solé 2007, 3). While the nominal asset base overall remains comparatively small (~US\$400bn), it is growing rapidly; and growth in *sukuk* issues alone is now approaching US\$100bn.⁹ These institutions and their products and services thereby can present real financial options to observant Muslims and others who seek alternatives to typical

⁹ “Under the microscope,” an *Economist Intelligence Unit* ViewsWire opinion piece (Mar 10th 2008), available online (subscription or for fee only) at http://www.economist.com/agenda/displaystory.cfm?story_id=10833755. Last accessed 17 August 2008.

risk-ranked, interest-based banking and investment products and services.¹⁰ Still, these otherwise potentially desirable alternatives carry their own range of overlapping risks that must be addressed, variously identified as compliance risk, operational risk, regulatory risk, fatwa risk, spiritual risk, and scholar risk (all on which more, below).¹¹

Consider the following scenario. After all necessary documents are signed and the transaction is finalized, one party, say the consumer/purchaser, discovers the deal may not in fact accord with not unreasonable assumptions about what fairly constitutes shariah-compliance. This may be due, perhaps, to discovery that (1) interest-bearing and non-interest-bearing funds are not all fully segregated by the financial institution selling the product; or (2) the institutional funds manager is not personally committed to advancing shariah-compliant standards across the business; or (3) the institution's investigation into shariah-compliance was not handled by a scholar or scholars recognized as holding proper authority by the customer's spiritual advisor; or (4) the scholar(s) advanced a minority opinion supporting the legitimacy of the particular transaction—an opinion contrary to the position promulgated by a majority of other Islamic finance advisors. How does the customer now judge the product or service that constitutes the deal? Does the consumer have any recourse? One cannot simply declare that the specific contract has or has not been breached, since what is at issue reflexively concerns what is meant by “shariah-compliant” in the context of this particular [type of] transaction. Neither is it clear that

¹⁰ It is of at least passing interest that Islamic financial institutions are doing well in the midst of the current global liquidity crisis hitting mainstream financial markets via the collapse of their complex securitized products.

¹¹ These risks are similar to, yet importantly different from, the risks using these names found in contemporary risk management literature (cf. e.g. Allen 2003; and McNeil, Frey, & Embrechts 2005). We thus leave aside other, more typical risks, such as legal risk, that closely track the risk concerns of makers and clients in most any financial transaction. For an explication of some legal risks that are more directly related to Islamic jurisprudential concerns, see Andreas Jobst, “The Economics of Islamic Finance and Securitization,” *Journal of Structured Finance* 13(1): 6-27 (Spring 2007).

there is any legal recourse involving a breach of general standards concerning good faith and fair dealing. As noted by Haider Ala Hamoudi at a recent symposium on Islamic business and commercial law, “I have more than once fielded calls from angry Muslim congregation leaders in the United States asking me to direct them to ‘real’ Islamic financial institutions, as the particular banks to which they went indirectly charged interest in their view, albeit in the form of an elaborate and obfuscatory transaction” (Hamoudi 2007a, 615).

Managing Risks

How might primary goals of communication, transparency and accountability be advanced in these cases, no less for the sake of expanding confidence in and recommending recourse to the larger market, as for managing expectations and understanding the particular transaction? One might suggest promulgation of a single, global standard, by an appropriate authoritative body, which would be adopted by any and all financial institutions in order to be recognized as Islamic or shariah-compliant. Of course there would be the initial concerns about what standards ought to be drafted, and what body could be deemed authoritative for delivering such a set of global standards to cover financial institutions in countries as diverse as the United States, Saudi Arabia, Malaysia, Nigeria, Turkey, and Brazil.

Perhaps launching a new international technical body, similar to the International Telecommunication Union (ITU), under auspices of the United Nations, would suit? After all, since its founding in 1865, the work of the ITU has been to bring together a wide range of private industry and public sector representatives from many nations to hammer out technical standards for interoperation of communications equipment around the globe. It has been very successful

over time, establishing regulations and specifications *inter alia* for telegraph, telephone, radio and satellite communications, which permit citizens around the world more easily to communicate with one another than would be the case in the presence of diverse national or product-by-product standards (Coddling & Rutkowski 1982). Hence, if standards and compliance issues are at stake in this matter, such a body might be well placed to determine whether any particular banking product or service constitutes an Islamic product or service for commercial or retail investors and customers in all the countries so served.

Or perhaps an international policy body, modeled on the Center on Transnational Corporations (CTC), also under the auspices of the United Nations, would better serve. It, likewise, has been relatively effective in its remit, advancing a variety of codes to handle wide-ranging economic matters by multinational corporations (Fatouros 1994). After all, since such a body can deal with broad policy issues touching economic justice and legislative fairness, regulations and specifications outlining the operations of large financial institutions that span the globe might help order a distinct, evolving Islamic banking regime.

Or better still, what of a working group under the auspices of the intergovernmental Organization of the Islamic Conference (OIC)? Similar to its Islamic Fiqh Academy, such a body would be able to combine aspects of both a standards-based ITU and policy-directed CTC, in addition to being a body singularly representative of the Muslim world (Khan 2001). Such a body could promulgate standards and policies touching Islamic banking affecting institutions around the globe, and with a perceived legitimacy unavailable to other more cosmopolitan bodies.

For all that these possibilities exist, I would argue that any and all such attempts at global harmonization would yield poor returns and ultimately be unavailing. The ITU option initially may be appealing, but the issues of Islamic finance cover far more than technical specifications for otherwise fungible items: whether a product or service is shariah-compliant raises issues of classical religious law and contemporary interpretation that go well beyond application of simple economic criteria. While the CTC option is thus a tad more appealing, the multiple and conflicting policies that underlie particular Islamic jurisprudential decision making augur against successful conclusion to any such body's work. Finally, as appealing as the OIC option may likewise appear, it too fails to be a convincing forum for determining standards and policies that will perforce apply to legal and financial systems that are not Islamic in character. While such a body might promulgate a code that reaches, for example, Saudi Arabia and Malaysia (itself a bit of a stretch, given the divergences already existing between these countries and their banking systems, today), it surely would not reach governmental financial regulators in the US or the EU (see Warde 2000, 299). Therefore, we must expect that all such global options will fail to deliver.

On the other hand, appointment of Islamic scholars or experts to secular, governmental regulatory bodies is likely not an option, either, at least in most countries where separation of religion and state is normative. For example, "excessive entanglement" legal rulings in the United States and similar legislative concerns in the United Kingdom prohibit governments from directly appointing religious leaders to enforce religious food (such as kosher and halal) regulations, one would expect *pari passu* the same prohibition to extend to governmental

financial regulators appointing their own shariah experts, however sensibly suggested by some commentators:

Financial regulators should also appoint their own Shariah experts, which would provide advice on the instruments and services offered by the institutions in their jurisdiction. Consultation with these experts would be crucial to ascertain whether the regulations issued by the supervisor with regard to Islamic institutions, as well as the licensing of different activities, are compatible with Islamic principles (Solé 2007, 5).

For all that, one might opine that a voluntary, self-regulatory environment is currently evolving in Islamic banking circles. Agencies such as the Islamic Financial Services Board (IFSB), the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), and the Islamic International Rating Agency (IIRA), have promulgated a variety of standards that financial institutions ought to meet in order to call themselves and their products and services Islamic or shariah-compliant. The IIRA even acts as a sort of Moody's-like ratings service, providing what it calls a Shari'a Quality Rating (SQR), running in six steps from the highest *AAA (SQR)* to lowest *B (SQR)* (the former conforming to the "highest level of standards" in all aspects; the latter conforming to an "adequate level of standards" though "weaknesses in some areas" exist), both for entities and their financial instruments.¹² Private consulting services and think tanks, like Dar Al Istithmar (a joint venture of Deutsche Bank, Russell Wood and Oxford

¹² Ratings agencies like Moody's Investor Service, Standard & Poor's, and Fitch Ratings, all follow Islamic finance markets and will rate the credit worthiness of, say, a bond issue underwritten by an Islamic financial institution, but none take into account or provide advice on shariah-compliance for their ratings purposes, leaving that assessment to appropriate religious authorities. Similar approach is taken by some governmental authorities, such as the UK Financial Services Authority exercising its regulatory role over the new Islamic Bank of Britain: the FSA provides secular oversight of the Bank's operations, but leaves shariah-compliance issues to the Bank's own Sharia'a Supervisory Committee. A different approach is taken by Dow Jones in the management of its multiple Islamic Market Indexes, which utilizes an independent Shariah Supervisory Board or SSB for counsel concerning equities meeting "stringent" criteria for inclusion in any index (details at <http://www.djindexes.com/mdsidx/?event=showIslamicOverView>, last accessed on 17 August 2008).

Islamic Finance, headquartered in London), likewise claim to provide expert advice to the industry and individual institutions.¹³

The limitations inherent in such self-regulation are relatively greater, however, in the financial realm than in other markets. In other, say the foods, arena, a consumer can buy at a shop licensed by a religious body associated with the particular sect to which the consumer adheres and so about which there is pertinent and sufficient information. If one alternatively wishes stricter or looser or even some different standards enforced, one chooses the appropriate shop licensed by the appropriate body. Naturally, one has legal recourse for false or deceptive advertising and fraud with regard to religiously sanctioned foods: if what is sold is knowingly offered by the seller not to meet the standards guaranteed by the advertised licensing body, one has been deceived or defrauded in the sale and usual legal remedies in public courts are available. But these remedies are neither more nor less than those widely available for sales in general, where the product or service is expected to meet some standard known and agreed by the parties. One is not in a position legally to challenge the award of a license by a private body, or labeling a specific product sanctioned by an appropriate licensing body, or generally to challenge the decisions and operations of the licensing body, itself (at least so long as it is operating according to its charter).

But what exactly are the standards that can be imported into such disputes where Islamic financial products are at stake? Just how are investors in and consumers/purchasers of these

¹³ Details concerning the Islamic Financial Services Board (IFSB) can be found online at <http://www.ifsb.org/>; the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) can be found online at <http://www.aaofii.com/>; the Islamic International Rating Agency (IIRA) can be found online at <http://www.iirating.com/>. All sites last visited on 17 August 2008.

products to know the sort of standards applied, whether they conform to the individual's principles and expectations that can be noticed and upheld by a court or arbitrator seeking to settle a dispute? One might rightly be concerned that any legal actions will fail on grounds similar to those noted by a British court in *Beximco*.¹⁴

In that case, reference was made to a set of financing agreements between a bank in Bahrain on the one side, and a pharmaceutical company and its guarantors on the other. One key governing law clause specified that the agreements were “subject to the principles of the Glorious Sharia’a” as well as English law. The justices decided that only English law would be construed and enforced; that the parties could not be asking the court to “get into matters of Islamic religion and orthodoxy” [quoting the lower court judge at ¶41] since there is no specific “reference to, or identification of, those aspects of Sharia’a law which are intended to be incorporated into the contract” [at ¶52] as one might do with foreign or international law terms that the parties seek to apply to their dealings (e.g. applying International Chamber of Commerce UCP 500 rules to a particular transaction’s documentary credits). In short, determining whether the financing agreements were or were not *halal* was beyond the purview of the court.

We might consequently proceed, then, by analyzing the range of risks identified earlier in this paper and, if possible, address them. The first, called compliance risk, refers in this context to the likelihood that a financial product or service “is not or will not be in compliance” (DeLorenzo 2007, 397) with the accepted structure and mechanics of Islamic law as related to financial transactions. According to DeLorenzo, we can best conceive of compliance risk as

¹⁴ *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and others*, [2004] EWCA Civ 19, [2004] 4 All ER 1072.

itself a function or form together of operational and regulatory risks (DeLorenzo 2007, 398). That is, managing compliance risk requires attending to the transparency of the product's or service's development, implementation, and subsequent control and use of funds associated with it, as well as how well this all is communicated to the target market of consumers/purchasers. As he subsequently notes, one way an institution can begin to manage these enveloping risks is to establish and follow the advice of an internal Shariah Supervisory Board (SSB)—comprising three or more scholars trained in Islamic law and finance, who are directly involved in and so responsible for the Islamic character of the financial institution's overall operations, as well as its particular products and services.

SSB's (and others) can then promulgate a fatwa or religious legal opinion, as is becoming more frequently required by some private regulators, attesting to or certifying that the character of the financial institution, or the particular product or service provided by the institution, is in compliance with Islamic law. The fatwa risk is then the probability that the fatwa will be rejected either by a private regulator or the institution's market targets. That probability is itself a function of scholar risk, or the likelihood that the SSB scholars will be accepted as such, that they represent a broader (or narrower) range of Islamic opinion and can communicate well with their institutions and the public. Part of this risk is a reflection of what has been nominated a scholar shortage: "In part because Islamic finance has grown in recent years, there has actually been a reported shortage of Shari'ah scholars possessing the dual expertise in modern finance and Muslim practices required to make such determinations" (Karasik, Wehrey & Strom 2007, 385). Neither is there any "consistent way of appointing Shari'ah boards, nor in the authority to which they report" (Kahf 1999, 454). Hence, concerns exist about potential conflicts of interest

(a single scholar serving on multiple boards for highly remunerative fees), as well as the range of differing interpretations that flow from these scholars' judgments. This latter concern sidles into our final, or spiritual risk, category, being the extent to which one is willing to put oneself and one's financial affairs under the guidance of any cleric or board for the sake of following Islamic mandates and so submitting to God: "The current range of religious opinion on Islamic finance provides many alternatives for people with varying tolerance for spiritual risk. The general consensus upholds the formal ban on interest despite frequent assertions [by a minority of scholars] that the Qur'an prohibits usury and exploitation rather than interest per se" (Bianchi 2007, 578).

Closing Observations

So let's return to one of the hypothetical queries with which we began: what if the institution's advisory board adopts a minority position (for example, the board might adopt a position of the Hanafi school that is rejected by the other three principal Sunni schools of Islamic jurisprudence broadly recognized by Muslim scholars and adherents of Islam)?¹⁵ Will different financial institutions then reflect different schools? Just what level of specificity must be embodied in the

¹⁵ There are four Sunni schools widely recognized today: the Hanafi, Maliki, Shafii, and Hanbali. A fifth school, Jafari, is associated with Shi'a Islamic jurisprudence (Brown 2007, 516). Not all schools agree with all financial options nominated shariah-compliant. For example, a minority allow a purchase of goods in a *murabaha* transaction to be completed directly by and in the name of the purchaser, rather than first being completed by or at least in the name and on behalf of the financial institution before transfer. As noted by Hamoudi, even when sanctioned by a recognized authority, many of these types of transactions "have proven somewhat controversial", while other jurists "have denounced them" outright (Hamoudi 2007b, 120). Just what a court is empowered to do or of what factors it can take notice, in turn depends on the laws to which it can make reference. Hence, a court in Malaysia, taking its cue from Bank Negara, that nation's central bank which is charged with determining just what transactions are shariah-compliant and so contractually licit, can make decisions on "black letter law" grounds; while other courts, which have no such fixed point of legal-financial reference, cannot. See e.g. the decision of the High Court of Malaysia in *Tahan Steel Corp Sdn Bhd v. Bank Islam Malaysia Bhd*, [2004] 6 MLJ 1 (Malaysia), wherein the lead Justice, with due respect to the British court's *Beximco* decision noted above, disagrees with the claim of internal conflicts in the law of Islamic finance (¶20) and cites black letter Malaysian law defining Islamic banking in order to help resolve the issues involved in the instant case concerning *istisnaa'* financing agreements. For review of various models concerning central bank governance of Islamic bank operations, see El-Gamal 1999.

financial institution's marketing practices and especially its financial documents detailing the agreement so that the consumer can receive the benefit of the bargain, and still retain legal recourse for breach of same?

Standard marketing practices highlight some of these concerns. A quick scan of banking catchphrases, for example, tells prospective clients that one bank holds to "Islamic Principles you can Bank on" [NBP Pakistan]; another proclaims "Your wealth Your principles" [Standard Chartered Saadiq, in Malaysia, UAE, Pakistan, Bangladesh]; and another suggests "Earn the Best of Both Worlds" [Clico Investment Bank, in Trinidad & Tobago]; while one more appeals to a desire to "Bank on Timeless Principles" [Askari Islamic Banking, in Pakistan]. But exactly what is the meaning or significance of these avowals? What do they actually entail, and so how do these financial institutions in practice differentiate themselves from non-shariah compliant banks, or distinguish themselves as a shariah-compliant bank from the rest?

There are some broad, key principles that might apply to these and related concerns rather well. In 1993, after some 10 years of interfaith consultation under royal patronage, Jewish, Christian and Muslim religious and business leaders met in Amman, Jordan, to announce "An Interfaith Declaration: A Code of Ethics on International Business Ethics for Christians, Muslims and Jews."¹⁶ In that Declaration, four key ethical concepts were identified: "justice (fairness), mutual respect, stewardship (trusteeship), and honesty (truthfulness)" (Webley 1999, 100). It is the fourth concept that is decisive in our context. Honesty, often cashed-out in terms of truth-

¹⁶ The Declaration is available online at http://astro.temple.edu/~dialogue/Codes/cmj_codes.htm. Last accessed on 17 August 2008. It is also analyzed and extensively treated in a series of papers, collected in G. Enderle (ed.), *International Business Ethics: Challenges and Approaches* (Notre Dame: University of Notre Dame Press, 1999). The Declaration is introduced by Simon Webley in his essay, "Values Inherent in the Interfaith Declaration of International Business Ethics," at 96-108.

telling or forthrightness, is a key variable. But it means more than candid descriptions of products and services. Note that the parenthetical is truthfulness—a character trait or virtue, not just a claim not to actively lie in word.

Gülen himself addresses this matter in a recent work that details the key concepts of Sufism as they apply both to private and public life. *Sidq* or truthfulness means “true thoughts, true words and true actions [so that one] always seeks truthfulness on both an individual and a social level. . . . Truthfulness can be defined as struggling to preserve one’s integrity and to avoid hypocrisy and lying, even in difficult circumstances when a lie will bring about salvation” (Gülen 2004a, 84), and so embodies that mutual respect and ongoing communication that authenticates true dialogue and submission to one’s Creator. From conversations I have had in Turkey with Muslim businessmen who attempt to adhere to Gülen’s ideas in both their private and public lives, it seems apparent that honesty and transparency in all personal relationships and business transactions are two core, repeated themes. In but one example, a Turkish businessman operating in Russia indicated that bribery is not a problem for him since he makes it clearly known from the start of operations in word and deed that he will leave the marketplace before making illicit payments—petty or substantial—to anyone, whether demanded by a governmental representative or private party. This commitment resonates well with the formal standards promulgated through laws and treaties like the United States’ Foreign Corrupt Practices Act (FCPA, originally promulgated in 1977), and the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention (originally adopted in 1997 under the formal title, Convention on Combating Bribery of Foreign Officials in International Business

Transactions), whereby corporations and their agents are held accountable to maintain honest and transparent activities in all their business dealings.¹⁷

Returning to the specific issues raised by claims of financial institutions to be engaging in Islamic banking practices: since (A) deceptive advertising and unfair competition statutes and enforcement are of limited value in this sector at this time; and (B) western legal jurisprudence would seem commonly to prohibit establishing shariah-compliance investigators/enforcers within federal or state securities, banking and consumer affairs agencies; and (C) there exists a variety of scholars and schools of Islamic jurisprudence which offer divergent as well as convergent counsel on what transactions are or are not shariah-compliant; and (D) claims by financial institutions within the US (and around the world) to be Islamic banks, or to be offering shariah-compliant products and services through separate service “windows”, are increasing; let me suggest the following five steps be taken for the benefit of the industry worldwide, as well as investors and consumers in otherwise Western-oriented markets.

First, consistent with rights to freedom of speech, freedom of association and freedom of religion, constrained legally only by statutory and common or civil law guidance concerning

¹⁷ Transparency International recently released its 2008 *Progress Report* on the OECD Anti-Bribery Convention, noting a variety of current investigations and enforcement actions (or lack thereof) by signatories (available for free download at http://www.transparency.org/publications/publications/conventions/4th_oecd_progress_report, last accessed on 18 August 2008). TRACE [Transparent Agents and Contracting Entities], another non-profit membership organization, published an interesting paper in 2003, entitled “The High Cost of Small Bribes,” arguing that even small facilitation payments (legal under the FCPA) come at an excessive cost and are to be avoided. It, too, is available online and free of charge at http://www.fandc.com/uploadfiles/co_gsri_high_cost_small_bribes.pdf. Last accessed 18 August 2008.

inter alia deceptive advertising and unfair competition, any financial institution may claim to offer Islamic or shariah-compliant products and services.¹⁸

Second, any financial institution which claims to offer Islamic or shariah-compliant products and services shall explain to any current or prospective investor and customer the bases for this claim, and offer in writing, as warranty for the same, a document detailing those bases.¹⁹

Third, these bases, comprising the institution's warranty of good faith and fair dealing, shall be incorporated into all transaction agreements or contracts, and noted as critical or essential elements of the deal agreed, so that any change in these bases constitutes a significant alteration of the parties' bargain.

Fourth, should any basis for the claim of Islamic or shariah-compliant status ever change (e.g. a change in scholars on the advisory board or a change in the schools of jurisprudence represented), the investor or consumer must be given updated notice as soon as practicable but no later than 30 calendar days after the change.

¹⁸ This is not to be confused with more limited undertakings, such as the Islamic Finance Documentation Committee (IFDC), that operates as a joint working group representing the International Capital Market Association (ICMA) and the International Islamic Financial Market (IIFM), to create regional guidelines applicable only to Middle Eastern markets, where Gulf Cooperation Council countries claim already to have established shariah-based regimes to guide the development of their banking sectors.

¹⁹ Practical examples of what might be expected in a writing along these lines can be found in consumer protection legislation, like the Truth-in-Lending Act, 15 U.S.C. §§1601 *et seq.*, and its accompanying detailed requirements in Regulation Z, at 12 CFR §226.1 *et seq.* While there may be no need for shariah-compliant transactions to adhere to certain specifics mandated in these laws (like size of font utilized in the document), the overall thrust of the legislation to ensure the consumer receives sufficient information to make an informed decision is well worth mimicking.

Fifth, and in relation to the fourth point above, should any basis for the claim of Islamic or shariah-compliant status ever change as noted, the investor or consumer must be permitted to renegotiate or unwind/close out the investment or transaction then open, in an orderly fashion and without financial or other penalty.

Naturally, one appropriate way for handling standardization of these terms and advancing the cause of these banking and investment alternatives is for financial institutions explicitly to adopt consensual guidelines and provide investor and consumer education of same, so that where one sees a particular body's license or label or seal of approval, one can know what sort of product or service to expect. By the same token, these standards bodies must engage in their own education and policing activities, so that investors and consumers can have confidence in, and institutional leaders can know they will be held to, the body's guidelines.

Consequently, it would be quite salutary to see increased transparency of these standards bodies in their processes of (a) producing guidelines; (b) licensing producers; (c) monitoring enforcement mechanisms; and (d) publishing industry data (e.g. how many institutions are licensed; how many periodic reviews/enforcement proceedings or actions have been taken; any licenses withdrawn and methods of publication/announcement of withdrawal to the general public). It would also help to publish comparative data, such as information on operations overseas, especially in countries like the US where shariah is not the law of the state.

Finally, it would also be valuable to have data published on general operations of those banks, like HSBC and Citi,²⁰ which operate Islamic or shariah-compliant “windows” so that others might benefit from knowledge of their histories.

In these multiple but linked ways, roads can be smoothed to advance the spread of such banking alternatives. So built on increasing investor and consumer confidence that institutions are offering products of value, and for which they can know there is recourse to settle concerns or grievances if and when they arise, neither is there need for any single cosmopolitan compact or standard defining shariah-compliance in investment or retail banking: diversity will be the sector’s strength, not its weakness.

²⁰ Some information about HSBC’s “Islamic window” or subsidiary, called HSBC Amanah, can be found online at <http://www.hsbcamanah.com/1/2/hsbc-amanah/>. Citi’s window is called the Citi Islamic Investment Bank, and some information about its operations can be found online at <http://www.citibank.com/ciib/homepage/index.htm> (both sites last accessed on 17 August 2008).

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