The Importance of Ijtihad in the "Conceptual Framework of Islamic Banking"

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Introduction:

In nearly all Muslim countries and societies, *Sharia* is experiencing a resurgence. Calls to return to Islamic authenticity are now familiar ones. This trend is particularly transparent in the realm of finance, banking and insurance.

Muslims since the 4th century (10th AD) lived under a "convention" that the "gate of Ijtihad is closed". This came after the completion of the four major fighi schools. It lead to virtual stagnation in the fighi research as the function of a fagih became just the repetition of what is already in the books.

In the second half of this century, and after the demise of colonialism, Muslims realized that the conventional institution of financial intermediation which is based on a borrower-lender relationship and interest is not in line with *Sharia.* They started looking into their history and jurisprudence to find a substitute. A model of Islamic bank was based on Mudarabah, replacing the borrower-lender relationship with a profit and loss sharing arrangement. To meet the needs of society and to compete with conventional banks, while still working within the boundaries of *Sharia*, Islamic banks needed a tremendous efforts in this area *Sharia* research and a great deal of Ijtihad. In-fact, the emergence of Islamic banks was a blessing to figh, because it created a strong case for "opening the gate of Ijtihad".

Meaning of Ijtihad:

Ijtihad in *Sharia* is the "total expenditure of effort by a [qualified] jurist in order to infer, with a degree of probability, the rule of *Sharia* from

their detailed evidence in the sources" (Kamali: P. 367). These sources being the Koran, Sunnah, Ijma and qias. Ijtihad can be directed to inferring rules of *Sharia* or in applying established rules to a particular new or unfolding situation. Ijtihad is not an "human" extension to *Sharia*. *Sharia,* therefore, encompasses its own means of renovation and revitalization

The limits of Ijtihad:

Though it is the means of *Shariah* resilience, Ijtihadis, by no means, a source of anarchy and chaos, or transforming *Sharia* from a divine to man-made law. Ijtihad, therefore, is not a human source of law. While utility, custom and the general good is well taken and considered in the process of Ijtihad, they are relevant in as much as they are lending weight to, for example, the choice of the possible analogy over another in the case of qias. Without such a limitation, *Sharia* will, by time, lose it virtue and its divine character.

This proposition is not only sets the limits of Ijtihad, but it also sets the limits of *Sharia* tolerance of hermeneutic exercise. On the other hand, Ijtihad don't include extraction of *Sharia* ruling from clear (un probable) texts. For example, The Koran says that "Alms are for the poor and the needy and those employed to administer the funds; for those whose hearts are to reconciled...etc. (Sura IX no. 60) knowing that Zakah is to be paid to the poor, needy.....etc. is not Ijtihad. But deciding that those whose hearts are be reconciled are paid part of the Zakah only because Islamic state was weak at the early days of Islam, and from that inferring that now (at the time of Khalifat Omer Ibn al-khattab) we don't need them no more and hence eliminate their share of Zakah is Ijtihad. This is what second Khalifa did.

Ijtihad in the words of one great Islamic scholar:

The following is an excerpt from Elaam Almuaggean, the famous book of the great fagih; Ibn Alqayyem concerning Ijtihad:

"This is the lucid righteousness: being ceaselessly set on the narratives is, always, going astray in *Sharia*, and an ignorance of the intention of leading learned men. He who gives fatwa based solely on what is narrated in the books, ignoring differences in people's norms, habits, their era, circumstances and signs of their conditions is misguided and misguiding, his harm to religion is worse than harm inflicted by one physician prescribing to all and every one out of only one book of medicine. Rather, this ignorant mufti is more harmful to the body and religion of Muslims". (Ibn Alqayyem P. 77-78).

Some examples of present-day Ijtihad:

It is no surprise that the most significant Ijtihad of the present-day is in the field of finance and banking. This is because Islamic banking is the most notable component of the Islamic system, that was brought to life in this era. To be able to meet the challenge of modern life, while remaining within the boundaries of *Sharia* a great deal of Ijtihad was needed for Islamic banking. The issues facing these new banking institutions had no ready-made ruling in *Sharia*. Many needed "Ijtihad" to infer from the original sources the appropriate rules. *Sharia* boards in Islamic banks and the figh Academies all over the Muslim world responded to this challenge. Some examples are given below:

1- The promise as a commitment in Murabaha:

Although, Islamic banks have to do “real” and not purly of monetary transaction, their primary function is financial intermediation. They are to offer viable and practicable substitute for conventional banking. One major concern for any bank is matching assets with liabilities. For this reason, Islamic banks can’t actually engage in a merchant-like activities, like maintaining warehouses with large inventory of good and equipment ...etc. Yet, it is required to finance through actual purchase and resale of such goods and equipment. It is a rule of *Sharia* that, to sell anything one is, first, have actual possession. When an Islamic bank is approached by a client who wants to buy an airplane, for example, the bank can’t enter into a sale contract unless it already owns and posses such plane. Certainly this client can promise that if such equipment is purchased by the bank, he will buy (on installment) and give a profit to that bank. However, a promise in *Sharia* is non is non-committal, for if a commitment is averted then it is no longer a promise but an actual sale contract which is not allowed at this stage. Some contemporary fugaha found that in the Maliki school, a promise becomes obligatory once the promised find himself in a predicament due to that promise. This Maliki position is, infact, in the realm of benevolent contracts (like gifts) and not exchange contracts (like sale). The Ijtihad of these fugaha was to adopt the same criteria for Murabaha, though it is a sale contract. Therefore, once the bank buyes that airplane, it will

actually because in a great predicament if the client desires not to buy. His promise actually becomes a vow.

2- Constructive liquidation of Mudarabah:

Mudarabah is a partnership in profit, where one agent (rubal-mal) provides capital, and the other (mudarib) provides labor or management. The two agents contract on dividing profit by what ever ratio they agree on at the time of contracting. However it is the standard *Sharia* requirement that Mudarabah is liquidated prior to portion of profit. This is because, without dissolution, we can't be certain that value was actually credited item of the original capital which is the owner-ship of the financier. Because the idea of Islamic banking was based on Mudarabah in its liability side, this becomes a problem. This is because investment accounts are mostly short term (3, 6, 12 months), while assets created by use of these funds are mostly long term. Liquidation is not practicable and at times plain impossible.

A major achievement of Ijtihad was made by Sharia boards in Islamic banking is that it is sufficient to do "constructive liquidation" via accounting procedures. This made the Mudarabah a viable and practicable substance for time deposits.

3-Reciprocal lending:

The loan contract in *Sharia* is, always, for benevolent purposes. Qard-hassan is the only form of lending allowed. No interest or any compensation is allowed to be advanced by the borrower to the lender. *Sharia* is very strict in this matter to the point that any conditions imposed by the lender on the borrower is considered suspicious and generally not allowed. In particular, giving a loan to some one with a condition that he gives a reciprocal one later is not allowed and considered usurious. When Islamic banks started, they needed, among other things, to have correspondent banks all over the world. Through correspondence banking remittances, transfer, L.C's...etc. can be made. All this require opening an account with a credit limit by the Islamic bank at each and every correspondeny bank. Certainly Islamic banks can waive their right to earning of interest, but a correspondent bank will never give "free" credit when such is needed. Rather than earn and pay interest. The solution was to work out an arrangement whereby an Islamic bank forge's earning interest on their accounts. Instead, the correspondent bank will extend credit at no interest for the same number of days on basis of daily balances. At least one Islamic Fatwa body (Al barakah seminar) ruled that, since the purpose of this arrangement is to avoid riba and not to earn it then it can be acceptable with certain conditions.