

Application of *Ijma'* in Modern Islamic Finance Rulings: Does *Ijma'* Really Exist? A Literature Review

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Abstract: Despite different views among scholars about the position of *Ijma'* as a source of *Shari'ah* and about the possibility of *Ijma'* to take place in its classical form in the contemporary times, the authenticity of it is proved by the *Qur'an* and *Sunnah* and the authority of *Ijma'* is unanimously agreed. Hence the aim of the paper is to find out whether *Ijma'* takes place in the contemporary Islamic Finance *Fiqhi* rulings or not. Based on document analysis that is the resolutions of different *Shari'ah* bodies like OIC Fiqh Academy, AAOIFI, SC of Malaysia, Kuwait Finance House, Dhallah of Baraka, Dubai Islamic Bank, Al-Rajhi Bank as well as different books and articles on *Ijma'*, this paper tries to get clear ideas about the classical and contemporary view of *Ijma'* and also tries to find out unanimous agreement of *Mujtahids* on Islamic Finance rulings. Findings reveal that as per its classical definition *Ijma'* does not take place in the contemporary Islamic finance, as no claim is found in favor of it. However, few rulings related to Islamic Finance are agreed by all *Mujtahids* of different *Fiqh* academy/ organizations and *Shari'ah* scholars which are the results of collective *Ijtihad* of *Mujtahids* of the current world and are binding in nature, so can be said are the results of *Ijma'* of contemporary scholars.

Keywords: Consensus (*Ijma'*), Collective *ijtihad*, *Shari'ah* rulings and Islamic finance.

1. Introduction

Islam is guiding and regulating not only individual's relations with God but all human social relationships and since the beginning Islam was not just a religion but a complete code for living. During life time Prophet (SAAS) and his Companions used *ijtihad*, which means independent and informed opinion on legal or theological issues subject to the confirmation and amendment through revelations. Later on, after the

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death of Prophet (SAAS) the Patriarchal Caliphs and the Prophet's Companions used reasoned personal opinion in three ways—through the interpretation of text (*Qur'anic* verses and the Prophet's practices), analogy (*Qiyas*) deriving judgment from same events ruled according to *Qur'an*, *Sunnah* and previous unanimous consensus and finally deduction from the spirit of Divine Law in the absence of any text (Nasir, 1990). After the colonial era by the endless effort of Muslim scholars Islamic finance industry has revived and Muslim jurists have derived legal rulings and also ensured the implementation of those rulings based on *Ijtihad* (juristic reasoning). Thus *Ijtihad* is a viable means to arrive at certain rulings which are subjected to changes based on time and places (Marjan Muhammad & Mohammad Mahbubi Ali, , 2014). Indeed, *Ijma'* took place during the period of Khilapah and within the era when the Companions were present (from the 2nd to the 4th centuries AH, the 7th – 10th centuries AD) and this is the time when Islamic juristic thought reached its peak after the death of the last Companion. It is said that 'the door of *Ijtihad* was closed' as the era of imitation (*taqlid*) and rigidity (*jumud*) prevailed from the middle of 4th to 13th centuries AH, the early 10th to the 19th centuries AD. During the peak period various schools of Islamic juristic thought flourished, generating systematic doctrines which differ from one another but were non-binding in nature and there was room for other equally valid interpretations. However, later the imitative jurist become bound to a single doctrine even from which they could not refurbish to another, the situation changed again and door of *Ijtihad* was revived during 13th century AH, 19th century AD as the control of west was felt in Muslim society (Nasir, 1990). At present the contemporary scholars are exercising collective *Ijtihad* as a means to standardize Islamic finance resolutions and these practices are really vital for the flourishing of Islamic banking and finance industry.

In essence *Ijma'* is considered the third source of *Shari'ah* after the Holy *Qur'an* and *Sunnah* according to majority of the scholars. The authority of *Ijma'* is unanimously agreed to be irrevocable and therefore, any ruling formed through *Ijma'* cannot be reinterpreted as it is deemed to be established through it. However, for the classical *Ijma'* to take place, certain criteria such as total unanimity of all *Mujtahidun* of a particular period must be fulfilled. Arguments among the scholars on possibility of *Ijma'* to take place in its classical form in the contemporary times is also found. Whereas few oppose that *Ijma'* in its classical form cannot take place in the present world due to lack of competent and well versed *Mujtahidun*, others refute the claim based on the authority that *Ijma'* derives from the *Qur'an* and *Sunnah* as well as based on the previous practices of *Sahabah*. Therefore, in the light of the above discussion, the current study aims to recognize whether *Ijma'* in the *Fiqhi* rulings of contemporary practice of Islamic Finance takes place or not. The current study also

throws light upon the practice of collective *Ijtihad* (*Ijtihad Jama'i*), that ranks second in order to *Ijma'*, as being practiced in formulating the *Fiqhi* rulings in contemporary Islamic finance.

The paper is divided into three parts. The first part provides for the literature review as a background to the concept and application of classical *Ijma'* and its role in contemporary Islamic Finance. The section following it identifies the *Fiqhi* rulings on which *Ijma'* among the international *Fatawa* issuing bodies can be recognized. Next session is the findings, scope for further study and the conclusion to the study.

2. Literature Review

2.1 Consensus (*Ijma'*)

Ijma' is an Arabic word which has two meanings: determination and resolution. To give an example from the *Sunnah*, the Prophet (SAAS) said: "The person who has not resolved to fast prior to dawn has no fast" (Zaidan, *Al-Wajiz fi Usul Al-Fiqh*, 1976). Therefore, *Ijma'* in this Hadith means to determine or agree upon something.

The other literal meaning of *Ajma'a* is 'unanimous agreement'. Hence the phrase '*ajma'a al-qawm 'ala kadha*' means 'the people reached a unanimous agreement on such-and-such'. The second meaning of *Ijma'* often subsumes the first, in that whenever there is a unanimous agreement on something, there is also a decision on that matter" (Kamali, 1999). An example from *Qur'an*: "... So resolve upon your plan and [call upon] your associates..." (*Qur'an*, 10: 71).

Ijma' in this verse conveys agreement upon something. It should be noticed that the first meaning reflects the determination of one person only, meanwhile the other meaning reflects *Ijma'* (consensus) of a group of people upon a certain matter. *Ijma'* must be reached through *Ijtihad* of Muslim scholars who are qualified to exercise *Ijtihad*. The *Ijma'* of non *Mujtahiduns* is not considered to be *Ijma'* (Zaidan, 2006).

With regard to the technical meaning, *Ijma'* was defined by Mohammed Hashim Kamali as "the unanimous agreement of the *mujtahidun* of the Muslim community on any period following the demise of the Prophet Muhammad on any matter" (Kamali, 1999).

Some other jurists such as Imam Al-Ghazali, and al-Amidi concur that *Ijma'* is the agreement of the whole *ummah*. It might be perceived that "whole *ummah*" refers to the entire Muslim community from the time of the Prophet till the end of this life. However, the appropriate meaning is the entire *ummah* of a certain period of time (Amanullah, 2010).

The Legitimacy of *Ijma'* is also being proved by the *Qur'an* and *Sunnah*:

“O you who have believed, obey Allah and obey the Messenger and those in authority among you ...” (*Qur'an*, 4: 59).

“And when there comes to them information about [public] security or fear, they spread it around. But if they had referred it back to the Messenger or to those of authority among them, then the ones who [can] draw correct conclusions from it would have known about it” (*Qur'an*, 4: 83).

The Hadith which typically form the basis for legitimizing *Ijma'* are as follows:

“My community shall never agree on an error”; and “I beseeched Almighty God not to bring my community to the point of agreeing on *dalalah* and He granted me this.”

It can be clearly seen from the above verses and hadith that *Ijma'* is permissible in the case where the rulings are neither existing in the *Qur'an* nor in *Sunnah*. These verses indicate the authenticity of taking the majority scholarly opinion in the case where no direct reference to rulings from the *Qur'an* and *Sunnah* can be made. Therefore, the scholars of *Usul al Fiqh* have unanimously agreed on the permissibility and recognition of *Ijma'* as a third source of *Shari'ah*.

2.2 Role of *Fiqh* and *Ijma'* in the Islamic Finance Industry

The objective of this section is to elucidate upon the relationship of *Fiqh* with Islamic finance. Further the role of *Ijma'* in Islamic finance is discussed so as to form the basis for the section dealing with the application and usage of *Ijma'* in the Islamic Financial Industry.

Islamic finance refers to institutionalized practice of financial transaction that complies with the basic tenets of *Shari'ah* or Islamic law (Gait & Worthington, 2007; Zaher & Hassan, 2001). Various definitions, both wide and narrow in scope, mainly define Islamic finance as a financial system based in principle and practice on the injunctions of the *Qur'an* (Warde, 2000). Therefore, Islamic finance is a system of executing financial practices according to the laws derived from the *Shari'ah*. The *Shari'ah* is the basic infrastructure of guidelines and principles of Islam derived from its basic sources, i.e. the *Qur'an*, *Hadith*, *Ijma'* and *Qiyas*.

From the definition of Islamic finance above, it can be seen that *Shari'ah* is central to the definition. To elaborate, the essence of Islamic finance is the *Shari'ah*. The literal meaning of the word '*Shari'ah*' is the 'road to a watering place' or 'straight path to be followed' (Laldin, 2006). However, technically the word embodies a comprehensive set of doctrines, guidelines and principles of Islam. In other words, it is the broad and

general framework within which the whole Islamic financial system operates. It is also defined as the 'canon law' of Islam, where all different commandments of Allah (relating to belief system, moral/ethical system and social system) to mankind are provided (Laldin, 2006).

However, *Shari'ah* being broad and general in nature requires to be deduced in order to be situation or case specific. This is done by applying the science of *Usul-al-Fiqh* to the broad body of *Shari'ah* sources (Nyazee, 2002; Laldin, 2006). By doing so the specific legal rulings are derived in order to determine the status of a particular matter or case in the *Shari'ah*. This body of legal rules is called *Fiqh*. Literally, in Arabic language, *Fiqh* refers to understanding (Nyazee, 2002). According to Philips (1995), *Fiqh* is 'true understanding of what is intended' which clearly implies the relationship of *Fiqh* with *Usul al Fiqh*. Therefore, *Fiqh* applies to all human actions that can be valued according to the degrees of validity in Islam (i.e. deeds categorized as *Halal*, *Mandub*, *Mubah*, *Makrooh* and *Haram* (Kamali, 1999)). *Ijma'* is recognized by the Islamic jurists as among the sources of *Shari'ah*. Although scholars disagree as to whether *Ijma'* constitutes primary or secondary source of *Shari'ah* (Rehman & Ahmedov, 2011), nevertheless, it is one of the legitimate sources of *Shari'ah* as has been elaborated in previous sections.

The determination of role of *Ijma'* in Islamic Finance is the objective of this study, which shall be determined through analysis of *Fatawa* of international bodies for Islamic Finance. However, it is necessary to highlight the role *Ijma'* plays in the modern era, as there is dispute with regard to application of *Ijma'* in the contemporary era especially after the era of the *Sahabah*.

Amanullah (2010) detailed on the possibility of *Ijma'* in the contemporary world as well as expounded on the juristic opponent and proponent views on *Ijma'*. The opponents of practicing *Ijma'* in the current era opine that it is not possible as there is lack of *Mujtahids* of the caliber of *Sahabah* and the four Imams who can carry out *Ijtihad* on individual basis. Also, the point raised by them is that today, most of the jurists and *Mujtahids* have scattered far and wide which makes *Ijma'* impossible to be carried out since they cannot be assembled at one place, as well as cultural and regional differences will still lead to differences of opinion even if all the *Mujtahids* can be assembled at one place.

However, their opinion is refuted by the proponents on the ground that when *Ijma'* according to its classical definition was possible during the time of the *Sahabah* then it is also possible to conduct during the present era. Moreover, the proofs of authority of *Ijma'* are not time bound since these are derived from the *Qur'an and Sunnah* whose rulings are applicable through all ages. Also, the usage of *Ijma'* in the

contemporary world is essential as many new rulings are required the evidence of which is not directly available in the *Qur'an and Sunnah* (as in the case of Islamic Finance) (Amanullah, 2010). Therefore, the author concluded that *Ijma'* in the contemporary world is not only feasible and allowed but is also obligatory in cases where *Fiqh* rulings can only be ascertained through *Ijma'*. This can be done, in the opinion of the Amanullah (2010) through establishing neutral and central *Fiqh* academies where all *Mujtahids* of Muslim countries shall be the members. This is in line with the fact that in the contemporary era, individuals well-versed in both Islamic law and any other particular field of worldly knowledge are few.

Nevertheless, today, in the Islamic financial industry, practices like collective *Ijtihad* (*Ijtihad jama'i*) take place in order to determine a ruling for particular issues. Collective *Ijtihad* is the practice of scholars whereby they make *Ijtihad* collectively in order to derive rulings for particular cases (Hasan, n.d.). Collective *Ijtihad* differs from classical *Ijma'* in two aspects—firstly, classical *Ijma'* requires the presence of all living *mujtahidun* which is not attained by contemporary practice of Collective *Ijtihad*. Secondly, any ruling reached through classical *Ijma'* is considered irrevocable and cannot be challenged or reinterpreted by later generation, which is not the case with collective *Ijtihad* according to some scholars (Hasan, n.d.).

3. Consensus on Fatawa of International Fatwa Issuing Bodies for Islamic Finance

Islamic financial products are divided in three broad categories—Islamic banking product, Islamic capital market product and Takaful product. There are some widely accepted modes of financing in Islamic financial system which are *mudarabah* (profit sharing contract), *musharakah* (partnership contract), *ijarah* (leasing contract), *murabahah* (mark-up or trade financing contract), *istisna* (progressive payments contract) and *qard hassana* (benevolent loan contract). These modes of financing had been practiced by our beloved Prophet Muhammad (SAAS) himself and his Companions also. People have misconceptions about Islamic product. They think both conventional and Islamic products are same. Basically both the products are different based on their underlying contracts and intention to avoid the *riba* (interest), *gharar* (uncertainty), *mysir* (gambling) and prohibited goods (pork, drugs, alcohol, tobacco) and differentiation also exist with the eagerness to follow and establish the ruling of divine revelation, the *Qur'an*. There are some contracts as well as methodology currently using regionally like *bay al inah*, *bay al dayn*, *tawarruq*, 33% benchmark for *Shari'ah* screening methodology used by SSC of SC, Dow Jones Islamic Index, etc. where there is disagreements among *Shari'ah* Scholars about the validity and permissibility of the contracts and method. However, this is appreciating that few Islamic countries are giving their endless effort to create a full-fledged Islamic

financial system by introducing innovative products but still there is room for more invention being a 40 years old young industry to be able to compete successfully with the mature over 800 years old conventional system. Equally, the Islamic financial system considering a unique and competitive system needs harmonizing as well as agreements of scholars on a particular issue of rulings. The following section is trying to identify the products from all categories of financial system of modern era where unanimous agreement of jurists is prevailing.

3.1 Islamic Banking Products

Home financing is an important product of Islamic banks and Financing companies. Home financing based on *musharakah mutanaquisah* is currently practiced by various banks of Malaysia. *Musharakah Mutanaquisah* is defined as a form of partnership in which one of the partners promises to gradually buy the equity share of the other partner until the title of the equity is completely transferred to him (AAIOFI, 2010). It is found that the contract is well accepted by all *Shari'ah* scholars across borders as an underlying principle in developing Islamic capital market instruments (International Islamic Fiqh Academy, 2010; KFH, n.d., p. 20; Dallah al-Baraka, 2007; Dubai Islamic Bank, 2001; Securities Commission, 2006, 2nd edition).

Another important example on the application of *Ijma'* can be seen from the issue of lard. From the *Qur'an* and the *Sunnah* there is no explicit injunction to the permissibility or prohibition of lard although pork is prohibited by revealed verses. Hence, based on unanimous agreement amongst the Muslim jurists i.e. *Ijma'* that all prohibitions related to pig, including its meat, are extended to lard. Therefore, lard, like pork, is Haram (Aznan, 2011). This implies that dealing in any business related to lard or its derivatives, e.g. business in cosmetics (or any non-edible or edible goods) which constitute fats derived from lard, benchmarking the value of asset, Investment returns, etc. to lard index is also Haram

Moreover, five well-known fatwa issuing bodies held that *Tawarruq* is permissible. Nevertheless, their resolutions did not explicitly specify the type of *Tawarruq*, whether it is the organized or non-organized *Tawarruq* (BNM, 2007; KFH, n.d; al-Masrafiyyah, 2007; AAOIFI, 2008; Board; 2005). However, some of them have come out with certain guidelines clarifying the type which is permissible and which is not.

With regard to the issue of incorporating *Hibah* in a *Mudharabah* contract only two fatwa issuing bodies made opinion on this issue namely: SAC of BNM and (al-Masrafiyyah, 2007). Both of them held that *Hibah* in *Mudharabah* contract is not permissible due to the fact that this contract is based on profit sharing. If *Hibah* is included in such contract, the whole nature of it will be affected. However, AAOIFI and other fatwa issuing bodies kept silent on this issue.

3.2 Islamic Capital Market Instruments

Among different instruments of Islamic Capital Market, *Sukuk* is one of the important and growing instruments which have huge demand both in Islamic and non-Islamic countries. *Sukuk* is a claim or claims that are similar to notes or certificates, such as a trust certificate. The Accounting and Auditing Organizations for Islamic Finance (AAOIFI) defines investment *Sukuk* as certificate of equal value representing undivided shares in ownership of tangible assets, usufruct and services, or in the ownership of the assets particular projects or special investment activities. It is an alternative of conventional bond. Two unanimous rulings of *fuqaha* of current world are found that is related to *Sukuk*. Those are *Musharakah Mutanaqisah* and Asset securitization. It should be noted that despite the widespread acceptance of *Musharakah Mutanaqisah* by modern *Shari'ah* scholars, it has yet to be widely applied in the issuance of *Sukuk*. Currently other contracts such as *Ijarah*, *Istisn'a* and *Murabaha* are still preferred by the issuers. However, scholars have set conditions that must be fulfilled for *Musharakah Mutanaqisah* to be valid (ISRA, 2012). Though *Musharakah Mutanaqisah* is currently used for home financing but it has a promising future for *Sukuk* issuance.

Besides *Musharakah Mutanaqisah*, the *Shari'ah* scholars of both Malaysia and GCC regions appear to agree on the practice of securitization. For the expansion of business and government projects additional fund is required that has been recognized by the *Shari'ah* scholars. Through asset securitization by issuing *Sukuk*, both entities can carry out their plans for the benefit of the *Ummah*. Nevertheless, it is important to note that *Sukuk* created through the process of securitization are different from conventional bonds in the sense that *Sukuk* represents equity instruments and shares in ownership of underlying assets whereas bond represents debt instrument (Securities Commission, 2006, 2nd edition, p. 64; AAIOFI, 2010, p. standard no. 17; Dallah al-Baraka, 2007, p. 401; MF, Res. No. 30 (4/5), 2010; Dubai Islamic Bank, 2001, p. 677; KFH, n.d., p. 162), .

3.3 Takaful

Takaful is based on the concept of *tabarru* or donation which means disbursement of wealth, rendering services and work without monetary consideration but with the hope for reward in the hereafter. Takaful is also based on mutual cooperation, shared responsibility and mutual protection. An unanimous agreement of fatwa is found to operate *takaful* based on cooperation and the rejection of conventional insurance because of its involvement of *Riba* (interest), *Gharar* (uncertainty), *Maysir* (gambling), *ghish wa ghabn* (cheating) and *al jalada* (ignorance) in contract (First

International Conference on Islamic Finance, 1976; Fiqh Academy of OIC, 1985; Al Barakah Group Symposium; Al Rajhi-Bank; National *Shari'ah* Council of Malaysia, 1972; Fiqh Council of Muslim World League, 1978).

4. Findings

From the above section, following findings on the application of *Ijma'* can be enumerated:

1. The fatwas that can be termed as holding *Ijma'* are those that relate to the prohibitions on *Riba*, *Gharar*, *Maysir*, etc. that have also been established on the authority of *Qur'an* and *Sunnah*.
2. *Ijma'* in its classical sense cannot be recognized in the Islamic financial industry as there is no declaration of *Ijma'* taking place. The reason for such can be due to the possibility of change in the interpretation of scenario/case, etc. in the field of Islamic finance—in the case of which it would be improper to revoke a ruling that might have been established by way of *Ijma'*, as the ruling established through *Ijma'* is irrevocable. Again, all *Mujtahidun* of the present world are not well-versed with the terminologies and specificities of Islamic finance, hence to obtain *Ijma'* is hindered. However, this problem has been resolved by resolution that covers the qualification of *Shari'ah* advisors who lead the *Shari'ah* advisory board of each financial institution. On the other hand, the resolutions of AAIOIF which are the results of collective *ijtihad* and are binding in nature can be said to follow the process of *Ijma'* (as collective *istihad's fatwa* supposed to non-binding) so they are the results of *Ijma'* of contemporary *Shari'ah* scholars.
3. Even there are various *Shari'ah* bodies or *Fiqhi* academies operating all over the world and unanimous agreement of them on some rulings is found. It is the responsibility of the financial institutions and banks to make sure the widespread use of those rulings.
4. *Ijma'* is such a section of *Shari'ah* which needs more attention and there are lots of scopes to use it to shape a universally accepted Islamic financial system by standardizing and harmonizing *Shari'ah* rulings.

5. Scope for Further Study

The current paper tried to review literatures and explore whether *Ijma'* is prevailing in modern Islamic financed practices or not as there are contradictory opinions about *Ijma's* existence in modern Islamic finance system. The literatures show a positive notion that *Ijma'* prevails in Islamic finance rulings although in different forms not

matching with classical definition. Hence, there is a scope for further study that can be conducted by analyzing the Islamic Banking products in practice to find out the real implementation of *Ijma'* and this kind of study is needed to ensure the implementation of Islamic rulings in banking and finance industry in its true form and substance which is also vital for the sustainable wellbeing of human beings that is the main theme of present research.

6. Conclusion

Ijma' is a valid source of Islamic law which connotes the rulings derived from divine revelation through the process of human reasoning. According to Imam al-Shafi'i matters related to religious obligation can be solved by *Ijma'*, only when the evidence in the *Qur'an* and *Sunnah* on the same matter is unclear (Zahrah). Some jurists argue that it is only applicable in juridical or religious matters. But during the regime of four Caliphs the practice of *Ijma'* was observed not only in religious matters but also in legal rulings and matters related to *muamalat*. This practice then had been followed by the successors (*Tabiin*) and the second generation of the successors (*Tabi al tabiin*) and became a continuing process, accepted and exercised by the successive generations. From the practice and indications from the *Qur'an* and *Sunnah*, the jurists agree that *Ijma'* can be used as one of the sources of Islamic law in determining or arriving at legal rules. However, the corpus *jurists* of *Fiqh* are divided into two main categories of devotional matters (*ibadat*) and civil transactions (*muamalat*). *Ijma'* is observed in matters related to *ibadat* and schools of law do not vary a great deal in their treatment of *ibadat* related subjects but juristic differences among schools occur mainly in the area of *muamalat* (Md. Hashim Kamali, 2006). So, certainly it is difficult to find rulings which are unanimously agreed by *Mujtahids* in Islamic finance. Hence, there is a scope to use *Ijma'* in the case of Islamic Finance ruling to build a competent Islamic financial system. As there are issues related to the qualification of *Mujtahids* and declaration of *Ijma'* so in contemporary Islamic world *Fatawa* are generated based on collective *Ijtihad* which is considered a level below *Ijma'* and *fatwa* generated by collective *Ijtihad* is non-binding and also can be changed. Despite the differences between the definitions of *Ijma'* and collective *Ijtihad*, when AAOIFI incorporates resolutions after long hectic process, which are made mandatory or binding to all Islamic financial institutions, it can be claimed that those resolutions are result of *Ijma'* of contemporary scholars. Again, the finding of unanimous agreements of scholars on *Shari'ah* compliant contract of *Musharaakah Mutanaquisah*, Asset Securitization, Takaful operation based on mutual cooperation and benefit as well as declaration of conventional insurance as non-*Shari'ah* compliant, non-use of Lard index, non-use of *Hibah* along with *Mudarabah* contracts

prove that *Ijma'* prevails in this current Islamic world and it is also possible to use this source of *Shari'ah* for harmonizing and standardizing *Shari'ah* rulings for the flourishing of Islamic financial system and for the betterment of current *ummah*.

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