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Controlling fatwa would harm Islamic finance

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By Jawad I Ali and Omar Salah

Recent developments in the Islamic finance market prompted the industry to rethink the role of Shariah scholars. Most Islamic financial institutions appoint a supervisory board or committee of religious scholars who are tasked with reviewing their transactions in order to ensure that they comply with the principles of Islamic Shariah in their business and financial dealings.

A Shariah supervisory board or committee approves or rejects a transaction through the issuance of a fatwa (an opinion or proclamation about the Shariah compliance of such a transaction).

The question of the day in the Islamic finance industry is whether Shariah scholars should be subject to some sort of supervision themselves.

In our opinion, the answer to this question depends on what is meant by 'supervision'.

Industry practitioners should oppose supervision if it means that Shariah scholars would have to adhere to strict criteria or methodology before issuing a fatwa.

Such supervision would in our opinion curtail innovation and transform the industry, prematurely, to a commoditised industry, since Shariah scholars would in their attempt to check all the boxes and stay within the accepted norms, refrain from covering new ground and developing new structures that would allow new transactions and thus the development of the industry.

The industry should not lose sight of the fact that Shariah scholars are our current day mujtahid (jurist). Throughout the history of Islamic jurisprudence, the use of human reasoning (ra'y) has played an important part in the development of Islamic Shariah.

When issuing fatwa, Shariah scholars are practising ijtehad and they should enjoy complete freedom in their practice of ijtehad; their guidance and limitations should only come from the five sources of Islamic Shariah being: the Qur'an; Sunna (the practice and traditions of the Prophet Muhammad (peace be upon him)); Qiyas (a comparison, used to make a judgement on issues which have no clear-cut ruling in the Qur'an or the Sunna, by consideration of similar issues which do have clear ruling); Ijtehad (the diligent judgement of the scholars through reasoning and logic); and Ijmaa (a consensus or agreement used for issues which require Ijtehad).

Therefore, in our opinion, Shariah scholars should not be restricted or limited in their practice of ijtehad by any regulator. Such regulation would neither benefit the Shariah -compliance of the industry nor its further development.

However, we would support supervision of Shariah scholars such as the new proposed rules of the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) to reduce the risks of conflicts of interest or improper disclosure.

This type of supervision may lead to more transparency and benefit the authenticity and credibility of both the industry and the Shariah scholars.

Organisations such as the AAOIFI should run training and continuing education programs for would-be Shariah scholars. Such programmes should aim to provide Shariah scholars with an understanding of various financial and business transactions and the legal framework in which such transactions are being consummated.

Most importantly, these training and continuing education courses should train Shariah scholars to be inquisitorial of the intention (niyya') behind the transaction. - Reuters

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