Fatwā Shopping and Trust: Towards Effective Consumer Protection Regulations in Islamic Finance

Abstract

Purpose: This study examines the phenomenon of *fatwā* shopping, its effect on consumer trust in Islamic finance products and the need for effective consumer protection regulations in the Islamic finance industry.

Design/methodology/approach: The methodology used in this study is qualitative research which draws significantly from relevant regulations on financial consumer protection through analytical method to identify common themes on *fatwā* shopping and consumer trust in the relevant literature.

Findings: This study finds that the increasing practice of *fatwā* shopping through clandestine searches by some Islamic banks to get their new products endorsed by leading Sharī'ah scholars requires proper legal regulation to avoid a total erosion of trust in the entire Islamic finance industry.

Research limitations: Though *fatwā* shopping is practiced in the Islamic finance industry, it is always difficult to get some desperate Islamic bankers to agree to this; hence, this study does not portend to examine the evidence on *fatwā* shopping, but it seeks to bring to the fore the effect of *fatwā* shopping on consumer trust in Islamic financial services, and the need for effective consumer protection regulations.

Practical implications: This study is expected to provide an invaluable guide and policy framework for emerging and promising jurisdictions on the need to regulate *fatwā* shopping through effective legal framework based on some best practices identified in the study.

Originality/value: Though there have been a number of studies relating to *fatwā* shopping, focusing on the need for effective consumer protection regulations in the Islamic finance industry will enrich the existing literature and have significant implications for the future of the industry.

Keywords: *fatwā* shopping, *fatwā*, Islamic finance consumers, consumer protection, consumer trust

"We create the same type of products that we do for the conventional markets. We then phone up a Sharia scholar for a Fatwā [seal of approval, confirming the product is Shari'ah compliant]. ... If he doesn't give it to us, we phone up another scholar, offer him a sum of money for his services and ask him for a Fatwā. We do this until we get Sharia compliance. Then we are free to distribute the product as Islamic". – A Dubai-based investment banker. (Foster, 2009).

INTRODUCTION

While speaking on the palpable signs of *fatwā* shopping in the Islamic finance industry at an international event sponsored by the Islamic Development Bank, in January 2009 in Kuala Lumpur, it was surprising to see a senior researcher of the Islamic Financial Services Board (IFSB) quickly corroborating the alleged incidences of *fatwā* shopping taking place in the industry.[1] Such categorical corroboration, though not sought for at the time it was made, should not perturb Islamic financial consumers, because further studies on *fatwā* shopping practices in the industry corroborate these trends in the Islamic financial services industry, particularly in cross-border transactions (Foster, 2009; Rahajeng, 2012).

There are different views with regards to the origin of the expression "*fatwā* shopping". While the accounting and auditing professionals refers to "opinion shopping", the legal professionals identify "forum shopping" in private international law. The expression "opinion shopping" which has its roots in the accounting and auditing literature originated from United States securities litigation in the early 1970s (Hawes and Sherrard, 1976; Lowenfels, 1971; Sloan III, 1972). On the other hand, "forum shopping" in private international law is the practice of choosing the most favourable jurisdiction to file a claim. In the United States, though there have been different views regarding the origin of "forum shopping", the term was first used by retired U.S. District Judge, Irving R. Kaufman in 1952 (Maloy, 2005). It thus appears there are both positive and negative sides of forum shopping which is also true for *fatwā* shopping as will be explained in this study.

Over the past four decades, the Islamic finance industry has transformed from a niche industry to a monumental force to be reckoned with in the global financial system (Hassan et al., 2013). Apart from the concerted efforts of Islamic economists and financial engineers in coming up with competitive products, the Sharī'ah scholars have also played a prime role in guiding the industry since its modern re-emergence in the world (Hamza, 2013). Following a recent study undertaken by the researchers on the legal implications of '*fatwā* shopping' and its far-reaching effects in the development of the global Islamic finance industry, this study examines another dimension of *fatwā* shopping with special reference to consumer trust and consumer protection regulations.

This study examines a recurring practice in Sharī'ah-compliant businesses in the search for favourable *fatwā* and the need for effective consumer protection regulations in the Islamic finance industry. The study therefore seeks to answer the following pertinent questions: Is *fatwā* shopping a wrong practice in the Islamic finance industry? If *fatwā* shopping is considered an unfavourable practice in the industry, does it have the potential of eroding consumer trust? Are the existing consumer protection laws in leading Islamic finance

[1] The senior researcher at the Islamic Financial Services Board openly declared that there are covert instances of *fatwā* shopping. Even though the author of this paper who was the speaker at that event was cautious in making a general statement, the IFSB researcher insisted that *fatwā* shopping happens a lot. He further revealed that he had witnessed a number of instances where it happened. This was made public at the 2nd Internal Conference on Islamic Economics & Economies of the OIC Countries, Parallel Session 3, Prince Hotel and Residence, Kuala Lumpur, 30th January, 2013 (Oseni et al., 2016).

jurisdictions adequate to regulate *fatwā* shopping? In addressing these questions, the methodology used in this study is qualitative research which draws significantly from relevant legal frameworks on financial consumer protection through induction method to identify common themes on *fatwā* shopping and consumer trust in the relevant literature. Relevant case studies are briefly examined to identify the ongoing trends in Sharī'ah advisory role and the confidence the courts and consumers generally have in the process.

This study is organised into five major sections. The first section provides a brief overview on *fatwā* making, trust and Islamic finance. It further explores *fatwā* and its relevance to modern Islamic finance industry while emphasising on the indispensable role of the *fatwā* making process in the industry and the modern models in form of Sharī'ah Supervisory Boards. Section two identifies what constitutes *fatwā* shopping and what is not *fatwā* shopping from the perspective of Islamic jurisprudence. Section three examines how *fatwā* shopping erodes consumer trust and provides some examples from certain avoidable incidences in the Islamic finance industry. Section four examines the adequacy of existing consumer protection laws in regulating *fatwā* shopping in the industry in order to build and sustain financial consumer trust. It further identifies a number of steps that can be taken to strengthen the existing laws to ensure proper consumer protection which will in turn sustain consumer trust in the industry. Finally, section five provides the findings of the study, some policy recommendations and conclusion.

FATWĀ-MAKING AND TRUST AND THE ISLAMIC FINANCE INDUSTRY

Consumer trust is generally driven by marketability, acceptability, and satisfaction of new products and services at both macro and micro levels of the financial ecosystem. Following the 2008 global economic crisis and the subsequent economic recession, business leaders and corporate entities are struggling to regain the trust and confidence of the public, particularly the investors. According to Halliburton and Poenaru (2010), trust is generally premised on the constructive evaluation of three related and complementary dimensions: competence (credibility); integrity (honesty), and empathy (benevolence). Accordingly, the first dimension is often classified as "rational trust" while the second and third are more of "emotional trust" (Halliburton and Poenaru, 2010, p. 6). The fatwa-making process and the concerns relating to fatwa shopping in the Islamic finance industry, which is the concern of this study, falls under the second and third dimensions; hence, the focus of this paper is more of the "emotional trust".

The hallmark of the modern Islamic finance industry remains its ability to ensure all products and services are not just conventionally competitive but also Sharī'ah-compliant (Vogel and Hayes, 1998). Regardless of whatever allegations the public might have levied against what one may refer to as "some bad apples" within the industry, the Sharī'ah scholars undoubtedly occupy a prime position in the industry. The Islamic finance industry will not be able to operate without this unique group of scholars. They are the custodians of the classical principles that are contextualised within the framework of the modern financial system. Rather than condemning the good work a number of leading Sharī'ah scholars have done to put together the building blocks of a robust faith-based financial system, which is gradually competing with other known financial models, it is appropriate to commend their efforts but point out a number of challenges associated with their roles.

The pragmatic nature of Islamic jurisprudence allows competent utilise major concepts like *takhayyur* (selection) and *talfīq* (eclecticism) in arriving at well-reasoned opinions upon which they base their rulings or resolution (Kamali, 2009). This is what is needed in a seemingly diversified Islamic finance industry and it is expected to spur further product development within the increasingly competitive global financial ecosystem. The inherent relevance and consequential application of these concepts to some controversial products in

the wider Islamic finance industry such as *tawarruq* reflects the nature of the hermeneutic rules in Islamic law (Vogel et al., 2016). Nevertheless, bank executives should not abuse this sacrosanct process for mere pecuniary benefits.

In examining the nature of *fatwā*-making by the proto-jurists, Hallaq (2009, p. 173) describes *fatwā* from the perspective of its judicial relevance as a "legal opinion issued by a mufti; although they were formally non-binding, judges adhered to *fatwā*s routinely, as they were deemed authoritative statements on particular points of law." This description fits the current practice of Sharī'ah advisory services in the Islamic finance industry. As a matter of routine practice, stakeholders generally adhere to *fatwā* or resolutions made by the Sharī'ah Supervisory Boards (SSB) of Islamic financial institutions. It is this element of trust that drives the stakeholders' intention to comply with the rulings of the SSB. This is because over the years, leading Sharī'ah scholars have done a lot to put together the building blocks of this robust faith-based financial system. Consumer trust in the entire Islamic finance industry is definitely of utmost importance in a financial sector that is still struggling to mainstream its products and services (Anneli Järvinen, 2014).

The concept of trust (*'amānah*) in civil and commercial transactions in Islamic law has been discussed copiously in most classical Islamic jurisprudence literature, and it remains an important factor in building and sustaining relationships in Islam. Trust is the single element that binds financial consumers to the Islamic finance industry based on reliable Shariah resolutions in form of a *fatwā*-making process. During the first debut of Islamic finance products in the late 1970s and early 1980s, there were no statutory requirements for Shariah advisory roles but the industry realised the necessity of such roles in corporate entities that market their products as "Shariah-compliant". Hence, the Islamic finance consumers trusted the Shariah advisory roles and on that basis, they embraced those products. It is on this basis that MacDonald (1987, p. 92) defines *fatwā* as "a formal legal opinion given by a *mufti*, or canon lawyer of standing [jurisconsult], in answer to a question submitted to him either by a judge or *by a private individual*. On the basis of such opinion a judge may decide a case, or *an individual may regulate his personal life*." [Emphasis added]. This mirrors the original nature of *fatwā* which is usually based on the trust the common people have in the scholars who make the legal verdicts. Compliance with the *fatāwā* (singl. *fatwā*) was not usually compelled by legal or statutory provisions, but was merely based on trust. Such legal opinions were not formally binding on the people. This trust element has been introduced in the Shariah ruling procedures in the Islamic finance industry but with an additional legal backing in advanced jurisdictions offering Islamic finance services and products. The main thrust here is the effect of *fatwā* on consumer behaviour in Islamic finance.

In terms of Sharī'ah governance, different models exist in various jurisdictions across the world (Arshad and Wardhany, 2012). While some jurisdictions like Malaysia, Sudan, Kuwait, Indonesia, United Arab Emirates, Pakistan, and recently, Oman, have centralised Sharī'ah Boards at the national level, others such as Jordan and Bahrain, though require Islamic banks to have Sharī'ah committees, do not necessarily have a national Sharī'ah Board (Hamza, 2013). In western countries such as Luxembourg, United Kingdom, and United States of America, self-regulation seems to be the prevailing practice.

Therefore, relying on Robinson's (1996) longitudinal study, one may argue that building trust in financial products offered in the Islamic finance industry might be more difficult than to destroy it, particularly when the level of trust was exceedingly high at the modern debut of Islamic financial services and products in the second half of the 20th century. Muslims had high hopes in the industry, which was, and is still, controlled by the Sharī'ah scholars. But recent occurrences, which are triggered by the need to survive in a competitive global financial system, have raised a number of issues that require the attention of all stakeholders in the industry.

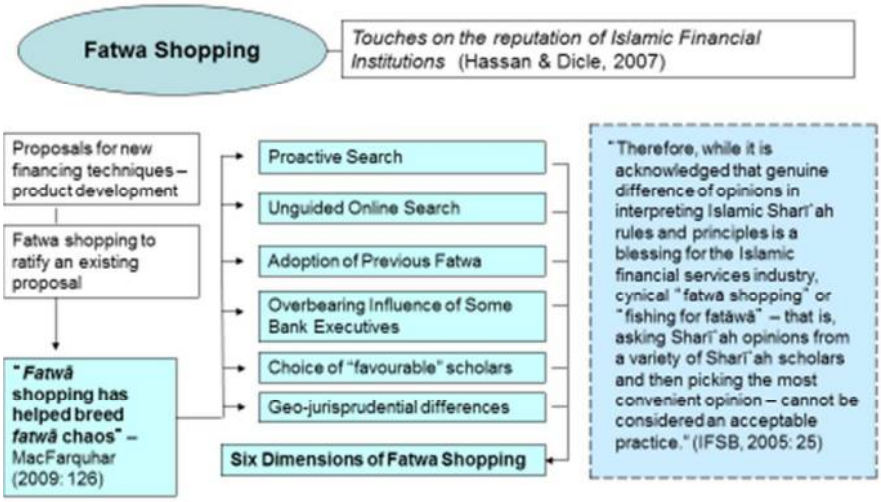
CLARIFYING THE DIFFERENT FACES OF *FATWĀ* SHOPPING

To set the facts straight, *fatwā* shopping is not always used in the negative sense. The positive side of *fatwā* shopping even has the potentials of spurring further development of the Islamic finance industry. But in the modern usage of the phrase, the negative connotation has gained more grounds than the positive sense. Therefore, this section considers the general usage of *fatwā* shopping in the modern sense but distinguishes between benign *fatwā* shopping and malignant *fatwā* shopping for clarify. A simple definition of *fatwā* shopping, in the positive sense, is the process of "seeking opinion and rulings by Islamic Scholars on matters where there is ambiguity that a certain product or banking activity is in line with Sharī'ah or not. *Fatwā* resolves controversies and addresses key challenges faced by Islamic Financial Industry" (Malik et al., 2011).

The benign form of *fatwā* shopping began during the early days of Islam, but precisely after the demise of the Prophet Muhammad, and the practice continued till the modern day. While it is easy for any Muslim to discountenance this argument or the use of the term "shopping", the point being made has undeniable historical precedents, which are relevant in today's discourse of *fatwā*. In this case, "*fatwā* seeking" might be more appropriate to avoid any misinterpretation. In any way, the companions of the Prophet and their pious predecessors were used to finding the correct rulings on certain issues through the seeking of the most appropriate *fatwā* from leading companions who give their respective opinions. Their sole objective was basically to receive a pragmatic and authenticated feedback which needs to be corroborated; and they do not come to seek for such opinions with preconceived notions. After seeking the most reliable opinion with appropriate jurisprudential links to the Qur'an and practices of the Prophet (*sunnah*), such companions then apply what seems convincing to them based on the reported practice of the Prophet (Kamali, 2009). This was how Islamic jurisprudence crystallised over time and many more legal precedents on a number of issues became documented and passed down to subsequent generations (Nyazee, 2006). This led to the gradual development of *fiqh* (Islamic jurisprudence) from its fundamental principles (*uṣūl*) to specific branches of jurisprudence (*furū'*). Even though the proto-jurists relied on the same sources, they reached different conclusions often because of their different positions on the level of authenticity and legal implications of certain prophetic precedents (*hadith*). It is important to add that such different conclusions were arrived at in complete good faith without any vested interest whatsoever (Alalwani, 2011). The statement or ruling of a companion called *qawl ṣaḥabī* developed through such experience sharing and comparing notes on express statements heard from the Prophet on an issue, his conduct observed by some companions, or some tacit approval he has given to some omission or commission of some companions which formed the basis of binding legal precedents for subsequent generations of Muslims (Kamali, 2009). There is no doubt that the element of pragmatism in Islamic jurisprudence has been its main thrust, which reemphasizes the nature of Islamic law as a timeless wisdom from the contextual and existential perspectives. But this flexibility is sometimes abused for pecuniary benefits. When the benign *fatwā* shopping is extended to the modern practice of Islamic finance, there will be better understanding of products and services in the increasingly diversified Islamic finance industry at the global level. In the light of the overblown differences in the acceptability of certain products on offer in Malaysia and the Gulf countries require some form of harmonisation that would emphasize the common grounds in the positions maintained by scholars of the two jurisdictions, broadly defined. These differences which often relate to the nature of the products and services developed and endorsed by Sharī'ah scholars has been the main factor that triggered the malignant form of *fatwa* shopping. In Oseni et al., (2016), the different dimensions of the malignant form of *fatwā* shopping identified through practices in the industry were analysed. These dimensions, though not exhaustive, include: proactive search,

careless online search, negligent adoption of previous *fatwā*, overbearing influence of some bank executives, geo-jurisprudential divergence on some Islamic finance products, and appointment of 'favorable' Sharī'ah scholars. These practices are not in any way acceptable in the eyes of Islamic law (Hassan and Dicle, 2007). To this end, Figure 1 illustrates incidences of *fatwā* shopping and how the phenomenon impacts the industry.

Figure 1: Incidences of "*Fatwā* Shopping" in the Islamic Finance Industry



Source: Author

The occurrence of such practices might have influenced IFSB to provide a stark warning on it when it advised that: "while it is acknowledged that genuine difference of opinions in interpreting Islamic Sharī`ah rules and principles is a blessing for the Islamic financial services industry, cynical "*fatwā* shopping" or "fishing for *fatāwā*" – that is, asking Sharī`ah opinions from a variety of Sharī`ah scholars and then picking the most convenient opinion – cannot be considered an acceptable practice" (Islamic Financial Services Board, 2005, p. 25). Some other scholars such as El-Gamal (2007) and Bassens et al. (2011, p. 98) have used the term "Sharia arbitrage" to refer to *fatwā* shopping. From the existing literature, one might not find much references to the positive sides of *fatwā* shopping. Rather, the phenomenon is mentioned in the negative sense and how it has impacted Muslim communities or Islamic finance products and services. *Fatwā* shopping becomes malignant when the purpose of seeking *fatwā* is not to identify the most appropriate ruling but to get an instant endorsement of a product. Table 1 below shows selected 12 instances where the phenomenon of *fatwā* shopping has been addressed in the existing literature.

Table 1: Some Instances of *Fatwā* Shopping in Islamic Finance Literature

	Instance	**Findings**	**Context**	**References**
1.	*Fatwā* shopping / Fishing for *fatwā*	Not an acceptable practice	Islamic finance	IFSB (2005)
2.	*Fatwā* shopping	Quick recognition of	Islamic finance	Hassan & Dicle

		products		(2007)
3.	Scholar search	Islamic identity for *de facto* conventional products	Islamic finance	Khan (2010)
4.	*Fatwā* shopping	Discouraging to investors	*Sukuk* market	Bolton (2011)
5.	*Fatwā* shopping	A threat	Islamic finance	Malik, et al (2011)
6.	*Fatwā* shopping	*Sharī'ah* arbitrage	Islamic finance	Baseens, et al(2011)
7.	*Sharia* arbitrage	*Fatwā* shopping	Islamic finance	(El-Gamal, 2007)
8.	*Fatwā* shopping	Practiced by banks	Islamic finance	Rahajeng (2012)
9.	*Fatwā* shopping	Caused by outsourcing *Sharī'ah* consultancy services	Islamic finance	Shaista & Wardhany (2012)
10.	*Fatwā* shopping	Lack of standardization	Islamic finance	Farook & Farooq (2013)
11.	*Fatwā* shopping	No clear regulatory framework	*Sukuk* market	Amzat, et al. (2014)
12.	*Sharīʿah* arbitrage	Marketing strategy	*Sukuk* market	Irfan (2014)
13.	*Fatwā* shopping	Law can regulate it	Islamic finance	Oseni, et al. (2015)

Source: Adapted from Oseni, et al. (2015)

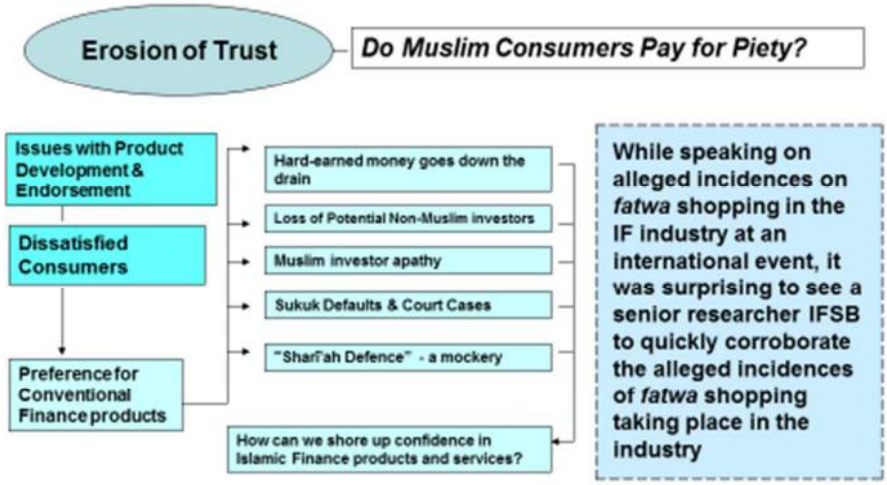
The mere fact that a number of studies in Islamic finance have begun to identify such instances of *fatwā* shopping shows that the phenomenon would affect the perceptions of Muslim investors as well as people who want to learn more about Islamic finance. Muslim investors particularly might be discouraged to part with their hard-earned monies in the name of investing in an "Islamic" product (Bolton, 2011).

HOW *FATWĀ* SHOPPING ERODES CONSUMER TRUST IN ISLAMIC FINANCE

A careful look at current trends in the global Islamic finance industry reveals some challenges relating to consumer trust in the products and services offered. Going beyond mere literature trends, there have been some case studies where consumers questioned the veracity and authenticity of some so-called "Islamic finance products". While a comprehensive analysis of such case studies transcends the scope of this paper, it suffices to note that such issues relating to trust are mostly prevalent in less regulated jurisdictions such as continental Europe and North America. For instance, in Canada, the UM Financial Group debacle few years ago raised a number of concerns as to the future of Islamic finance in less regulated jurisdictions where susceptible investors are at the mercy of the so-called Sharīʿah finance corporate entities. The piety (or faith) premium is always the trigger (Ali, 2014; Gallery et al., 2011; Oseni and Hassan, 2015). Any Sharīʿah product or services packaged and marketed in countries where there are Muslim minorities often catch the attention of innocent Muslims who, though might not be so knowledgeable in Sharīʿah and finance issues, are convinced of anything "Islamic" being part of their fundamental beliefs as Muslims (Khan, 2014). "The UM Financial Group went into liquidation in 2012 and a series of earth-shattering revelations, shocking for an Islamic financial institution, have been revealed. The insolvency of this Islamic mortgage lender has raised more questions than answers as to the nature of *shari'a*-compliant business in North America" (Oseni, 2012, p. 5). In the ongoing liquidation proceedings, it was revealed that a "large secretive payoffs made in gold and silver bullion to Shari'ah scholars" were facilitated by the accused person (The Islamic Globe, 2011). This incidence may be partly due to the lack of robust regulations in most countries offering Islamic financial products and services (Wilson, 2012).

Other examples of the erosion of consumer trust in Islamic finance products and services which have negatively impacted the industry include: the resignation of the entire Sharī'ah board of FNB in South Africa due to what the chairman of the board referred to as "untenable breakdown in TRUST" occasioned by the unacceptable approach of the new senior bank executives (Desai, 2012); the criminal conviction of Majed Al Refai who is the founder of Unicorn Investment Bank (now called, Bank Al Khair) for fraud and embezzlement in Bahrain (Sleiman, 2012); and the alleged despicable act of the Sharī'ah Supervisory Board of Investment Dar, a Kuwait-based company, in issuing a statement where the board of directors of the company was advised to drop its lawsuit against Blom bank. The Sharī'ah board of Investment Dar barred the company from relying on arguments based on Islamic law in the lawsuit and finally advised it to drop the suit (Permatasari and Baltaji, 2010). These numerous instances are merely a tip of the iceberg as there are more case studies in other jurisdictions. As Siddiqui (2012, p. b6) argues, "once the trust and confidence of Islamic finance is questioned, it starts the erosion of the niche market and prevents it from achieving its ultimate objective: becoming mainstream". Figure 2 below illustrates how *fatwā* shopping erodes consumer trust in Islamic finance products and services.

Figure 2: How *Fatwā* Shopping Erodes Consumer Trust



Source: Author

The usual assumption is that Muslim consumers often pay for piety, and this boils down to the issue of trust in Sharī'ah endorsement of the financing proposals. Therefore, the whole process starts from the product development and endorsement stage, and this is usually where bank executives approach Sharī'ah scholars or their Sharī'ah boards to either design or endorse a product. When Islamic finance consumers later become aware of the seemingly non-Sharī'ah compliance nature of the products, there is a total erosion of trust and in most cases they opt for conventional finance products. This has been partly responsible for the investors apathy to products being offered in some regions. It has also cast doubts in the minds of some non-Muslim investors, and is partly responsible for some cases of *ṣukūk* (Islamic investment certificates) defaults and court cases involving Islamic finance products appearing in the English courts (Hasan and Asutay, 2011).

Lack of standardization of products and services in the Islamic finance industry has also led to incidences of *fatwā* shopping, which in itself has generated further controversy on whether there is a need for standardisation of Sharīʿah rulings and practices (Farook and Farooq, 2013). Others such as (Arshad and Wardhany, 2012) argue that the practice of outsourcing Sharīʿah advisory services without a proper regulation has contributed to incidences of *fatwā* shopping. Whatever be the case, *fatwā* shopping poses a serious threat to the competitive potentials and future of the global Islamic finance industry (Malik et al., 2011). In an interesting episode, Irfan (2014) presented an instance where he witnessed a clear example of *fatwa* shopping where the name of a scholar has been simply used for marketing purposes.

> At the WIBC, another attendee in the audience that day had been named in the prospectus as one of the eight members of the Sharia board of the advisory firm who had procured the *fatwa* for the product. And yet he had not attended that final review meeting. In classic legalese, the *sukuk* prospectus had hinted that a *fatwa* would be procured but did not specify when, and which of the named scholars would actually sign the *fatwa*. When I asked him in a private moment to clarify his view on the *sukuk,* the scholar denied he was aware of the contents of the *sukuk* documentation, denied that he was still a member of the Sharīʿah board of the advisory firm listed in the prospectus, and denied that he had ever signed any associated *fatwa*. His name had simply been used.

Such increasing instances where the names of Sharīʿah scholars have been used unwittingly without their knowledge call for concern and may require some sort of regulation or actionable remedies in competent court of law. This can only be realised through strengthening of existing laws to ensure consumer protection because unsuspecting investors would always be at the receiving end.

STRENGTHENING THE EXISTING LAWS TO ENSURE CONSUMER PROTECTION

One may begin to think about the adequacy of the existing consumer protection laws in jurisdictions where Islamic finance products and services are being offered and whether such laws extend to Sharīʿah governance issues. This is necessary to prevent instances of *fatwā* shopping which will ultimately affect consumer trust in the products and services offered. Though there are several laws and model legal frameworks for consumer protection across the world, this study focuses on leading Islamic finance jurisdictions that are competing to become global hubs for Islamic finance services and products. This paper therefore focuses on Bahrain, Luxembourg, Malaysia, Oman, United Arab Emirates, and United Kingdom. Table 2 presents the existing laws in the six selected jurisdictions and the likelihood of *fatwā* shopping.

Table 2: Consumer Protection Laws and Possibility of *Fatwā* Shopping

Jurisdictions	**Legislation**	**Consumer Protection**	**Possibility of *Fatwā* Shopping**
Bahrain	Central Bank of Bahrain Rule Book, Volume 2	Incorporated but also available in other laws	Low
Luxembourg	Sukuk Law (Law 6631 on sale and buy-back transaction of real estate assets	Available in other laws	High
Malaysia	Islamic Financial Services Act	Incorporated but also	Rare

	2013	available in other laws	
Oman	Islamic Banking Regulatory Framework 2013	Incorporated but also available in other laws	Low
United Arab Emirates	UAE Federal Law No. 5 of 1985	Available in other laws	Low
United Kingdom	Several Regulations & Amendments	Available in other laws	High

Source: Author

It is pertinent to note that the jurisdictions identified in Table 1 have consumer protection laws and some of them are adequate for what they are primarily meant for, including the protection of financial consumers. However, there is still a lacuna in most regulatory frameworks relating to Islamic finance in the protection of Islamic finance consumers from instances of *fatwā* shopping which relates directly to Sharī'ah governance issues. This is the focus of Table 2. Bahrain, Oman and UAE have separate laws on consumer protection and adequate provisions are contained in their Islamic finance laws but the laws do not sufficiently solve the problem of *fatwā* shopping, so the possibility of such phenomenon cannot be ruled out but it is rather low from *a priori* deduction from their existing regulatory structures. On the other side of the continuum are two other jurisdictions – Luxembourg and United Kingdom – which have high standards for consumer protection codified in relevant laws but Sharī'ah governance is not adequately catered for in the several regulations and amendments to enabling laws relating to Islamic finance (Alger, 1989)(Grassa and Matoussi, 2014). This makes these two western jurisdictions to be susceptible to *fatwā* shopping. The last category only has Malaysia which, apart from its specific law on consumer protection, has codified a number of provisions in Islamic Financial Services Act 2013 (Act 759) (IFSA 2013) (Lee and Oseni, 2015). Though one might not absolutely conclude that *fatwā* shopping is impossible in Malaysia, particularly when cross-border transactions are undertaken, it is rare for such a phenomenon to occur.

Although consumer protection regulation is important, such initiatives go beyond merely protecting the direct customers of the bank. Third parties who are one way or the other affected by the any form of Sharī'ah-compliant transactions should also be reasonably protected based on the principle of general public good (*maṣlaḥah 'āmah*) (Al-Zuhayli, 2002). Therefore, for major financing that has significant public interest, Islamic banks should add to every major agreement in any new product the environmental impact of such financing. This should naturally be part of the structuring and product development of Islamic products, and the Sharī'ah scholars endorsing such new products should look out for any aspect of a product proposal that may harm the public or an individual either directly or indirectly (Maali et al., 2006). The Islamic financial services industry should scale up its practices to a high-level stage where Sharī'ah scholars approached to give *fatwā* or ruling on the Sharī'ah compliance of a product can refuse such endorsement as a result of a perceived environmental or social harm of the product (Wilson, 1997).

While taking reasonable steps to strengthen the existing laws to ensure consumer protection, policy makers must not lose sight of the role of an effective Sharī'ah governance framework in ensuring consumer protection (Hasan, 2011). The underlying concept here is trust in the products offered by the industry, and if such products are not properly structured in a Sharī'ah-compliant way, then the much-needed trust will be eroded. Rather than relying only on "Sharī'ah-compliance" and the names of leading Sharī'ah scholars as a tool for marketing Islamic finance products, some measure of consumer trust must be built into the process of product development since the consumers in most cases rely on the endorsements of products and services by the Sharī'ah scholars. Without taking such Sharī'ah endorsements for granted, the instrumentality of the law might be necessary to positively regulate the development, marketing, and trading of Islamic finance products and services.

Though it is often argued that consumer protection laws relating to banking services should be centralised at the federal level in a country as Schiltz (2008) contended, there is additional requirement when it comes to Islamic finance. Very stringent regulations should be introduced to curtail instances of *fatwā* shopping where the idiosyncrasies of the people are exploited.

Other jurisdictions may borrow a leaf from the Malaysian practice where *fatwā*-making and Sharī'ah resolutions are strictly regulated to protect consumers who are easily swayed by anything that is presented as Sharī'ah-compliant. The IFSA 2013 was specifically enacted to introduce prudential practices in the industry with particular reference to Sharī'ah governance and consumer protection (Lee and Oseni, 2015). The new law provides a comprehensive legal framework for the Islamic financial services industry in line with three core areas: Sharī'ah principles, the existing domestic legal and regulatory framework, and international standards and regulations. The two major aspects IFSA 2013 focused on, besides other enabling provisions, which makes it unique relate to the discussion on *fatwā* shopping (or making) and consumer trust. In its bid to promote strict Sharī'ah compliance in product development and endorsement and to ensure responsible business conduct, section 6 of IFSA 2013 provides for the regulatory objectives of the new legal framework:

> The principal regulatory objectives of this Act are to promote financial stability and compliance with Sharī'ah and in pursuing these objectives, the Bank shall—
>
> *(a)* foster—
>
> (i) the safety and soundness of Islamic financial institutions;
>
> (ii) the integrity and orderly functioning of the Islamic money market and Islamic foreign exchange market;
>
> (iii) safe, efficient and reliable payment systems and Islamic payment instruments; and
>
> (iv) fair, responsible and professional business conduct of Islamic financial institutions; and
>
> *(b)* strive to protect the rights and interests of consumers of Islamic financial services and products.

From the above provision, it is thus clear that for safety, soundness, and stability of the industry at the macro level as well as the micro level, the Sharī'ah governance element and the requirement for consumer protection are germane (Lee and Oseni, 2015). To this end, while Part IV of the Act provides for comprehensive Sharī'ah requirements, Part IX provides for business conduct and consumer protection. These provisions are read together with some salient provisions in the Central Bank of Malaysia Act 2009 (Act 701) (CBMA 2009) where the two-tiered Sharī'ah governance framework is outlined, specifically in sections 56 and 57 of CBMA 2009 which touched off a maelstrom of legal controversy in the Malaysian courts. While section 55 of CBMA 2009 provides for the Central Bank and all Islamic financial institutions operating in the country to consult the Sharī'ah Advisory Council (SAC) for any Sharī'ah matter relating to Islamic financial business, sections 56 and 57 of CBMA 2009 provide for reference to SAC for ruling from the courts and arbitral tribunals, and the binding effect of the rulings of SAC respectively. This was a subject of litigation in Malaysia few years ago where a party challenged the position of SAC as the final authority on Sharī'ah matters involving financial business in Malaysia as recognised by section 56 of CBMA 2009. It was argued that the courts are abdicating their judicial powers, and that such powers have been conferred on SAC which now authoritatively exercises the quasi-judicial functions on matters that would have been decided by the courts (Zakaria, 2013).

The controversy triggered by those provisions was laid to rest in the decision of the Court of Appeal in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2013] 3

MLJ 269, where the court held that the SAC which is the highest statutory body in matters involving Sharī'ah in Islamic financial transactions is not usurping the power of the courts. In its judgment, the Court of Appeal effectively clarified the position of the law relating to the extent of statutory powers conferred on SAC: "The duty of the SAC is confined exclusively to the ascertainment of the Islamic Law on financial matters or business. The judicial function is within the domain of the court, i.e. to decide on the issues which the parties have pleaded. The fact that the court is bound by the ruling of the SAC under s 57 does not detract from the judicial functions and duties of the court in providing a resolution to the dispute(s) which the parties have submitted to the jurisdiction of the court".[2] Even though the parties appealed to the Federal Court, which is the apex court in Malaysia, the main subject matter of the case was settled out of court which effectively laid to rest the controversy *as per* the powers of SAC.

Therefore, it thus means that having a centralised Sharī'ah advisory body will minimise instances of *fatwā* shopping at the country level but there is still the challenge of cross-border Islamic finance transactions owing to the fluid nature of such transactions (Oseni, 2013). At the national level, strengthening the existing laws by codifying the role of Sharī'ah advisory will enhance the competitive edge of the industry and further promote the ideals of consumer protection. In fact, Schedule 7 of IFSA 2013 regulates marketing of banking and takāful products and products in order to build consumer trust in the entire industry. Whatever be the case, proper regulation through an enabling robust legal framework is expected to reduce drastically instances of *fatwā* shopping in the industry as exemplified by the Malaysian model. Though one may concede that having a "one-one-solution-for-all approach may defeat the objective of the regulation" (El-Hawary et al., 2007, p. 785), matters relating to consumer protection and trust are universal, particularly when they involve marketing Sharī'ah products.

CONCLUSION AND RECOMMENDATIONS

From the foregoing analysis, one may conclude that the significance of consumer protection is more pronounced in a financial industry which is faith-based and value-oriented, and positively claims to be Sharī'ah-complaint. Therefore, financial consumers' trust in the products and services offered in this uniquely important industry is paramount considering the faith premium leveraged on in marketing the products (Amin et al., 2013, p. 92). It is therefore easy to prey on the sentiments of unsuspecting Muslim investors if a proper regulatory framework is not introduced to protect such class of investors. This does not underrate the overarching importance of *fatwā* in repositioning the industry, as it remains the driving force that propels and enhances the competitiveness of the industry in an increasingly globalised financial system.

Nevertheless, this study finds that the increasing practice of *fatwā* shopping and the clandestine searches by some Islamic bank executives to get their new products endorsed by leading Sharī'ah scholars require proper regulation to avoid a total erosion of trust in the entire industry. Islamic bankers are not necessarily Sharī'ah scholars. So rather than putting the blame of *fatwā* shopping on the Sharī'ah scholars, the bankers and product development executives may be held responsible for the continuous phenomenon (Khan, 2010, p. 818). Notwithstanding, the Sharī'ah scholars should be wittingly cautious and meticulously conscious of the provisions of any Islamic finance products and services brought to them for endorsement.

The study also finds that in spite of the religious sentiments of Muslim investors relating to Sharī'ah compliance and their propensity to invest in related products, they cannot

[2] See *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2013] 3 MLJ 269 at 277.

be reasonably protected with mere Sharī'ah principles that are not backed up with appropriate robust legal framework; hence, law plays a significant role in bridging the gap between market products and consumer trust. New legislations on Islamic finance should borrow a leaf from the Malaysian model where the dedicated law on Islamic finance pointedly and copiously addresses consumer protection through numerous provisions on business conduct. New legislations should consider the need to codify some of the principles relating to consumer protection in Sharī'ah governance in dedicated legislations on Islamic finance.

This finding is consistent with that of Azmat et al., (2014) who berated the lack of clear regulatory framework for cross-border transadctions such as *ṣukūk*. One must admit that Sharī'ah compliance issues and the role of Sharī'ah advisory bodies are often overlooked in laws and regulations on Islamic finance, particularly in less regulated jurisdictions. Self-regulation is often adopted in such jurisdictions but this might not be in the best interest of the unsuspecting consumers who might have invested their hard-earned savings in Sharī'ah-compliant businesses as a result of the faith premium, which is sometimes abused.

Finally, the nature of Islamic finance products and services presents more of cross-border opportunities in terms of Sharī'ah-compliant investments for both global investors and entrepreneurs. Therefore, going beyond domestic legal systems, there may be a need for some sort of cross-border regulation (Oseni, 2013). Regulation of cross-border Islamic finance transactions still requires a further look to minimise the instances of *fatwā* shopping. Though most jurisdictions have prudential rules regulating consumer protection, cross-border regulations may be more effective in the face of increasing interest in *ṣukūk* which more often than not involves investors across national borders. While the nomenclature for a robust cross-border regulation of Sharī'ah-compliant investments might start with prudential standards from renowned international standard-setting bodies such as the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) and IFSB, there is the possibility of a future treaty among the Organisation of Islamic Cooperation (OIC) member countries which could be extended to other jurisdictions such as the United Kingdom and Luxembourg that are actively interested in Sharī'ah-compliant products and services.

Future studies may focus on empirical studies on the dynamics and dimensions of *fatwā* shopping and consumer trust. It will be good to undertake further studies on the extent of consumer trust on each of the components of the Islamic finance industry – banking, capital markets, *takaful*, and even money market – in the light of Sharī'ah issues and regulatory frameworks. It is also important to explore, though through indirect survey questions, the procedure of product development in cross-border *ṣukūk* transactions with a view to ascertaining the intentions of the issuers and their efforts toward ensuring Sharī'ah compliance and consumer trust in the structuring and marketing of their products. There may also be the need to explore the perceptions of Islamic finance consumers on trust in Islamic finance products and services offered in a particular jurisdiction.

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