

FINANCIAL EXCLUSION OF MINORITIES: ISLAMIC BANKING TO THE RESCUE?

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Abstract

After many years of extensive debates, reports and declarations, the RBI in November of 2017 declared that it would not allow for the incorporation of Islamic banking in India. It based its decision on the ground that there were sufficient pre-existing schemes in place for financial inclusion of all sections of society, including the Muslims. Research indicates that certain pre-existing schemes for financial inclusion were not as effective as the Government portrayed them to be. This puts the Indian demographic, especially minorities, at severe risk of exclusion from conventional banking methods. Therefore, Islamic banking could be a potential solution to deal with this problem of exclusion of minorities. This paper seeks to analyze whether this decision of the RBI was truly right and beneficial for the wide Indian demographic.

This paper also seeks to answer the following questions, in corollary to the main premise: would such a non-conventional form of

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banking be constitutionally valid? If it were to be introduced in India, then who would administrate it? What would the short term and long term challenges be, if it were in fact introduced in India? Furthermore, how must it be implemented to effectively deal with all these challenges?

I. AN INTRODUCTION TO INDIA'S SHAKY HISTORY IN RELATION WITH ISLAMIC BANKING

Islamic banking can be most succinctly described as a non-conventional, interest-free banking system which exclusively follows Shariah principles. Due to its non-conventional nature, the questions of its validity, application and implementation within the country have been extensively debated. To understand the scope of the implementation of Islamic banking in India, the Reserve Bank of India (“**RBI**”) in 2005, appointed the Anand Sinha Committee to study Islamic Financial Products that could be introduced in India for the purpose of economic inclusion of Muslims.¹ The Committee recommended against Islamic banking as the current regulations governing banking companies in India do not allow Islamic banking. The introduction of Islamic banking would mean amending to the Banking Regulation Act, 1949 along with separate regulations and rules governing interest-free banking.² Moreover, the Committee

¹Shariq Nisar, *Islamic Banking in India: The Flip-Flop*, INDIAN CENTRE FOR ISLAMIC FINANCE (Jan. 2, 2017, 12:00 pm), <http://icif.in/icif-news-event.php?event=ei&id=278>.

²Press Trust of India, *'Islamic window' in banks would attract huge Gulf money: ICIF*, THE ECONOMIC TIMES (Nov. 28, 2016, 8:50 pm), <https://economictimes.indiatimes.com/news/economy/policy/islamic-window-in-banks-would-attract-huge-gulf-money-icif/articleshow/55670680.cms>.

opined that the tax laws would also have to be amended to allow for interest-free banking provision.

In sharp contrast to this, the Raghuram Rajan Committee in 2008 suggested the inclusion of interest-free banking as a part of financial sector reforms.³ The Committee recommended that certain appropriate legislative and executive measures should be taken to permit the delivery of low-interest finance for the purpose of financial inclusion and creation of a solid framework for financial products.⁴

Almost as if in compliance with the aforesaid report, various government bodies attempted to introduce principles of Shariah banking into the banking sector of India. For example, in 2016, the RBI proposed Islamic windows to be opened in conventional banks. At the same time, it highlighted the complexities of Islamic finance, various regulatory and supervisory challenges, and the lack of experience of Indian banks in this field.⁵

However, the inaction of the RBI for more than a year following its declaration forced the Press Trust of India (“PTI”) to file a petition under the Right to Information Act, 2005 to inquire about the status of the window. In response, the RBI revealed that after reconsideration, it had reneged its proposal on the grounds of making “wider and equal opportunities available to all citizens to access banking and financial services”.⁶ This development was met with bouts of criticism,

³Government of India, *Report of the committee on Financial Sector Reforms, A HUNDRED SMALL STEPS*, 8 (2008), http://planningcommission.nic.in/reports/genrep/rep_fr/cfsr_all.pdf.

⁴*Id.*

⁵Ashwini Shrivastava, *Sharia banking: RBI proposes 'Islamic window' in banks*, PRESS TRUST OF INDIA (Nov. 20, 2016, 1:19 PM), http://www.ptinews.com/news/8097951_Sharia-banking--RBI-proposes--Islamic-window--in-banks.html [hereafter Shrivastava].

⁶Ashwini Shrivastava, *Not to pursue Islamic banking in India, says RBI*, PRESS TRUST OF INDIA (Nov. 12, 2017, 11:31 AM), http://www.ptinews.com/news/9228772_Not-to-pursue-Islamic-banking-in-India--says-RBI.html.

especially from the Muslim community in India. As a result Public Interest Litigation (“**PIL**”) was initiated in the High Court of Jammu and Kashmir to issue a notice to the Government of India and the RBI to enable the Jammu and Kashmir Bank to open up Islamic banking services for the public.⁷

The RBI’s shaky stand on Islamic banking coupled with the PIL opened a Pandora’s box of opinions on Islamic banking. This was the authors’ primary motivation for research on this subject. This paper seeks to analyze the constitutional and practical questions regarding the viability of Islamic banking in India. This paper has four primary parts. Part I explains the principles of Shariah related to banking; Part II tests the viability of Islamic banking against the Constitution of India; Part III recommends a regulatory framework for Islamic banking in India after analyzing the structure for Islamic finance in the United Kingdom and Malaysia; finally, Part IV identifies an additional set of problems that may arise in India in relation to Islamic banking, and suggests potential solutions.

II. PRINCIPLES OF SHARIAH

Shariah law has directives to regulate all the aspects of a person’s life, whether secular or religious.⁸ The Quran commands that finance be regulated by the principles of Shariah envisaged in it and

⁷Indian Centre for Islamic Finance, *Islamic Banking In J&K: HC Gives Finance Ministry, RBI Two More Weeks To Respond*, ICIF (Mar. 20, 2018), <http://www.icif.in/icif-news-event.php?event=ei&id=339>; Ishfaq Tantry, *Islamic banking: HC notices to RBI, state*, THE TRIBUNE (Mar. 20, 2018, 12:32 AM), <https://www.tribuneindia.com/news/jammu-kashmir/islamic-banking-hc-notices-to-rbi-state/560338.html>.

⁸Delwin A. Roy, *Islamic Banking*, 27 MIDDLE EAST. STUD. 427, 427 (1991); Ahmad Hidayat Buang, *Islamic Contracts in a Secular Court Setting? Lessons from Malaysia*, 21 A.L.Q. 317, 317-318 (2007).

implemented by the Sunnah.⁹ Shariah lays emphasis on economic development with economic justice at all stages.¹⁰ It insists on sharing of wealth amongst human beings and discourages its concentration amongst a few.¹¹ It allows individuals wide freedom of contract, which in turn makes room for all transactions but those which are *haram*, i.e. expressly prohibited.¹² Transactions based on ownership and sale, that is, participation in trade and gaining profit, are approved by the Shariah.¹³ Islamic law envisages two main forms of prohibition, *Riba* and *Gharar*, the philosophical basis of which is to avoid unjust enrichment.¹⁴

A. *Riba*

The word '*riba*' is derived from the Arabic word "raba-wa", which means 'to increase' or 'excess'.¹⁵ Prohibition on *riba* addresses all transactions where the profit earned by the trader exceeds the efforts put by him.¹⁶ For example, in the Pre-Islamic Arab society, *riba* consisted of doubling and redoubling of debt on non-repayment of the amount within the stipulated period.¹⁷ Modern forms of *riba* would even include commitment commissions charged by banks and exorbitant penalties imposed on the customer for late payment.¹⁸ However, prohibition against *riba* is most closely associated with the

⁹Beximco Pharmaceuticals v. Shamil Bank of Bahrain, EC [2004] APP.L.R. 01/28.

¹⁰Zamir Iqbal & Abbas Mirakhor, *Progress and Challenges of Islamic Banking*, 41 T.I.B.R. 381, 386 (1999) [hereinafter Iqbal & Mirakhor].

¹¹Madiha Khan, *Islamic Banking Practices: Islamic Law and Prohibition of Ribā*, 50, ISLAM. STUD. 413, 413-414 (2011) [hereinafter Khan].

¹²Iqbal & Mirakhor, *supra* note 10, at 386.

¹³Nicholas H. D. Foster, *Islamic Finance Law as Emergent Legal System*, 21 A.L.Q. 170, 172 (2007).

¹⁴CHARLES PROCTOR, *THE LAW AND PRACTICE OF INTERNATIONAL BANKING* 769 (1st ed. 2010) [hereinafter PROCTOR].

¹⁵*Id.*

¹⁶*Id.*

¹⁷Mohammad Omar Farooq, *Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link*, 21 A.L.Q. 285, 287 (2007).

¹⁸Proctor, *supra* note 14, at 771.

prohibition against fixed interest on debt. It is based on the idea that money, having no intrinsic value, cannot be exchanged as a commodity. It therefore cannot be used to produce more money without sharing the risk.¹⁹ Another reason for the prohibition on *riba* is that the fixed and predetermined nature of the interest gives the lender a wrongful advantage over the borrower, as the interest is certain but the profit of the borrower is not.²⁰ Islamic law thus hits the foundation of the conventional banking system. However, this does not mean that Islamic law prohibits trading. Islamic law has its own set of banking products and schemes which are Shariah-compliant. An example of such a product is called *mudaraba*, akin to equity, wherein although the profit-sharing ratio is fixed, the return itself is not.²¹ It is a profit-sharing contractual arrangement between the investor (*Rab-ul-maal*) and the bank (*mudareb*).²² Under this Shariah-compliant scheme, the bank collects funds from the investor and invests in the business of the borrower, who manages the enterprise. The investor takes risk on its investment, and at the end of the stipulated period of time, the capital is returned to it, along with his share of profit as per the profit sharing agreement. The investor does not have a guaranteed return on his investment, and takes part in losses up to the amount of capital invested by him. The entrepreneur is not liable to incur losses unless they can be attributed to his own negligence.²³

¹⁹Ashraf U. Kazi & Abdel K. Halabi, *The Influence of Quran and Islamic Financial Transactions and Banking*, 20 A.L.Q. 321, 323 (2006).

²⁰Khan, *supra* note 11, at 415.

²¹Khaled Qasaymeh, *Islamic banking in South Africa: between the accumulation of wealth and the promotion of social prosperity*, 44 C.I.L.S.A. 275, at 282-283 (2011).

²²Nasser M. Suleiman, *Corporate Governance in Islamic Banks*, 22 *Society and Economy in Central and Eastern Europe*, 98, at 101-102 (2000).

²³PROCTOR, *supra* note 14, at 782, 785.

B. *Gharar*

The word ‘*Gharar*’ means ‘uncertainty’.²⁴ Islamic law prohibits transactions which involve unnecessary uncertainty in their outcome, to prevent the unjust enrichment of one party against the other.²⁵ *Gharar* invalidates a contract if the risk is significant and it affects the principal outcome of the contract.²⁶ It is a general term and encompasses other transactions, such as *maisir* (gambling).²⁷ An example of *gharar* would be sale of a commodity when the buyer touches it without seeing it.²⁸ *Gharar* also raises issues related to modern-day forward contracts. Forward contracts are contracts for sale of a commodity at a pre-determined price and quantity on a future date.²⁹ In general, Islamic law does not allow forward contracts as the seller contracts for the goods he does not possess, which results in uncertainty.³⁰ It only allows those forward contracts, known as *Salam* contracts,³¹ where one counter-value exists at the time of the execution of the contract.³² In other words, Shariah allows for forward contracts in which payment of money is done at the time of execution of contract. This is directly in contrast with modern forward contracts in which payment is made at the time of actual delivery of goods. Moreover, the goods to be sold must either exist or be fungible, and the quantity, quality and other characteristics must be clearly

²⁴Frank E. Vogel & Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* 88 (Springer, 1998).

²⁵Nicholas C. Dau-Schmidt, *Forward Contracts—Prohibitions on Risk and Speculation Under Islamic Law*, 19 Ind. J. Global Legal Stud. 533, 534 (2012) [hereinafter Dau-Schmidt].

²⁶PROCTOR, *supra* note 14, at 771, 772.

²⁷Sherin Kunhibava & Balachandran Shanmugam, *Shari’ah and Conventional Law Objections to Derivatives: A Comparison*, 24 A.L.Q. 319, 324 (2010) [hereinafter Kunhibava & Shanmugam].

²⁸*Id.*

²⁹Dau-Schmidt, *supra* note 25.

³⁰*Id.*

³¹*Id.* at 542.

³²Kunhibava & Shanmugam, *supra* note 27, at 327.

described.³³ Islamic law also allows another type of forward contract known as *Istisna*.³⁴ This is a contract in which one party agrees to manufacture a product for the other party at an agreed price. The payment to the manufacturer is made by the buyer only after the product is ready.³⁵ The contract is immune from revocation once the product is ready.³⁶

To sum up, the principles of Shariah-compliant banking are based on principles of fair dealing. It is pertinent to note that the actual scope and purview of Shariah-compliant banking is unfamiliar to many people in India. As a result, the question of its viability in a secular country such as India has arisen time and again. The following section seeks to assess whether this form of banking is constitutionally permissible in India.

III. DOES INDIA TRULY NEED ISLAMIC BANKING AND IS IT CONSTITUTIONALLY VALID?

In 2018, the RBI decided not to pursue Islamic banking in India on the grounds of making “wider and equal opportunities available to all citizens to access banking and financial services”.³⁷ In other words, the RBI meant that there were sufficient schemes in place for the financial inclusion of all the sections of the society - for example, the Pradhan Mantri Jan Dhan Yojana (“PMJDY”), which was floated to ensure that all persons have access to bank accounts. While the opinion of the RBI appears tenable at face value, the reality is starkly different. The RBI’s reasoning is questionable in light of the World

³³Dau-Schmidt, *supra* note 25, at 544.

³⁴Noor Mohammed, *Principles of Islamic contract law*, 6 J.L. & RELIG. 115, 124 (1988) [hereinafter Mohammed].

³⁵Dau-Schmidt, *supra* note 25, at 545.

³⁶Mohammed, *supra* note 34.

³⁷Shrivastava, *supra* note 6.

Bank Global Findex database, 2017 which reported that almost half of the Indian bank account holders in the year 2017 had inactive accounts.³⁸ Specifically in the context of PMJDY, the latest data (as on August 1, 2018) on the official website shows that a total of 32.235 crore accounts have been opened and Rs. 80,674.62 crore has been deposited under the scheme, since its inception. This means that the average deposit amount is around a mere Rs. 2600.³⁹ The RBI in 2015, based on an empirical study, went to the extent of reporting that a significant number of Muslims are voluntarily excluded from short term formal finance because it is not Shariah-complaint.⁴⁰ These statistics point not only to the RBI's vacillating stand but also to the fact that there is a clear lack of financial inclusion of Muslims. Islamic windows can be utilized by the RBI to bring the Muslim minority at par with the majority to facilitate financial inclusion. This is in consonance with the idea of social justice, envisaged under Article 14 of the Constitution, which requires equitable distribution of resources and abolition of inequalities of income and opportunity.⁴¹ If the State finds a minority community which is not placed equally with majority community, it is empowered by the Constitution to take positive actions to bring them at par.⁴²

The consideration now is whether the practice of Islamic banking is violative of secularism. This question came before the Hon'ble High Court of Kerala in *Dr. Subrahmaniam Swamy v. State of Kerala*⁴³ in

³⁸LEORA CLAPPER ET AL., THE GLOBAL FINDEX DATABASE 2017: MEASURING FINANCIAL INCLUSION AND THE FINTECH REVOLUTION 65 (Apr. 19, 2018, World Bank).

³⁹Progress Report, Pradhan Mantri Jan Dhan Yojana (Aug. 01, 2018), <https://pmjdy.gov.in/account>.

⁴⁰RESERVE BANK OF INDIA, REPORT OF THE COMMITTEE ON MEDIUM-TERM PATH ON FINANCIAL INCLUSION, 42-43 (2015).

⁴¹Article 14 reads as "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. See Vijay Harishchandra Patel v. Union of India, (2009) 3 GLR 2153, ¶¶ 8-9.

⁴²Id.

⁴³*Dr. Subrahmaniam Swamy v. State of Kerala*, (2011) 1 KHC 584, ¶ 10.

which the decision of the Government of Kerala to contribute to the share capital of a Shariah-compliant trading institute was challenged. The main contention of the Petitioner was that the action of the Government was against secularism and specifically violated Article 27 of the Constitution. This was rejected by the Court, which held that the Government of Kerala can contribute to the share capital of the institute to carry on business in a Shariah-compliant manner as the purpose of the transaction is to attain commercial benefits.⁴⁴ Merely because the trade has a basis in some religion does not mean that the State violates the ideals of secularism.⁴⁵ It further held that State may spend public money on such a contribution as it is not for the purpose of promoting a religion.⁴⁶

The jurisprudence in India and the interpretation of this case is limited to the constitutional validity of the State participating in trade in a Shariah-compliant manner. However, this is just one aspect of a larger, unexplored realm of law. The question still remains as to whether the position taken by the Court will hold good for full-fledged State-run Islamic banks or Islamic windows in State-run banks. In other words, is the State venturing into the prohibited territory of ‘promoting religion’ or ‘violating secularism’ by actually setting up Islamic banks?

Secularism essentially entails neutrality of the state towards religion and equal treatment of different religions by the State,⁴⁷ which is reflected in Articles 25 to 28 of the Constitution of India. This in turn is based on the idea that religion is a personal affair and should be

⁴⁴*id.* at ¶ 36.

⁴⁵*id.* at ¶ 52.

⁴⁶*id.* at ¶ 54.

⁴⁷The political ideology of Secular state was born as a result of a series of religious wars in seventeenth century Europe that led to massive destruction of human life and property. It was established by the Peace of Westphalia (1648) which took away the sovereignty of rulers over religious affairs.

kept outside the public sphere.⁴⁸ The State is prohibited from identifying with any religion or according preferential treatment to any religion.⁴⁹ However, this is not to suggest that there is a complete ban on the Indian State's association with religion.⁵⁰ The State may associate itself with an activity that has some basis in a religion, provided that the State's association does not result in the direct promotion and propagation of the religion.⁵¹ The test to ascertain whether the State is promoting a religion is to examine the purpose of the State's activity.⁵² For example, introduction of Sanskrit as an elective by the Central Board of Secondary Education was not held to be violative of secularism, as the purpose of such introduction was to better the understanding of Indian culture and not to propagate any religion.⁵³ Also, the affiliation of an educational institution imparting optional religious instruction apart from secular education was held not derogatory to the secular character of the state as the purpose was the protection of minorities and promotion of education.⁵⁴ Similarly, expenditure to facilitate Haj pilgrimage,⁵⁵ contribution to ensure proper administration of religious trusts and institutions,⁵⁶ provisions for academic research on the life of Guru Nanak in relation to its impact on Indian civilization and culture⁵⁷ were held not to be hit by

⁴⁸Kevin Y. L. Tan, *Secularism and the Constitution: Striking the Right Balance*, STATE AND SECULARISM: PERSPECTIVE FROM ASIA 137, 139 (Michael Heng Siam-Heng & Ten Chin Liew ed., 2010).

⁴⁹S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶ 146.

⁵⁰Kidangazhi Manakkal Narayanan Nambudiripad v. State of Madras, AIR (1954) Mad 385, ¶ 6.

⁵¹Dr. Subrahmaniam Swamy v. State of Kerala, (2011) 1 KHC 584, ¶ 52.

⁵²*id.* ¶ 43.

⁵³Santosh Kumar v. Ministry of Human Resources, AIR (1995) SC 293, ¶ 19.

⁵⁴The Ahmedabad St. Xavier's College Society v. State of Gujarat and Ors, AIR (1974) SC 1389, ¶ 139.

⁵⁵Mahanagar Ghaziabad Chetna Munch v. The State of Uttar Pradesh, (2007) 1 ADJ 77, ¶¶ 54-56.

⁵⁶Mahant Sri Jaganath Ramanuj Das v. The State of Orissa, AIR (1954) SC 400, ¶¶ 9-10.

⁵⁷DAV College v. State of Punjab, AIR (1971) SC 1737, ¶¶ 25-29.

the Constitutional limitation as their purpose and direct effect is not to promote religion.

To test the idea of Islamic banking against secularism, we need to look at the purpose of introducing Islamic banking in India. It has a two-fold purpose: the financial inclusion of Muslim minorities on the one hand and promotion of trade and flow of capital on the other.⁵⁸ It is not to promote and propagate the teachings of Islam. For that same reason, public money can be spent on it without violating Article 27 of the Constitution.⁵⁹ Moreover, secularism is related to equality of religions and bringing the minority communities at par with the majority communities.⁶⁰ The Government, however, must observe complete religious neutrality. It must make sure that the Islamic banking institutions only focus on financial inclusion of the Muslims and do not get involved into advancement of religion itself.⁶¹ Therefore, introducing Islamic banking within the purview of the Indian scenario is to facilitate secularism rather than impede it.

IV. RECOMMENDATIONS FOR ADMINISTRATIVE FRAMEWORK FOR ISLAMIC WINDOWS IN INDIA: A CASE STUDY OF UNITED KINGDOM AND MALAYSIA

The next question that arises in relation to Shariah finance is how to make space for it in India. For this the authors have looked into the practice and regulatory regime specific to Islamic banks in the United Kingdom (“UK”) for the reason that it is also a secular country which

⁵⁸Shrivastava, *supra* note 5.

⁵⁹Article 27 read as “No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination”.

⁶⁰Vijay Harishchandra Patel v. Union of India, 2009 3 GLR 2153, ¶¶ 9-10.

⁶¹*Id.* at ¶ 13.

was once dominated exclusively by conventional banks, similar to India. However, owing to various pitfalls that the system in UK suffers from, the authors have also looked at the practice in Malaysia, which has a well-developed system and thriving Islamic finance to suit its Muslim-majority population. In this section, the authors analyze the historical and administrative set-up of Islamic windows and banks in both of these countries in order to select the most suitable features for India. By this, a suitable model is sought to be recommended for Islamic banking in India.

A. Case Study: United Kingdom

Islamic Banking was introduced in the United Kingdom in the 1980s with the establishment of the Al-Baraka Bank, which operated with a license. Although this bank was shut down in 1993 due to certain complications, it paved the way for the concretization of Islamic finance in the UK.

The British banking system was regulated by the Financial Services and Markets Authority Act, 2000 (“**FSMA**”).⁶² This Act mandated a regulatory authority for banking and financial services, named the Financial Services Authority (“**FSA**”). The FSA was the body that authorized the conduct of a ‘regulated activity’ with regard to banking. It must be noted at the outset that while the term ‘banking’ itself is not defined as a ‘regulated activity’ in the FSMA Act, 2000, the act of ‘accepting deposits’ is generally accepted as a sufficient threshold to allow ‘banking’ to fall within the scope of the Act.⁶³ The violation of the principles enshrined in the Financial Services and Markets Authority Act, 2000 (FSMA) amounted to a criminal offence.

The FSA regulated the conduct of conventional and non-conventional modes of banking. As a result, it has authorized and supervised the

⁶²Financial Services and Markets Act, 2000, Part II, §2, 2012 c.21 (Eng.).

⁶³Financial Services and Markets Act, 2000, Part II, §5, 2012 c.21 (Eng.).

establishment and growth of Islamic windows in banks and full-fledged Islamic banks in the UK. The first fully-fledged Islamic bank authorized by the FSA was the Islamic Bank of Britain. Following this, the UK has seen major development in the Islamic banking scenario, making it the largest Islamic banking hub in the western world.

The FSA operated on a non-discriminatory basis, whereby it would grant a bank or financial institution with permission to carry on a regulated activity.⁶⁴ In matters of authorizing institutions to conduct their activities, the FSA ensured that all institutions, whether they abide by religious principles or conventional banking principles, are subject to the same standards.⁶⁵ Therefore, the threshold for allowing any regulated activity to be authorized is set at uniformly high for all institutions, irrespective of their religious affiliation.⁶⁶

The original text of the FSMA was in operation till 19 December 2012. On this date, the Parliament substantially amended the FSMA by the Financial Services Act, 2012 to ensure better regulation of the banking system. It is pertinent to note that this amendment was effective when the United Kingdom was still a member of the European Union. As a result of the amendment, from the 1 April 2013, the FSA was abolished and replaced by two statutory bodies - the Financial Conduct Authority and the Prudential Regulatory Authority.⁶⁷

The Financial Conduct Authority (“**FCA**”) is a quasi-judicial authority, similar to its predecessor. The FCA is a company limited by guarantee. Its primary duty is to ensure that banks conduct their

⁶⁴Financial Services and Markets Act, 2000, Part II, §19, 2012 c.21 (Eng.).

⁶⁵Financial Services and Markets Act, 2000, Part IV, §40, 2012 c. 21(Eng.).

⁶⁶Howard Davies, Conference on Islamic Banking and Finance Bahrain, Islamic Finance and the UK Financial Services Authority, (March 2, 2003), <http://www.fsa.gov.uk/Pages/Library/Communication/Speeches/2003/SP118.shtml>.

⁶⁷Financial Services Act, 2012, Part 2, Chapter 1, 2012 c.21 (Eng.).

daily affairs with customers on a fair basis, to implement healthy competition between banks, and to identify any potential risks associated with the banking sector.⁶⁸

The Prudential Regulatory Authority (“**PRA**”) is a limited company which is wholly owned by the Bank of England. Its primary duty is to promote the safety and security of the entities that it regulates, to supervise all the entities and to set appropriate standards for the entities.⁶⁹ The banking authorities have unendingly ensured that the new structure also maintains a level playing field for all banks and institutions, like its predecessor. This new structure purports to achieve two objectives. First, to ensure the smooth supervision of banks and financial institutions in a more systematic manner and second, to ensure compliance with certain basic European Union norms of banking, such as the Capital Requirements Regulations, 2013⁷⁰ on prudential requirements for credit institutions and investment firms and Capital Requirements Directive (IV), 2013⁷¹ on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firm, *inter alia*. The implications of the United Kingdom’s exit from the European Union may potentially alter this present system, however, the same is yet to be seen.

a) *Problems with Islamic banking in the UK*

While in theory, the FCA operates on a system of fixed standards for all institutions and non-discriminatory treatment of all customers, it is plainly evident that certain shortcomings exist in the present model.

⁶⁸Financial Services Act, 2012, Part 2, Chapter 1, §1A, 2012 c.21 (Eng.).

⁶⁹Financial Services Act, 2012, Part 2, Chapter 1, §1B, 2012 c.21 (Eng.).

⁷⁰Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements For Credit Institutions And Investment Firms 648/2012/EEA, 2013 O.J. (L 176).

⁷¹Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms 2002/87/EC, 2013 O.J. (L 176) 1, 338.

The first is the stark absence of any definitional or regulatory clauses on Islamic finance contained in any English legislation which is applicable to banks and financial institutions. This leads to a system of confusion, since it opens a window for discriminatory treatment of customers of the bank and fraudulent transactions.⁷² Furthermore, due to the lack of a definitional standard regarding the applicability of Shariah principles to a commercial contract, Courts have time and again held that Shariah law cannot be the governing law of a financial transaction despite the fact that the contract itself makes a reference to the application of Shariah law. This imbalance in the threshold for the application of Shariah principles to govern a contract and be regulated by fixed standards can lead to the exacerbation of disputes.⁷³

A second practical issue that arises is with respect to the absence of any governing authority or authorizing agency of each institution on the principles of Shariah law and the rules which shall govern the particular authority.

The third issue is the absence of a proposed body to aid the Courts with the adjudication of a potential dispute involving Shariah interpretation, which may arise between the parties to the transaction. English Courts have on occasion faced difficulty in interpreting the principles of Shariah law in relation to commercial transactions. The Court in *Investment Company of The Gulf (Bahamas) Limited v. Symphony Gems N.V. and Ors.*⁷⁴ went to the extent of seeking expert views from Shariah scholars on the validity of mudarabah agreements in commercial contracts, which it later chose to ignore in favour of a literal interpretation of the contract. This issue is further fueled by the

⁷²Zulkifli Hasan et al., An analysis of the Courts' decisions on Islamic finance disputes, 3 (2) ISRA International Journal of Islamic Finance 57, at 41-71 (2011).

⁷³*Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd (No.1)*, (2004) 2 All E.R. (Comm) 312; *Investment Company of The Gulf (Bahamas) Limited v. Symphony Gems N.V. and Ors.*, (2014) EWHC 3777.

⁷⁴*Investment Company of The Gulf (Bah.) Limited v. Symphony Gems N.V. and Ors.*, (2014) EWHC 3777 (Comm) (2014).

fact that there is also an absence of any special procedural regulations which shall be applicable to resolve such a dispute, should it arise.⁷⁵

B. Case Study: Malaysia

Pitfalls in the system of UK call for a look at the more developed model of Islamic Finance in Malaysia. Malaysia operates on a dual banking basis: a conventional banking system and an Islamic banking system, which offers a wide range of services to residents and non-residents. Islamic banking in Malaysia was introduced in 1983. Since then, it has offered an alternative option to conventional banking. The statutes governing the two systems are the Financial Services Act, 2013 and the Islamic Financial Services Act, 2013, respectively. Banks are regulated by the central bank called Bank Negara Malaysia (“**BNM**”) which is to supervise and control all the banks in Malaysia.⁷⁶ BNM was established under the Central Bank of Malaysia Act, 2009 and is administered by it.⁷⁷ For Islamic banks, Malaysia has a Shariah Advisory Council (“**SAC**”) of BNM, which issues rulings or advice to the BNM on the interpretation of Islamic law related to financial business.⁷⁸ The SAC will give such rulings/advice when the BNM makes a reference under the Central Bank of Malaysia Act, 2009.⁷⁹ The published rulings of SAC are also taken into account by courts or arbitrators dealing with any Shariah-related matter.⁸⁰ The courts or arbitrators shall also make reference to the SAC for its ruling where any question pertaining to Shariah arises.⁸¹ Any ruling given by the SAC to the BNM, courts or arbitrators are final and

⁷⁵Scott Morrison, *Brexit: bane or boon for Islamic finance and banking?*, 32(7) J. Intl. Banking Law & Regulation 293, at 291-298 (2017).

⁷⁶Islamic Financial Services Act, 2013, § 6, No. 759 of 2013 (Malay.).

⁷⁷Central Bank of Malaysia Act, 2009, § 3, No. 701 of 2009 (Malay.).

⁷⁸Central Bank of Malaysia Act, 2009, § 51, No. 701 of 2009 (Malay.).

⁷⁹Central Bank of Malaysia Act, 2009, § 52, No. 701 of 2009 (Malay.).

⁸⁰Central Bank of Malaysia Act, 2009, § 56(1), No. 701, Laws of Malaysia, 2009 (Malay.).

⁸¹Id.

binding.⁸²To ensure the quality of rulings, members of SAC are appointed after consultation from BNM from amongst persons who have knowledge or experience in Shariah as well as banking and finance.⁸³

In addition to the SAC, each bank is to establish a Shariah committee.⁸⁴ This committee provides advice to the bank and its subsidiaries on Shariah matters to make sure that the bank complies with Shariah principles at all times.⁸⁵ Moreover, where there are differences in rulings between the Shariah Committee of an Islamic bank and SAC, the ruling of the SAC would prevail.⁸⁶ In matters that cannot be resolved by the Shariah committee, banks can directly seek ruling or advice from the SAC through its Secretariat.⁸⁷

The difference between the English and the Malaysian model is that the FCA in the former case does not have a board of Shariah scholars who are appointed to interpret and review the Islamic banking principles and instruments of Islamic banking. In this regard, UK tends to treat conventional banking and Islamic banking at par with each other; however, it does on occasion attempt to incorporate the developed standards of Shariah which are set by certain Islamic organizations, for example, the Islamic Financial Services Board (“**IFSB**”) and the Accounting and Auditing Organization for Islamic Financial Institutions (“**AAOIFI**”).

⁸²Central Bank of Malaysia Act, 2009, § 57, No. 701, Laws of Malaysia, 2009 (Malay.).

⁸³Central Bank of Malaysia Act, 2009, § 53(1), No. 701, Laws of Malaysia, 2009 (Malay.).

⁸⁴Islamic Financial Services Act, 2013, § 30, No. 759, Laws of Malaysia, 2013 (Malay.).

⁸⁵Islamic Financial Services Act, 2013, § 30, No. 759, Laws of Malaysia, 2013 (Malay.).

⁸⁶Islamic Financial Services Act, 2013, § 58, No. 759, Laws of Malaysia, 2013 (Malay.).

⁸⁷Central Bank of Malaysia Act, 2009, § 55, No. 701, Laws of Malaysia, 2009 (Malay.).

C. Recommendations for Islamic Banking in India

Owing to the presence of a sizeable Muslim community in India and how it has been historically disadvantaged, the authors suggest that Islamic windows must be introduced as an alternative to conventional banking. It could be started as a window, since it is a fairly novel concept to India. Gradually, based on the success of the Islamic windows, the Government could consider setting up full-fledged Islamic banks and eventually allow private Islamic banks to enter the market. The reason behind starting with only State-run banks would be to provide increased accessibility to the people and ensure accountability of the Government for greater protection to customers and investors. Meanwhile, State-run Islamic windows could be regularly monitored for their progress.

To allow for Islamic windows in India, the Banking Regulation Act, 1949 has to be appropriately amended, a task in which the Ministry of Finance will play a major role. The Ministry could move an amendment bill in the Parliament. The aid of Shariah scholars could be taken in the drafting of the amendment bill. Considering that the lack of definitional and regulatory clauses in the English legislation posed a significant roadblock in the implement of smooth Islamic finance in England, the authors propose that to avoid such a problem in India, the Indian Parliament could consider including important definitions and broad standards through the amendment. This would usher in uniformity and alleviate confusion with regard to Islamic finance in India. The Parliament could also consider making suitable changes to the Reserve Bank of India, 1934 and the Banking Regulation Act, 1949 to make way for a Shariah Advisory Committee as a recommendatory body of the RBI. This concept is taken from the Malaysian model⁸⁸. Members of Shariah Advisory Committee must

⁸⁸Central Bank of Malaysia Act, 2009, § 51, No. 701, Laws of Malaysia, 2009 (Malay.).

be qualified in Shariah and have expertise in banking and finance. However, the authors' recommendation differs on the point of the binding value of the Shariah Advisory Committee's advice. This committee could have a two-fold purpose: *first*, to interpret financial standards based on Shariah in banking, keeping in mind Indian demographics; *second*, to ensure that the Islamic windows in banks are compliant with Shariah principles. The Monetary Policy Committee of RBI should adhere to the aid and advice of Shariah Advisory Committee while making monetary policies for Islamic windows. Further, the authors would not suggest that each bank have its own set of scholars to define Shariah standards, as it may lead to inconsistent interpretation of Shariah principles across banks in the country. It may also potentially result in Fatwa shopping. This entails the cherry-picking of scholars who are inclined to grant a fatwa in favour of a certain activity, rather than picking those scholars that shall evaluate the accuracy of the principle on a holistic basis.

Furthermore, the authors have observed that the United Kingdom does not have a proper channel for Courts to seek the aide of Shariah scholars to interpret Shariah law in banking disputes. To tackle this problem, it is recommended that disputing parties resort to the same methods of dispute resolution as in a conventional banking dispute in India. In case the adjudicating authority (whether it be the Courts, arbitrators of the parties' choice, Debt Recovery Tribunal, etc.), has any doubts regarding the interpretation of Shariah law, it may take the aid of the Shariah Advisory Committee to interpret the same. An example of such a doubt could be whether the adjudicating authority must award interest (on account of delay in the proceedings) to the aggrieved party, since interest is prohibited by Shariah. This is based on the Malaysian model of dispute resolution in Islamic financial disputes.⁸⁹ However, unlike the Malaysian model, the authors suggest that the role of Shariah Advisory Committee may be merely

⁸⁹Central Bank of Malaysia Act, 2009, § 57, No. 701 (Malay.).

recommendatory in this regard. It is preferred that the adjudicating authority, in its discretion, thoroughly evaluates the advice of the Shariah Advisory Committee. This method will ensure that the award or decree ultimately rendered is accurate as per Shariah standards. The final award or decree of the adjudicating authority can be allowed to challenge on parameters such as correctness of the award, arbitrariness, inequality, etc, however it cannot be allowed to be challenged merely on the ground that the award or decree is not in compliance with the interpretation given by the Shariah Advisory Committee.

Finally, banks must be legally obligated by statute to take proactive steps to create awareness of interest-free products amongst the depositors, especially in the semi-urban and rural areas, to ensure financial inclusion. The Depositor Education and Awareness Fund established by the RBI⁹⁰ could be utilized for this purpose.

V. PRACTICAL PROBLEMS ASSOCIATED WITH THE IMPLEMENTATION AND ESTABLISHMENT OF ISLAMIC BANKING

The previous section of the paper sets a recommendatory tone for the establishment of Islamic windows in India. However, upon examining various jurisdictions that have incorporated Islamic banking, the authors realize that many similar issues may arise upon the establishment of Islamic windows in India. This section of the paper seeks to delve into the intricacies of the problems, both short term (such as taxation issues, money laundering and terrorism) and long term (inequality), that may potentially crop up during or after the

⁹⁰Banking Regulation Act, 1949, § 26A, No. 10.

implementation of Islamic banking, and it seeks to provide a solution to the same.

A. *Taxation*

An immediate issue that could potentially arise is the irregular and confusing tax treatment meted out by State-run Islamic banks in India. The reasoning for this is that the tax treatment of instruments of Islamic banking varies vastly from that of conventional banking, a lesson that can be taken from the experience in countries that have implemented Islamic banking.⁹¹

In England, prior to the enactment of the Finance Act of 2003 and its subsequent amendments, Islamic banks and Islamic windows of private banks in England had a relatively high rate of taxation for customers of a bank. This was due to the absence of a steady legislation or tax policy governing their operations.⁹² The Finance Act 2003 brought in significant changes in this regard; for example, it eliminated the double real estate transfer tax on Islamic mortgages.⁹³ Prior to this, it was once taxed when a bank purchased property and again taxed when the customer repurchased the property from the bank.⁹⁴ Similarly, the Finance Act 2007 dealt with the absence of a

⁹¹FAYAZ AHMAD LONE, ISLAMIC BANKS AND FINANCIAL INSTITUTIONS: A STUDY OF THEIR OBJECTIVES AND ACHIEVEMENTS 4-6 (1st ed. 2016); Nayamath Basha, *The Hundred Differences between Islamic and Conventional Banking Systems*, 5(9) International Journal of Scientific Research and Management 7102, at 7093-7106 (2017).

⁹²Yusuf Karbhari et al., *Problems and Challenges Facing the Islamic Banking System in the West: The Case of the UK*, 46(5) Thunderbird International Business Review 525, 521-543 (2004).^[17]_{SEP}

⁹³In Murabaha, the bank purchases a commodity that the client is selling and the client agrees to a payment schedule for repurchasing the good at an amount which is equal to cost and profit.

⁹⁴Mohammed Amin, *Taxation of conventional and Shariah compliant mortgages: A review of the United Kingdom's taxation rules regarding the granting and securitisation of residential and commercial mortgages, covering both conventional*

provision for deductibility of profit distributed to the Sukuk holders (which made it an expensive instrument of finance),⁹⁵ by mandating the taxation of Sukuk at par with the taxation of a conventional bond.

To equalize the tax treatment between conventional and Islamic banks, the authors examine the tax treatment of Shariah-compliant products and conventional banking in Pakistan, a country whose legal system possesses adequate safeguards in this regard. The Federal Board of Revenue of the Government of Pakistan introduced the Seventh Schedule to the Finance Act, 2007 to deal with tax payable on profits and gains from a banking company and the tax treatment of the same.⁹⁶ The purpose of Regulation 3 of this Schedule was to eliminate tax-based discrimination. Regulation 3(1) of this Schedule provides that merely because a bank offers ‘Shariah-compliant’ instruments of banking does not mean that it shall be accorded any special treatment in terms of additions and reductions to income.⁹⁷ Furthermore, Regulation 3(2) states that Shariah-compliant banks are not to be treated specially in terms of tax liability, subject to fulfillment of filing requirements, certified by the auditors. More importantly, the Government frequently issues clarifications on non-discriminatory tax treatment of Shariah compliant products.⁹⁸

To avoid any confusion and irrationality, the authors recommend that India follow this model, whereby the Income Tax Act, 1961 must specifically state that the tax treatment for all banking companies shall be uniform, without any prejudice as to whether they are conventional or non-conventional banking companies.

and Shariah compliant transactions, PRICE WATER HOUSE COOPERS LLC, 24 (2008), http://www.pwc.blogs.com/files/taxation_rules_for_mortgages.pdf.

⁹⁵Finance Act, 2007, §53, 2007 c.11 (Eng.).

⁹⁶Finance Act, 2007, Sch. VII, No. 4 (Pak.).

⁹⁷Finance Act, 2007, Sch. VII, Reg. 3(1), No. 4 (Pak.).

⁹⁸Federal Board of Revenue, Explanation Regarding Certain Provisions of the Income Tax Ordinance (2017).

B. Money laundering and terrorism

In addition to the aforementioned issue, the accountability of Islamic banks must also be adequately regulated. The consequence of unregulated operations of Islamic banks could range anywhere from money laundering and stretch as far as to terrorism. Due to the wide demographic of people, many opportunities arise for criminal activities such as money laundering and fraudulent investments, in the name of the establishment of an Islamic bank.⁹⁹

A prime example of such an incident of money-laundering occurred in Delhi where hundreds of people were left cheated of their life savings, in the name of 'Islamic investment.' During the short period during which the Government of India had allowed Islamic NBFCs, a Delhi-based investment group named 'Al-Fahad' ran a scheme on the principle of participation of profits. The group collected money from Muslim investors under the garb of savings for their annual 'Hajj'. Eventually, all the savings were laundered by the high ranking officials of the group and no returns were made to these investors.¹⁰⁰ A suitable way to regulate this is to ensure that no bank, financial institution or investment group is exempted from complying with KYC Norms, to ensure strict accountability. Further, proper background checks must be made strictly enforceable to ensure that there is no attempt made by one to abscond with the savings of another.

Terrorism, however, could be one of the most extreme cases of unchecked and under-regulated operations of Islamic banks and Islamic windows in banks. French political scientist Gilles Kepel goes

⁹⁹Humayon A. Dar et al., *Lack of Profit Loss Sharing in Islamic Banking: Management and Control Imbalances*, 2(2) International Journal of Islamic Financial Services 5-16, 3-18 (2002).

¹⁰⁰THE MILLI GAZETTE, <http://www.milligazette.com/Archives/01-7-2000/Art13.htm>.

so far as to contend that certain Islamic-terror groups (for example, the Muslim Brotherhood), helped in the establishment of specific Islamic banks only with the ulterior motive that such banks could then eventually finance Islamic militant operations.¹⁰¹ Even the Security Council of the United Nations has reported that terrorist groups such as the al-Qaeda abuse the tools that constitute the basis of Islamic banking and religious donations.¹⁰²

An example of this was seen in *Jesner v. Arab Bank*, where the appellant sued the Jordan-based Arab Bank on the ground that the bank had helped finance over 50 terrorist attacks on American civilians in the Middle East.¹⁰³ In a controversial turn, the US Supreme Court in a 5:4 decision held that the suit was not maintainable on the ground that liability under the Alien Tort Statute, 1789 could not be extended to foreign corporations. However, the minority went to the extent of opining that the case be remanded back to the district court on the ground of a strong possibility of a terrorism link to the bank.¹⁰⁴

In addition to this, it appears that terrorist groups have also reportedly branched out into money-laundering operations in order to avoid attracting the attention of their domestic and international regulatory authorities.¹⁰⁵ In corollary to using this *hawala* (method of money transfers), al-Qaeda is notorious for having set up various charitable institutions as a front to conduct seemingly legitimate (however, illegal) transactions through Islamic banks.¹⁰⁶

¹⁰¹GILLES KEPEL, *JIHAD: THE TRAIL OF POLITICAL ISLAM* 51 (Harvard University Press, 2002).

¹⁰²Jean-Charles Brisard, *Terrorism Financing: Roots and trends of Saudi terrorism financing*, JCB CONSULTING, Dec. 19, 2003, at 21.

¹⁰³*Jesner v. Arab Bank*, 584 U.S. ___, 138 S. Ct. 1386 (2018).

¹⁰⁴*id.* ¶2. (Sotomayor, J. dissenting).

¹⁰⁵NIKOS PASSAS, *Terrorism Financing Mechanisms and Policy Dilemmas*, *TERRORISM FINANCING AND STATE RESPONSES* 34-35 (2nd ed., 2007).

¹⁰⁶PHIL WILLIAMS, *WARNING INDICATORS AND TERRORIST FINANCES*, *TERRORISM FINANCING AND STATE RESPONSES* 85-86 (2nd ed., 2007);

In order to tackle this empirically proved abuse, Malaysia has enacted the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001 to limit such activities by strictly punishing their perpetrators.¹⁰⁷ This is done by ensuring that any ‘person’ who is either engaged in some unlawful activity of terrorism¹⁰⁸ or money laundering¹⁰⁹ is sufficiently punished for the same by methods such as freezing the offenders’ assets, seizure of the offenders’ property and confiscation of any proceeds of money-laundering. The recent enforcement of the Fugitive Economic Offenders Act, 2018 in India will aid the already prevailing Indian legislation, such as the Prevention of Money Laundering Act, 2002 and its subsequent amendments, in tackling such offences.

The authors recommend that to ensure that there is no abuse of funds by any banking company or Islamic window in India for either money laundering or terrorism, these illegal activities (specific to banking and financial services) should be specifically included in relevant Indian legislation.

VICTOR COMRAS, AL-QAEDA FINANCES AND FUNDING TO AFFILIATED GROUPS, *TERRORISM FINANCING AND STATE RESPONSES* 123-124 (2nd ed., 2007).

¹⁰⁷Suppression of Terrorism Financing Offences and Freezing, Seizure and Forfeiture of Terrorist, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001, No. 613, Laws of Malaysia, 2001 (Malaysia).

¹⁰⁸Suppression of Terrorism Financing Offences and Freezing, Seizure and Forfeiture Of Terrorist, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001, Part VIA, §66A-66F, No. 613, Laws of Malaysia, 2001 (Malaysia).

¹⁰⁹Suppression of Terrorism Financing Offences and Freezing, Seizure and Forfeiture Of Terrorist, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act, 2001, Part II, §4, No. 613, Laws of Malaysia, 2001 (Malaysia).

C. Inequality

After Islamic banks are established in India, a pertinent problem that may arise is that of inequality. On a practical scale, this problem could exist between Islamic men and women.

First, the authors examine the situation of inequality between Islamic men and Islamic women, especially in male-dominated territories. For this particular problem, the authors have primarily analysed available data from the Middle East and North Africa, since these areas are Muslim-dominated and subscribe primarily to Shariah principles of banking. It has been widely reported by the World Bank that in the Middle East and North Africa, the facilitation of certain Shariah principles has resulted in misuse of the same by the Islamic banks.¹¹⁰

For example, a survey conducted by the Center of Arab Women for Training and Research, in five countries, namely UAE, Bahrain, Tunisia, Lebanon and Jordan, reported that out of 1228 women entrepreneurs who wanted to grow their business, a vast majority were unsuccessful in receiving financial aid from their respective Islamic banks.¹¹¹ Furthermore, it has been noted that there are high gender barriers to a woman's access to mere finance due to the abuse of personal and labour laws by such financial institutions.¹¹² The appalling ratio on access to financial institutions for men and women was recorded in a report by the World Bank. This report was on 14

¹¹⁰World Bank. [WB], *Women, Business and the Law: Removing Barriers to Economic Inclusion*, 10, (September, 2012), <http://pubdocs.worldbank.org/en/107821519930717245/Women-Business-and-the-Law-2012.pdf>.

¹¹¹International Finance Corporation. [IFC], *Strengthening Access to Finance for Women-Owned SMEs in Developing Countries*, 14-15, (October, 2011), https://www.ifc.org/wps/wcm/connect/a4774a004a3f66539f0f9f8969adcc27/G20_Women_Report.pdf?MOD=AJPERES.

¹¹²World Bank. [WB], *The Status & Progress of Women in the Middle East & North Africa*, 29, (June 2009), http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Compendium-2009-1.pdf.

Middle-East and North African economies which revealed that 17 men have access to financial institutions, for one woman that has such access.¹¹³

The RBI committee on Medium-Term Path on Financial Inclusion provided a useful suggestion to the problem of exclusion of women. It recommends that in this regard, State-run banks have to undertake “special efforts” to ensure that they open accounts for women, especially those from a below-poverty-line background.¹¹⁴

The second aspect of inequality appears to stretch to the inclusion of women in key managerial, administrative or employee roles in State-run Islamic financial institutions. There exists a high level of under-employment of women in Islamic financial institutions.¹¹⁵ Even in a country such as Malaysia, which has a prominent Islamic-banking structure and boasts of a relatively large number of women CEOs of Islamic banks, it is noted that the total number of women employed in this sector is significantly less than the number of men employed.¹¹⁶

It is the authors’ recommendation that State-run Islamic windows abide by Article 15 of the Constitution of India while employing workers, and ensure equal employment opportunities for both men and women.

VI. CONCLUSION

Islamic banking is a new and unexplored concept in India. Through research, the authors have found that *first*, many Muslims are

¹¹³World Bank [WB], *supra* note 110.

¹¹⁴Reserve Bank of India, *supra* note 40, at 8.

¹¹⁵Mushtaq Parker, *Misogyny still rules in finance*, NEWS STRAIT TIMES (Dec. 28, 2016, 11:02 am), <https://www.nst.com.my/news/2016/12/199966/misogyny-still-rules-finance>.

¹¹⁶*Id.*

voluntarily excluded from participating in financial activities since they have no access to Shariah-compliant methods of banking. The RBI itself has reported that some of them appear to access only long-term methods of conventional banking because of the slight similarity between long-term methods and Shariah-compliant methods; *second*, on examination of the constitutional scheme, the RBI can in principle set up Islamic banks; *and third*, the Government must take adequate safeguards to ensure that the aforesaid practical problems which may arise are mitigated to the fullest extent possible.

While the RBI's decision to not participate in Islamic windows is understandable, the RBI could have at least tested the need and viability of the concept in India before dismissing it at face value. The RBI must however ensure that it acts within the Constitutional boundaries while implementing Islamic banking. Additionally, it could learn from the experiences of numerous other countries (some of which have been mentioned above) that have incorporated the Shariah principles in their banking law.