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 ISLAMIC BANKING PRODUCTS AND MAQASID AL-SHARI'AH: DO THEY WALK
 TOGETHER?
 By
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My short answer to the question posed is “Yes, they do.”

Whether we take *maqasid* as referring to the Al-Ghazali's five objectives or Al-Qarafi's six or ibn Taymiyyah's open-ended list or with a further edition by Qaradawi or the latest two edition, as far I know, by Kamali, I say that every Islamic banking product, at the very least satisfies one *maqasid*, may be more.

The very reason for the introduction and development of Islamic banking in its modern form is to provide an alternative to conventional banking so that Muslims could avoid committing a sin in their financial transactions. Hence, with the assistance of the Shari'ah committees based at the institution itself and/or at national level, we tried our best to produce Shariah-compliant products. As a result, Muslims are able to obtain finance to buy houses, cars, to run businesses and so on without having to resort to riba-based banking.

Just imagine, without it, a Muslim only has the following two choices: take a conventional loan or try to save money to buy a house (to take only one example) when he has saved enough. If he chooses to save, most likely, he will not be able to buy a house at all. Why? Because, he will have to rent a house while trying to save money to buy one. The rentals and the price of houses would keep increasing that he would not be able to save enough to buy a house even when he retires because by that time, the price of houses would have doubled or tripled. In Malaysian context, it would mean that Muslims would be an *ummah* of tenants of non-Muslim landlords, who might take the opportunity to keep increasing the rentals resulting in the Muslims remaining tenants forever. The Muslims will be a “homeless *ummah*” in their own country. Does that fulfil any *maqasid al-Shari'ah*?

So, at the very least, every Islamic banking product satisfies the first *maqasid* of Shariah, i.e. Protection of Religion (al-Din). Indeed, depending on the purpose of the facility given, it could fall under other headings as well. If it is to buy a house, it could also fall under Protection of Life (a-Nafs), Protection of Progeny (al-Nasl) and Protection of Property (al-Mal). If it is for further studies, it could also fall under Protection of Intellect or Mind (al-'Aql) as well as Protection of Property (al-Mal).

In the modern world, other than the businesses of selling fried bananas, prayer beads and other similar businesses, there is no way in which anybody or company could raise enough capital from savings to go into business.

One of the arguments put forward by critics of Islamic banking products when discussing *maqasid* is that the products are imitations of the products of conventional banks. There are two sides to this. First, the type of product is similar to that of conventional banking. Secondly, they are, at best Shariah-compliant, some are not,

according to them. Other criticisms are directed at Shariah experts employed by the banks. They say that those Shari'ah experts either do not know *maqasid al-Shariah*, do not focus on *maqasid*, do not give sufficient attention to it or that they compromise *maqasid* to please the banks that appoint them and pay them for their services. One writer points to non-Muslims engaging in Islamic banking and Islamic finance. They go in only to make profit. They are not concerned about *maqasid*. Yet, many are disappointed that Islamic banks (and Shari'ah Scholars) are producing products which are not tailored to achieve justice, fairness, equal distribution of wealth, meeting the needs of the poor, providing for the social welfare of the poor and so on. Instead the products cater for the rich, oppressive, purely profit-oriented and so on, so they say.

Let me try to respond to these criticisms one by one.

Regarding the type of products being similar to the conventional products. My quick answer is: Does it matter that *halal* beef and non-*halal* beef look the same and have the same nutrient content? Again, in whatever business you are, you have to offer the products that the customers need and want, otherwise you will close shop very soon. To me the test is: whether it is Shari'ah-compliant or not.

They cite BBA, *tawarruq* and *sukuk* as back-door to *riba*. Well, if you say they are not Shari'ah-compliant, that is the end of the matter. Why look for *maqasid* of Shari'ah from products which are not even Shari'ah-compliant?

Frankly, with my common law background, when I first read about BBA I thought that it was very artificial. Over the years, I asked two Shari'ah scholars about it separately. Their combined reply was, "Tun, you are not the only one having that kind of problem. But there is no other way." So, I took the view that in order to move on, I accept their ruling on it. If they are prepared to say it is Shariah-compliant, I will not argue with them. What alternative do we have? Even the critics do not produce an alternative product which satisfies their standard.

Now, after about thirty years, BBA is being phased out. Besides, the "oppressive" factor had been attended to. At first, civil court Judges were the most vocal about it. They hear both conventional and Islamic banking cases. In similar cases, they see the disparity when determining the balance due to be paid to the bank. In the conventional case, the difference is between the amount disbursed by the bank and paid by the customer. In the case of Islamic financing, it is the full sale price and the amount paid by the customer.

At first the Judges were accused of not understanding the principles of the Islamic banking. However, BNM as the regulator, saw the problem and that if it persists, Islamic banks would not be able to compete with their conventional counterpart. So, they went to the SAC and obtained a ruling and issued the Guidelines on *Ibra'*. For in-depth discussion see my articles and the article which I co-authored with Dr Adnan Trakic. For easy reference, just visit my website. It should also be noted that in an Islamic product there is no element of compound interest. It fixes the maximum profit rate upfront, disallows commitment fees, prohibits early settlement fees etc.

In any event, if anybody could produce “more genuine” Shari’ah products that satisfy the *maqasid* of Shari’ah by their standards and compatible with the current market demands, please do so.

On non-Muslims being involved in Islamic-banking products, it is true that since they even reject Islam, we can’t expect them to care about compliance with Shari’ah or *maqasid al-Shari’ah*. After all they come in to make money. But, does that mean that they should be excluded altogether? By the same argument, it would mean that non-Muslims should not be permitted to produce or sell *halal* food-stuffs. That does not make sense to me. Confining ourselves to Islamic finance, isn’t it better that we encourage them to produce and deal with Shariah-compliant products. I say it is even better if, there comes a day, *insha Allah*, when they will only produce and deal with Shari’ah-compliant products. That will mark the end of conventional finance. Call it a dream. It does not matter. But, you can’t even have such a dream if, from the beginning, you close Islamic finance to non-Muslims.

How do we ensure that the products are Shariah-compliant? First, each Financial Institution has its own Shari’ah Advisers. They should ensure that the products are Shari’ah-compliant. Secondly, especially in Muslim countries, there are regulators to ensure that they follow the rules. Thirdly, the customers themselves will be the final judges, in the same way as they avoid non-*halal* food-stuffs now.

It is said that Islamic banking products should be equitable, meaning that it should be fair and that there should be no exploitation. Sitting in the SAC of Bank Negara and of the Securities Commission for over a decade (albeit, as a “non-Shari’ah member of the Shari’ah Advisory Council”, my own description) I do not think that there was any product that was approved that could be described as unfair to customers. Indeed, the SAC of Bank Negara had made resolutions that made it possible for Bank Negara to issue Guidelines on *Ibra’* which, inter alia, made it obligatory for the banks to grant a rebate in case of early settlement based on a certain formula approved by the SAC.

Just to give another example, in the case of late payment charge after judgment, in Malaysia, pursuant to a ruling by the SAC, the Rules of Court 2012 has been amended to allow courts to make an order of late payment charge from the date of judgment to the date of full settlement based on the principles of *ta’wid* and *gharamah* with the *ta’wid* portion going to the judgment creditor and the *gharamah* portion going to charity. If you want to know more please visit my website. I have written an article on it.

Coming now to redistribution of wealth and social welfare. I am not an economist. All that I will say is that an Islamic bank is not a charitable institution and the customers do not put their money in the bank to do charity. Do not expect a free meal from Islamic banks. In any event, as I have just mentioned, the *gharamah* portion of the late payment charge goes to charity. That does not happen in conventional banking. Muslim customers also pay zakat. Besides, products based on *waqfs* and equity participations based on *musharakah* and *mudarabah* principles are other areas which could be explored. Please help to develop them.

In conclusion, I think that, even now, Islamic banking products do satisfy the *maqasid al-Shari'ah*, some more, some less. If you have an idea of how to improve them, please make your contribution. Don't just criticise what other people do without offering an alternative. They are trying their best, taking into account the reality in the industry. It may not be the ideal. Let critics produce the ideal.

Thank you.

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