A CRITICAL STUDY ON SHARI‘AH COMPLIANT AND SHARI‘AH BASED PRODUCTS IN ISLAMIC BANKING INSTITUTIONS

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ABSTRACT

This paper aims at analyzing the concept of Shari‘ah compliant and Shari‘ah based products in existing Islamic Banking Institutions. The paper would shed more lights on the differences between both concepts. The main argument which is premised on the notion that the products may be Shari‘ah compliant but not fully Islamic is vehemently deficient due to the fact that if the product is Shari‘ah compliant and is less Islamic, then it is basically contrary to proper and true concept of Shari‘ah. It is incontrovertible that Shari‘ah is the system of law based on the commandment of Allah and the submission to such law would permit someone to be recognized as “Muslim” A believer in Islam. However, such kind of contradictions certainly shows the presence of shortcomings in such products, or in process of making them compliant to Shari‘ah. Therefore, this study is a qualitative design, which addresses lacuna of the idea of Shari‘ah complaint may be of less Islamic ethics. It will also examine the approach used by the Prophet-peace be unto him- to reform the financial systems during his era. The paper will conclude by offering four alternative approaches on Shari‘ah compliant parameters viz.; ‘Aqd approach, Maqasid approach, Reporting approach, and Legal documentation of contract approach. In addition, this paper will explains the relationships among the various approaches, as some stand as dependent parameters, while the other stand as independent parameter. The study will offer suggestions for future research.

Keywords: Shari‘ah compliance, Shari‘ah base, products. Introduction
Introduction
The issue of Shari‘ah based and Shari‘ah compliant is of great interest nowadays. Therefore, this research will be focusing on the reconciliation of some understanding that products, which have been in compliant with Shari‘ah may be less Islamic and also the notion of follow conventional pattern due to infancy of Islamic financial institutions rather we should believe that an attempt to make a product be Shari‘ah complaint is based on juristic interpretation which is subject to right or wrong. Though many scholars must have spent most of their efforts on this matter, but if we look back at prophetic era we will find out that most pre-Islamic trade and commercial transactions were not wholly eradicated rather they had been reformed and upgraded in a manner that will make it compatible with Shari‘ah.

Primarily, it should be noted that during Prophetic era, the revelation was coming down directly to the Prophet and there were no divergences on reformation because the basis of law is one. Therefore, whenever there are some lacunas or shortcomings in the process of making certain product compatible with Shari‘ah, it should be reconciled. Since, there are no definitive prescriptions that are standards in market whereby the concept of Shari‘ah based and Shari‘ah compliant would be distinguished. Rather, people just upheld to the general understanding that the Shari‘ah based is those products that have no basis from conventional products, whilst the Shari‘ah complaint is the products that have been originating from conventional banks, which is known as Islamized conventional products.

This kind of segregation emerged in a couple of years and become widespread in market. Among the examples of Shari‘ah compliant products are mainly the debt based products particularly those that reflect the conventional loan. Such as (a) cost plus murabahah contract that is very close with interest in conventional loan since it has the same effect. (b) Ijarah thumah bay’ to certain extent matches also hire purchase in the conventional market, though in hire purchase every deal will be concluding in one contract. Conversely, in AITAB (Ijarah thuma al-bay’) the transaction would be in two separate contracts. Nevertheless, both products have its basis in the conventional space.

This paper shall mainly analyze the concept of Shari‘ah based and Shari‘ah complaint. It also treats some issues pertinent to both concept and shows that nothing is wrong with Shari‘ah complaint products so long the Shari‘ah requirements are met. The paper supports four parameters suggested by Prof. Saiful Azhar Rosly in order to secure and ascertain the fulfillment of Shari‘ah precept in juxtaposition with the universal interests of Shari‘ah so that the product will be constructed upon the spirit of Shari‘ah from its basis and monitored through the financial accounting and secured by legal documentation.

The Principles of Islamic Economics
Islamic economic has been in existence since the evolution of Islamic state in Madinah. It is based on the Shari‘ah, which incorporates the entire rules for Muslims economically, socially, and religiously. It is entire code of life in the universe because it is a divine law given by the Lord of the universe. Therefore, Shari‘ah is worth studying before economic issues are
particularly addressed. Allah’s Messenger has given clue for main sources of Shari’ah, which encompass divine sources (revelation) and human reasons. The latter must be tested on the former for their validity, while the former is eternal, immutable, and universal (El-Shaker and Rodney 2006). However, the Islamic economic is a subset of Shari’ah aims at achieving three main principles.

**Islamic Economic Principles**

**a) The principle of moderation (I’tidal)**

The principle of moderation stipulates that human behavior, perception, economic and other aspects should be performed justly. Allah says: 31. O Children of Adam! Take Your adornment (by wearing Your clean clothes), while praying and going round (the Tawaf of) the Ka‘bah, and eat and drink but waste not by extravagance, certainly He (Allah) likes not Al-Musrifun (those who waste by extravagance).

Imam Ibn Jarir was reported to have said: “Allah does not like those who go beyond His limit in lawful and unlawful, that is those surpass the limit of lawful to legalize unlawful and unlawful to forbid lawful, rather Allah likes to legalize lawful and forbid unlawful, this is the moderation that Allah the exalted Has ordered. Al-Tabari (1420/2000).

**b) The principle of efficiency (al-Kifayah)**

The emphasis on economic efficiency is a by-product of the previous concept: unity and vicegerency (El-Shaker and Rodney 2006). In an attempt to emphasis on this principle, Shari’ah has distinguished between two significant ideas: israf and tabdir.

*Israf*: is an extension in consumption beyond the level of daily needs, while *Tabdhir*: is considered as an unnecessary use of economic resources, i.e. wastage of economic resources, large or small, and at level of consumption. Therefore, *israf* is an extensive use of resources, while *tabdhir* is the wasteful use of these resources. In short, the former may lead a Muslim less perfect of Islam, but the later would take him to be irresponsible to the point of evil. Allah says: “27. Verily, spendthrifts are brothers of the Shayatin (devils), and the Shaitan (Devil - Satan) is ever ungrateful to his Lord”. Allah commands His servant to avoid *israf* and *tabdhir* after He has ordered them to spend their money in a good manner. The scholars have deferred on the meaning of *tabdhir*, ibn Mas‘ud and Ibn ‘Abbas said: it is when money spent in wrong manner. Mujahid said: if someone spent all his property in a right way, it would not amount to *tabdhir* otherwise, it would be so. Qatadah said: it is spending money on sin, wrongdoing, and corruption. (Mubarakfuri, 2000).

**c) The principle of social justice (al-‘Adalah al-Ijtima‘iyyah)**

Social justice is embedded in Islam; people are equal in front of Allah. Allah says: “we have created man and woman, and grouped you in nations and tribes, verily, the noblest among of you is those who are piety” this also would be more clear from the following hadith reported by Imam Bukhari and Muslim that Allah’s Messenger says: people are as equal as the comb’s teeth and the noblest of you are the best in character”
The above illustration shows that the Islamic economic based on three principles, which are: moderation, efficiency, and social justice which are considered as basic tool to control the resources in an effective manner to achieve pleasure of Allah and sustainable life.

The principal function of Islamic economic and commercial rule is not actually to create new system, rather to reform reevaluate and/or ratify the existing commercial laws completely or partially. Islamic commercial law changed and modified meanings, applications, and patterns totally or partly, which do not conform to Shari’ah principles, but all these, are to ensure justice and fairness between both parties in accordance with Shari’ah precepts (Abdullah Alwi 2007).

**The Role of Shari’ah**

Since the most effective key to understand Islamic finance is first and foremost to understand the sources, application, and objective of Shari’ah . Therefore, the cognizance of Shari’ah is sine qua non for anyone wants to embark in Islamic financial operation. Imam Abdul Rahman al-Akhdari (a Maliki jurist) said: it is incumbent upon every Mukallaf (the law subject) that he/she should not embark in any act/ transaction until; he/she knows the rule of Allah on that particular matter. Therefore, Caliph ‘Umar said: we should not permit someone who does not know trade and commercial rule in fiqh mu’amalah because he may commit accidentally riba due his ignorance. One can infer from this point, the enthusiasm of our predecessor to comprehend this rule. The best example of this is Imam Abu Hanifah who is Imam of school thought at the same time he is a prominent merchant. The Shari’ah is a set of principles laid down by Almighty Allah to guide and guard entire life of human being such as family law, inheritance, criminal, dress, social and civil conduct, and soon. The application and practical effects on daily life of a Muslim are considered as the significant aspect of Shari’ah. It is not just a set of principles to be observed in certain times or selected circumstances by Muslims rather it is a complete way of life. Shari’ah drives the cultures, customs, practices, and daily life since the prophetic era. So Muslims must to abide by Shari’ah tenets in matters pertinent to business and finance as well as they have submitted themselves in matters related to personal, social, family affairs. Having clarified the premier role of Shari’ah in Islamic Finance, we should briefly single out the real concept of Shari’ah and Islam.

The word Islam in literal sense means surrender and reconciliation; it is derived from word (salam) which means peace or salvation. It is the religion revealed to the Prophet Muhammad between 610 and 632 A.D, and the previous Prophets. Allah says: “… He has chosen you (to convey his message of Islamic Monotheism to mankind by inviting them to his religion, Islam), and has not laid upon You In Religion any hardship, it is the Religion of Your father Ibrahim (Abraham) (Islamic Monotheism). It is He (Allah) who has named You Muslims both before and in this (the Qur’an), that the Messenger (Muhammad) may be a witness over You and You be witnesses over mankind! …” (Q22:78).Allah the exalted says: “… Today, I have perfected Your Religion for you, and completed My Favour upon you, and have chosen for You Islam as Your religion…” (Q5:3)
The scholars have divided into three views in relation to the term of Islam, some say it means (shahadah), which is made up of two elements: the first is the nafy (“negation”) la ilaha (there is no God) the second is ithbat (“affirmation”): Allah. Between them is a bridge, illa the negation side faces the affirming ithbat which means there is no God worthy of worshiping except Allah. Some also upheld to the response of the Prophet (saw) when He was asked what Islam is. Then the Prophet considered Islam as outward deeds and Iman is inner deeds.

Others also consider Islam as synonymous to Iman. However, it is indeed accurate to adhere with the response of the Prophet for that matter. As for Shari‘ah, it is canonical law of Islam and revealed law as put forth in the Quran and Sunnah. Islam makes no distinction between religion and life, nothing being excluded from religion, or outside it, and “secular”. Shari‘ah covers not only ritual but every aspect of life. Shari‘ah derived from the root Shari‘ah, having a primary range of meaning in relation to religion and religious law. Within Muslims discussion, Shari‘ah designates the rules and regulations governing the lives of Muslims, derived principally from the Holy Quran and Sunnah Encyclopedia of Islam (2000).

Therefore, Shari‘ah is a totality of commands and rules governing beliefs and conducts, which Islam mandates their applications for the realization of reformatory role in society, which is primary objective of Shari‘ah. So Islam comes to fulfill three primary reformatory goals, which are in sequence and each one of them is considered as result of what precedes it. They are as follows:
1- Freedom from mimicry and myth through sound creed
2- Reformation of individual intellectually and morally through performing legitimate worships.
3- Reformation of society in a manner that unity and peace would govern the society.

In a way to realize the goal, Islam comes with civil system that contains all system of laws, which necessary for raising societal life, organizing relations among the people, and protecting the rights of individual and public in society. From the above goals, one can identify the real meaning of Shari‘ah. Whereby it is clear that Shari‘ah stands on three pillars, which are: Intellectual creed, Spiritual worship, and Juristic and legal system of law. Therefore, they say Islam is religion and nation (Zarqa Mustafa 2004).

According to the above theory, it would become clear that Islam is the religion of Allah upon which He has sent Prophets and Messengers, in order to realize three major things. While the Shari‘ah is commands and rules given by Allah and the submission to which a man becomes Muslim, a person who surrender and submit himself to the wills, rules, and commands of Allah sent through His Messengers.

Therefore, it is inappropriate to say or acknowledge that a single thing complies with Shari‘ah but not full Islam. The submission to rules and commands of Islam must be in totality not partiality, therefore, Allah says: 208. O You who believe! Enter perfectly in Islam (by obeying all the rules and regulations of the Islamic religion) and follow not the footsteps of Shaytan (Satan). Verily! He is to you a plain enemy.

Ibn Abi Hatim reported that Ibn ‘Abbas said: “the command is directly focusing on believers among those who have tawrah (Ahlu al-Kitab) because upon their believing in Allah and
adoption of Islam, they were still adhering to some rules in *tawrah* and the Shari‘ah given to them during the era of Musa, then Allah revealed this verse to His Messenger saying that: “enter entirely into Shari‘ah given to Muhammad, do not leave behind nothing, and it is enough for you to believe in *tawrah* and what it encompasses not to take it as guiding rules Mubarakfuri (2006, p.153). This rule indirectly encompasses Muslim to adhere to all commands and rules of Shari‘ah and abstain from all of prohibitions and proscriptions. In the light of this, Imam Mujahid said: do all deeds and perform all activities in manner of charities, as prescribed in Islam especially the believers among Ahlu al-Kitab (the people of the Book) Mubarakfuri (2006, p.153).

**Distribution of Products**

According to existing practices, Islamic financial products do not solely offer by Islamic banks but also by their conventional counterpart in a specified distribution channels, the so called- Islamic banking window. This phenomenon raises some questions, among of them is whether the products offered by real Islamic banks are better than that of Islamic banking windows. The fact has no doubt is that the manner of offering products is different from each bank to another, even among the Islamic banks themselves. Nevertheless, would these differences in way of structuring products make either of them better or worse? Let us have a look at the differences in distribution channels and in what way Islamic banks and their conventional counterpart can work unity in order to provide the best possible financial solutions for their clients (Natalie 2009, p.53).

**Distribution Channels**

In Islamic financial institutions, a product must fulfill minimum criteria to be compliant with Shari‘ah requirements. The followings are the main criteria:

1- The prohibition of *riba*
2- Avoidance of *gharar* (uncertainty)
3- Any conditions result in riba or *gharar*, or both
4- Prohibition of *maysir* (gambling)
5- Prohibition in engaging production of forbidden commodities
6- Application bay‘ (trade and commerce) with its cornerstones and conditions prescribed in Shari‘ah.

Once these are satisfied, the bank obtains Shari‘ah Supervisory Board (hereinafter SSB) approval. The SSB is defined by AAOIFI (2008, p.4-4) as: “an independent body of specialized jurists in *fiqh al-mua‘malat* and the field of Islamic financial institutions who is entrusted with the duty of directing, reviewing, and supervising the activities of Islamic financial institutions to ensure the compliance with Shari‘ah rules and principles.” Then the products are considered as Shari‘ah compliant. Since, the conventional banks are not denied to offer Shari‘ah complaint products; they also offer these products via the following distributional channels:
a- Window- the term uses for some conventional banks carrying out Islamic financial activities and delivering them via the same distributional channels, such as branches, they also often distribute conventional financial products. However, Operations and accounting are secluded from the conventional operations. In UK, Lloyds TSB and HSBC Amanah are good example, for this matter.

b- Branch- this is structurally similar to windows, but uses separate branches instead of the conventional branch network to disseminate Islamic financial products. The same bank may use both window and branch for that matter. Like HSBC Amanah, where the bank uses both conventional network and separate branch to distribute Shari’ah compliant products.

c- Subsidiary- it is a separate legal entity/company that manages its own strategy within the parent’s overall guidelines. Subsidiaries typically prepare separate annual reports, which are reported on a consolidated basis into parent’s annual reports and accounts. The best example at this junction is Citi Islamic Investment Banks, which was incorporated in Bahrain in 1996, in response to US regulations, which allow American banks to offer Shari’ah compliant products via off-shore entities (Natalie 2009, p.53-54).

Shari’ah based banks deemed to comply with Shari’ah precepts. Therefore, not only individual products are required to meet Shari’ah principles rather all operations within the Islamic bank have to comply with Shari’ah principles. This is main distinguishes between Islamic banks and conventional-Islamic window, branch and subsidiary.

**Shari’ah compliant versus Shari’ah based in Distributional Channels**

The consideration of level of Shari’ah compliance of Islamic financial institutions and Islamic banking window is of essence in the first position. Subsequently, other factors would be considered such as size, reputation, and solid track record of the bank. Experts argued that conventional bank with proven track record may generally provide a relatively higher degree of comfort than a newly established Islamic bank. Furthermore, the large conventional banks have the advantage to support big balance sheet and structure capabilities that recently seemed beyond the potential of Islamic banks. To clarify this, let us have a look and compare the total assets of the largest Islamic banks with largest conventional counterpart. As of March 2007, the largest Islamic bank, which is Meli Iran, had a total assets of $34 billion and closely followed by Al Rajhi bank with total assets 33.4 billion at the end of December 2007. Conversely, the largest conventional bank (Royal Bank of Scotland) with assets close to $4 trillion, followed by Deutsche Bank, BNP Paribas, Barclays, HSBC, Credit Agricole, Citigroup, and UBS, all with assets exceed $2 trillion, each at the end of December 2007 (The banker, 2008). The large balance sheet aids conventional banks to underwrite large sukuk and to structure sizeable project finance which are over the capacity of Islamic banks. It is should be kept in mind that Islamic financial products offered by conventional banks are part of a broader range of financial products, though the individual offerings are to some extent compliant to Shari’ah according to their process. The distribution channel is also different for other pure riba based finance.
According to this scenario, a conventional bank tends to co-mingle funds raised in an Islamic manner with conventionally raised funds. It can also hedge positions using innovative financial products that contravene Shari’ah precepts due to speculative nature of most hedging products. On the other hand, Shari’ah based bank operates fully within umbrella of Shari’ah injunctions (Natalie 2009, p.54-55). What the author sees necessary here is that to purify such institution rather than the products otherwise, some discrepancies would still occur such as screening of the institution and the minimum basis from Shari’ah point of view. Hence, conventional banks under existing law are not denied to offer Shari’ah compliant product, the assets must be verified along with revenues to ascertain their compliant with Shari’ah.

Product Development and enhancement in Islamic finance
Shari’ah is a divine law that takes its origin from the Quran and Sunnah, it encompasses all avenues of life such as political, economic, and social affairs. To that effect, a leading Western scholar says: the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, is the core and kernel of Islam itself” Schacht (1991, p.1). Shari’ah in its broad sense has two sides “revelation and reason”. The latter which is field for the qualified scholars to exercise juridical interpretation and come out with legal ruling must be however be tested upon the former to ascertain its validity. It must be noted that Islamic law is text-oriented approach because jurists are guided by textual evidence given by the direct and indirect revelation (al-Quran and Sunnah).

The interpretative process is called *ijtihad*, and the outcome of the process is *fiqh*, which is significantly vary from the Shari’ah, because the later is divine law (revelation) while the former is based on human wisdom which subject to impropriety and rightness, nevertheless, it must be constructed upon the revelation. The classical scholars have experienced lots of challenges; by the way the contemporary Muslim scholars would also be encountered. The fatwa of Ibn Taymiyyah on the legality of lease of orchard deserves some considerations to reflect how new “instrument” can be introduced and how an existing “instrument” can be enhanced further” Daud Bakar (2002, p.6-9). Hence, the presumption and original status of each and every contract is its permissibility unless proven otherwise. This is known in Arabic as (الأصل في الأشياء الإباحة) (al-Nadawi, 1994, p.121-122). Therefore, in cases of commerce, banking, finance, insurance, capital market, and the like, we may presume that each and every contract or term is lawful unless started or proven otherwise. Therefore, the development and enhancement of products particularly can be done through some Shari’ah secondary sources, which are:

1- *Istihsan* (equity):
2- *Maslahah* (public interests)
3- ‘*Urf*’ (customs)

Example of *istihsan* in the past is Bay’ Salam, which is deferred delivery contract that is contrary to the principle of ‘*Aqd* that subject matter being present at the time of contract. It is however, permissible by Hanafi School on the basis of *Istihsan*, nevertheless, the permissibility based on textual authority according to Hanbali School (al-Madkur, p.240).
An example of *istihsan* in existing practice of Islamic banking is the way how dividends are distributed to shareholders in the stock market. In investment principles, dividend should be based on actual amount of capital subscribed by each shareholder/investor. However, the rate of dividend declared usually applies initial price rather than the market value of the share at the time dividend is declared. This is a departure from the original accounting principles in Shari‘ah which is *mudarabah* or *musharakah*. This departure is justified on the ground that it is more appealing and comfortable to the parties in the stock market (Daud Bakar 2002, p.10-12).

Another source is *maslahah* that according to one scholar is to argue that good is lawful and that lawful is good” Kamali (1997, p.7). The need of this principle is obvious because issues relating to modern contracts are not textually covered by the revelation. For instance, Sale and Purchase Agreement and attestation is *maslahah* based requirements, which support the intent of Shari‘ah in securing the rights of the parties (al-Ghazali, 1322). Islamic financial product developers strive to meet up the market with their conventional counterpart. At this point, the essence of product development is significantly evident. The creation of new product/instrument stems from product development, which indeed must satisfy or meet some factors in order to be successful. These factors are :a) customer needs, legal requirements, and other industrial revolutions (Daud Bakar 2002, p.14).

Let us have a look on sell and lease back agreement, which combines two contracts that each has been separately approved by Shari‘ah , but the combination has no historical trace in Islamic commercial law. However, the product enjoys approval from many Shari‘ah boards (Daud Bakar 2002, p.15). Another product is *musharakah mutanaqisah* (decreasing partnership). This product actually consists of *musharakah* and *ijarah*; in which the customer and shareholding jointly owned property under *musharakah* via redemption of shareholding of the “financier”. The aim of the product is to construct both contracts jointly to form a new financing instrument for a specific purpose i.e. financing, active project/business participation, fixed income to the financier via lease rental and transfer of ownership via shareholding redemption (Daud Bakar 2002, p.16-17).

Having discussed the manner of developing products in Islamic financial institutions based on secondary sources of Shari‘ah such as *istihsan*, *maslahah al-mursalah*, al-‘urf, it would be appropriate to follow it with how the Shari‘ah compliant and Shari‘ah based would be identified.

**Shari‘ah Compliant Vs Shari‘ah Based products**

Muslim investors are conscious of the compliance of their products with Shari‘ah tenets. This is to confirm legitimacy of their earnings. There are difficulties in an attempt to identify theoretical idea between Shari‘ah based and Shari‘ah complaint products, however, it could be identified through one of the following dimensions:

a) Through assets based perspective
b) Through the manner of innovation and formulation of the products
c) From distributive branches.
Shari‘ah Based Products from Asset based Perspective

As to date, there is conclusive description of Shari‘ah based products though, according to common understanding of people in the market in relation to asset. From the asset based, where the asset used in Islamic products is really transacted on, not only used as “conduit” to obtain the same result of the conventional products like indebtedness, proceeds and etc (Aznan Hasan 2008, p.12). The best example of this is asset backed securitization, where a higher connectivity to the underlying assets and operating business is required, even though the tools are distinctive, the process of Islamic securitization is virtually identical to any conventional asset-backed securitization (Abdul Kader Thomas 2005, p.154). The major principle of Islamic finance is that financing schemes should be asset backed. Shari‘ah compliant structure necessitates some degree of ownership in the underlying assets which should be transferred to issuer, rather than a mere assignment of the cash as in case of conventional securitization.

Shari‘ah Compliant Products from Asset based perspective

If an asset is used to reach the same effect as the conventional products, such asset is called Shari‘ah compliant. Simply, because it behaves in the same way the conventional products normally behave. Like in case of application ‘inah, tawarruq, tawarruq in personal financing and wa‘d total return swap, structured product linked to conventional index, ijarah sukuk (asset based).

An example of ijarah sukuk (asset based), is where asset sold to the SPV as agent and trustee for the sukukholders, funded by the sukuk issue proceeds; lease (i.e. the leaseback by SPV), and the purchase undertaking (i.e. the right of the SPV to oblige the counterparty to purchase the assets following a sukuk dissolution even or on scheduled maturity). There are three silent transactions in sukuk ijarah. For instance, the Nakheel $3.52 billion pre-IPO convertible sukuk ijarah structure is as follows:

- Nakheel Development Limited (the issuer) issued trust certificates to investors in order to purchase a long leasehold interest in property at Dubai Waterfront (which forms as part of sukuk asset) from Nakheel Holding 1LLC, thereby sukukholders have an undivided beneficial share in the underlying sukuk assets.
- Nakheel Limited Development Limited, as lessor leased the sukuk assets to the Nakheel Holding 2LLC for three year lease agreement. Rental here was paid to the issuer for onward payment to sukukholders, representing half of the sukukholders’ return entitlement, in the form of regular periodic distributions. The remaining half is payable to sukukholders on redemption of the sukuk.
- Under a purchase undertaking, granted by Nakheel 2 in favor of the issuer as trustee for the sukukholders, Nakheel undertakes to purchase all of the issuer’s interest in the sukuk assets at a price, on the relevant exercise date following the issue of a notice either prior to the scheduled redemption date of sukuk or following the occurrence of a dissolution event, sufficient to redeem sukuk in full. This price includes the sukukholders’ deferred accruals accumulated, during the tenor of the sukuk.
- As is well known in ijarah, there is a servicing agency agreement between the issuer (lessor) and Nakheel 2 (lessee) pursuant to which Nakheel 2 is considered as servicing agent for sukuk management on behalf of the owner (Nakheel Development). This servicing agency
agreement is sine qua non because Shari‘ah necessitates ownership liabilities to be assumed by the lessor. Pursuant to Shari‘ah requirement, Shari‘ah scholars agreed that lessor can delegate these responsibilities to the lessee, provided acting as agent of the lessor (Bilal, Imran & Lovells 2006, p.104-105).

The structuring of the products often start with the conventional product as a reference. Then Islamic contracts (may be single or multiple) will be used to construct an Islamically accepted product which behaves (in term of its result) similarly to its “original” conventional product. Generally, Islamic banks against overdrafts but permit personal loan associated with an asset, as in case of *tawarruq* and *‘inah* in personal financing. Where the banks must have some form of ownership before concluding the transaction. They have two main forms of personal loan:

a) Secured personal loans
b) Unsecured personal loans

1-The secured personal loan is a loan which directly finances the asset required by the client. The bank has ownership on the asset and keeps it as pledge in order to secure itself in case the client defaults. There are right now two common forms:

a) Lease or hire purchase contract: In this contract, the client approaches the bank for loan to purchase an asset. Once the bank agreed, the client then identifies the asset with all its specifications, the bank may purchase it directly or assign the client as agent to purchase the asset. Subsequently, the bank leases the asset to the client with agreed rental fee and repayment in a specific period of time. Although the asset will be delivered directly to the end-buyer but legal ownership with the bank till due date of lease period. Then ownership will be transferred to the client after due date once the payment is done.

b) *Murabahah*/deferred payment sale: in this contract, when the bank has satisfied and agreed to finance the client. The client will identify the assets and all its specifications and request the bank to purchase it. Usually the bank appoints the client as agent to purchase the asset. The asset often delivered directly to the end-buyer but the legal ownership still holds with the bank until the due date. The asset, the original purchase price, and the mark up price, will be specified and agreed upon the contract (Natalie 2009, p.67-70).

2-Unsecured personal loans: this occurs when the client requests for cash not associated with a specific asset to be financed. For instance, if he requests for school fees, dowry, and amount to be paid for building construction, etc. the common instruments for this loan are *tawarruq*, *‘inah*, and commodity *murabahah*.

**Shari‘ah Based Products from the Manner of Formation and Innovation of Products**

Formulation of new products would not involve any of conventional products as a benchmark. It may (may not) resembled some of the conventional features of conventional products, but there is no intention (in mind, when structuring) to have or follow the conventional product or its features. So, the products will use Islamic contracts.

An example of this is *murabahah*, whereby a real purchase and sale of an object which the corporation requires, e.g. a bank will purchase (usually with the corporate acting as the undisclosed agent of the bank) raw materials from a supplier. Having acquired title, the bank will sell them to the customer at a sale price consisting the cost price plus profit on a deferred
payment basis. The terms of the deferred payment may be via installments, “ballooned” payments or even a “bullet” payment (Rustum and Lovells 2008).

It is noticed that the formation and structure of the product would be source for the asset based transaction, since the money is considered in Islamic banks as mere means not asset, therefore, in an attempt to formulate /structure product and make it compatible to Shari‘ah precepts, there must be in between an asset to show that the deal based on asset not on capital. Therefore, if Islamic bank takes conventional products as benchmarks assets must be present even though it gets to the same result as conventional bank. Similarly, if a product is originally structured and formed from Islamic banks definitely the asset ought to exist.

Some pertinent issue in Shari‘ah based and Shari‘ah compliant

It is said that Shari‘ah compliant products are less Islam compared to Shari‘ah based products. If it true what make it less Islam? How a product would comply to Shari‘ah and less Islam? Is it because of similitude between the product and the conventional product? What wrong in having product comply with Shari‘ah but it acts as the conventional product normally acts?

Form the above assumptions; we may infer that the replication/imitation is the course of this query. Therefore, let us have a look on replication from Shari‘ah perspective.

The Reformation and Replication from Shari‘ah Perspective

Reformation in the early Islamic era

Evidence proved that in Mecca, in pre-Islamic time, certain customary commercial law was enforced by the businessmen among themselves as was the law Merchant in Europe. However, the outlines of Islamic law of property, contracts, and obligations did not form part of the customary law of the pre-Islamic Arabs (Abdullah Alwi 2007, p.10-12). Rather when the Prophet came and he found the Arab on this situation, and the liberal attitude of the Prophet towards trade was not understated as he himself had taken an active part in commerce and trade. The Quranic injunctions also demonstrate freedom of trade with some minimal restrictions on the fulfillment of religious obligations and ethical requirement of fair dealings.

The Prophet –peace be upon him- had taken several approaches to reform trade and commercial obligations, the main approaches are two, namely:

(1) Changing the perception towards wealth, in terms of creation, management, distribution: - The change of perception is considered as basic part, because it based on principles and commands given in textual authorities in order to guide conduct of mankind. they are:

(a) The concept of real ownership belongs to Allah alone, Allah says: “whatever in the heavens and earth belongs solely to Allah” (Q, 53:31)

(b) The concept of wealth as trust from Allah and mankind are just vicegerent and must be accountable for their utilities. Allah says: “remember [O Muhammad] when your Lord says to the angels, verily, I will make upon the earth vicegerent…”(Q, 2:30)

(c) The impetus to create the wealth is a natural habit of human. Allah says: those who do take out of their wealth prescribed right (zakah)” (Q, 69:24)
(d) Reorganization of real ownership in certain thing (private ownership). Allah says: “…for men, a portion of what they have earned and for women a portion of their earnings…” (Q, 4:32)

(e) The promotion of honesty, transparency, and justice in acquiring ownership. Allah says: “…so that it will not be a perpetual distribution among the rich from among you…” (Q59:7)

(f) Safeguard the right of others, with priority given to community and state rights. Allah says: “…do not eat up your others wealth unjustly…” (Q, 2:188). Imam Muslims, Abu Daud, and Tirmidhi, reported that the Prophet had said: “whosoever monopolizes commodity to cause harm for Muslims has committed sin”.

(2) Reforming and upgrading existing commercial practices and infrastructure: - The Prophet –peace be upon him- established principles that will govern trade and commercial activities. The Prophet has set up two main methods namely:

(a) Scrutinizing the existing practice and products, thereby the Prophet eliminated some elements that are not consistent with Shari’ah tenets and replaced them. Then the Prophet considered the contract as valid and Shari’ah compliant. Most existing Islamic products now are falling under this category, like sale leasing, salam, mudarabah and musharakah, etc. because they are pre-Islamic products, which the Prophet made some necessary amendment to make them compliant with Shari’ah . However, if the practices are contrary to essential principle of Shari’ah and are not adjustable, such products will be null and void, like riba in all its angles.

(b) Introducing new products/contracts that will cover the need of Muslims, the example of this is contract of hiwalah, istisna’ (Aznan Hasan 2008, p.19-22).

From the above arguments, one can infer that Islam does not intend to create new system of commercial law but to re-evaluate or ratify completely or partially the existing pre-Islamic contractual obligations. However, there is no problem in adopting formidable products available in non-Muslims practices rather the problem is how could the Muslims reform such products as to make them compatible with Shari’ah tenets?

Replication from Shari’ah perspective
Most of terminologies related to replication such as adaptation, imitation, adoption, all provide the same meaning and purpose with slight difference. For instance, replication means an act of making copies (word web), or to copy something exactly/to produce exact copies of itself see Oxford Advanced Learners’ Dictionary (7th edition, 2005). Adaptation is the act of changing something or changing your behavior to make it suitable for a new purpose or situations see Collins COBUILD Dictionary on CD Room2006). It is defined synonymously to this sense in Oxford Dictionary.

Imitation means copying the action of someone else (world web). Similarly, in Oxford, it is defined as an act of copying something or somebody/ copying the way somebody talks or behaves, especially to make people laugh, here it is synonymous to impersonation, impression. However, the terminologies similar to these in Arabic Language are taqlid, tashabuh, muhakat, iqtida’ which have similar and different connotations, however, the word taqlid in its technical
meaning is dispraised so it cannot be permissible unless otherwise necessary. Therefore, Ibn Qayyim has declared the vituperation and decay, then he classified into three categories:

1. Necessary replication/imitation
2. Permissible replication/imitation
3. Prohibited imitation

Then, he said: taqlid is reprehensible, and there are no divergences among the scholars on repulsion of taqlid. Even the classical scholars have denied to follow them without prove (Madkur, p.316). However, such imitation related to devotional aspect, not mundane aspect. Though, it is reprehensible in Shari’ah to imitate non-Muslim in general due to several texts that indicate prohibition of imitating non-Muslims. Such as what has been reported by Abu Daud in that Ibn ‘Umar narrated that the Prophet said: -peace be upon him-whoever imitate a group it would be among of them!" in another report in majami’ al-Fatawa Ibn Taymiyyah stated that: “whoever imitate other than Muslim is not among our community” (Ibn Taymiyah, 25:331). Abu Sa’id al-Khudri narrated that the Prophet -peace be upon him- said: you will follow the way of those who before you inch by inch, arm by arm until if they enter the hole of lizard you will join them. The narrator said: we asked the Prophet saying are they Jewish and christen, the Prophet, then replied him who should be except them? From these arguments, one can note that it is impermissible to imitate/replicate their products rather we should reform them so that they will comply with Shari’ah tenets. Therefore, it is not adequate to say that Islamic banks replicate or imitate their conventional counterpart. Actually in practice, Islamic banks do not imitate in the real sense of imitation. Instead it will be appropriate to say Islamic banks reform/upgrade the conventional products.

Shari’ah parameters in Islamic finance

The push of innovation which induces Islamic financial institutions to create some products that are in line with conventional principles and instruments raise many unresolved issues such as bench-making bank profit rates against interest rates, penalty charges on late payments, charging profit from delay or installment payment, sale-buyback involving two parties, sale-buyback using three interrelated parties, sale-buyback at fixed price, lease and leaseback, purchase undertakings, sale of debt at discount, promise (wa’d), profit-rate swap and paying upfront profit on Islamic investments, securitization of receivables and future cash flows. These issues give many suspicions against Shari’ah compliant products and some people as a result of that are now saying that Shari’ah compliant are less Islamic. Therefore, an attempt has been made to reconsider what Shari’ah compliant product should be comprised. Although, the attempt is just mere ijtihad, which should not be definitive evidence for that matter.

However, it would surely fill the gap to a greater extent, especially once the higher intents of Shari’ah is considered within the parameters. Prof. Saiful suggests four parameters to determine Shari’ah compliance.

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1 Sunan Abu Daud, no: 4031, it is weak hadith but it has some relatives Ahadith that affirm the same content.
Aqd Approach:
In order for a transaction to be valid, there must be some factors. There are four main factors, which must be present in each contract, namely:

1. Seller and buyer (al-'Aqidan)
2. Subject matter of the contract (mahal al-'aqd)
3. Objective of contract (mawdu' al-'aqd)
4. Cornerstones of contract (arkan al-'aqd) or (sighah al-'aqd)

On the first factor, seller and buyer or parties to the contract, each side may contain one person or more, if a group of heirs decides to buy the portion of another in order to take his/her portion through sale by his/her consent. They may also be principal/representatives like agents or trustees, one of them may be principal for himself while the other party is agent, provided the legal capacity to enter into contract is present, such as puberty, sanity, maturity.

The second factor: subject matter of the contract is what is capable to accommodate the effect of contract, like assets sold in sale contract or gift in hibah contract, or mortgaged assets in case of mortgage, debt guaranteed in contract of surety/kafalah. There are legal conditions, which must be present in subject matter. They are: (1) Stability, (2) Being known to both parties, (3) Ability to be handed over and (4) Presence of subject matter during the conclusion of contract.

The third factor: the purpose of the contract, which means the primary intent upon which the contract is legitimacy. This something has certainty in every contracts but it differ according the nature and circumstances of contract. For instance, in contract of sale the purpose to transfer the ownership of subject matter to purchaser against compensation, while in hibah contract the ownership of asset will transfer to grantee/done without any compensation, conversely, in ijarah contract, the usufructs of asset will be transferred against payment, contrary to this, in i'arah contract the usufruct will be passed to lent/loaned person without any payment. However, this is totally different from motive, which is considered personal purpose of a party to the contract.

The fourth factor: cornerstones of the contract comprise two things; offer and acceptance, which are initiative factors for constructing the contract. They call them also (sighah al-'aqd) or statement of contract. Mustafa Zarqa (1:399-405) stated some conditions necessary to present with this statement (offer and acceptance), which are:

a) Use of past tense
b) Conformation offer to acceptance
c) Clarity of offer and acceptance
d) Connection of acceptance with offer.

Whenever all these factors with their conditions are present in a contract, such contract would be considered as valid contract.

Maqasid Approach:
Unanimously it has been agreed upon that no provisions of law instituted for mankind would be without certain objectives. The same also goes for the divinely made Law. The substantial aspect of maqasid is that the Shari’ah principles can be distinctly appreciated. There are five fundamental universal intents of the Lawgiver, namely: (a) Preservation of religion (hifs al-din),
(b) Preservation human soul (hifs nafs), (c) Preservation of intellect (hifs al-‘aql), (d) Preservation of property hifs al-mal), (e) Preservation of lineage (hifs an-nasl).

In relation to transaction, a product through adherent to these objectives would be more efficient. Definitely it is so, because according to Imam Shatibi, the preservation of five fundamental universal intent of the Lawgiver is achievable in two ways: (1) by establishing and strengthening them; and (2) by averting all harm that might affect them. So, the preservation of property means protecting wealth of the community from being ruined and from shifting to the hands of others without compensation. It comprises also protecting the different constituents of that wealth which is valued in Shari’ah from being destroyed for no return. Furthermore, the preservation of individual wealth results eventually to preservation of community’s wealth because preservation of whole is attainable by preserving its constituent parts (El-Mesawi 2006, p.116-117).

With regard to the protection of property, the proscription of riba serves the purpose of repelling harm incurred by the payment of interest as it depletes one's property. Therefore, by prohibiting riba the harm would be removed. Through the maqasid, the assurance that Islamic banks cannot provide any financial products that will be harmful to their clients, because the phenomenon is totally contrary to the intent of Shari‘ah, and the activities and products of Islamic banks, Islamic windows or branches must be tested on Shari‘ah precepts as well as objectives. Whenever there is inconsistency with the principle and objectives it would be inappropriate to say that such products are Shari‘ah complaint.

To illustrate this more, let us have a look on hedging products against price volatility, which consider as an important ingredient in business to date. Manufactures that purchase raw materials to make their products, will usually want to buy them at cheapest cost possible. Thereby, some purchase forward whereby they buy the commodity now to be delivered and paid for at a specific future due date. The price is set on spot on the day the transaction is concluded. This sale raises hot discrepancies among modern scholars, when some say it is lawful, because the contract fulfills all contractual requirements in Shari‘ah and others say it unlawful, because the contract is akin to gambling therefore it is harmful and unjust. When we concentrate solely on ‘aqd approach, there are many contracts that would be compliant with Shari‘ah simply due to the existence and fulfillment of ‘aqd. Conversely, if we look at the same contract form maqasid perspectives it would be not prima facie Shari‘ah complaint product regardless of full Islam.

**Accounting and Financial Reporting Approach:**

Accounting can be defined as the process of identifying, measuring and communicating economic information to permit informed judgments and decisions by users of the information. This process falls under the concept of hisbah in Shari‘ah, which is equivalent to ombudsman that becomes an indispensable tool of government in many countries. However, the functions of muhtasib include account taking (hisbah) of such matters like weight and measures, quality of commodities on sale in markets, honesty I trade and commerce, observance of modesty in public places, and such other things both temporal and spiritual (Sayid Khalid 2003, p.111).
This institution has its origin from the Holy Quran and Sunnah. From the Quran, Allah says: “let there arise out of you, a band of people, enjoining what is good, and forbidding what is wrong and believing in Allah” (Q, 3: 104).

It is narrated that the Prophet himself appointed Sa‘ad bin Al-‘As ibn Umayyah as muhtasib of Mecca and ‘Umar ibn al-Khatab as that of Madinah. ‘Umar bin al-Khatab assigned ‘Abdullah ibn ‘Utbah al-Mas‘ud as muhtasib of Madinah. According to Ibn Taymiyyah, duties of muhtasib cover areas not covered by Qadi or governor. This is in turn related to the Quranic duty of “enjoining the good and forbidding the evil”. To do this he is empowered to lay down rules to regulate different activities falling within his jurisdiction and duties (Mushtaq Ahmad 1995, p.136-138).

Imam al-Mawardi, opines that there are three types of compliant which a muhtasib take cognizance of:

(a) Complaints relating to weight and measure
(b) Complaint against adulteration in the substance sold, or complaint against the price paid for an item sold; and
(c) Complaint against non-payment of debt even while possessing the ability to repay it (al-Mawardi 2000)

Mu‘tasib can be considered in relation to Islamic accounting though accounting entwines several areas generally agreed to include financial accounting, managerial accounting, cost accounting, and accounting for non-profit organizations. As far as Islamic banking and finance is concerned, the only accounting area concerned us is financial accounting. Financial accounting is to provide financial rights and obligations, and results of operations as well as to disclose the present and potential parties an information necessary concerned the affairs of the entity of its financial position, and the result of its operations and its cash flows.

The purpose behind this information is to assist those parties in making suitable decisions towards the entity. The main reports, financial accounting intends to disclose are financial statements which include statement of financial position, income statement, the statement of cash, and related notes (AAOIFI 2008, p.8). Thereby it helps in removing ambiguities, It serves to eliminate ambiguities (gharar)in financial contract through factual reporting of the said transaction. More importantly, financial reporting explained what exactly was transacted in the business dealings such that one is able to know whether, say, a transaction is a loan or a sale, whether a sale is a true one or not. This is exceedingly important because investors often rely on financial report to be clear and predict the future cash flow of Investee Company. Moreover, financial accounting will disclose a balance sheet or statement of financial position, which is a summary of persons or organization's assets, liabilities and ownership equity on a specific date, such as the end of its financial year. A balance sheet is often described as a snapshot of a company's financial condition.

According to above arguments, one can say that there is coherent relationship between the role played by accounting and institution of hisbah in Shari‘ah. The former acts according to its role, performances, and objectives, as pace and parcel of the later one which known now as the institution of ombudsman or commissioner of public compliant and that becomes an
indispensable arms of government in many countries. However, the functions of hisbahan ombudsman in Shari'ah are more than that of ombudsman in governmental sector because the later one is more stressing mundane while the former encompasses both mundane and hereafter devotional aspects. Coming back to financial accounting, which provides adequate information on balance sheets that comprises; assets, liability, and shareholders’ equity. The asset mainly categorizes in first list followed by liabilities. Thus it differs from liabilities in terms of being as net assets or the net worth of the company. According to the accounting equation, net worth must equal assets minus liabilities (Saiful Azhar Rosli 2008, p.5-6).

Since Islamic banks apply trade and commercial principles, they must adhere to financial reports that provide true information of business transactions. for instance, if the transaction is constructed on ijarah, then the reports must show it in balance sheet that the leased asset is fixed asset. When the leased asset purchased, it would be subject to tax whose payment is recorded as operating expense in the income statement. Decreasing allowances will be recording as an expense, therefore, the company that took the leasing option can benefit from the tax allowances to improve its underside.

_ijarah thumma bay’_ (AITAB) that is leasing with intention to own or purchase, is a Shari’ah compliant instrument used for car financing. The leased asset must be recorded as fixed asset as it obviously specified by the contract of ijarah. But when it comes to AITAB as it operates under the conventional Hire-Purchase Act 1967, it (i.e. AITAB) is treated as a financing activity instead of a true lease as no recording of ijarah asset is evident in the balance sheet.

In relation to asset-financing like murabahah or bay’ bithaman ajil contract, the Islamic bank is anticipated to have purchased the real asset prior to enter into the sale. It is well known in unchangeable principle of Shari’ah that “it is forbidden for someone to sell unless; otherwise one possesses ownership on the subject matter sold”. Such accounting treatment is an inevitable fact and any Islamic bank that failed this test is guilty of riba since it indicates that no true sale exists. Although bank may hold the asset for a few days or even hours, proper accounting must be uphold (Saiful Azhar Rosli 2008, p.6).

Interestingly, financial reporting can prove that ‘inah sale is not a true sale but only a fictitious one. Although the ‘aqad approach indicates the validity of bay’ ‘inah according to Shafi’i doctrine. But in reality there is no sale ever took place since no recording of purchase is evident in the balance sheet. There seems to be a conflict between juristic validity and financial reporting. Such inconsistency suggests that the contract approach cannot stand alone anymore and must find supplementary devices to secure complete Shari’ah legitimacy.

**Legal Documentation of Contract Approach:**

Legal documentation is a legal term used for any formally executed writing that can be formally attributed to its author, records and formally expresses a legally enforceable act, process or contractual duty, obligation, or right, and therefore evidences that act, process, or

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3 Collaborative International Dictionary of English v.0.44, s.v. "instrument", retrieved on 19 May 2009:
agreement. Examples include a certificate, deed, bond, contract, will, legislative act, notarial act, court writ or pleading, or any law passed by a competent legislative body in municipal (domestic) or international law. Many legal instruments were written under seal by affixing a wax or paper seal to the document in evidence of its legal execution and authenticity (which often removes the need for consideration in contract law); however, today most jurisdictions have done away with the requirement of documents being under seal in order to give them legal effect. Others, e.g. Australia, have re-interpreted sealing as a formally attested signature.

The purpose of legal documentation is to provide security to contracting parties where their rights, obligations and responsibilities are clearly spelt out in the terms of agreement or contract. The security enabled them to seek legal protection in case the outcome of the contract is not realized as agreed upon in the agreement (Saiful Azhar Rosli 2008, p.7).

The existing practices of BBA, is presently considered as basis products in Malaysia and Middle East, which comprises bay’‘inah, tawarruq commodity murabahah, and the sukuk. In fact, BBA in really sense is a sale, and it does not comply with the Law of Good Sale Act 1957. There is an explicit condition that the seller has the right to sell that he has ownership title to the buyer. This implies that the seller must hold legal and real ownership of the goods prior to the sale. Conversely, In the case of Dato’ Nik Mahmod vs. BIMB, a true sale is not evident since the transfer of asset title from the sale was not effected as the ownership of land remains with the plaintiff. Similarly, in the case BIMB vs. Adnan Omar, the land is put under charge with the bank which means that the defendant has remained the legal owner of the land over the financing period. It is necessary as far as Shari‘ah principle is concerned that the rule of ownership must prevail in all sales bearing the contract of al-bay. Acting with this rule can imply violation of the Law of Good Sale Act 1957. However, to realize the significance of legal document, i.e., if the contract is written down to evident a financing agreement rather than a sale agreement, the judge will decide in favor the former and not the latter (Saiful Azhar Rosli 2008, p.9).

In view of the above discussion on four parameters, the author is of the view that the main parameter is contractual obligation (‘aqd). While the financial accounting and legal documentation are just mechanisms to monitor and supervise the degree of adherence to contractual obligations prescribed in Shari‘ah. For instance, in BBA contract, if the contract is to be found valid, then it must be according to ‘aqd requirement at first instance. Later on, in order to affirm this validity, one should have look at the financial accounting and reporting, whereby in balance sheet, the subject matter owned by the bank must be incorporated under fixed asset. Then to secure, this deal, the transfer of ownership must be clearly shown, and if the subject is found to be defective, the client/customer would be protected under consumer protection law, hence, the asset will solely belongs to the original seller (the bank). It must bear the risk in due case. Therefore, the author observes that the ‘aqd approach and maqasid approach are independent parameters. While the financial reporting and legal documentation serves as

4 Barron’s Law Dictionary, s.v. “instrument”
5 www.wikipedia.org/wiki/legal_instrument#cite_note-3
dependent parameter. And because the latter does not serve their interest rather they serve interest of other parameters.

**Conclusion and recommendations**

In conclusion, based on the aforementioned discussions, it would be wise to reiterate that the issue of Shari‘ah compliant is indeed appetite for thorough study because the compliance with Shari‘ah is of essence and is *sine qua non* for Islamic banking and finance practices. The Islamic principles of trade and commerce must be adhered to in apposition with the intent of Shari‘ah cum corroborative devices such as financial accounting and legal documentation, in order to ascertain the fulfillment of the Shari‘ah requirements.

The prevailing issue of reforming non-Muslims products in Islamic product development is not alien as it was done during the Prophetic era and afterwards. However, the problem is how we reform such products in a manner that will be simpatico and compatible with Shari‘ah tenets. It is also noteworthy that Islamic banks should not rely on reformation rather it should focus more on innovation, as the former is reprehensible unless it complies with Shari‘ah. It is also marked that till to date there is no *prima facie* evidence or clear-sighted on both terminologies (Shari‘ah based and Shari‘ah compliant), thereby it would not be satisfactory to say that Shari‘ah based product is more Islamic than Shari‘ah complaint product because both products must comply with Shari‘ah requirements. When the Shari‘ah requisite is accomplished, it is also full Islam, because Islam is indivisible part. The dynamism and flexibility of Shari‘ah are considered as major devices for Islamic banks to focus on innovation rather than replication of mainstream economic system, if we really believe that Islam has distinctive financial system. In order to ascertain complete Shari‘ah compliance, the foregoing four parameters must be adhered to. The consistency in these four parameters is the prerequisite for true Shari‘ah compliance.

Moreover, if the is BBA/murabahah is valid from *‘aqd* side; the financial report reflects the true ownership over the subject matter prior to sale. The transfer of the ownership over the subject will be revealed via the legal documentation and proper registration of the ownership. Ultimately, the *maqasid* shows the absence of any harm to the parties and the contract does not embrace any trick to circumvent *riba*. Therefore, is noteworthy that there is a need for thorough study on financial rights and financial usufructs to distinguish between tradable assets and non-tradable assets. Empirical study needs to embark on to ascertain substantial relation between four parameters. Study must also carry out on the position of Shari‘ah advisors in product assessment.
References


