Editorial

Illegality in the Islamic financial services industry through practices such as "purification": How far in the UK can we stretch inaction and non-justiciability?

The question of Shari'a-compliance, which is the very essence of the Islamic financial services industry, remains surprisingly fudged and indeterminate. This is despite the hype and protestations to the contrary we often hear from this industry. There are of course multi-layered and intertwined political, jurisprudential as well as interpretative reasons why this opaqueness remains the case -and why it shall continue for the foreseeable future. But what should concern us here in the UK is that we must be wary not to position ourselves domestically to suffer adversely from spill-overs due to marriages of convenience within this industry, *i.e.* among commercial, legal, jurisprudential, marketing interests, as well as intra-Islamic grandstanding, *etc.*

Indeed, as far as the Islamic financial services industry is concerned, we in the UK need credible forms of scrutiny buttressed by deeper knowledge of relevant Shari'a jurisprudence. This is to ensure that the wool is not pulled over our eyes by those who misleadingly claim that dubious financial products, services and procedures are acceptable by Shari'a. For, not only such claims invariably have no firm jurisprudential basis under Islamic *Fiqh*. The resultant dubious financial products, services and procedures would also be considered illegal under Shari'a itself and even offensive to its core values.

It would be unheard of for a bona fide legal system (or credible jurisprudents) to sanction the whitewashing of tainted money – or a fraction of it. Neither would it be acceptable to mix legitimate or illegitimate funds obtained contrary to public policy grounds. We would not, for example, expect a burglar to eschew culpability and that their ill-gotten money (or part of it) would be deemed legitimate should they donate a portion of it to charity – or by engaging in any other "redeeming" activity. Nor is it allowable for a maximum threshold of unlawful earning to be considered acceptable practice – say permitting 5% of total income to be generated from illegitimate sources.

Yet the above is loosely what is taking place in the Islamic financial services industry today before our own eyes within the questionable practice of "purification" – with even regulations, countless academic papers and meticulous calculations advising on how Shari'a funds can be "purified" from tainted non-Shari'a compliant sources. One recently study even stated boldly that: "Purification is a pivotal element of the Islamic investment process". Indeed, to have a feel of the pervasiveness of this misguided practice, one only needs to look at statements such as:

> Sharīʿah scholars have set a limitation on the percentage of impure income to be accrued in a company's account [. . .] (AAOIFI, 2015). This relaxation implies that a Sharīʿah-compliant company, despite its objective of making only pure income out of its business, may end up earning a proportion of impure income. Thus, the investor seeking a fully Sharīʿah-compliant investment needs to purge this impure income accrued in the accounts of the company in which the investment is made. (AAOIFI, 2015)

By trespassing against Shari'a's principles of financial probity, such accounts distort its *Maqasid* and disregard its full adherence to the rule of law. This is especially as prominent norm-setting bodies at the heart of the Islamic financial services industry such as the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) has no qualms about legitimising the "purification" procedure – *i.e.* under Standard No.21. In evident violation of the spirit of Shari'a and its fundamental legal principles AAOIFI even

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engages in "legitimising" the percentages of *Riba* "acceptable" Islamically – limiting under Section 3(4)(4) companies' income to no more than 5% of sources tainted with *Riba*. This is despite the fact that *Riba* (interest) is illegal under Shari'a on public policy grounds.

AAOIFI also states under Section 3(4)(2) that *Ribawi* (interest bearing) loans should not constitute more than 30% of a company's total capitalisation. It under Section 3(4)(6) similarly mandates that, by no later than the end of the financial cycle (whether annual or quarterly), companies must rid "purify" themselves of funds (or mixed funds) tainted by *Haram* sources such as *Riba* – due to "trading" or "ownership" as it elaborates. Yet, when it comes to justifying the jurisprudential basis on which it relies to legitimise "purification", AAOIFI is astonishingly generic and non-committal. Something which is not acceptable Islamically, as Shari'a is articulate and highly detailed when it comes to how, and on what grounds, it validates its rulemaking.

It is this present author's firm view that "purification" is counterintuitive to *Shari'a's* fundamental principles and public policy objectives which stand firm on *Halal* earning and legitimate sources of income. "Purification" under current practice similarly sets the apparent complacent tone of the Islamic financial services industry we witness today – in breach of Shari'a's rejection of whitewashing tainted assets and funds.

It is also this present author's firm view that such justifications for "purification" have nothing to do with the Shari'a concept of *Darourah* or hardship as misguidedly touted by its proponents. It is equally offensive to Shari'a to stretch the meaning of purification mentioned in the Qur'an in the context of justifying *Zakatat* – in the sense of purifying the soul from greed and love of money when one gives and donates proportions of their earnings or wealth to charity or in support of needy members of society. This justification for purifying the soul by the Qur'an has nothing to do with twisting and stretching it procedurally to whitewash illegitimate earning or proportion of it. For, Shar'a is in favour of legal certainty, legitimacy of earning and transactional stability.

Legitimising owning or trading in *Haram* possessions or monies (as it is experienced today in the Islamic financial services industry under the practice of "purification") is also in direct contrast to the traditions of the Prophet Muhammad (PBUH) – *i.e.* in which he advocated the highest degree of integrity and ascertainment of the source of funds and assets. For, consistent with upholding such high standards, the PBUH even refused to eat one piece of dates which he found discarded on a public road – explaining to Muslims that he had not been certain of its source and whether or not he would have been allowed to have it.

Needless to say, Shari'a and its jurisprudential tenets avoid grey areas as a matter of principle. This ruling by AAIOFI which legitimises the whitewashing of illegally earned profit, therefore, breaches the spirit of the well-known *Hadith* in which the PBUH stated that *Halal* is obvious and *Haram* is obvious – asking Muslims to avoid *Mushtabahat* (doubtful or grey areas which lie in between). For their part, Islamic jurists hold this *Hadith* as highly preponderant in its relevance and scope of application to Shari'a rulemaking – designating it as one of a handful of most significant *Hadiths* in Islam. So, the spirit of Shari'a in this regard is clear and its jurisprudential trajectory is indicative of a legal system highly observant of the rule of law and non-tolerant of dubious or uncertain sources of funds or assets.

It is of course confounding and deeply disconcerting when jurists, scholars, researchers and norm-setting bodies within the Islamic financial services industry render legitimate such dubious practices which violate Shari'a and run counter to its jurisprudential thrust. We in the UK should, therefore, adopt a more nuanced stance *vis-à-vis* the Islamic financial services industry and not taken at face value what we are told counterintuitively to be

Shari'a compliant. For, there will be many instances when this is not the case – and the product, service or procedure will not be Shari'a-complaint. Neither would blind reliance on the jurisprudential veracity of such questionable standards (albeit being issued by Islamic norm-setting bodies) in a litigious context in the UK constitute a defence.

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