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AIMS AND SCOPE

- Islam and Civilisational Renewal (ICR) offers an international platform for awakening the civilisational potential of the Islamic legacy. Revitalising synergies between Islamic and other civilisations in a spirit of self enrichment through discovery and research may facilitate renewal within Muslim societies and more significant contributions by Muslims to the global human community.
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- We seek viable policy-relevant research yielding pragmatic outcomes informed by the best values and teachings of Islam as well as of other contemporary civilisations.
- ICR is inter-disciplinary, non-political and non-sectarian. We seek to contribute to prospects of peace among all nations, and assist the conceptual and societal transformation of Muslims.
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EDITORIAL

This October 2015 edition of the flagship international journal of IAIS, Islam and Civilisational Renewal, contains five substantive Articles, as well as four Viewpoints, which stress on two significant fields – Law, both Shari'ah and modern law, and the field of Islamic banking and finance. This edition opens with my Focus article addressing the subject of "Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice". It reviews the merits of amnesty and reconciliation given the expansion of conflicts in the Muslim world following the September 2001 terror attacks and 2011 Arab Spring uprisings. The article draws insights from the Qur'an and Sunnah, as well as the principles of *siyasah shar'iyyah* (shari'ah-oriented policy). It is also supportive of *ijtihad*-oriented initiatives that seek the continuity of scriptural guidelines and their applications to changing societal conditions. Some deep questions are address such as how can people act with mercy and forgiveness when a crime has been committed against them? And who grants a pardon – the crime victim, his relatives, or the head of state?

Two articles on Islamic finance follow. The first is by Professor Yasushi Suzuki and Dr. Mohammad Dulal Miah of Ritsumeikan Asia Pacific University, Japan and the University of Nizwa, Oman on "A New Institutional Approach in Explaining the Underdevelopment of Islamic Microfinance". The authors' stress on the supply aspect of microfinance that involve altruistic benefactors raises the question whether conditions on funding should be set. They conclude that safeguards against potential violation of Islamic social norms need to be devised and incorporated into microfinancing loans. Dr. Inam Ullah Khan, a former magistrate court judge from Islamabad, Pakistan writes on "Islamic Bonds (*Sukuk*) in Malaysia" and discusses the criticism by Shari'ah scholars of the initial debt-based *sukuk* in the Malaysian market, which prompted, in turn, the introduction of the Sustainable and Responsible Investment Sukuk Framework followed in 2014. This is also believed to be in line with the rising global trend towards "green bonds" and "social impact bonds" that promote sustainable and responsible investing. Examples provided from both the Middle East and Malaysia demonstrate efforts that seek to bridge the 'gap' towards greater Shari'ah compliance.

Muhammad Abdullah and Professors Mohamad Abdalla and Robyn Jorgensen of Griffith University Australia can be congratulated on their pioneering effort "Towards the Formulation of a Pedagogical Framework for Islamic Schools in Australia". Their focus is on instilling Islamic educational principles to develop a framework to ensure Islamic schools benefit especially from the Prophet's (Peace be upon him) example and teachings. Muhammad Yaseen Gada of Aligarh Muslim University, India has compiled an enthralling historical summary of "Why the Crusades Failed: Narrating

the Episode after the Fall of Jerusalem" with the objective of not only re-living the episodes but of highlighting a previously overlooked level of mutual understanding, respect and fruitful transactions between Muslims and Christians in the Holy Land that could well be emulated today. In his "Advancing Well-being with Interest-free Finance" Abdul Karim Abdullah analyses equity and credit markets relative to efficiency. He concludes that while equity markets are efficient, credit markets are not. The chief reason is that participation in equity markets is driven by a desire to earn profit, while participation in the credit markets is driven by a desire to gain interest. While the former is well suited for allocating resources efficiently, the latter is not.

Four enlightening Viewpoints with new perspectives on a number of different topics are presented. Dr. Daud Abdul-Fattah Batchelor demonstrated in his Viewpoint titled "Enhanced Life Expectancy during the Golden Age of Islamic Civilisation" that Islamic teachings themselves calling for good health, hygiene, and education led to the general availability of many institutions. Public baths, hospitals, and urban water and sewerage services, together with important medical breakthroughs, that resulted in achieving overall life expectancies better than in classical Greece and Rome, as well as medieval Europe.

Tengku Ahmad Hazri, IAIS Research Fellow in his viewpoint on "Shari'ah Offences and Fundamental Liberties in Malaysia" observes how debates on the scope of Syariah offences in Malaysia—which in essence should be about protecting individual liberties—have sometimes been framed as a question of jurisdictional conflict between civil and Syariah courts. As potential solutions he recommends opening the scope of constitutional protection of fundamental liberties to be available even in the Syariah courts and secondly, for state legislatures to support fundamental liberties by providing a 'negative' protection process. Apnizan Abdullah in her viewpoint titled, "Is Garnishee Proceeding Feasible on Islamic Banking Deposits and Investment Accounts in Malaysia?" discusses specific differences between conventional bank deposits and investment accounts and those of Islamic banks. She concludes that a garnishee proceeding is suitable for the execution of a judgment obtained by a creditor against a conventional bank on all types of deposit accounts, but in the case of Islamic bank accounts, only debt-based accounts, such *Qard* and *Wadiah Yad Dhamanah*-based deposit accounts can be so executed. In the case of other types of Islamic bank accounts, a judgment creditor must proceed with alternative recovery methods which apply to non-debt-based.

Ahmad Badri Abdullah discusses the "Use of Big Data and Its Effects on the Right to Privacy: A Shari'ah Perspective" stressing that an important privacy requirement is that a person is able to not disclose certain information about himself. He cites Kamali who believes that the right to privacy in Islam not only refers to the sanctity of an individual's home but also to other aspects that range from privacy of personal

correspondence to confidentiality of one's private activities. Badri highlighs specific problems with the use and abuse of private data taken without an individual's consent, and suggests the adoption of suitable oversight legislation. He suggests that Muslim data brokers should be governed by Islamic ethical principles underpinned by the *maqasid al-shari'ah*.

This edition reports on the seminal event in the Muslim world of the promulgation in Istanbul of the Islamic Declaration on Global Climate Change (IDGCC), followed also in August by holding at IAIS Malaysia of the "Round Table Discussion on Islamic Perspectives on Sustainable Development", which was well-attended by university scholars, NGOS and industry representatives. The IDGCC called for a mindset change to aim for future zero greenhouse gas emissions and the use by Muslims countries of 100 per cent renewable energy sources by 2050; to recognise the moral obligation of wealthy and oil-producing states especially to reduce consumption, and for all to realise that chasing after unlimited economic growth in a finite, overloaded planet is not viable.

Further, in promoting Islamic societal developments, the Events reporting includes highlights of the Round Table Discussion on the Future of Muslim Youth held in May. The journal closes with the obituary for distinguished Professor Sheikh Wahbah Mustafa al-Zuhayli, leading scholar of Islamic international law and late chairman of Islamic Jurisprudence at the College of Shari'ah, Damascus University. Finally I would like to thank all contributors to this edition and trust that readers will find it informative and interesting.

Mohammad Hashim Kamali
Editor-in-Chief

FOCUS

AMNESTY AND PARDON IN ISLAMIC LAW WITH SPECIAL REFERENCE TO POST-CONFLICT JUSTICE**

*Mohammad Hashim Kamali**

Introductory Remarks

The subject before us has acquired renewed significance in the aftermath of the September 2001 terrorist attacks, the tumult and violence that has been on the increase ever since, but also what followed the advent of the Arab Spring in many Muslim countries. Conflicts that engulf countries and communities rarely, if ever, end by clean endings. They leave behind a host of issues, including the urge to take revenge by the aggrieved parties − hence a vicious circle of violence follows. Post-conflict justice requires careful management, such that measure- for -measure justice may not be the right option in one's quest to restore peace. The spirit of peace and willingness to give and take, admission of truth and forgiveness may be among the more effective means of healing and moving forward. What role, if any, is there in the midst of all this for Islam's guidelines on repentance, amnesty and forgiveness is the main subject I address in the following pages.

Amnesty, pardon and forgiveness are the means, in Islamic theology and law, as also in most other world traditions, of relieving someone from punishment, blame, civil liability or religious obligation. The same result is often achievable by recourse to certain other methods such as reconciliation, arbitration, and judicial order. This article focuses on an exposition of Islamic law provisions on amnesty (*'afwa*). The *fiqh* positions explored here derive, for the most part, from the Qur'an (normative teaching), or *Sunnah* of the Prophet Muhammad, pbuh, and general consensus (*ijma'*) of scholars across the generations. Yet instances are found where *fiqhi* interpretations of the relevant scripture are reminiscent of historical settings and conditions of their time, which may, upon reflection, warrant further scrutiny and interpretation more in tune with the contemporary conditions of Muslims. These have occasionally been explored in a quest for

alternative answers. This approach is in line with the spirit of *ijtihad* that seeks the continuity of scriptural guidelines and their application to the changing conditions of society. A mere reproduction of scholastic positions is not always the best approach, not even recommended by the leading Imams and thought leaders of Islam.

Amnesty and pardon would be insignificant without the reality of an adverse consequence or punishment. For pardon without the ability to strike back is tantamount to helplessness. Yet reconciling pardon and punishment in the sphere of criminal justice, especially in a post-conflict setting, poses questions often of conflicting interests. At the theological level, the Qur'an clearly tells Muslims that God is both merciful and just, but how does the law meaningfully reconcile these two objectives. How can people act with mercy and forgiveness when a crime has been committed against them? These questions raise issues sometimes beyond legalities. Textual guidelines and *fiqh* rulings on justice, mercy, repentance and forgiveness are not always self-evident nor do they provide for facile combinations. Science and education, economic conditions and the culture of Muslim communities and entrenched tribal and customary practices also reflect on the *fiqh* positions. Phases of development and modernist culture accentuate fear of rampant mischief-making by individuals and groups that call for more rigorous approaches to legal interpretation. In a post conflict setting, the quest for healing and social harmony may sometimes need to look beyond legalities. Hence it is important to reflect on some of the broader teachings of the Qur'an and Sunnah, as well as principles, such as that of *siyasah shar'iyyah* (*shari'ah*-oriented policy henceforth called *siyasah*) that provide for a measure of flexibility and pragmatism.

Article Summary: I begin with a review of the meaning and scope of amnesty and proceed with an overview of the Qur'an and Sunnah on the subject. Then I explain the juristic relevance of amnesty to repentance, the prescribed penalties of *hudud*, and just retaliation (*qisas*) respectively. The basic purpose is to explore the permissibility or otherwise in Islamic law of amnesty in respect of the various types of criminals in these categories. Next I pose the same question and the likely responses that can be obtained from recourse to the principles of *siyasah* and *ta'zir* (deterrent punishment) respectively. A brief comparison is then attempted between amnesty and reconciliation, which is followed, in turn, with a question: who grants a pardon and when − the crime victim, his relatives, or the head of state? The article ends with a section on the expiration of time (*al-taqadum*) and its impact on prosecution and punishment.

Meaning and Scope

'Afwa literally means omission (*isqat*) or waiver and it is defined as exempting the wrongdoer by not taking him to account. Another Arabic synonym of *'afwa* is *al-safh*, which means to turn away from someone but also to widen the space and incline toward reconciliation. In this sense *al-safh* involves taking a step beyond *'afwa*. Yet another synonym to *'afwa* that occur in the Qur'an and hadith is *maghfirah*, which is granted by someone in position of superiority and power. The difference between *'afwa* and *maghfirah* is that the former implies waiver of blame and shame without, however, any addition of virtuosity to the account of wrongdoer, whereas *maghfirah* does have that implication and can add spiritual reward to the wrongdoer's account. Both *'afwa* and *maghfirah* require omission of punishment, but the latter can also add a reward.[1] In *fiqh* terminology, *'afwa* means a waiver of a duly warranted punishment for wrongdoing − this being the special meaning of *'afwa* as *'afwa* does not always lead to omission of punishment.[2]

The Arabic word *'afwa* subsumes all of its three English equivalents: amnesty, pardon, and forgiveness. Pardon may be granted by an individual or a group of individuals, and by extension also by a corporate body or institution.[3] I may employ amnesty and pardon when there is substantial involvement of government authorities, and forgiveness when the initiative belongs to an individual or a non-state party, although pardon also stands good with reference to both.

The Qur'an and Sunnah: An Overview

'Afwa is a major theme of the Qur'an and takes a high profile in the Islamic order of values, being the subject of over thirty verses in the Holy Book that subsume legal, religious, moral and cultural dimensions. The Qur'an often speaks in praise of those who take a forgiving attitude toward people; *'afwa* is designated as a manifestation of *ihsan* (beauty and goodness − Q al-Baqarah, 2:178). Then also God the Most High associates His illustrious self with forgiveness and speaks of His love and affection for those who forgive without vindictiveness, especially when they are overwhelmed with the urge for revenge (Q Aal-'Imran, 3; 134). Pardoning is especially meritorious by someone who can avenge but chooses to exonerate and forgive. Yet Islam also puts a high premium on justice that may well demand sternness, especially from a leader or judge, to bring the wrongdoer to account. Justice and amnesty often moderate and temper one another but can also conflict. To quote the Qur'an:

> God commands justice (*al-'adl*) and the doing of good (*al-ihsan*) and generosity to one's kindred, and He forbids indecency, wrongdoing and oppression." (Q al-Nahl, 16:90)

Justice in this verse is enjoined side by side with *ihsan*, and the juxtaposition implies that it is not always the measure for measure approach that is desired; justice should be tempered, whenever appropriate, by *ihsan*, which in this context subsumes amnesty. Punishing the wrongdoer is the normal course enjoined by the Shariah, but amnesty may be preferable at times. God thus praises:

> Those who spend in the way of God, in times both of prosperity and hardship, and those who control their anger and forgive their fellow humans. Truly God loves the *muhsinin* (those who persist in *ihsan*)" (Q Aal-'Imran, 3:134).

Elsewhere the Qur'an speaks of proportionality and equivalence in punishment, but espouses it with a recommendation for forgiveness:

> Whoever transgresses against you, your response should be proportionate to the transgression committed against you (Q al-Baqarah, 2:194).

> And the recompense of an evil is an evil equal thereto, but he who forgives and seeks reconciliation, his reward shall be with God, and God does not love the wrongdoers (Q al-Shura, 42: 40).

Tribal Arabia was prone to violence especially in situations where consultation and arbitration (*shura* and *tahkim* respectively) failed to end conflict. Tribal justice was also prone to exaggeration in revenge, which is why the Qur'an took an emphatic stand on proportionality and equivalence that inclines toward forgiveness. The relevance of these guidelines can hardly be overestimated in the wake of sectarian and tribalist violence that has plagued Iraq and many other countries, including Lebanon, Libya, the Yemen and Mali. The Qur'anic verse just quoted is followed, two verses later, by what is even more meritorious than proportionality in revenge:

> But (remember) one who endures with fortitude and forgives, that indeed is a most distinctive of all deeds – *min 'azm al-umur* (Q al-Shura, 42:43).

Reconciliation, amnesty and forgiveness in these passages fall under the Qur'anic principle of benevolence (*ihsan*), which are highly appraised and preferred, whenever appropriate, to exacting and punitive approaches, and even justice (*'adl*). But if one chooses to strike back, it must be proportionate to the pain inflicted on one in the first place.

The Qur'an also commanded the Prophet to "hold to forgiveness, enjoin kindness, and turn away from the ignorant." (Q al-A'raf, 7:199). Amnesty and kindness thus go hand in hand and the one become indicative of the sincerity of

the other. As for those who fall into error out of ignorance, one is best advised to turn a blind eye and not let oneself be provoked by their behaviour. The Prophet himself strongly appraised the virtue of forgiveness, as in the hadith: "forgiveness does not fail to bring honour to a servant of God when he grants it (for His sake)."[4] The Prophet also showed this on the occasion of the conquest of Makkah in the year 8 Hijrah: He declared general amnesty to all Makkans that included his former enemies and persons who had committed acts of atrocity and aggression against the Prophet and his family members.

'Afuww (most forgiving) is one of the Excellent Names of God as in the verse: "whether you do good openly or in secret, whether you pardon the misdeeds of those who wronged, God is Ever Forgiving, All-Powerful (*'Afuwwan Qadira*) (Q al-Nisa', 4:149)." Interestingly enough, God's pardoning is here juxtaposed with His unbounded ability and power. Pardoning is also a most distinctive of the virtues of Prophets and Messengers, and should therefore be emulated by everyone, especially in dealing with one's parents and family, and the wider community, whenever it is likely to put an end to conflicts.[5]

The Prophet Muhammad is frequently reported to have granted pardon to those who wronged him. Jabir bin 'Abd Allah has thus narrated that when a Jewish woman from Khaybar served the Prophet some poisoned mutton, he took a small amount, but some of his Companions took more and fell ill. When the Prophet questioned her later: "did you poison that meat? She said 'yes.' Some of the Companions present asked the Prophet 'would you not order that she be killed!' The Prophet replied in the negative, and granted her pardon. Here was a great leader showing the way, so graphically exhibited, as to how Islam values forgiveness by one who has the power to strike back. The next two incidents I recount are also striking.[6]

Jabir bin 'Abd Allah reported that on one occasion he fought a battle in the company of the Prophet and upon return the Prophet rested under the shade of tree and hung his sword, "and we all fell asleep. The Prophet then alerted us when he caught red-handed a Bedouin who had taken the Prophet's own sword and attempted to strike him, at which point the Prophet woke up and questioned the man, but then pardoned him and let him go."[7]

According to another report, on the authority of 'Abd Allah ibn Mas'ud, the Prophet was wounded by an enemy soldier in the Battle of Uhud and was wiping blood from his face while also uttering the words: "O my Lord! Forgive my people, for they do not know-" the very same prayer that was once uttered by the Prophet Noah.[8] Similar other reports have been narrated by the Prophet's widow, 'A'ishah, to the effect that the Prophet often granted pardon to people who wronged him, and in addition would pray to God to guide them to the right path.[9]

Amnesty and Repentance: the *Hudud* Crimes

Repentance (*tawbah*) and amnesty are logically connected, as amnesty is usually due when the offender shows remorse and repents. Muslim jurists have thus discussed amnesty and repentance in the context of *hudud* penalties (note that *hadd* and its plural *hudud* are used for prescribed crimes and punishments both) and *qisas* (just retaliation). I shall begin with the *hudud* and address *qisas* separately below.

It will be noted that *hudud* consist of two main components, namely the Right of God (*haqq Allah*) and Right of Man (*haqq al-adami*), or a combination of the two. The legal consequences of amnesty vary according to the manner in which it relates respectively to infringement of the Right of Man, or private right, and the Right of God, or public right. Juristic views vary on which of the *hudud* crimes consist of each of these rights and in what proportions.

Amnesty is permissible, even recommended, in the case of exclusively private rights. When rights of this kind are violated, as in cases of personal debt and ownership rights, the right to just retaliation (*qisas*) and preemption (*shuf'a*),[10] the right bearer may grant forgiveness at his discretion, and is in some cases encouraged to consider granting it.

Hudud are held to be fixed and mandatory penalties that consist of public rights violations wherein amnesty plays a minimal role if at all. Neither the individuals nor the authorities are vested with powers to grant amnesty over the *hudud* crimes, especially after the offence in question has been duly reported to the authorities. The victim of *hudud*, if still alive, and his or her guardian (*wali*) in the event of the victim's death, have no recognised right to grant amnesty.[11] Government authorities cannot be selective in the enforcement of *hudud* either: to enforce them in some cases and omit them in others. The government has a duty to enforce the *hudud*, just as is the case with the administration of justice, and enforcement of people's rights. It is an act of merit and sacred service (*'ibadah*) for everyone to facilitate the same, just as is the case with giving testimony in the cause of justice. Government leaders are themselves liable to *hudud* without any prerogative or discrimination - if they commit the offence. A reference is made in this connection to the Prophet's renowned Farewell Speech (*hajjat al-wida'*), and instances even before then, wherein he asked the people if he had punished, verbally abused or hurt anyone, or taken anyone's property, they may retaliate and claim what is due to them.

There are differences of detail among jurists as to whether all or only some of the six or so *hudud* crimes belong to the Right of God category. They have disagreed, for instance, over slanderous accusation (*qadhf*), being one of the *hudud* offences, as to whether this actually belongs to the private or the public

rights category. The majority of jurists have considered *qadhf* to combine both, but they differ again as to which constitutes the greater part. The majority seem to have considered *qadhf* to consist predominantly of a private right, and consequently entitle the victim of this offence to pardoning the offender.

An issue arising is whether repentance does in any way impact the question of punishment, and whether it begets amnesty and if so under what circumstances. With the exception of the Hanafis who hold that amnesty may not be granted on any ground in the hudud offences of adultery, intoxication, and theft (thus leaving out wine drinking, slanderous accusation and apostasy) - the other schools have held different views even on the latter three offences. There is consensus, on the other hand, on the permissibility of both repentance and amnesty in hudud before they are reported to the authorities and the offender has shown remorse. This position extends to a thief who repents and returns the property to its owner before it is reported to the authorities. On this even the Hanafis agree that repentance may beget amnesty as there would basically be no case to warrant prosecution and punishment.

The issue of repentance in two of the *hudud* crimes, namely apostasy (*riddah*) and highway robbery (*hirabah*) is especially debated. With regard to *hirabah*, if it does not involve loss of life and property and the offender surrenders himself to the authorities prior to subjugation and arrest, amnesty is permissible by the clear text of the Qur'an (Q al-Ma'idah, 5: 34). This long verse assigns specific penalties ranging from crucifixion, mutilation of limbs, and exile for convicted criminals depending on the involvement or otherwise of terrorism, loss of life and property - the text then provides: "except for those who repent prior to subjugation. Know that God is Forgiving, Most Merciful." The text not only permits repentance in what is evidently the most severe of punishments for any crime available in the Qur'an, but also refers to God's unbounded mercy and forgiveness. Then it is argued: if God the Most High opens the door to repentance and amnesty in this case, one may extend the spirit of this flexibility, as Abu Zahrah (d. 1974) has observed, to all the other *hudud* offences. Added to this analysis is the case of Ma'iz bin Malik, who came to the Prophet and made a confession of his act of *zina* and requested to be punished - notwithstanding the Prophet's repeated intimations that Ma'iz may have erred and may want to withdraw his confession, Ma'iz repeated his confession and was consequently stoned to death. But when this was reported back to the Prophet, he asked: "did they not let him go- *ala taraktumuhu*," as he had sincerely repented. This is also in line with the overall juristic position on the issue: when the thieves or wine drinkers confess and repent prior to punishment, they may be granted amnesty in so far as the Right of God/ public right aspect of the offence is concerned, but they are still accountable for violation of the private right therein. The question as to whether repentance is

genuine is normally ascertained in the case of theft when the thief returns the stolen goods to its owner, and also if the drunken person amends any harm he might have inflicted on someone's person or property. As for a Muslim who renounces Islam, then repents and embraces the faith again, he is also to be exonerated.[12]

There is disagreement, however, with regard to inchoate crimes. Muslim jurists have recorded three different views as to whether repentance prior to completion in *hudud* offences is admissible and whether amnesty may be granted on its basis:

1. Some Shafi'i and Hanbali jurists have referred to the Qur'anic text on highway robbery which clearly admits repentance prior to subjugation, adding further that explicit references to repentance are also found in Qur'anic verses on theft and adultery respectively (i.e. Q 5:39 & 4:16). On a broader note, they have held that repentance suspends punishment prior to arrest and prosecution in those of the *hudud* crimes which consist predominantly of public right/ *haqq* Allah, such as adultery and wine drinking, but not in crimes such as qisas, battery and bodily injury which belong for the most part to the private rights category. It is further stated that the sincerity of repentance must be proven by corrective action and a clean record of avoidance. This last would, in turn, require a waiting period, which is why some jurists have viewed it as a delaying factor that cannot be known at the material time – hence recommending its omission.[13]
2. Imams Malik (d. 795 CE), Abu Hanifah (d. 767 CE) and some jurists in the Shafi'i and Hanbali schools, maintain that repentance does not exonerate the offender from *hudud* punishments, except in the case of the highway robbery by virtue of a clear text. With regard to the *hadd* of adultery, it is added that notwithstanding Ma'iz bin Malik's confession, the Prophet, pbuh, still authorised execution of punishment. Hence the highway robbery is to be treated as *sui generis*, and not made the basis of any analogy. That the Qur'anic verses on adultery and theft too impose punishments in general and unqualified terms, whether the offender repents or not -hence they are all liable to the same punishments regardless of repentance. The proponents of this view have further questioned the analogy between *hirabah* and other *hudud* crimes saying that the Qur'an made an exception for perpetrators of this crime as they are usually terrorists whose arrest and subjugation may be difficult, but that this is not the case in other *hudud* offences. Moreover, suspending punishment because of repentance is likely to interfere with the rule of law and entice criminals to baseless repentance. In conclusion, the offender's repentance prior to completion of crime is neither a basis for pardoning nor for suspension of punishment.[14]

3. Ibn Taymiyyah (d. 1327 CE) and his prominent disciple, Ibn Qayyim al-Jawziyyah, of the Hanbali school have held: just as punishment cleanses the transgressor, so does repentance prior to completion of his crime. The public rights aspect of the offence in question is accordingly open to amnesty by the authorities, but not the part that pertains to private rights.[15]

The general position in modern law is that repentance by the offender does not exonerate him from punishment, except for some countries such as Egypt and France, which exonerate the criminal that abandons the crime before completion. This is in line with the view taken by some Muslim jurists as reviewed above. In common law jurisdictions, including Britain and India, an inchoate crime does not necessarily invoke amnesty.[16]

Abu Zahrah has discussed the various views on the admissibility or otherwise of repentance and grant of amnesty on its basis and wrote that there are clearly differences of opinion. In response to a question whether repentance even after arrest and adjudication can be the basis of amnesty, Abu Zahrah says that some of the views are based on questionable interpretations, especially over what the Prophet, pbuh, has said concerning the case of Ma'iz. That some of "their own reasoning point to the credibility of repentance even after adjudication, and even at the point of enforcement. The truth is that the Prophet has considered this (i.e. repentance prior to enforcement) as a revocation of confession (*ruju' fi'l-iqrar*)."[17] He then quotes Abu'l-Hasan al-Mawardi (d.450/1058), a Shafi'i jurist and author of *Kitab al-Ahkam al-Sultaniyyah*, who wrote that repentance is only admissible prior to arrest and adjudication. Then he quotes the Hanbali scholar and contemporary of al-Mawardi, Abu Ya'la al-Farra, who wrote in turn:

> If the adulterer repents prior to subjugation, the *hadd* punishment is to be suspended, and this is the case also regarding the thief and highway robber/terrorist, both of whose cases are so mandated in the text of the Qur'an. Abi'l-Harith thus narrated from (Imam) Ibn Hanbal (d. 869 CE) that when the thief repents prior to subjugation, the punishment of mutilation is suspended. Al-Maymuni has also narrated from Ibn Hanbal on two separate occasions concerning the adulterer, concerning whom he (Ibn Hanbal) said on one occasion: when he confesses four times before the *hadd* is enforced, his repentance is admitted and the *hadd* is consequently suspended. Maymuni added that he spoke to Ibn Hanbal in another meeting and he said: if he revokes his earlier confession, the stoning punishment is suspended.[18]

This view can hardly be ignored, notwithstanding the majority position that does not allow space for repentance and amnesty in *zina*. A holistic reading of the text clearly rises above many of these juristic stipulations. To quote the Qur'an on adultery:

> As for the adulterer, man and woman, flog each of them a hundred lashes, and let not compassion move you away from carrying God's law, if you believe in God and the last day … and those who accuse chaste women and fail to produce four witnesses, flog them eighty lashes and do not accept their testimony ever after, for they indeed are evildoers (*fasiqun*). Except for those who repent thereafter and reform themselves (*illal-ladhina tabu min ba'di dhalika wa aslahu*). Then God is Forgiving, Most Merciful. (Q al-Nur, 24: 2-6)

Some commentators have raised questions about the precise implications in this verse of the pronoun *al-ladhina* (except for those) whether the reference is to slanderous accusers, or to evildoers (*fasiqun*) in general, and whether the adulterer can also be included among those who may be allowed to repent. Whatever the nature of that debate may be, it would appear that fasiqun only describes the preceding offenders and does not introduce a new, independent and rather ambiguous category as such. I now quote the verse of theft:

> As for the thief, male or female, cut off their hands as retribution for their deed, and punishment from God as a deterrent. And (remember) God is Most Mighty, Most Wise. But whoever repents after his crime and mends his ways (*fa-man taba min ba'd-e zulmihi was aslaha*), God pardons him. For God is Forgiving, Most Merciful. (Q al-Ma'idah, 5:38-39)

The uninterrupted sequence of this verse is self-evident, there being no other subject in between: theft, its punishment, God's Power, repentance, pardon, God's Pardon and Mercy.

Based on the general principle, in both the Islamic and modern law, that criminal legislation should be interpreted in favour of the accused and on the side of leniency, it is submitted that all of the preceding categories of offenders are included in God's mercy and pardon and thus afforded the opportunity, on a selective basis at least, to repent and reform themselves. For otherwise the repeated Qur'anic emphasis on this theme would have been relegated to moral teaching. The *hudud* are clearly not treated as moral precepts alone. In sum, the verses under review explicitly extend the prospects of repentance and pardon to four of the *hudud* offences: adultery, slanderous accusation, theft - as well as highway robbery. On the subject of adultery, elsewhere the Qur'an again provides:

> If the two of them are guilty of lewdness, punish them both. If they repent and correct themselves (*fa-in tabaa wa aslahaa*), leave them alone (*fa'ridu 'anhuma*). For Allah is oft-Returning, Most Merciful (Q al-Nisa': 4:15-16).

Unlike the somewhat obscure view that this verse has been abrogated, Abu Zahrah refutes the suggestion, saying that the text before us is perspicuous (*muhkam*) and it is not, as such, amenable to abrogation in the first place.[19]

Abu Zahrah's analysis is sound. Even though he falls short of taking some of his points to their logical conclusions, he has given sufficient indication that repentance and pardon need not be put under too many restrictions, simply because the Qur'an and Sunnah do not sustain them.

Tawbah (repentance, atonement and self-correction) is a major theme of the Qur'an occurring in over 120 places in the Holy Book, and much emphasis on it is also found in the Sunnah, which are undoubtedly reflective of Islam's essence of forgiveness, without compromising on the rule of law aspect of combating lawlessness and crime. Only with regard to terrorists and highway bandits is there a limitation in the text as already reviewed. The wider implications of that verse regarding other *hudud* penalties have also been seen in two different ways, one in favour of repentance and amnesty, even after subjugation and arrest, and the other against. As already mentioned, textual interpretation on penalties should be on the side of leniency whenever the text can accommodate such, as is indicated in the following hadith:

> 'A'ishah reported that the Prophet, pbuh, said: "suspend the punishments whenever there is doubt (*idra'u al-hududa bi'l-shubhat* – note that *hudud* at that time was used in reference to all punishments, not to *hudud* alone as this expression acquired a technical meaning much later) and find a way out of them for Muslims whenever you can. If the Imam errs, it is better that he errs on the side of amnesty rather than punishment.[20]

The present writer has elsewhere discussed repentance in the Qur'an with a view to integrating it into the theory of *hudud* in a wider study. I have advanced the view that when reformation and repentance are so integrated, then one must depart from the notion that *hudud* are fixed and mandatory penalties over which the judge, the head of state and *mujtahid* have no role other than enforcing them upon proof. For juristic stricture that characterises the *hudud* discourse in *fiqh* has made the *hudud* difficult to implement, in the past as also in our own time. Due to severity of some of the punishments involved, judges and prosecutors are generally reluctant to enforce them. But improvement is possible if one were to open the *hudud* to reasonable levels of interpretation and *ijtihad* that can be sustained by the textual evidence.[21] I have discussed this elsewhere and referred in this connection to a letter that Abu Yusuf (d. 182/798), the then chief justice, wrote to the Abbasid caliph, Harun al-Rashid, in such terms as "if you would order that the *hudud* should be enforced (fully) it would help reducing the prison

population, frighten the transgressors and prevent crime."[22] The letter indicates that judges had problem with the enforcement of *hudud* even at that time.

Some of the *fiqh* positions are also debatable. For instance, Abu Zahrah has found inconsistency in Imam Shafi'i's (d. 820 CE) reported rulings, as different versions, some affirmative and some negative, have been recorded by the Shafi'i school. Having looked into them, he writes: "we are inclined to conclude that the affirmative view (on admissibility of repentance) is the preferred position of Imam Shafi'i."[23] That this is the correct position of the Shafi'i, Hanbali and other schools of *fiqh* is further supported by the hadith: "One who repents from a sin is like the one who has committed none."[24] It follows therefore that sincere repentance in some crimes at least, removes the stain and the person is no longer guilty, hence not liable to punishment either.[25] Added to this are the Qur'anic verses on theft, slander, adultery and *hirabah*, which are explicit on the admissibility of repentance.

As for apostasy, there is a minority opinion that it is not a *hadd* but a *ta'zir* offence.[26] The majority considers apostasy to be a *hadd*, yet they permit repentance after the sentence has been passed but before execution. The offender may repent during this interval, and if so, amnesty may be granted by the authorities.

Textbook writers are almost unanimous on the following three conditions a valid repentance must qualify: 1) it must be indicative of remorse over what has happened; 2) it must be expressive of determination not to repeat the conduct in question; and 3) that there is no actual recurrence. Yet it is added that the first two are mental conditions that are hard to prove by evidence. All that one can do is to scrutinise the veracity of the statement the accused person makes before the court. As for the third condition, this too is difficult to ascertain as it involves future projection. There is general agreement, however, that *hadd* punishment is suspended concerning an offender who sets a clean record, after a duly recorded repentance "for a long period of time." Imam Abu Hanifah and his disciples have held that expiry of a long time suspends the *hadd* punishment, whether before or after reporting, and even regardless of repentance. The other schools stipulate, however, that repentance suspends the *hadd* only before the offence is reported to the authorities, and some have said even after that, and that repentance is valid if followed by a long clean period. "A judicial repentance – *al-tawbah al-qada'iyyah* - verifies the truth of repentance upon expiry of six months, some just mention 'a long time' in which the person concerned stays clear of repetition."[27] With regard to the thief, a good sign of the truth of his repentance is the return of stolen goods to its owner prior to arrest and prosecution.

Siyasah and *Ta'zir*

Islamic criminal justice is only partially regulated by the clear text, which obtains mainly with regard to *hudud* crimes and *qisas*, but the much larger area of crimes and penalties has been, through much of the Islamic history, regulated by state laws and ordinances that broadly fell under the rubric of *Shariah*-oriented policy, or *siyasah*, which subsumed, in turn, the deterrent yet unquantified punishment of *ta'zir*. Measures introduced by way of *siyasah* must address issues and problems as they arise in a way, however, that combine various influences, including the higher purposes of Shariah (*maqasid al-shariah*).[28] Questions also arise as to the philosophical viewpoint and attitude taken toward punishment, including retaliation, reform, and the possibility also of amnesty to individuals and groups, especially in the context of post-conflict justice. Whether a legal punishment is to be carried out against a repentant, first time offender, and a non-repentant recidivist alike, and how should one be bound by issues of legality while facing the larger concerns of peace and normal order in a fragile environment such as now prevails in Afghanistan, Iraq, and many other places – underscore the importance of the Islamic public law principle of *siyasah*. For *siyasah* empowers the authorities to act in accordance with the spirit and objectives of Shariah at the expense even of a certain departure from scholastic interpretations and *ijtihad*.[29]

Note the concern also over the *hudud*, as one observer put it, that they "are nowhere fully enforced in the Muslim world. This fact demonstrates that an update of the criminal justice system in Islam is one of the major challenges that need to be taken up by Muslim opinion leaders and governments."[30] *Hudud* lie at the core of the Islamic criminal justice and cannot as such be marginalised, yet judicial practice is varied over them such that they are by and large replaced by other punishments, especially imprisonment, which may be seen as instances generally of *ta'zir*.[31] There has been renewed interest in recent decades over the implementation of *hudud* laws in some Muslim countries, such as the Islamic Republics of Pakistan and Iran, the Sudan, Nigeria and elsewhere, but the practice of *hudud* is on the whole partial and inconsistent. The state authorities in most of the Muslim countries tend to shy away from regulating the *hudud* in a systematic way that could address issued faced by the judges and prosecutors. Other factors in this picture are the contemporary human rights discourse and Western opinion that have taken issue with the *hudud* penalties. One may add to this analysis an evolving trend since the tumultuous events of September 2001 and that now gives the *hudud* a different dimension, namely the unprecedented increase of terrorism and violence, suicide bombing, drone attacks and state terrorism. Post conflict justice does not escape the suspicion that war lords and criminals take high positions and become influential in government. The state itself is sometimes

seen as complicit to crime – hence a fresh demand for the restoration of *hudud* laws that are known to be more resolute and less dependent on the vicissitudes of politics and divergent demands of questionable interest groups.

Ta'zir is basically an open-ended category that extends to almost all other punishments outside the *hudud* and *qisas* wherein the judge and head of state may exercise discretion in determining a deterrent punishment for an offence in light of the circumstances surrounding the case and conditions of the offender- or else to grant amnesty if they deem it to be the best course of action. There is general consensus on this, but disagreement is recorded as to whether such discretionary powers exist with regard to all *ta'zir* offences. Thus it is said that when a *hadd* punishment is reduced to *ta'zir* due to some deficiency in its proof or other material aspects of the offence – it would be exceptional and the authorities may not grant amnesty over it.[32] As already noted, *ta'zir* is a sub-theme of *siyasah*, which vests the authorities with discretion in punishments and court procedures. But even in *ta'zir*, it may be added that the judge does not create the offence but only a suitable punishment for a behaviour type which is held to be a transgression (*ma'siyah*), or denounced in some way in the Qur'an, Sunnah and general consensus.[33]

Amnesty in *Qisas* (Just Retaliation)

Literally *qisas* means equivalence, implying that a person who has committed murder, manslaughter or bodily injury, will be punished in the same way, in the same proportion and by the same means as he employed in killing or injuring his victim. Ascertaining this degree of equivalence and proportionality is not always possible, such as in the case of a broken bone, in which case a suitable substitute is to be applied. If the offender is a minor or insane, there shall be no *qisas* but only the payment of blood money (*diyyah*), which according to the majority, is payable by the family of the offender. An exception to the rules of equivalence is also made for the father: If the father kills his son, he is not liable to retaliation but a deterrent punishment (*ta'zir*) only. As a general rule, the death of the offender himself removes all claims, and all proceedings shall cease, except for any loss of property, or outstanding debts, which are normally inherited by the heirs of the offender.[34]

Qisas must be carried out in the least painful manner. Equivalence naturally means that a person may not inflict a harm greater than was inflicted on him. *Qisas* is the principal punishment for murder, whereas payment of blood money (*diyyah*)[35] is the principal punishment of unintentional killing and culpable homicide. *Diyyah* may also be payable in murder cases in which the relatives of the victim pardon the killer from execution and choose to receive a compensation.

Diyyah is payable by the criminal himself, or by his agnatic relatives.[36] Muslim jurists are in agreement over the permissibility of amnesty in *qisas* based on the following Qur'anic address to the believers:

> Retaliation is prescribed for you in all cases of murder, but if remission/ pardon is made to one by his (aggrieved) brother, prosecution (for blood money) should be according to usage and payment in fairness. This is an alleviation and mercy from your Lord. But anyone who resorts to aggression after that shall bring upon himself a painful punishment (Q al-Baqarah, 2: 178-179).

Pardoning by the next of kin in *qisas* cases may seem eminently suitable in certain family conflicts: in a case, for instance, where retribution can only add to the agony of the next of kin who is also the surviving relative. Supposing a man is slayed by his own brother, and the father, who is entitled to ask for *qisas*, now finds himself in a sorry predicament of having to lose his only other surviving son. Then it would seem that pardoning offers a preferable course. A case also arose of a murder during the time of the caliph ʻUmar al-Khattab wherein the deceased person's relatives requested *qisas*. Then came the wife of the murderer who was also the deceased person's sister and entitled to grant a pardon. She voluntarily declared that she wished to pardon the killer, and the caliph saved the murderer from execution as a result. The woman found herself in a situation of having lost her brother and then about to lose her husband as well.[37]

The law of *qisas* is premised on total equality, and thus applies in all cases of murder regardless as to whether the victim is a child, insane, elderly or ill, male or female. The principle of life for life is the essence of equality in *qisas* law. *Qisas* has two components that involve public and private rights, of which the latter is predominant, as it is the right of the family and close relatives of the victim and only they are entitled to grant a pardon over it.[38] But even when the crime victim or his next of kin grant a pardon, the public right aspect of *qisas*, be it in homicide or bodily injuries still remains and it is for the public authority to grant it if the public interest so dictates. The head of state, judge, and public prosecutor/ attorney general have no powers to grant amnesty over a private right in *qisas* itself or its monetary substitute, the *diyyah*. Even when the victim or his relatives grant a pardon, it does not in any way derogate from the government's power of amnesty or prosecution over the public right aspect of *qisas*, which has obvious implications for peace and public order, and the punishment so imposed partakes in *ta'zir*. There is disagreement on the maximum limits of a *ta'zir* punishment. Whereas the Hanafi and Shafiʻi schools maintain that it should not in any category exceed the *hadd* punishment, the Maliki and Hanbali schools maintain, on the other hand, that *ta'zir* may, in exceptional cases, include death punishment.[39]

The crime victim or his family's right to pardoning is thus limited to punishment, but not to crime as such. In the event even when the victim or his relative specifically pardon crime and punishment both, it would only relate to the punishment but not the crime. For had the right-bearer of private right the authority to exonerate the offender from both the punishment and crime, there will remain nothing for further intervention by head of state or Attorney General in respect of imposing a punishment on account of the public right violation of the offence.[40] Applying the *qisas* law is problematic under modern law wherein the government itself, or its Attorney General, represents the public rights aspect of the offences. Modern criminal law is generally not in tune with the *fiqh* division of rights into the binary categories of Right of God and Right of Man (*haqq Allah*, and *haqq al-cabd*). Departures from the *fiqh* provisions to a different regime of laws began with emergence of the modern nation state. Whereas the said division was premised on the prominent role of tribe and family in criminal justice, that role was no longer recognised in a system of criminal law that had departed from the *fiqh* premises. The family unit, especially the agnatic relatives were previously responsible for payment of *diyyah* in the event of pardoning or reconciliation. Some of those roles also became exposed to new questions in view of the availability, under modern law, of pension rights, life insurance plans and so forth.

Fiqh scholars of all *madhhabs* have spoken on the virtues of *'afwa* as an act of great merit simply because the Qur'an declares it so: "But he who grants a pardon, it shall be an expiation (*kaffarah*) for him." (Q al-Ma'idah, 5:45, see also Q al-Baqarah, 2:178 as reviewed above).[41] In a similar vein, the Prophet's Companions, Anas bin Malik, has reported the following: "No case of *qisas* came before the Prophet, pbuh, wherein he did not advise the grant of pardon."[42] What it means is that the Prophet was strongly inclined towards pardoning in *qisas*, but not always, especially when the enormity of crime dictated a firm response. Given in illustration for this was the renowned case of a Jew who had killed his female slave by placing her head between two rocks and crushed it. When the case came to the Prophet, the heinousness of that killing convinced him that pardoning would only mean condoning cruelty. The man was thus executed in line with the spirit of the Qur'anic dictum: "and there is life for you in qisas, O people of understanding - so that you can protect yourselves against aggression."(Q al-Baqarah, 2:179).[43]

Pardoning in *qisas* can promote a good cause when the killer acts in haste and anger and then shows remorse. Ibn Taymiyyah has thus observed that the Qur'an designates pardoning as a form of *ihsan* (beauty and goodness- as in 2:178) provided that no one is harmed by it, but if harm were to arise from pardoning, then it is unlawful.[44] The Maliki school has upheld the permissibility

of pardon except in the case of *al-ghilah*, which is to slay for the sake of taking the victim's wealth. For this would partake in terrorism/hirabah, and when the terrorist/*muharib* kills in that way, he must be executed and no room for pardoning remains. The terrorist is killed in this case, not by way of *qisas*, but as a prescribed *hadd* crime wherein the authorities have no choice but to protect the community against crime and corruption (*fasad fi'l-ard*).

When a pardon is duly granted, all hostility must cease. This is the clear ruling of the following hadith:

> One who is victim of death or injury has one of the three options, and if he opts for a fourth, he must be grabbed by the hand (and stopped): to retaliate, or forgive, or take blood money. One who does other than these indulges in excess and will suffer the torment of Hell forever.[45]

The main message of this hadith is on cessation of hostility: when solution to a conflict has been found and agreed upon, whether through pardoning, financial compensation or punishment, from that point onwards, all hostility must cease. This is relevant to post-conflict justice in that all parties concerned in homicide and crimes of violence should try to reach a settlement and then cease all hostility as of that time. The Shariah provision on blood money or *diyyah* can also be gainfully applied as a means of settlement in post-conflict situations. This may be an agreed upon sum, or one that is now specified in some laws, such as in Pakistan, or by reference to life insurance practices. Barring exceptional cases where murder charges or crime against humanity can be successfully proven, most other instances of homicide are likely, in post-conflict situations, to be faced with difficulties of evidence and proof due to passage of time and involvement of a host of other factors. Attempts at reconciliation and negotiated settlements are more likely to boil down to a reduced charge of manslaughter, which can be settled on the basis either of compensation by way of *diyyah*, or amnesty based on admission of truth and repentance, whichever is deemed preferable under the circumstances.

Pardon and Reconciliation (*'Afwa* and *Sulh*) Distinguished

When the private right-bearer grants pardon in *qisas*, it is regarded as *'afwa* proper if he grants it without a consideration, but if he only waives his right to retaliation in favour of taking blood money, then it is arguably not a pardon, but a case of reconciliation (*sulh*). This is the view of Imams Malik and Abu Hanifah. The explanation is that the giving or taking of *diyyah* must be agreed by both parties, including the offender, and that turns it into an exercise in *sulh*. The effect is about the same as both pardon and reconciliation suspend *qisas* and certain other punishments too. Just as a pardon may be granted in *qisas*, it can also be in

granted respect of *diyyah*, regardless as to whether the *diyyah* in question is the primary punishment, as in manslaughter, or a substitute punishment that replaces the primary punishment, namely of *qisas* in murder.[46] Reconciliation in *qisas* is also valid for monetary compensation with or without a reference to *diyyah*, and for any amount based on agreement of the concerned parties. It may be for cash or kind, be it of the same kind as *diyyah* or otherwise, and whether prompt or deferred for a specified period - all variations are acceptable. For the next of kin has a right and is therefore entitled to waive it gratis or in exchange for compensation.

Whether it is *qisas* or *diyyah* or *sulh*, they do not take effect automatically but need to be proven beyond doubt in the court of justice and authorised by a valid judicial order. The manner in which *qisas* is carried is also subject to supervision of the relevant authorities, not by the individuals concerned, as there will be fear of excess and the Qur'an clearly enjoins moderation and equivalence. The relatives are thus given the power (*sultan*) to choose *qisas* but required in the meantime to: "Avoid going to excess (in retaliation) - Q al-Isra', 17:33."

The authority for *sulh* is provided in hadith as well as general consensus (*ijma'*). Text book writers quote the following hadith:

> One who intentionally slays another should be handed over to the next of kin of the deceased, who may decide to retaliate if they wish, or take a *diyyah*, or attempt reconciliation (*sulh*) and the compensation they take also belong to them.[47]

The only restriction regarding the amount that may be agreed upon in *sulh* is when the legal heirs include minor persons, in which case the agreed upon sum should not be less that the amount payable in *diyyah*. However, if reconciliation is reached over the amount of *diyyah*, not over *qisas* as such, then the amount should not exceed the maximum that is payable in *diyyah*. For this would be a case of unwarranted increase and considered as *riba* (usury), which is unlawful.[48] In juristic terms, *sulh* is a contract, which must fulfill three conditions: 1) that the agreed sum is clearly quantified such that precludes ambiguity and ignorance; 2) that it precludes non-halal substances such as alcohol; and 3) that it is not in respect of something that cannot be waived or alienated, such as someone else's share in inheritance.[49]

Reconciliation is encouraged as a method of conflict resolution among people, not only in respect of *qisas* and *diyyah* but in most other instances of conflict. The Qur'an thus describes reconciliation that brings peace as a better option generally (*was-sulhu khayr* - Q al-Nisa', 4:128); and provides in another place: "Truly the believers are brethren, so bring peace between your brothers - Q al-Hujurat, 49:10; see also al-Anfal, 8:1".[50] Reconciliation and compromise that facilitate peace and

removal of conflict is a Qur'anic principle that the *fiqh* texts have elaborated under arbitration (*tahkim*), and reconciliation and negotiated agreement (*sulh*), with or without supervision of the regular judiciary. These may also be attempted within or beyond the existing law of the land. For peace is not always a question of legalities and conformity to normal procedure, although these do often merit consideration. It is a question often of inspiring the human spirit to rise above counting and measuring, to the level of *ihsan*, magnanimity and forgiveness for a noble cause, which is peace, and saving of lives through putting an end to conflict, which could otherwise continue to cripple the lives of individuals and communities. It becomes an urgent calling of all peace-loving people, Muslims and non-Muslims alike, to support the cause of peace and facilitate its realisation through all legitimate means at their disposal.

Who Has the Right to Grant Pardon?

Should there be only one surviving heir to the deceased person, then the theory of *qisas* entitles him or her to exercise the rights both to retribution and pardoning. But when the deceased is survived by several relatives all of whom are adults, pardon can still be granted by them collectively. Issues arise, however, when some of them pardon and others do not and insist on *qisas*. In response to this, the Imams Abu Hanifah, Shafi'i and Ibn Hanbal have held that pardon even by some of the heirs suspends *qisas*, for a requirement of *qisas* is that it is demanded by all the surviving heirs without exception. When some of them pardon, this by itself introduces an element of *shubha* (doubt) and *qisas*, like the *hudud*, collapses in all cases of doubt- also because the Qur'an and Sunnah encourage amnesty and forgiveness, as in the verse: "And the recompense of an evil is an evil the like thereof, but one who forgives and reconciles, his reward is with God." (Q al-Shura, 42:40, see also Q al-Nahl, 16:126)

There are two variant reports on Imam Malik's position, one of which is that pardoning, like *qisas*, must be granted by all the surviving heirs, and that the pardon of some is not enough to suspend *qisas*. The other view is more detailed and draws a distinction between male agnatic relatives and others and weakens itself by the discriminatory treatment of some over others.[51] An issue also arises if some of the heirs are minor persons, then a question arises as to who is entitled to grant a pardon. Different views are recorded, some advise waiting until they attain majority, while others entitle their elder relatives/ guardians to represent them in pardoning. Another issue is also when some among the adult relatives are absent without known whereabouts – should one then wait for them all to be present. The preferred position does not advise delay and validates representation.[52]

In the case of bodily injury and loss of limbs, the right to pardon belongs to the victim of the crime himself, and there is general consensus over this. This is also the position in murder cases wherein the deceased person himself grants a pardon before he actually dies. The pardon is held to be valid, notwithstanding differences of opinion among jurists over details as to whether the pardon was for an injury or murder, the time interval, if any, the cause and effect sequence and so forth.[53]

The Shariah-ordained right of forgiveness by the victim or his relatives has a meaningful role in bringing conflicts to an end, especially in post-conflict situations. For it is the family and relatives of the deceased person who would most likely be pursuing the case. For the family to be vested with the right of pardon enhances their ability and standing in reconciliation efforts. When the purpose is to find ways to heal open wounds through forgiveness, benevolence and *ihsan*, recourse to the right of pardon add value to reconciliation efforts. This can be said perhaps with regard to post-conflict situations currently obtaining in Afghanistan, Iraq, Libya and Somalia where family involvement in reconciliation efforts can hardly be overestimated.

Expiry of Time (*al-Taqadum,* also *Murur al-Zaman*)

The issue before us is whether the right to reconciliation and grant of pardon, be it by the individual or government, expires, if at all, after a lapse of time in which no action is taken by any of the parties concerned. For lack of action over a long period is not only considered to introduce an element of doubt, but also affect reliability or otherwise of witnesses and other means of proof. Muslim jurists have recorded three different opinions on this:

The majority of Maliki, Shafi‘i and Hanbali jurists as well as the Zahiri and certain other early scholars maintain that the *hudud* and *qisas*, like all other rights, are not suspended by the passage of time. That neither the crime nor its punishment in *hudud* and *qisas* are liable to expiration however long the time may be, and due judicial process may be activated any time, although some jurists have held that the punishment of *shurb* (wine drinking) expires with time. The majority holds a different view, however, with regard to *ta‘zir* offences, which are subject to discretion of the authorities who may decide not to prosecute if they deem this to be in the public interest (*maslahah ‘ammah*). For the head of state/ Attorney General has powers in this area to grant amnesty with regard to either the punishment or crime or both, and this can be any time.

The second view is that of the Hanafi school, which concurs with the foregoing in regards to *qisas* and *diyyah*, slanderous accusation (*qadhf*) and theft, which are not liable to expiration. But the Hanafis hold that the remaining *hudud*

offences collapse and expire with the passage of time. They also hold that *ta'zir* punishments are all suspendable and may be dropped on grounds of taqadum, regardless of their type and means of proof, but that *hudud* offences other than *qadhf* are also suspendable if their proof consist of witnesses, but not if it is confession, except for the punishment of *shurb*.[54]

The third view is attributed to an early jurist, Ibn Abi Layla (d. 768 CE), who held that *taqadum* suspends punishments generally. Hence neither testimony nor confession is admissible regarding old crimes.[55]

There is, however, some ambiguity as to the length of time for *taqadum*. One view in the Hanafi school holds that it is up to the judicial authorities to determine it in light of relevant factors, as a fixed time is difficult to determine such that can suitably apply to all excuses and delaying factors. Muhammad ibn Hasan al-Shaybani (d. 813 CE) has, however, held it at six months, whereas a report attributed to Imam Abu Hanifah and his other disciple Abu Yusuf (d. 798 CE) held it to be one month.[56]

Having discussed the various views, 'Abd al-Qadir 'Awdah (d. 1954) draws the conclusion that the head of state is within his rights to determine time limits for acceptance or otherwise of the testimony of witnesses if this be the sole means of proof for the offence.[57] One may refer here briefly also to developments under Ottoman law on the subject of *taqadum* concerning three types of offences, namely of felony, misdemeanor, and violation respectively. A felony expires after ten years, a misdemeanor after three, and a violation after one year.[58] These time limits have also been upheld in some follow- up legislations in the Middle East and Asia. They seem generally sound, and often necessary to curb doubtful claims that prolong conflicts among people. Felony would subsume the *hudud* and *qisas*, whereas *ta'zir* may broadly fall under the other two classes of offences.

Taqadum is valid only when no attempt has been made by the party concerned to bring the case to the attention of the authorities, and also that lack of action is not due to fear of inviting adverse or hostile reaction from any quarters. Any attempt made to report the issue to the authorities will disrupt *taqadum* and that will then count as a new starting point.[59]

Taqadum evidently relates to post-conflict justice, as large scale conflicts that engulf countries such as Afghanistan, Iraq, Somalia and Libya etc., are most likely long term. Passage of time, lack of prosecution and court judgment could be, or alleged to be, due to uncertainties of the justice system in times of open conflict, which could well be a valid excuse. Lapse of time is, in any case, likely to affect aspects of evidence and proof, and strengthen to that extent the likelihood of reconciliation and compromise. It would be difficult, however, to speak of reconciliation if the guilty party/parties refuse to admit wrongdoing and refuse to seek forgiveness.

Conclusion

The twin objectives of this article had been to review the Islamic law provisions on amnesty and pardon as are expounded by its leading schools and scholars, and then also to explore the prospects of needed reform of some of its relevant provisions. This approach coincides with the binary concern of Islamic law for continuity and change, and Islamic jurisprudence provides a number of principles and formulas to facilitate them.

The Shariah is often characterised as a 'diversity within unity.' Diversity is due to a degree of flexibility and openness in the language of the text, especially of the Qur'an, to fresh interpretation and *ijtihad*. The unifying dimension of Shariah is manifested in its recognition of the overriding authority of *tawhid* (Divine Oneness, the Oneness of Being), and the principle of consensus (*ijma'*).[60] These and certain other principles of Islamic jurisprudence are accountable for the continued relevance of Shariah to the applied laws of Muslim countries to this day. Yet if it were to retain its vitality and relevance, the Shariah needs to be read side by side with the changing facets of social reality and the living conditions of people.

It is important to know the juristic details of *fiqh* and how Muslim scholars have tried to contextualise the source guidelines of Islam with their own conditions and realties. *Hudud* and *qisas* laws still constitute the mainstay of Islamic criminal law, and can hardly be dismissed altogether in the name of modernity and change, or of amnesty and reconciliation. Yet the realities of criminal justice system and that of the nation state that now prevail are indicative of discontinuity, in some respects at least, with the *fiqh* details of *hudud* and *qisas* – as I earlier explained. The prevalence of *taqlid* for many centuries and then of colonial rule disrupted the continuity of Shariah, scriptural interpretation and *ijtihad*. We are now left with a larger challenge in Afghanistan, Iraq and Libya as also in many other Muslim jurisdictions, of realising the right blend of statutory law of a western type and those of Islamic principles. But since realisation of human welfare, peace and normal order in society constitute the cardinal objectives (*maqasid*) of Shariah, all *bona fide* efforts that do not compromise the integrity of truth and justice and seek to put an end to conflict command Shariah validity. This presentation has addressed aspects of Islamic justice in regard to *hudud* and *qisas* and the place of amnesty and forgiveness therein, but realise in the meantime that legalities may need to be contextualised, even superseded, if one's *bona fide* efforts are likely to realise the higher objectives of Islam to end conflict, save people's lives, and restore peace.

I may end this presentation with a proposal for the formation of a truth and reconciliation commission (TRC) for Afghanistan, a country I have known best, and any other country that may find this proposal relevant and useful for

their purposes. The TRC should include non-partisan Afghans that comprise of Shariah and modern law experts, prominent academicians and peace negotiators from within Afghanistan and outside, current or former senior judges, and a representatives each from the parties to conflict with clean records, as well representatives from the UN and Organisation of Islamic Cooperation (OIC). A set of guidelines and procedures should be drafted and approved by parliament and the head of state. There should be timelines and carefully regulated phases of progress for purposes of evaluation and measurement. The TRC may sit as an associate body of the Independent Human Rights Commission of Afghanistan, but should otherwise be totally independent. It should present its findings to the Supreme Court either to confirm and return the file to the TRC, or in the case of serious objections, to specify them and return it file to the TRC preferably within a month. The Supreme Court does not adjudicate otherwise, and the TRC itself decides on further action that leads to desired results - again within a specified period of time.

Notes

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** No distinction between "amnesty" and "pardon" is made in their meanings in this article since in Shariah law this distinction is also not made. Western jurisprudence does, however, reserves pardon for removal of punishment after adjudication whereas amnesty is not limited by this framework.

1. Wizarat al-Awqaf wa'l-Shu'un al-Islamiyyah, *al-Mawsu'ah al-Fiqhiyyah*, Kuwait, 1994/1414, Vol. 30, p. 168.
2. Ibid., pp. 20 & 167.
3. Wizarat al-Awqaf, *al-Mawsu'ah*, Vol.30, p. 167; Abu Bakar Jabir al-Jaza'iri, *Aysar al-Tafasir li-Kalam al-'Aliyy al-Kabir*, Jeddah: Rasim li'l-Di'ayah wa'l-I'lan, 1987/1407, Vol. 1, p. 316.
4. Muslim b. Hajjaj al-Nishapuri, *Mukhtasar Sahih Muslim*, ed. Muhammad Nasir al-Din al-Albani, 2nd ed., Beirut: Dar al-Maktab al-Islami, 1984/1404, p. 475, hadith no. 1790.
5. Cf., Hanan 'Atiyyah al-Juhni, "Dawr al-Walidayn fi Tanshi'at al-Abna' 'ala

Khuluq al-'Afwa," *Majallah Jami'ah Umm al-Qura li'l-'Ulum al-Tarbawiyyah wa'l-Nafsiyyah* (Saudi Arabia), Vol. 2, no. 2 (July 2010/Rajab 1431), 279.

6. Hadith on the authority of Jabir bin 'Abd Allah recorded in al-Bukhari, *Sahih al-Bukhari*, Cairo: Dar al-Hadith, 2004, 4 Vols., Vol. 2, hadith no. 2617 at p. 219.
7. Muhammad bin Isma'il al-Bukhari, *Sahih al-Bukhari*, Vol. 2, hadith no. 2910 at p. 305.
8. Ibid., Vol. 4, hadith no. 6929 at p. 314.
9. See for more reports Hanan 'Atiyyah al-Juhni, "Dawr al-Walidayn," pp. 260-61.
10. *Shuf'a* is the right of a neighbour giving him priority over other people to purchase an adjacent property when it is offered for sale.
11. Cf., 'Abd al-Qadir 'Awdah, *al-Tashri' al-Jina'i al-Islami Muqarinan b'l-Qanun al-Wad'I*, 2 Vols. 13th edn., Beirut: Muassasah al-Risalah, 1994/1415, Vol.1, p. 774.
12. See for details, Muhammad Abu Zahrah, *Al-Jarimah wa'l-'Uqubah fi'l-Fiqh al-Islami: al-'Uqubah*, Cairo: Dar al-Fikr al-'Arabi, 2006, pp. 226-227. See also 'Awdah, *al-Tashri' al-Jina'i al-Islami*, Vol. 1, p. 353.
13. Cf., 'Awdah, *al-Tashri' al-Jina'i al-Islami*, Vol. 1, p. 354.
14. Ibid., 354-55.
15. Ibid.
16. Cf., *'Awdah, al-Tashri'*, Vol. 1, 355.
17. Abu Zahrah, *al-'Uqubah*, p.231.
18. Abu Zahrah, *al-'Uqubah*, p. 231. Al-Mawardi and al-Farra's views also appear in Wizarat al-Awqaf, *Mawsu'ah Fiqhiyyah*, Vol. 30, pp. 185-186.
19. Abu Zahra, *al-'Uqubah*, p. 227. See also Kamali, *Punishment in Islamic Law*, pp. 56 & 59.
20. Abu 'Abd Allah al-Khatib al-Tabrizi, *Mishkat al-Masabih*, ed. Muhammad Nasir al-Din al-Albani, 2nd edn. Beirut: al-Maktab al-Islami, 1399/1979, Vol. II, p. 1061, hadith no. 3570. See also Abu Yusuf Ya'qub b. Ibrahim, Kitab al-Kharaj, 5th ed. Cairo, al-Matba'ah al-Salafiyyah, 1396/1976, p. 164. *Mishkat al-Masabih* is a select collection of hadith from the authoritative six collections, known as *al-sihah al-sittah*. See also on the expression *hudud*, Kamali, *Punishment in Islamic Law*, 45f.
21. See for details Mohammad Hashim Kamali, *Punishment in Islamic Law: an Enquiry into the Hudud Bill of Kelantan*, Kuala Lumpur: Institut Kajiian Dasar, 1994; reprint by Ilmiah Publishers of Kuala Lumpur, 2000, especially Section iii entitled "An analysis of *hadd* in the Qur'an, *Sunnah* and *fiqh*" (pp. 45-85) and IV entitled " the Philosophy of *hudud*" (pp. 85-90).
22. Abu Yusuf Yaʿqub Ibrahim, *Kitab al-Kharaj*, 5th edn., Cairo: al-Matbaʿah al-Salafiyyah, 1396, p. 163.
23. Abu Zahrah, *al-Jarimah*, p. 227. See also for a review of the scholastic positions, *Mawsu'ah Fiqhiyyah*, Vol. 30, p. 184f.
24. 'Abd Allah Muhammad b. Yaziz al-Qazwini, better known as Ibn Majah, *Sunan Ibn Majah*, 2nd ed., Beirut: Daral-Kutub al-'Ilmiyyah, 2004/1425, p. 689, hadith no. 4250.
25. Ibid., p.184. For a more detailed discussion of *hudud* and reform proposals on them see M H Kamali, *Punishment in Islamic Law*.
26. This is because *hadd* is by definition a crime for which the Qur'an or hadith

specifically prescribes a punishment. The Qur'an is silent on this but an *ahad* (solitary) hadith makes apostasy liable to capital punishment. The majority position of the legal schools on this issue is also not devoid of an element of uncertainty on the purport of the specific wordings of the relevant hadith. See for details Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Cambridge: Islamic Texts Society, 1997, pp. 212-250.

27. Abu Zahrah, *al-'Uqubah*, p. 233.
28. The *maqasid al-shari'ah* includes the safety and protection of human life and intellect, a normal order in society, protection of religion, private property and family. For details on *maqasid* see Kamali, *Shari'ah Law*, chapter 6, pp. 123-141 in the next note.
29. For details on *Siyasah* see Mohammad Hashim Kamali, *Shari'ah Law: an Introduction*, Oxford: Oneworld Publications, 2008, ch. 11: "Beyond the Shari'ah: an Analysis of Shari'ah-Oriented Policy (*Siyasah Shar'iyyah*)," 225-246.
30. Chawkat Moucarry, *The Search for Forgiveness: Pardon and Punishment in Islam and Christianity*, Leicester (UK): Inter-Varsity Press, 2004, p.282.
31. The precise number of *hudud* offences varies as to whether one includes apostasy (*iddah*) and wine drinking (*shrub*) in them or not, but the rest of the *hudud* consist of theft (*sariqah*), adultery (*zina*), slanderous accusation (*qadhf*) and highway robbery/terrorism (*hirabah*).
32. Cf., 'Awdah, *al-Tashri' al-Jina'i*, Vol.1, pp. 777 & 559-560.
33. See further details on the limitations of *ta'zir* Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, Cambridge: Islamic Texts Society, 2008, pp. 96-97. See for details on *Siyasah Shar'iyyah*, Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam*, Cambridge: Islamic Text Society, 2000, pp. 143-149, and on *ta'zir* as an aspect of *siyasah*, p. 149.
34. Cf., Kamali, *The Right to Life*, pp. 17-19; see also Cherif Bassiouni, edr., *The Islamic Criminal Justice System*, London & New York: Oceana Publications, 1982, p. 209.
35. The quantum of *diyyah* is determined at 100 camels or its monetary equivalent.
36. See for details Mohammad Hashim Kamali, *The Right to Life*, p. 12f.
37. Cf., Abu Zahrah, *al-'Uqubah*, pp. 483 & 485.
38. See for details Wizarat al-Awqaf, *Mawsu'ah Fiqhiyyah*, Vol. 30, p. 174f.
39. See for details Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2003 edn., pp. 364-65.
40. See for details, 'Awdah, *Al-Tashri' al-Jina'i*, Vol.1, p. 175f.
41. *Kaffarah* lit. means a concealer in that it can conceal and relieves the person from other sins.
42. This hadith is recorded in Abu Dawood, *Mukhtasar Sunan Abi Dawood*, ed. Mustafa Dib al-Bugha, Damascus: Dar al-'Ulum al-Insaniyyah, 1995/1416, hadith no. 4497 at p. 643. Abu Dawud has remained silent about (evaluating it) this hadith, whereas al-Shawkani who recorded it in his *Nayl al-Awtar* went on to say that there is no problem in its chain of transmitters (*isnad*). See Wizarat al-Awqaf, *Al-Mawsu'ah al-Fiqhiyyah*, Vol. 30, p. 174.
43. Case cited in Abu Zahrah, *al-'Uqubah*, p. 483. This hadith is also recorded by al-Bukhari, *The Translation of the Meaning of Sahih al-Bukhari*, tr. Muhammad

Muhsin Khan, 4th revised ed. Lahore: Kazi Publications, 1979, Vol. IX, hadith no. 23.

44. *Mawsu'ah Fiqhiyyah*, Ibid, Vol. 30, at 174.
45. Tabrizi, *Mishkat al-Masabih*, Vol. II, hadith no. 3477. See for further details, Kamali, *The Right to Life*, p. 18f.
46. Jamal al-Din Al-Zaylai, *Bahr al-Ra'iq*, Vol. 8, p. 300 as quoted in 'Awdah, *al-Tashri'*, Vol. 1, p. 776.
47. Hadith narrated by 'Amr ibn Shu'ayb from his father, from his grandfather, from the Prophet. See Ibn Muwaffaq al-Din Qudamah, *al-Mughni*, Cairo: Mutba'ah al-Manar, 1367H, Vol.9, p. 477; 'Awdah, *al-Tashri' al-Jina'i*, Vol. 1, p, 774.
48. Cf., 'Awdah, *al-Tashri' al-Jina'i*, Vol. 1, p. 774.
49. Cf., Abu Zahrah, *al-'Uqubah*, p. 492.
50. 'Ala al-Din al-Kasani, *Bada'i' al-Shara'i' fi Tartib al-Shara'i'*, Cairo: Matba'ah al-Istiqamah, 1956, Vol. 10, p. 4655. See also *Mawsu'ah Fiqhiyyah*, Vol. 30, p. 183.
51. Cf., Abu Zahrah, *al-'Uqubah*, p. 486.
52. Ibid, p. 487. See also *Mawsu'ah Fiqhiyyah*, Vol. 30, p. 177.
53. See for details, *Mawsu'ah Fiqhiyyah*, Vol. 30. pp. 177-182.
54. 'Awdah, *al-Tashri' al-Jina'i*, p. 781.
55. See for details Subhi Mahmassani, *al-Nazariyyah al-'Ammah li'l-Mojibat wa'l-'Uqud*, 3rd edn., Beirut: Dar al-'Ilm li'l-Malayin, 1983, p. 568.
56. Muhammad Amin Ibn 'Abidin, *Hashiyah Radd al-Mukhtar ila Durr al-Mukhtar*, also known as Hashiyah Ibn 'Abidin, Cairo: Dar al-Fikr, 1399/1979, Vol. 3, p. 218.
57. 'Awdah, *al-Tashri' al-Jina'i*, p. 781.
58. Mahmassani, *Al-Nazariyyah al-'Ammah*, p. 570.
59. See the *Ottoman Mejelle*, Articles 1661, 1662, and 1675 on the relevance of taqadum to property claims over usurpation and unlawful possession, also discussed in Mahmassani, *Nazariyyah*, p. 567f.
60. See for details on *Tawhid*, Kamali, *Shari'ah Law: An Introduction*, pp. 17-19. There is also a chapter on *ijma'* in Kamali, *Principles of Islamic Jurisprudence*, pp. 228-264.

ARTICLES

A NEW INSTITUTIONAL APPROACH IN EXPLAINING THE UNDERDEVELOPMENT OF ISLAMIC MICROFINANCE

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Abstract: The progress of Islamic microfinance is very slow despite the fact that mainstream Islamic finance has been growing marvellously. This paper explains the logic of underdeveloped Islamic microfinance, placing an emphasis on the supply side of funds. It argues that Islamic altruism appears to be dependent on reciprocity backed by mutual belief in the omnipotence and omniscience of the absolute power. Strong *reciprocity* however, may create a 'dilemma' - to be or not to be unconditional altruist - on the actors which might ironically drain the supply of funding to the poor. Evidence to support this hypothesis has been provided explaining some cases and other anecdotal facts. The research proposes that besides relying on actors' belief towards omnipotence and omniscience, appropriate safeguards against potential violation of co-operative and other Islamic social norms should be devised *ex ante*; otherwise Islamic microfinance is unlikely to thrive in the future.
Keywords: Islamic microfinance, reciprocity, cooperation, Islamic banks

1. Introduction

Islamic finance has been growing at a remarkable pace since its inception in the 1970s. According to Islamic financial services industry stability report 2014, assets with Islamic banks and Islamic banking windows grew at a compound annual growth rate of 40.3 percent between 2004 and 2011. Total asset of the industry estimated to be US$ 1.8 trillion as at end of 2013. Furthermore, it has been predicted that Islamic banking assets will experience an average growth rate of 19.7 percent per annum until 2018 (King, 2015). This marvellous growth of Islamic finance however, seems not to be contributing much to achieve the motto of financial inclusion towards financing unbanked and financially stranded segments of the population. Islamic financial institutions, besides their typical role of providing finance following *Shari'ah* principles, are also expected to make a positive contribution in poverty alleviation by fulfilling the socioeconomic objectives of 'social justice'

in accordance with the objectives of *Shari'ah*. In practice, mainstream Islamic financial institutions, like their conventional counterparts, are reluctant to provide finance to small and microenterprises. In this circumstance, Islamic microfinance can be a critical source of finance for those small entrepreneurs who are untouched by Islamic banking system and also shy in accepting finance from conventional microcredit providers who are dealing with interest.

An analysis on the demand and supply of Islamic microfinance reveals a yawning gap between them. Currently, there are 650 million Muslims living on less than $2 per day and majority of them prefer to be included under the umbrella of Islamic finance. For instance, a number of IFC-commissioned market studies in Afghanistan, Indonesia, Syria and Yemen suggests a strong demand for Islamic microfinance products: there are many Muslim clients who use conventional products but are ready to switch once Islamic finance is at their reach (Karim et al., 2008). Another survey referred by UNDP (2012) indicates that 80 percent of the Muslim respondents claimed to prefer Islamic products to conventional products, while 45 percent showed their preference even if cost of fund provided by Islamic microfinance is higher than conventional microfinance. The survey further shows that 85 percent of the current borrowers from conventional microfinance institutions (MFIs) admitted that they would switch to Islamic products if available. This provides with the evidence that the Muslim clients are concerned about Islamic financial products which aim to fulfil the socioeconomic objectives of social justice in accordance with the objectives of *Shari'ah*.

However, the overall supply of Islamic microfinance products is still quite small compared to the demand. An estimated 255 financial service providers worldwide offer *Shari'ah*-compliant microfinance products to approximately 1.28 million clients. Of them, approximately 82 percent reside in only three countries: Bangladesh, Sudan, and Indonesia. In Bangladesh, Islamic microfinance remains very small in comparison with the conventional one. As of 2007, the top 535 NGOs and MFIs distributed approximately US$ 10,690.86 million to 39 million beneficiaries of which Islamic MFIs represent only 1.26 percent (UNDP, 2012). In the context of Sudan, Eissa (2013) reports that except three state-owned banks, the disbursement of microcredit is negligible against the mounting demand for it. Khaled (2011) provides further evidence stating that even major microcredit institutions in Sudan have failed to reach beyond 10,000 active clients after 10 years in operation whereas their conventional counterparts are growing rampantly. The scenario is same in Indonesia as well. Karim et al. (2008) show that in 2006, Islamic financing instruments comprised only 2 percent of outstanding microfinance loans in Indonesia. In addition, the average outreach is merely 2,400 clients. The story is similar in other Muslim countries in the world. In Pakistan, for instance, there are 1,613 branches of the microfinance services to the poor

and the active borrowers are around 2 million (Arif and Farooq, 2011). Taking into account the magnitude of more than 45 million poor households, the level of micro-financial deepening is still low. Besides, the Pakistani Islamic banks - 6 licensed Islamic banks and 12 conventional banks with more than 330 branches operating as of 2007 - are not providing microfinance services. Though some non-bank Islamic institutions are providing the micro-credit services, their outreach is very limited in the country. In sum, the overall progress of Islamic microfinance is still very limited. This leads us to ask a host of important questions:

I. How can we explain the underdevelopment of Islamic microfinance?
II. Is there sufficient supply of funds available for Islamic MFIs like their conventional counterparts?
III. Despite Islamic tradition and teaching about social equality and justice, why Muslims hesitate to achieve these objectives through financing microenterprises?
IV. What needs to be done for a rigorous Islamic microfinance sector?

The paper attempts to answer these questions. In so doing, it draws the following hypotheses:

Hypothesis I: shortage of funds is the critical constraint to a thriving Islamic microfinance sector.

Hypothesis II: 'reciprocators' dilemma' - to be or not to be unconditional altruists for the poor - drains the supply of funding to the poor.

The above hypotheses are then tested analysing the liability side of Islamic microfinance institutions to unveil if there is any shortage of fund as a possible obstacle that inhibits the progress of the industry. In addition, the research draws on the theoretical contributions of the New Institutional Economics (NIE) and applies some of these contributions to analyse the logic of underdeveloped Islamic microfinance. The paper has been structured as follows: section two describes the concept of Islamic altruism citing various Qur'anic verses and Hadiths. This section also explains the idea that unconditional altruism can create the reciprocator's dilemma which can contribute to a slow growth of the sector. Section three highlights a case, Rural Development Scheme (RDS) of Bangladesh, to show the contribution of one of the largest Islamic microfinance providers towards financing poor Muslims. Section four connects the reality RDS to reciprocators' dilemma with the help of an analysis of stag hunting game. This is followed by a conclusion and policy recommendations.

2. Islamic altruism and reciprocity

Green traces the origin of the term "altruism" to August Comte who coined the

term in the nineteenth century from the Latin word "alter" which means "other" or "care for others". In commensuration with this concept, Green (2005) defines altruism as an intentional action which is undertaken for the welfare of others without expecting any benefits or in some cases the actor might suffer a loss. Homerin (2005) translates the Arabic word *Al-Ghayriah* from the word *Ghayr*, meaning "others". However, the Qur'anic meaning of *Ghayr* tends to indicate "others" in general although it includes the intention of favouring "others" than the self. Homerin (2005) further argues that the closest term to "altruism" in Arabic can be found in the Mediaeval Sufi term "*Ithar*" which means "preferring the other to the self" (Homerin, 2005:84). *Ithar* is used in the Qur'an to mean charity (Yosoff, 2014). Likewise, scholars endorse charity to indicate altruistic behaviours of agents (Khalil, 2004). Hammond (1975:115) clears the concept "… altruism can be invoked to explain any charitable behaviour we may observe. But it is not quite obvious that altruism must be invoked to explain all charitable behaviour." For Hammond (1975) other than pure altruism, some charities are driven by egoism - a condition in which the altruist believes that his current altruistic actions would return in the future while in need. Or in the view of Fong (2007) the former is unconditional altruism while the latter is reciprocal altruism. All these views conform to the idea that altruism can be equated with charity in the context of Islam.

Many scholars including Mawdudi (2011) and Naqvi (2003) point out that the Islamic right of the poor to receive their share in the wealth of the rich strengthens altruistic behaviour significantly in running efficiently and equitably an essentially individualistic economy. To begin with, we look at the 'altruism' of the *Madinah* Muslims, praised by Allah in the Qur'an, which was so great in its scope and impact:

> And (in this wealth there is also a share) for those (the Helpers) who had settled in the city (of *Madinah*) and had embraced the Faith before these (refugees arrived there). They love those who migrated to them for refuge and (who) even though poverty be their own lot, found no desire in their hearts for that which is given to them (refugees) but they gave them (refugees) preference over themselves. And (bear in mind that) those saved from the covetousness of their souls are the ones to achieve the goal (Qur'an 59: 9)[1].

In the Muslim society, there is the powerful concept of Allah's ownership of all wealth and that human beings are mere 'trustees' of this wealth (Qur'an 3:180, 57:10). As is summarised in Naqvi (2003: 105), what this means is that the individual's right to spend his wealth is limited in several ways: (a) he must spend it according to Divine wishes (Qur'an 57: 10), (b) he cannot hoard it, especially when

there are urgent social needs to be met (Qur'an 3: 180), (c) he must give it to the poor not as charity but as a matter of the latter's acknowledged right in his wealth (Qur'an 70: 24-25), and (d) he must spend wealth only in moderation because being spendthrift is both a social waste and a cardinal sin (Qur'an 17:26-27).

The Holy Qur'an further, unambiguously states that the poor have a due share in the wealth of the rich. Naqvi (2003) elaborates this notion in that "it is motivationally rational for a person to sacrifice his selfish interests because in Islam (a) "success" is measured in terms of one's distance from greed and avarice; or (b) making a sacrifice in this world enhances the expected reward in this world as well in the hereafter". In parallel, the role of *waqf* is emphasised as an important contributor to societies: *waqf* is considered as retention of a property for the benefit of a charitable or humanitarian objective, or for a specified group of people such as members of the donor's family. The global *waqf* will focus on three basic activities: on-going charity (*sadaqa jariyah*), education and family *waqfs* (Çizakça, 2011). On-going charity can be interpreted as a poverty alleviation mechanism. Qur'an postulates the virtue of spending in philanthropic motive:

> Never shall you attain the highest state of virtue unless you spend (in the cause of Allah) out of that which you love; and whatever you spend. Allah, indeed, knows it well (Qur'an 3:92).

The above discussion postulates that Islamic altruism for realising social and economic justice through eradicating poverty is comprehensive and greater in scope. For example, even the Rawlsian Difference principle which regulates inequality and explicitly requires the rich to help the poor on a priority basis "… does not include in the rich man's wealth the right of those who cannot participate in market exchange (Naqvi, 2003:107). Naqvi (2003:107) further notes "Western theological systems are generally ambiguous about recognising the poor's right". Moreover, in the tradition of western political philosophy, altruism itself depends on recognition of the reality of the other persons, and on the equivalent capacity to regard oneself as merely one individual among many (Nagel, 1970:3). In contrast, Islamic altruistic behaviour appears to depend on reciprocity backed by mutual belief in the omnipotence and omniscience of the absolute power. Furthermore, Qur'an's propagation about the poor's right in the wealth of the rich is a unique institutional structure which creates Islamic reciprocity and is helpful to supply the fund for those small and microenterprises that face difficulties in fund-raising.

We should note that, as is pointed out by Samuel Bowles, not only unconditional altruists but also 'strong reciprocators' may support redistribution to the poor. "Altruism is a widely discussed and important motive for assistance to the poor. But strong reciprocity provides a quite different perspective. Strong

reciprocators wish to help those who try to make it on their own but who, for reasons beyond their own control, cannot, and they wish to punish, or withhold assistance from, those who are able but unwilling to work hard or who violate other social norms" (Bowles, 2012: 145-6). Bowles refers to 'strong reciprocity' which is a propensity to co-operate and share with others similarly disposed, even at personal cost, and a willingness to punish those who violate co-operative and other social norms, even when punishing is personally costly and cannot be expected to result in net personal gains in the future (Bowles, 2012: 131). He refers to a report in which many people (81 percent of survey respondents in the report) favour public funding for child care if the mother is a widow who is trying to support three children, while only a few (only 15 percent in the report) favour public funding when the mother has never married and is not interested in working. Bowles is concerned about strong reciprocity as driving force of making people willingly help the poor, but withdraw support when they perceive that the poor may cheat or not try hard enough to be self-sufficient and morally upstanding. Or in other words, strong reciprocity while driving actors towards helping others responding to their social obligation is not ready to tolerate opportunistic behaviour of entrepreneurs.

The New Institutional Economics provides an important explanation in the question of opportunism and its complementary element, trust. The school argues that the risk of opportunism can be reduced by mutual trust (Williamson, 1985). Trust has been referred to as "attitudes and behaviour which indicate that each person is willing to rely on the other to act fairly and to take into account the other's welfare", as "solidarity", and as "a belief in future harmonious affirmative cooperation" (Cohen and Knetsch, 1992). Contract negotiations and performance will likely take place more effectively if trust is present and is generated by the process (Cohen and Knetsch, 1992). Fukuyama (1995), referring to what the sociologist James Coleman has called 'social capital', argues that the ability of people to work together for common purposes in groups and organisations and their ability to associate with each other depends on the degree to which communities share norms and values and are able to subordinate individual interests to those of larger groups. Trust evolves from these shared values (Fukuyama, 1995). One of the invaluable insights of Francis Fukuyama and Kenneth Arrow (1974) is that trust has a large and measurable economic value and has an important bearing on economic organization. "Ethical elements enter in some measure into every contract; without them, no market could function. There is an element of trust in every transaction; typically, one object of value changes hands before the other one does…" (Arrow, 1974: 24).

In general, opportunism in terms of pursuing self-interest with guile involves subtle forms of deceit and refers to the incomplete or distorted disclosure of

information, especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse (Williamson, 1985: 47). However, since operationalising trust, no matter how it is defined, has proved inordinately difficult (Williamson, 1985: 406), the empirical analysis of the variable is still limited. Arrow insists that the efficacy of alternative modes of contracting and monitoring would vary among cultures because of differences in trust. To some extent, cultural factors are related to the degree of trust relations. However, we would say that the degree of trust even in a particular culture or society could rather vary. "Most of us operate in some middle realm where we admit social claims, sometimes forget about them for long stretches of time as we go about our daily private role, sometimes rise to an occasion, sometimes fall miserably short, as we assert our individuality in contexts that are not totally appropriate" (Arrow, 1974).

From the Williamsonian 'opportunism' perspective, we may say that the cooperative mode of economic organisation, where trust and good intentions are generously imputed to the membership, has its weakness in being endowed with few organisational responses to the debilitating effects of *opportunism*. For Williamson (1985: 64-5), "such organisations are easily invaded and exploited by agents who do not possess those qualities". Transactions that are subject to *ex post* opportunism will benefit if appropriate safeguards can be devised *ex ante* (Williamson, 1985: 48). We should note that, in other words, if safeguards are not sufficiently devised ex ante, opportunism would possibly emerge as a troublesome source of behavioural uncertainty in economic transactions. While, Islamic altruism and reciprocity towards the poor may, in theory, contribute to facilitating Islamic microfinance, lack of information about the efforts and sincerity of agents is likely to inhibit the process in the same way. To some extent, microfinance is still seen as a philanthropic activity rather than a business enterprise because profit motive of microfinance is depressed by the fact that managing small transactions is intrinsically costly, while screening and monitoring microenterprises is extremely difficult.

We argue that a way out of this dilemma - to be or not to be altruistic in the context of Islamic microfinance - can be devising some mechanisms *ex-ante* that will create a sense of understanding that agents will not behave opportunistically. By the same token, Naqvi (2003) points out that public policy is required to assure the altruistic individual (one who is not inclined to free-ride) that his contribution will not go to waste and that others in society will not be allowed by the government to withhold their contributions.

> An excess insistence on altruism can create a permanent tension between what a Muslim society is required to do and what eventually gets done in practice. *Indeed, there is a real danger that if moral*

> *perfection is demanded at all times, then the entire social system will become dysfunctional for want of the required supply of altruism*. Thus, in general, appropriate public policy must keep a balance between self-interest behaviour and moral imperative because the principles of altruism and exchange are both mutually supportive as well as antithetical (Naqvi, 2003: 131).

From the Muslim perspective, there is no agency problem between the absolute existence as the principal and its followers (including fund providers, lenders and borrowers) as the agent, because the followers retain their firm belief in the omnipotence and omniscience of the absolute existence. As mentioned earlier, Islamic altruistic behaviour appears to depend on reciprocity backed by mutual belief (among the followers) in the omnipotence and omniscience of the absolute power. At the individual level, the prospect of accountability on the Day of Judgment would bring positive behavioral changes. However, the current-life problem in microfinance is ensued from the fact that nobody knows the judgment on the others; in other words, nobody on earth precisely knows the scale of spiritual belief of others on the Day of Judgment. Thus, Muslim principal (particularly fund providers) is exposed to higher agency risk and more so because the Muslim fund providers have the divine obligation to share risks in enterprise under the PLS scheme as well as to share a portion of income with the poor or the entrepreneurs who face difficulties in fund-raising. This altruistic or reciprocal behavior is always monitored by the absolute existence. This structure may cause a dilemma in the Muslim agents as well. Unless appropriate safeguards and rules for protecting the right of the principal can be devised *an ante*, it makes sense that potential moral hazard or possible opportunistic behavior in the agent (particularly borrowers) would make the principal (particularly fund providers) hesitate to share risks in enterprise if he/she is not unconditional altruist. At present such safeguards in this purpose are rare. As a consequence Islamic microfinance is still underdeveloped. The following case reveals this scenario highlighting the problems of scarcity funds.

3. The Case of Rural Development Scheme in Bangladesh

Bangladesh is a poverty stricken country where majority of the population lives in abject poverty. Poverty eradication is the primary focus of the country's socio-economic and political agenda. The evolution of microfinance in Bangladesh is the result of this strategy. In other words, Bangladesh can be viewed as the synonym for microcredit due to the sector's rapid expansion over the last few decades. Basically two direct channels are providing microcredit in Bangladesh

- microfinance institutions (MFIs) which are the main direct providers and non-government organizations (NGOs), and apex lenders including bank and non-bank financial institutions. As of June 2013, total loan outstanding of microcredit institutions amounted to Bangladeshi Taka (BDT, the currency of Bangladesh) 341 billion and savings BDT 226 billion. The total client base of the sector is estimated to be 33 million. Total loan outstanding of the sector grew at an average 16 percent annually from 2009 to 2013 whereas savings increased by 17 percent per annum at the same time. Despite this laudable endeavour, microcredit outreach to the poor is still far from the target. Studies show that more than 60 percent of all poor households have been found one way or other involved in micro-credit programs in the country (Ahmad, 2007). The scenario would be more depressing if we consider the fact that one borrower taking loan from more than one MFIs and the extent of overlapping may be as high as 40 percent (Imai and Azam, 2010).

One of the critical reasons of not many poor coming under the umbrella of conventional microfinance in Bangladesh is the religious belief. Islam is the official religion in Bangladesh and it is the third largest Muslim country in the world in which 90 percent of the population belongs to the Muslim faith. A large proportion of the poor is practicing Muslims, and is unable to take advantage of traditional microfinance contracts which involve the payment of interest. In response to this market niche, some MFIs have started providing microcredit to the poor following the Islamic principles However, the outreach of Islamic microfinance is very low worldwide let alone Bangladesh. There are many small-sized Islamic MFIs rendering their services to the poor in Bangladesh. Notable among them is the Rural Development Scheme (RDS) mechanised and controlled by the Islamic Bank Bangladesh Ltd. (IBBL). IBBL started the first interest free bank not only in Bangladesh but also in South Asia and introduced the RDS in 1995 as part of its corporate social responsibility (IBBL is considered now one of RDS main financing channels) to support the government in addressing the high rates of rural poverty, and to tackle the gaps associated with government program that failed to target the poor. Its main goal is to create employment opportunities for the poor and alleviate poverty through income generating activities by adopting Islamic microfinance products (UNDP, 2012). It is reported that RDS alone serves 67 percent of the total Islamic micro-finance market in Bangladesh (El-Zoghbi and Tarazi, 2013).

The RDS program is styled in accordance to Grameen Bank concept except the fact that the former uses Islamic modes of investment based on the profit and loss sharing methodology whereas the latter uses conventional practice. As per the RDS micro-financing model, the bank does not issue the agreed upon loan amount to customers in cash, but rather delivers goods to the customers

ensuring that lending is invested in income generating activities. Investment financing starts after eight weeks of observing the group members in terms of regular attendance to the weekly group meetings and center meetings. At the group and center meetings, members are offered support services such as skill training, environment awareness, and entrepreneurship development to ensure the success of the potential small and medium entrepreneurs. This is offered to ensure that potential beneficiaries are successful in starting and managing their new investment. During the eight week process the field officers in collaboration with the investment committee of the branch carefully review all the investment applications. Upon the approval of the applications, investment products (not cash) are handed over to the clients. The initial investments start around Tk. 10,000 (approximately USD 145) and based on good repayment, thresholds increase by Tk. 2,000 to Tk. 5,000 in every succeeding term depending on the sector of investment. The rate of return (based on profit and loss method) is at 12.5 percent, however timely repayment is rewarded by a 2.5 percent rebate, thus a successful member will pay 10 percent of his or her profit to the bank. This rate of return makes it lower than any rate offered by any conventional MFI in Bangladesh.

Members of the center also have to open a *Mudaraba* savings account and are required to deposit Tk. 20 per week. Savings however can be withdrawn once members have fulfilled their liabilities toward the bank. This ensures the sustainability of the fund. And to encourage the act of *Zakat*, members are encouraged to deposit a minimum of Tk. 5 per week to the *Quard El Hasan*, which is an interest-free fund given to the extremely poor, for members who are not able to make their timely payments or toward the rural development of the community (for instance, building and installing latrines, tube wells etc.). The receiver of the Quard El Hasan is only liable for the repayment of the principle. This innovative approach encourages the act of giving and ensures that the extremely poor are included in the program to make them self-reliant and productive in the community. This kind of operational mechanism has proved to be very successful in benefiting many of the rural poor. RDS's current repayment rate is 99 percent, making this scheme one of the most successful schemes in Bangladesh (UNDP, 2012). Despite all these effort, Islamic microfinance remains very small in comparison with the conventional MFIs in Bangladesh (Table 1).

Table 1: Selected indicators of RDS

	As of December 2012			As of December 2013		
	RDS	All MFIs	Share of RDS	RDS	All MFIs	Share of RDS
No. of Branches	207	17,890	1.16%	240	18,332	1.31%
No. of Employees	2,154	230,522	0.93%	2674	233,901	1.14%
No. of Active Members	733,520	33,714,959	2.18%	836,227	33,673,341	2.48%
No. of Borrowers	474,766	26,895,515	1.77%	532,235	26,728,034	1.99%
Loan outstanding (in MI Taka)	10,390.71	325,051.12	3.20%	13,730.92	365,981.54	3.75%
Net Savings (in MI Taka)	3,322.52	163,439.87	2.03%	4,377.98	199,977.66	2.19%
Microcredit as % of Bank credit	0.33	11.76	2.81%	0.32	9.78	3.27%

Source: Authors' calculation based
Bangladesh Microfinance Statistics (BMS), 2013

As of December 2013, a total of BDT 325 billion (roughly US $4.17 billion) amount of loan disbursed to about 27 million borrowers by 550 microfinance institutions which was 3.75 percent higher than the figure in 2012. However, the portion of Islamic microfinance compared to the total scenario shows a very depressing result. For instance, RDS (which serves two third of the total Islamic microfinance market in Bangladesh) represented only 3.2 percent of the total market of microfinance in 2013. In terms of borrowers, RDS accounted for only 1.77 percent of all microfinance borrowers in 2013. While total microfinance in the country represents approximately 12 percent of bank credit, RDS accounts for only 0.33 percent of it. This profile shows that the deepening of Islamic microfinance in Bangladesh is very miniscule even though the country is featured by majority of Muslim population and top Islamic microfinance provider in the world. In practice, the demand is there but the supply of sufficient funds to meet that demand is absent.

Needless to say, microfinance programme requires high operational cost which creates a downward pressure on the profitability and sustainability of these types of institutions. It is reported that the net profit of RDS as percent of the investment income has been decreasing. In 1996, that figure stood at 62.91 percent and has been gradually decreasing to 0.24 percent in 2008, 7.88 percent in 2009. The leading microfinance institution in Bangladesh, Grameen Bank, charges an annual interest rate of 20 percent on its main credit product; this rate however, is below the cost recovery level. In the case of Islamic microfinance, the product category is such that requires higher transaction cost than their conventional counterparts. For instance, in *Murabaha* or *Ijara* transactions, the provider of funds purchases a commodity (such as equipment or inventory) and resells or leases it to the user with a markup. Islamic MFIs may benefit from cheaper prices on the wholesale market, but the costs associated with purchasing, maintaining, selling, or leasing a commodity (such as a sewing machine) are expensive.

The problem of high operational cost can be tackled by capitalising on economies of scale through expanding the scope of their services. This requires permanent and stable sources of finance for these institutions. In reality, Islamic microfinance institutions in Muslim majority countries suffer from lack of funding. An analysis of sources of funds for microfinance institutions in Bangladesh reveals that members' net savings contribute 44 percent of the total funding whereas institutions' own funds contributes about 14 percent; surplus income and bank loans contribute roughly around 9 percent each (BMS, 2013). Among outside sources, donor fund from both multilateral and national agencies is a contributing source for conventional microcredit providers. However, for Islamic microfinance institutions, fund flowing from outside sources is further restricted by principle of interest-free transaction. There is a lack of knowledge on the concept among many donors. As a result, they most likely show no interest in funding such programs. Commercial Islamic banks, which are much more familiar with Islamic financial products, such as IBBL, play an important role in supplying funds to those microfinance institutions. However, for programs to be sustainable in the long-run adequate funding support and commitment will be required. Perhaps, IBBL was able to provide funding toward RDS at the beginning. But the operational cost of RDS increases drastically with the increase of its coverage. As a private bank, IBBL has the resources for its commercial means to fund such a program, however for MFIs wanting to emulate this program, they will require funding from governments, donors and from the private sector in order to be sustainable (UNDP, 2012). To make this into reality, mechanisms are to be devised for overcoming the problem of reciprocator's dilemma.

4. Reciprocator's dilemma

In Bangladesh, a market positioning is seen when they find that the Islamic banks are engaged in providing 'non-participatory' financing mainly to the Muslim traders and merchants in the urban area. Due to the scarcity of 'risk' fund in their capital structure and the opportunity to capture a certain promised returns from non-participatory financing, the Islamic banks' strategy in asset portfolio management - the so-called "*murabaha*" syndrome - makes sense. However, the Muslim community faces an institutional failure to mediate the risk fund into a new venture or a large scale project by SMEs which need the risk diversification among the society. The pertinent question is how can the Islamic banks possess a diversified base of depositors who absorb the associated potential loss, which encourages the banks to engage more in participatory financing? This is an important challenge not only to the Islamic banks, but also to the Bangladeshi economy as a whole.

Conventional microfinance and Islamic banking are not always complementary in Islamic economies. In Bangladesh, for instance, there is a significant difference between these two systems - the mode of Islamic banking and the Grameen Bank (GB) mode of microcredit - when it comes to the target group and the cliental-base. The GB microcredit targets the marginalised poor of rural areas of Bangladesh, its members and borrowers lay at the bottom of the economic ladder in the society. More importantly, 98 percent of GB members are rural women. It is a kind of organisation where extra income, wealth, and land become disqualifications for borrowing and membership. Also, GB offers microcredit on the basis of group collateral, whereby no asset underlies against the lending. On the other hand, the Islamic banking operations in most cases are still confined to urban or semi-urban areas and their target groups are different than those of the GB. Yet, the portfolio of lending of the Islamic banking is dominated by financing like *Murabaha* and *Ijara*, which are backed by assets. From institutional viewpoint, they are essentially not competitors. Rather, GB borrowers after graduation from their below poverty status to above poverty may complement the Islamic banking activities at a distant end. The recent involvement of one of the Islamic banks with the development of small entrepreneurs in Bangladesh by adopting the operating system of GB in accordance with the framework of Islamic *Shari'ah* gives an indication about the possible complementarity of the two systems of banking.

Can we accept such a hypothesis that Islamic banking is fundamentally concerned about the merchants in the urban area, less concerned about the farmers and small manufacturers in the rural area? Islam, a religion born in the Arabian Desert, where *trade* constituted the most important, "perhaps even the

sole economic activity, favours merchants, property rights, free trade and market economy" (Çizakça, 2011: xv). In this context, Islam is called as the religion for merchants (Ayub, 2007; Çizakça, 2011). The business ethics in the Islamic mode of transactions are related to the civilised urban way of life at the birth of Islam. The holy Prophet had spent half of his life working as a merchant in Mecca, where the urban culture flourished and the values for facilitating fair transactions among the merchants in equal positions were shared. The Prophet mentioned that trade constituted nine-tenth of the livelihood of early Muslims. In fact, of the four righteous Caliphs, Abu Bakr was a cloth merchant and Uthman was an importer of cereals (Çizakça, 2011: xiv).

The values being shared among merchants have developed the concept of business and trade, while Islam restrains the freedom to engage in business and financial transactions on the basis of a number of prohibitions, ethics and norms. It is widely known that the prohibition of *riba* (usury), *gharar* (uncertainty) and *maisir* (gambling) is the most strategic factor that defines invalid and voidable contracts and demarcates the overall limits which should not be crossed (Ayub, 2007: 12). The prohibition of *gharar* in *speculation* is considered as the wisdom for minimising the potential periodic financial disaster (Suzuki, 2013). In parallel, the prohibition of *gharar* as well as the profit-loss sharing (PLS) framework may have given Islamic banks a dilemma of the so-called '*murabaha* syndrome' (concentration of conservative credit portfolio on asset-backed transactions at mark-up pricing). How can we expect the Islamic banking to contribute to the development of microfinance in the primary and secondary industries? Yumna and Clarke (2011) introduce Asyraf Wajdi Dusuki's argument such that group based lending mechanism is not alien in Islam as it has been known by the concept of *As Sabiya* which shares the positive values such as teamwork, sense of belonging, cooperation and trust. In spite of that Islamic MFIs have failed to realise advantages from these religious institutions.

We can resort to NIE to draw a logical explanation of this anomaly. One of the salient contributions by NIE is to support the proposition that effective contracting is dependent upon *institutions* in terms of "rules that constrain economic behaviour", including *informal* or *intangible* institutions such as religious, culture and customary practices. Although there should not be an overemphasis on the cultural factors, it can be argued that the unique institutional structure which creates Islamic altruism and reciprocity may enhance the supply of Islamic microfinance, but simultaneously, may cause opportunistic behaviour, consequently leading to the drain of the capital for small and micro-enterprises. In particular, strong reciprocators would fall into a dilemma - to be or not to be unconditional altruists for the poor.

The concept of reciprocators' dilemma is related to a dimension of 'assurance game' which is also commonly known as 'stag hunt' in the game theory. The French philosopher, Jean Jacques Rousseau, presented the following situation. Two hunters can either jointly hunt a stag (an adult deer and rather large meal) or individually hunt a hare (tasty, but substantially less filling). Hunting stags is quite challenging and requires mutual cooperation. If either hunts a stag alone, the chance of success is minimal. Hunting stags is most beneficial for society but requires a lot of trust among its members. Each can individually choose to hunt a stag or hunt a hare. Each player must choose an action without knowing the choice of the other. If an individual hunts a stag, he must have the cooperation of his partner in order to succeed. An individual can get a hare by himself, but a hare is worth less than a stag. In the stag hunt, there are two pure Nash equilibria; when both players cooperate and both players defect. An example of the payoff matrix for the stag hunt is described in table 2.

Table 2: The payoff matrix of stag-hunt game

Player 1 / Player 2	Corporate (stag)	Defect (hare)
Corporate (stag)	(2, 2)	(0.1)
Defect (hare)	(1, 0)	(1,1)

Assume that there are two projects; one project is planned by a microenterprise or a start-up, the other is a *murabaha* project. The success of the former project would contribute to the society in terms of alleviating poverty and incubating innovative entrepreneurs (stag), though the probability of success is relatively low. The success of the latter project would less contribute to the society (hare), though the probability of success is relatively high. Also assume that there is a Muslim investor (player 1) who is ready to finance the poor or innovative microenterprises, but is worried about the potential opportunistic behaviour of the borrower. The best payoff is that the investor (player 1) would invest in microfinance upon a belief in the commitment by the borrower (player 2) to pay best efforts for the success of the project - represented by the (2, 2) payoff in the matrix. If the investor instead of investing in microfinance prefers *murabaha* project he would get a fixed return from murabaha, but there would be no chance of the stag project to be materialised for the borrower (1, 0). Even though the investor invested in microfinance, if no borrower challenges to implement the stag project or if the borrower shirks paying best efforts for the success of the project, the investor would get nothing (0, 1). Most likely, the investor with reciprocators' dilemma would hesitate to finance for the poor, though he/she is

ready to do for the poor, consequently incubating only *murabaha* projects by the enterprises who possess assets for funding (1, 1).

We assume that faith communities and organiations have played an extensive and important role in supporting microfinance and sustaining economic development efforts (Looft, 2014). There is a growing tendency to view *zakat* as a source of funding for microfinance. *Zakat* funds appear ideally suited to support Islamic microfinance as a poverty alleviation strategy (Karim et al., 2008; Yumna and Clarke, 2011). However, Yumna and Clarke (2011) point out that although *zakat* is compulsory charity in Islam to fight against poverty, the awareness of Muslim of paying *zakat* is not so high. They report that BAZNAS, the largest *zakat* institution in Indonesia, only collected US$ 2.6 million in 2010, where the national potency of *zakat* on household income reaches US$ 61 trillion (they refer to the data from FEM *Institut Pertanian Bogor Indonesia* 2011). Given this scenario, the *zakat* fund would not be reliable as a source of funding. Besides, an institutional analysis tells us that an excess reliance on charity may possibly cause moral hazard or opportunistic behavior in the agent in the microfinance industry. Furthermore, strong reciprocators may fall into a dilemma, resulting in the hesitation of supporting the redistribution to the poor. The mainstream economists insist that market failure in credit market, such as credit rationing in equilibrium, can be caused by *information asymmetries* between lenders and borrowers. Institutional economists are concerned about the ill-designed *incentive* and *sanction* mechanism which may cause agency problems in credit market. Besides, we should argue that important market failure in Islamic microfinance can be caused by divergences in the degree of altruism and reciprocity of Muslim players in the industry.

In relation to the RDS case, the major financer of the institution is IBBL. We have shown that the asset-class of mainstream Islamic financial institutions (including IBBL, the largest of the country) is dominated by *murabaha* product. The product is based on markup price and does not involve with uncertainty. In contrast, financing MFIs relates to uncertainty but embodies the spirit of profit and loss sharing principles. This uncertainty can be accepted as business practice. However, uncertainty from agent's opportunistic behavior is unacceptable to principals. This circumstance creates a 'reciprocator's dilemma' in the perspective of IBBL in supplying fund to RDS. The mark up-based *Murabaha* (hunting a hare) might not be the optimum outcome for the mainstream financial institutions as well for the society but it does not require having too much trust on the actors' belief on divinity. On the other hand, pay-off would be more in financing MFIs (hunting a stag) but requires agents' devotion and faith on the life hereafter which cannot be known *a priori*. Principal's dominant strategy therefore, remains not to finance MFIs. That explains the current reality of Islamic MFIs worldwide.

5. Concluding comments

International data and other anecdotal evidence suggest that there is a huge demand for Islamic microfinance across the globe. However, the supply side has apparently failed to meet the needs of rising demand. Various hypotheses can be raised and tested as possible reasons for this apparent failing. This paper however, focuses on the liability side of Islamic microfinance institutions. In general, capital will flow to the sphere of economy where it is most needed. But the nature of Islamic micro financing is that it is more of a philanthropic help than a pure profit motive. If so, it is unlikely that capital will eventually flow responding to the needs of the market demand. Microfinance institutions could not successfully convince donors to finance their activities. This failure can be attributed to various factors including the fact that Islamic scholars and policymakers have not been able to highlight the distinguished characteristics of Islamic financial model. Second, the fact that a significant portion of poor Muslims are reluctant to access to conventional micro financing is not properly recognized. Third, there are some among Muslim donors who hesitate to accept the contemporary mode of Islamic finance as properly *Shari'ah* compliant. Because of lack of representation or misrepresentation of facts embedded with Islamic finance, donors shy away from financing such schemes. At present, about one half of the total funding is supplied by the members themselves. Taking into account the funding capacity of those financially stranded population, it is understandable that their power to meet the social demand of micro financing will be an absolute meager and insufficient to eradicate poverty. Thus, shortage of funds is a critical constraint towards a growing Islamic microfinance.

On the other hand, lack of fund is seemingly a paradox in the sense that Islam encourages giving and spending for equality and justice in the society. Poverty eradication in the Muslim society is no less noble for faith community than another motives instructed in Islam. Citing some Qur'anic verses and Hadith as well as reviewing the existing literature, the paper has shown that the provision of altruism is very much pronounced in Islam. Islam fosters and encourages altruism. Thus, Muslims tend to support others based on trust and cooperation at personal cost. At the same time, they find it their duty to punish those who behave opportunistically even sometimes it personally costs them. As such, it is essential to know about the entrepreneur's faith and belief on the Day of Judgment which will drive his/her willingness to put sincere and honest efforts to make proper utilization of funds. However, trust of others on the divine punishment and rewards is impossible to know. Thus, possible funders are not willing to supply funds to entrepreneurs as long as other alternatives, which are not involved with uncertainty, are available.

Of course, overcoming this problem is not an overnight issue. Moreover, the modern practice of Islamic financing is rather new. In this sense, a better system for enhancing microfinance activities can only be constructively adapted through a process of trial and error. Keeping this in mind, the following recommendations can be offered:

- Despite having various alternatives for altruistic activities in Islam, charity towards those who are in need of finance for starting a small business can certainly be considered. Towards this, the forum for Islamic microfinance can be established for creating awareness among those financially blessed by the Almighty to involve in charity through Islamic microfinance. At present, the conception of microfinance is confined merely to business. However, the charity aspect of it in terms of achieving equality in the society is also a critical aspect.
- Most importantly, besides relying on altruism and philanthropic sentiments of actors, national financial system should devise some provisions to avoid possibilities of opportunism so that any doubt in the mind of principals is abolished *ex ante*. It is understood that Muslim should comply with Islamic traditions and teachings. However, formal regulations for punishing those who may behave opportunistically will help them concentrating on microfinance-based charity more than they do in the absence of tangible rules. To realise this possibility, a proper *Shari'ah* board must be established who can certify the boarder scope of Islamic finance.
- Currently, most Islamic financial institutions are involved merely with *Murabaha* financing; however, they can be encouraged to focus also on social justice and equality through philanthropic financing towards the poor in the form of microfinance.
- In designing appropriate institutions, emphasis can be put on how to realize the *Zakat* fund for micro-financing. The mobilisation of compulsory almsgiving is very miniscule in all Muslim countries across the world despite having a high potential as a source of fund for micro-financing. Only proper initiatives can make this possibility into a reality.

Notes

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ISLAMIC BONDS (*ṢUKŪK*) IN MALAYSIA

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Abstract: This article introduces the various types of *ṣukūk* that exist in the Malaysian secondary market. The Malaysian *ṣukūk* market was initially debt-based which attracted criticism from the Shariah scholars from the Gulf and Middle East. However, the Malaysian *ṣukūk* market made a turn towards equity and *ijārah ṣukūk* and ventured into "green *sukuk*" or socially responsible investment (SRI) *sukuk*. To facilitate the financing of sustainable and responsible investment initiatives, the Securities Commission of Malaysia (SC) has launched the Sustainable and Responsible Investment (SRI) *Ṣukūk* Framework in 2014. The introduction of the SRI *ṣukūk* framework is seen to be in line with the rising trend of "green bonds" and "social impact bonds" that have been introduced globally to facilitate and promote sustainable and responsible investing. The writer has presented different examples from both regions to show that the gap has been bridged. However, despite this convergence the author recommends a revisit of the controversial debt-based instruments by Malaysian Shariah scholars.

Introduction

The Arabic word used for Islamic securities is *sukuk* which is the plural of *sakk*. It literally means a claim similar to a note or certificate such as a trust certificate. However, this claim is not limited to a financial claim to a cash flow but includes ownership claim as well.[1] There are several definitions of *sukuk*. However, the Securities Commission (SC) of Malaysia presents a comprehensive definition of sukuk as a "document or certificate which represents the value of an asset."[2] Sukuk in general are issued and structured based on different Shariah principles such as the contract of exchange (*ʿuqūd al-muʿawaḍāt*) comprising *murābaḥah*, *al-bayʿbithaman ājil*, *bayʿal-ʿīnah*, *ijārah* and *istiṣnāʿ* which involve the sale and purchase transactions of an underlying Shariah compliant asset; and the contract of participation (*ʿuqūd al-ishtirak*) comprising *mudarabah* and *musharakah*.

Although *sukuk* is considered a contemporary investment instrument of Islamic finance, its traditional usage could be traced back to the 1st century AH of the Umayyad period. The Umayyad Mosque in Damascus, Syria, was built using sukuk during the Umayyad Caliphate.

Since then the Sukuk market became active globally. Malaysia issued its first sukuk in 1990 through Shell MDS (Malaysia) and subsequently its first global Guthrie corporate *sukuk* in 2003. This was followed by Singapore and Bahrain in 2001.[3]

The Malaysian *ṣukūk* market developed rapidly between 2001 and 2008 with an average annual growth rate of 21%. It exceeded the outstanding amount of conventional debt securities issued in the domestic market. In 2008, the amount of corporate *ṣukūk* issued exceeded the value of outstanding corporate bonds. *Ṣukūk* has access to a larger pool of investors from both sides of the investing worlds: it has a confined investor base such as Islamic pension funds and Islamic insurance companies, which can only invest in *sharīʿah*-compliant instruments; whilst those who traditionally invests in conventional bonds are now seeking diversification and investing in *sharīʿah*-compliant instruments.[4]

There is now a rising trend on issuances of "green bonds" and "social impact bonds" in the global *sukuk* market to meet the growing demands for environmental friendly and socially responsible businesses, which are in line with the objectives of the Shariah (*Maqasid-al-Shariah*). To compete with the global *ṣukūk* market, the Securities Commission of Malaysia (SC) launched the Sustainable and Responsible Investment (SRI) *Ṣukūk* Framework in 2014 to facilitate the financing of sustainable and responsible investment initiatives.[5] The SRI *ṣukūk* framework is in line with the initiative set out under the SC's Capital Market Master Plan II to promote socially responsible financing and investment.

Islamic bonds issuers in Malaysia consist primarily the government, quasi-government and the corporate sector. The 'Government Investment Issues (GII) which was issued by the government of Malaysia and governed by the Government Investment Act (GIA) 1983 was initially based on debt securities. However, in 2005 the GIA 1983 was amended to include to the deb, equity and *ijarah*.

The Khazanah Bench Mark bond[6] was issued by the Khazanah National Berhad (a quasi-government body) which issued a long term financing and is debt–based as well. Shell MDS RM125 million *sukuk* remains as the historic first corporate *sukuk* in the country.

Islamic bonds in Malaysia are structured as debt-based, asset-based or equity-based. Debt-based structures are most commonly used which are based on fixed or zero rate coupon bonds. Malaysian Government Investment Issues (GII) and Khazanah bonds are based on this principle i.e., debt-based.[7]

The sale based structure of *sukuk* basically overlaps with the debt-based sukuk and are correlated. The sale based *sukuk* are generally debt-based because they represent debt.[8] On the other hand, the equity-based structure of the *sukuk* represents common ownership and entitles the holders a share in a specific

project. Shares of profit are determined beforehand by a definite proportion of the total bond amount. Although it is similar to shares, it has a fixed maturity, which is determined by the tenure or project completion date. This structure normally bears a floating rate.[9] The example of equity based *sukuk* are *sukuk al-muḍārabah* and *sukuk al-mushārakah*.

Lastly there is another group of *sukuk* which is called *ṣukūk al-ijārah*. The structure of *ijārah sukuk* indicates ownership in the assets that generate income. Such assets are normally owned by Special Purpose Vehicle (SPV). The holder of the *sukuk* will benefit from the cash flow generated through the lease.

Debt based Islamic Bonds

The writer would like to highlight on the contracts of *bayʿ al- dayn* and *bayʿal-ʿīnah* as both these contracts are utilised in debt-based Islamic bonds. Both of these contracts are highly controversial from shariah perspective. The expression *bayʿ al-dayn* consists of two words that is *bayʿ* and *dayn*. Literally *bayʿ* means sale and dayn may be defined as debt, pecuniary obligation[10], liability or obligation. *Bayʿ al-dayn*, therefore, proposes the sale of a payable right that arise normally from a variety of transactions such as *murābaḥah*, b*ayʿ bithaman ājil* and *bayʿal-istiṣnāʿ*, if their prices are deferred. The Securities Commission of Malaysia has defined it as a transaction that involves the sale and purchase of securities or debt certificates that are issued by a debtor to a creditor as evidence of indebtedness that complies with the Shariah.[11] In Islamic legal literature, *dayn* has been defined as "a constructive asset in the obligation of the debtor".[12] It is obvious from this definition that debt (*dayn*) is a type of asset (*māl*), although constructive (*ḥukmī*) or at least, a financial right (*ḥaq mālī*).[13]

On the sale of debt, there are opposing views among classical and contemporary jurists. There are two varieties of sale of debt: *bayʿ al-dayn naqd* and *bayʿ al-dayn nasī'ah*, (also known as *bayʿ al-kalī bi al-kalī*.) Most of the classical jurists did not allow *bayʿ al dayn al-nasī'ah*.[14] There were differences among the traditional Muslim jurists regarding (i) the sale of debt from the creditor to the debtor (*bayʿ al-dayn li al-madīn*) and (ii) the sale of debt from the creditor to a third party (*bayʿ al-dayn li ghayr al-madīn*).

The sale of debt to debtor generally takes place when a creditor sells his deferred debt (*dayn mu'ajjal*) to the debtor at a discount but on spot payment basis. The *fuqahā'* are divided on the legality of this discounted sale. According to the Ḥanafīs, Mālikīs, Shāfiʿīs and some Ḥanbalīs,[15] the creditor has the right to sell his debt to the debtor at any price he likes as far as the debt is raised from the cost of damage, *qarḍ*, price of commodity, cost of services or dowry of a woman. This is because the creditor has the right to give up or withdraw

his debt at any point in time he wants. On the other hand, the Ḥanbalīs[16] have subjected the authenticity of selling of debt to the debtor to the confirmed and non-confirmed types of debt.[17] They allow the sale of confirmed debt, by the creditor to the debtor. However, they do not allow the sale of non- confirmed debt such as the cost of labour before completion, the dowry of a woman before marital consummation and the capital of salam.[18] The majority of the *fuqahā'* agreed on the permissibility of selling the debt to the debtor for cash, while a minority viewed it as prohibited. The writer is of the view that the opinion of the majority is more appropriate, as their proof is solid and in line with the broader objectives of *Sharīʿah*.

The discussion now turns to the sale of debt to a third party. The jurists are not in agreement on the sale of debt to a third party. This disagreement is due to the element of *gharar* which arises over the completion of certain obligations. The sale of debt to a third party means, the sale of debt to a non-debtor at a discounted price, normally on spot payment basis. This suggests that a creditor cannot wait for the due date of his debt and wants to sell it to a third party at a discounted price and on cash basis. This sale may be either with the approval of the debtor or without his approval. The authenticity of this sale has been the subject of divergence among the classical and contemporary jurists. Although majority of them agreed on the legality of selling the confirmed debt to the debtor, they differed on selling the debt to a third party irrespective of the nature of the debt.[19]

It is interesting to note however that the practice of the sale of debt to third parties with discounting has been declared permissible by the SAC of the Malaysian Securities Commission, demonstrating a different point of view from the global juristic approaches.[20] There are two main reasons behind this ruling. The first one is that the characteristic of the securitised debt has changed into an independent financial right (*haqq mālī*) that can be bought and sold at a price agreed upon by the contracting parties. It is also argued that "securitised loan" is similar to a "financial right" (*haq mālī ʿaynī*), such as shares, copyrights and patent rights. In this sense, the securitised debt is no longer similar to money, and hence not governed by the rule on currency exchange such as the rule of equality.

As far as *bayʿ alʿinah* is concerned, it has been used significantly in Malaysian Islamic financial markets. It is considered valid (*ṣaḥīḥ*) by the *Sharīʿah* Advisory Council of Bank Negara Malaysia[21] and the *Sharīʿah* Advisory Council of the Securities Commission of Malaysia.[22] It is argued that *bayʿ al-ʿīnah* is permitted by the Shafiʿī school of *fiqh*, and is therefore used in many banking facilities such as personal financing, overdraft and deposits. A larger application can also be found in the Islamic capital market in the issuance of Islamic private debt securities.

Although, the *Sharīʿah* Councils (SAC) of Bank Negara Malaysia and Securities Commission of Malaysia have approved *bayʿ al-ʿīnah* as a permissible contract, the *Sharīʿah* advisors from the Middle East and Gulf region have criticised and considered it as a 'back door' to *ribā*. It is argued that what is practised in Malaysia is not very different from *ribā*.[23] It is also well known that there is no consensus amongst the jurists concerning the legality and validity of *bayʿ al-ʿīnah*. The controversy on *bayʿ al-ʿīnah* has been widely debated in many of the Islamic law books.[24] *Bayʿ al-ʿīnah* takes place in two different types of arrangements: firstly, the seller sells a commodity for credit on a higher price and buys it back for cash at a lower price than the credit price. Secondly, the seller sells a commodity for cash for a lower price and buys it back on credit for a higher price than the cash price. The main purpose of the transaction is to get the needed cash and thereby circumventing *ribā* (interest) through a legal devise (*hilah*). A genuine sale and purchase does not really take place between the parties involved in the transaction.[25]

The government of Malaysia has issued debt-based Islamic bonds which are government guaranteed bonds. The securitisation of Khazanah bonds is analogous to other Islamic bonds in which the contract of *bayʿ al-ʿīnah* is applied.[26] Securitisation creates a financial right (*haq mālī*), that is the right to sell or purchase a commodity that one owns.[27] This right involves an ability to derive usufruct (*manfaʿat*) from it, which qualifies Khazanah bonds to take the role of property (*al-māl*).[28] The usufruct is obtained here from the commodity that is sold and purchased in this transaction.

The issuer in the Khazanah bond would identify the assets followed by the Islamic bank purchasing these assets on competitive tender basis. The profits were then paid out to the issuer. Subsequently, the assets were resold to the issuer on the basis of *bayʿal-ʿīnah*.[29] Normally, the issuer sets the buy-back price at par value.[30] The issuer issued the bonds and these bonds are traded in the secondary market on the basis of *bayʿ al-dayn*.[31] In 2006 Khazanah National Bhd issued its first exchangeable *ṣukūk* based on *mushārakah*.[32] It was believed to be the world's first S*harīʿah* compliant exchangeable trust certificates. The *ṣukūk*, exchangeable into the equities of Telekom Malaysia, were issued by Rafflesia Capital Ltd, an orphan special purpose company (SPC) incorporated in Labuan (Malaysia), who was to act as the issuer and investment agent of the investor.

The issuer, Rafflesia issued the exchangeable Trust Certificate to the investors in consideration of which, the investors paid the issue proceeds worth USD750 million. Meanwhile, the obligor, Khazanah National Bhd, sold and transferred the 'exchange property' to its wholly owned SPV Orchid. The 'exchange property' consisted of Telecom Malaysia (TM) shares. Orchid then sold and transferred the exchange property to Rafflesia. The issue proceeds were used by Rafflesia to pay

Orchid the consideration for the purchase of exchange property. Orchid then paid the issue proceeds to Khazanah.

Khazanah also made an undertaking to purchase back the exchange property at face value upon maturity. However, the issuer was given the call option to exercise the purchase undertaking after three years. For the purpose of *Sharīʿah* compliance, TM business must comply with *Sharīʿah* principles to ensure that dividend generated on the shares were *Sharīʿah* approved. If this requirement was not met, the investors would have the option to sell the *ṣukūk* back to the issuer. Impure income from dividends attributable to the exchangeable properties would be purified by the donations to a charitable organization.

Since 2006, the market has witnessed issuances of *Sharīʿah* compliant equity-linked products in the Middle East. This shows a move towards debt-based *sukuk* to other forms of *sukuk* like equity and *ijarah sukuk*. Malaysia should follow this trend so as to bring its Islamic financial system at par with the Middle East. There is a need for SAC of Bank Negara Malaysia and SAC of the Securities Commission of Malaysia to revisit their position on *bay' al-inah* and *bay' al dayn* specifically to third parties. The change will augur well for the development and harmonisation of Islamic finance in general.

3- Islamic Asset Backed Securities (IABS)[33]

The Securities Commission of Malaysia defines "Asset-Backed Debt Securities as private debt securities or Islamic securities that are issued pursuant to a securitisation transaction". Such securities shall exclude all debt securities or Islamic securities that are capable of being converted into equity howsoever and whether redeemable or otherwise. Examples of such excluded securities include exchangeable bonds and private debt securities or Islamic securities with attached warrants.[34]

The *Sharīʿah* Advisory Council (SAC) of the Securities Commission defines asset securitisation as a process of issuing securities by selling financial assets identified as an underlying asset to a third party. Its purpose is to liquidate financial assets for cash or as an instrument to obtain new funds at a more attractive cost, compared to obtaining funds through direct borrowing from financial institutions. Financial assets which have a future cash flow is sold by a company that needs liquidity or as a new fund, to a third party known as Special Purpose Vehicle (SPV) for cash. To enable the payment for the purchase of the assets, the SPV will issue Asset Backed Debt Securities to investors based on the future cash flow of the assets. Investors will then gain returns through a future cash flow managed by the SPV.[35]

The writer intends to examine the transaction structure of IABS. In such a transaction, the originator will first sell *Sharīʿah* compliant assets to an SPV. The

SPV will then issue IABS to the investors. The money paid by the investors will be used to pay the originators as consideration for the transfer of the assets. The IABS represent the investors' undivided proportionate beneficial interest in the assets, thus, entitling them to receive the cash flow stream coming to the assets.[36]

In 2006, *Mushārakah One Ṣukūk*, an IABS was issued in Malaysia. In this transaction, the originator, Times System Integrators (TSI) Sdn Bhd wanted to sell its assets in the form of deferred payment receivables from the supply of the computers to certain schools under the Ministry of Education. *Mushārakah* One Capital Bhd (SPV) called upon the investors to invest capital by way of *mushārakah* amongst themselves to fund the purchase of assets from TSI (originator). The SPV issued *mushārakah sukūk* to evidence the capital contribution by the investors.[37]

The SPV then used the issue proceeds to buy the assets from the originator. The assets were sold out at a discount from the total face value of the debt receivables. The sale of the assets from the originator to the SPV was a true sale where there was no recourse to the originator. Thus, the income will come to the investor from the assets backing the *ṣukūk*.[38]

It is reiterated that the above *ṣukūk* involve the sale and transfer of assets that consist of receivables. These assets are debts in nature and when they are sold by the originator to the SPV that becomes the sale of debt with discounting. This practice is considered valid in Malaysia but the Middle-Eastern scholars do not consider this as valid. This practice needs to be re-considered.[39]

It would be more appropriate to look at an example from the Middle-East. Although, IABS is rare in the Middle-East but some instances can be found in Saudi Arabia. In July 2003, Islamic Development Bank (IDB) issued *ṣukūk al-istithmār* worth USD 400 million for the global market. The structure of this *ṣukūk* includes *ijārah* as well as rights and interests in both *murābaḥah* and *istiṣnaʿ* contracts. This reflects a mixture of tangible and debt-based assets. However, the asset portfolio was structured to be dominated by tangible assets rather than debt receivables.

The IDB was the originator and the assets were deemed non-debt assets because of the tangible assets that IDB owned. Keeping in view the controversy with regard to the sale of debt with discount, the IDB structured the *ṣukūk* in a way that *ijārah* assets formed 50% or more of the total portfolio. For this transaction, the *ijārah* assets were more than 60% of the total portfolio which confirmed the domination of tangible assets as compared to debt-based assets, thus allowing its sale with discount.

The IDB sold the assets to Islamic Corporations for the development of the private sector (ICD), a member of the IDB group of companies and institutions. The ICD then sold the assets to the Solidarity Trust Services Limited (STSL).

The SPV entity then issued the *ṣukūk* to the investors. The proceeds from the issuance were paid for the price of the assets bought from the ICD. The ICD further paid the money to IDB as a consideration for the assets bought. There would be periodic distributions of cash flow coming to the assets to the investors throughout the tenure.[40]

The IDB gave a guarantee against any shortfall in the cash flow of the assets. The guarantee gave a right to recourse back to IDB as originator. In this case, it does not fulfil the requirements of a genuine sale that is required in a genuine IABS.[41] On the other hand, the *Mushārakah One Ṣukūk* involve the sale and transfer of the assets that consist of receivables. These assets are debt in nature and when they are sold by the originator to the SPV that becomes the sale of debt with discounting. This practice is not considered valid by the Middle-Eastern scholars.[42]

The writer now turns to another form of *ṣukūk* available in the Islamic financial market known as equity based *ṣukūk*. The equity based *ṣukūk* are based on the principles of *muḍārabah* and *mushārakah*. The purpose of the discussion is to show that there is a shifting pattern in the Malaysian secondary market. The market was initially overwhelmed with debt based *ṣukūk* but later on, the equity based *ṣukūk* was starting to be issued.

4-*Muḍārabah* or *Muqāraḍah Ṣukūk*

The word *muqāraḍah* has been taken from the word *qirāḍ*, which is synonymous with *muḍāraba*h that is commonly used by the Ḥanafī and Ḥanbalī schools of Islamic law, while *qirāḍ* is being used by the Mālikīs and Shafiʿīs.[43] *Muḍārabah* or *Muqāraḍah* means an agreement between two parties, where one of the parties provides capital for the other to work on the condition that the profit is to be shared between them according to an agreed ratio. Keeping in view this definition, *muqāraḍah* is considered as an Islamic method of financing that is totally different from the *ribā* mode of financing which is based on a prearranged rate of interest.[44]

The Council of the Islamic Fiqh Academy of the Organization of Islamic Countries (OIC) during its fifth conference in Jeddah in February 1988 approved the mode of *muqāraḍah* by issuing *fatwā* after evaluating various studies on *muqāraḍah* bonds. *Muqāraḍah* bonds are based on the conclusion of a lawful *muḍārabah* contract with the capital provided by one party and labour by the other, while the shares of profit are determined in advance by a specific percentage of the total.[45]

Muḍārabah bonds bear close similarity to revenue bond financing in the conventional system.[46] Revenue bonds are generally backed by revenue generated

by the project funded by the bond issuer. For instance, the local government of a city wants to build a new airport considering that the new facility will attract trade to the area. The local government issues revenue bonds to finance the construction of the airport. The money for the periodic dividend payment and ultimate retirement of the bonds come from the revenue generated by the airport. If the airport generates enough revenue to reimburse the bonds, then bondholders will receive their interest and principal in full on due time. However, if the airport does not generate enough revenue, bondholders either receive their interest and principal later or nothing at all. The bondholders do not have the right to claim from the local government's general treasury fund and are exclusively dependent on the revenue generated by the project being financed.[47]

Likewise, the *muqāraḍah* bonds provide its owner the right to obtain his capital and an annual amount of the recognised profits as agreed earlier at the time the bonds are submitted. It means that at maturity, the owner will get his capital apart from the profit that he has earned during the tenure of the contract. The *muqāraḍah* bonds can play an essential role in the process of developmental projects because it is associated with the profitability of the projects. Financing by way of *muqāraḍah* is more efficient in terms of the allocation of resources, compared with financing based on the interest which does not reflect the profitability of projects.[48]

The writer concludes that *muqāraḍah* bond is based on the lawful contract of *muḍārabah* which is an approved *Sharīʿah* compliant contract. No doubt that *muqāraḍah* bonds have similarities with the conventional revenue bonds as both can be utilised in the financing of the projects. Nonetheless, *muqāraḍah* bond is more secured as it provides to its owner the right to obtain his capital and an annual amount of the recognised profit. On the other hand, the bondholders in the revenue bond do not have the right to claim from the local government's general treasury and are dependent on the revenue generated by the project being financed.

4.1 Guarantee[49] of the *Muqāraḍah Ṣukūk*

It is allowed for a third party completely different in personality and financial capacity such as the government to promise to compensate for any losses persistent in a specific project. Nonetheless, this guarantee should not become a part of the main contract of *muqāraḍah* bonds but should be carried out as a separate contract. This is the position taken by the Securities Commission of Malaysia. The legitimacy of the *muqāraḍah* bonds contract should also not be linked to this guarantee. Hence, it is not permitted for the issuer to guarantee the capital of the *muḍārabah*.[50]

This position is being sanctioned by the Jordanian Ministry of Endowment, which is the first body that issued *muqāraḍah* bonds. The Jordanian government

guarantees the full settlement of the nominal value of the bonds on maturity.[51] Nonetheless, it is worth mentioning that in the case of the Jordanian *muqāraḍah* bonds, the government views the amount paid as a loan on the liability of the *Awqāf* Ministry that should be repaid as it is stated in section 12 of the "*Muqāraḍah* Act". This section of the Act, among other issues, has been discussed in the Islamic Fiqh Academy's debate on *muqāraḍah*. It was decided as revealed in the resolution that guarantee should be in the form of *tabarru'* or voluntary commitment and not as a loan, otherwise it will convert the *muqāraḍah* bond into an interest-based loan.[52]

It is also allowed for the *muḍārib* and the investors to agree to specify a definite amount of money or certain profit as reserves to provide protection or to meet any losses that may arise during the course of business.[53] Furthermore, the Jordanian Ministry of Endowment has been criticised[54] for the fact that it does not endorse any right to bond holders concerning the project ownership. The amount that is being paid out by the bond holders is kept in trust, which is returned to them at their value at the time of redemption. Moreover, the bonds holders get their share of any recognised profits. Nonetheless, they do not sustain any losses and are entitled to their principal amount in full in all situations.

This is in contrast with the *muḍārabah* contract as the actual *muḍārabah* contract does not burden the *muḍārib* to guarantee full repayment of the principal to the fund provider. Abdul Rahman Yousri Ahmed[55] asserts that the jurists consider guaranteeing repayment of the nominal value of bonds as a violation of the *muḍārabah* contract in which the principal cannot be guaranteed along with the right to share in the realised profit. However, he defends the *fatwā* issued in Jordan allowing such a guarantee with the observation that Islamic economists have to evaluate the implications of these different analyses.

Abdul Rahman Yousri further adds that guaranteeing repayment of the principal amount along with the payment of profits discourage the principle of *al-kharāj bi al-ḍamān*[56] (gain accompanies liability for loss), but asserts that Islamic economic products and transactions are lacking in the contemporary Islamic societies and are being dominated by the conventional banking system that deal in interest based-transactions and bonds. Therefore, he claims that when a government of an Islamic country offers guarantee to any Islamic security issued by one of its official entities, this will yield into the acceptance of the "new instrument" by the masses.[57]

The writer supports Yusri opinion as it will encourage people to buy an Islamic security and will help them to refrain from dealing with interest based financial institutions. However, the resolution of the *Fiqh* academy as mentioned above should also be taken into account because the resolution accepted that the government could guarantee the repayment of the nominal value of the

muḍārabah bonds only as a kind of *tabarru'* or voluntary commitment and not as a loan which the ministry of *Awqāf* should repay.[58]

In Malaysia, the first *muḍārabah ṣukūk*, that is, Pasir Gudang Municipal *muḍārabah ṣukūk* was issued in February 2005. The issuer in this transaction was an SPV, PG Municipal Assets Bhd. The issuer would first enter into a *muḍārabah* contract with the investors, whereby the investors contributed RM80 million as capital. The issuer issued the *ṣukūk* to evidence the investors proportionate capital contribution in the *muḍārabah* contract and their subsequent rights in the assets.

The main reason of this *muḍārabah* contract was to authorise the issuer to enter into a second *muḍārabah* contract with the local authority of Pasir Gudang (PG). Under the second *muḍārabah* contract, the issuer invested the whole capital of RM80 million in the Pasir Gudang local authority as *muḍārib*. Profits were expected as the local authorities of the PG started using the *muḍārabah* capital in managing the property taxes collection. The profits from the property taxes would then be channelled to the SPV. The SPV will provide the profit share of the investors to the Security Trustee, who would then distribute it amongst the investors as per the agreed profit rate.[59]

It should be noted that PG *ṣukūk* relied solely on the strength of the cash flow coming to the *muḍārabah* project. There was no recourse to the issuer but limited recourse to the *muḍārabah* project. There was no guarantee from the *muḍārib* (issuer) as the structure is in agreement with the *Sharīʿah* principles. On the other hand, the Jordanian *muqāraḍah* bond is guaranteed by the Jordanian Government which results in the encouragement of the investors. This approach had also been endorsed by the OIC *Fiqh* Academy with a modification that the guarantee should be made in the form of voluntary commitment and not as a loan. In the case of Jordanian *muqāraḍah* bond, the guarantee is provided by the government and not by the Ministry of Endowment. This may not be considered a third party guarantee as the government and the Ministry of Endowment may be perceived as one entity. However, the writer is of the view that the Ministry of Endowment is an autonomous entity in terms of financial obligations and therefore, the Jordanian government and the Ministry of Endowment are separate entities. Now the writer turns to another segment of the equity *ṣukūk* known as *mushārakah ṣukūk*.

4.2 *Mushārakah Ṣukūk*

Mushārakah ṣukūk involve the merger of the capital between the issuer and the investors. It is a partnership between two parties where both provide capital towards the financing of a project. Both parties share profit on a pre-agreed ratio but losses are shared on the basis of equity participation. Management of the project may be carried out by either party. This partnership is very flexible in

nature, where the sharing of the profits and management can be negotiated and pre-agreed by all parties.[60]

There are a number of *mushārakah ṣukūk* that have been issued in Malaysia and the Middle East. The writer intends to examine at least one *ṣukūk* from each side. Assar Chemicals *ṣukūk* worth RM150 million was issued in Malaysia in 2005. In Assar Chemicals *ṣukūk*, the company cum issuer entered into user agreements with some oil companies. The user agreements essentially required the company to operate an Independent Oil Company (IOT) for the use of the oil company.

The issuer called for the contribution of capital and the investors provided 87 percent of the capital while the rest was invested by the issuer. Accordingly, the issuer issued the *mushārakah ṣukūk* to evidence the investors proportionate capital contribution to the venture. The *mushārakah* capital would be used for the construction of IOT. The issuer was the project manager and upon completion of the IOT, it would be leased out to the company.[61]

The lease rentals paid by the company would be distributed to the investors as periodic distribution upon an agreed profit ratio. The company would use the terminal to meet its obligations under the user agreements with the oil companies. The oil companies would pay the amount agreed for using the IOT to the company. Upon maturity, the company would redeem the *ṣukūk* from the investors and would return their capital investment.

On the other hand, Dubai Metal and Commodity Centre (DMCC) issued USD200 million *mushārakah ṣukūk* in 2005. In this transaction, the corporate and the Special Purpose Company (SPC) entered into a *mushārakah* agreement for a period of five years. The SPC was acting as the investment agent of the investors. The corporate contributed land and other assets equal to USD100 million, while the SPC added cash amount of USD200 million to the *mushārakah*. The agreed profit sharing ratio between the SPC and the corporate was 80:20.

The corporate was appointed as an agent to develop the land or other physical assets with the invested cash. After that, the developed assets would be sold or leased out to the end users which were DMCC licensed companies in the diamond, gold and metal trades. The net profit was to be divided according to the agreed ratio of 80:20. The agent would get a fixed agency fee plus a variable incentive fee payable semi-annually. The corporate irrevocably undertook to buy the *mushārakah* shares of the SPC at an agreed price on semi-annual basis. Therefore, the SPC would no longer have any shares at the end of five years.[62]

Before going to the discussion on *ijārah ṣukūk*, the writer would like to discuss green *ṣukūk*. Green *Ṣukūk* is a new phenomenon in the Islamic capital market introduced in 2008 by the World Bank in the shape of Green Bonds. The earnings of the green bond are tied to environment friendly investment. Since

then, the World Bank has raised US$6.4 billion in green bonds. This was raised in 67 transactions in 17 different currencies funding a diverse range of projects. It started from drinking water projects in Tunisia to the treatment of wastewater project in China. Market participants expect the issuance of green bonds to exceed US$100 billion by the end of 2015.[63]

The principles of Islamic finance emphasise on ethical investment, and green bond is an environment friendly product, therefore, green *ṣukūk* falls within the ambit of the objectives of *Sharīʿah*. Recognising the need for green *Ṣukūk*, the SC of Malaysia issued SRI framework to facilitate the SRI financing and investment initiative. The SRI *ṣukūk* framework is an extension of the existing *ṣukūk* framework and therefore, all the other requirements in the Guidelines on *Ṣukūk* continue to apply. The additional areas addressed in the framework for the issuance of SRI *ṣukūk* include utilisation of proceeds, eligible SRI projects, disclosure requirement, appointment of independent party and reporting requirement.[64] Similarly, the UAE Securities and Commodities Authority's recent regulatory reform for *ṣukūk* is a positive step for the development of *ṣukūk* regime. This could equally be used for the development of green *ṣukūk* framework.[65]

Green *Ṣukūk* has picked up momentum in recent years, with a number of green *ṣukūk* launched since the first issuance of a green *ṣukūk* in France in 2012. In the Islamic finance market, Islamic Development Bank is already a major player in clean-sector investments with more than US$1billion spent in countries such as Morocco, Pakistan, Egypt, Tunisia and Syria.[66] In Malaysia, Khazanah Nasional Bhd has successfully offered a RM100 million seven-year Sustainable and Responsible Investment (SRI) *ṣukūk* to be issued via a Malaysian incorporated independent special purpose vehicle (SPV), that is Ihsan *Ṣukūk* Bhd. This issuance is pursuant to Ihsan's RM1.0 billion *ṣukūk* programme, the first programme approved under the Securities Commission Malaysia's SRI *ṣukūk* framework. There was participation from a diverse investor group including corporations, banks, pension fund and asset management companies. The issuance proceeds would be used to fund schools under the Yayasan AMIR Trust School Programme identified for 2015. Yayasan AMIR is a not-for-profit foundation incorporated by Khazanah to improve the accessibility of quality education in Malaysian Government schools through a Public-Private Partnership with the Ministry of Education. The structure of this *ṣukūk* is in accordance with the Islamic principle of *Wakalah bil Istithmār*.[67]

5- *Ijārah Ṣukūk*

In *ijārah ṣukūk* the issuer in need of financing will first sell its asset to the investors to get the required amount of money. The same asset is then leased back to the issuer for a lease rental. The periodic lease rental will constitute the periodic distribution of payments to the investors. The issuer will then issue *ṣukūk al-ijārah* to the investors cum lessors. The *ṣukūk* represents undivided proportionate ownership by the investors cum lessors in the leased asset that gives them the right to the lease rental. Therefore, the trading of *ṣukūk al-ijārah* in the secondary market is backed by the real tangible asset. This is one of the reasons of the better global acceptance of *ṣukūk al-ijārah*.

The Malaysian Global Sovereign *ṣukūk* 2002 was based on the principle of *ijārah*. The Malaysian Global *Ṣukūk* Inc, was a Special Purpose Vehicle (SPV) which was incorporated for the sole purpose of the *ṣukūk* issuance. The SPV first purchased a number of identified land parcels from the Federal Lands Commissioner (FLC). Due to legal constraints in Malaysia, the FLC retained the legal titles on the land parcels and only transferred the beneficial titles to the SPV. The SPV then leased out the land parcels through a series of *ijārah* arrangement to the Malaysian Government for periodic rental payments.

The SPV issued the *ijārah ṣukūk* to the investors. The investors paid the *ṣukūk* proceeds amounting to USD600 million. The *ṣukūk* represent undivided proportionate ownership over the land parcels. The *ṣukūk* proceeds were the purchase price of the land parcels that the investors bought from the SPV. The SPV then paid the *ṣukūk* proceeds to the FLC as the purchase price of the land parcels. The Malaysian government made an irrevocable promise to buy back the land parcels from the investors upon maturity of the *ijārah* agreement. The *ṣukūk* holders would be entitled to receive the lease rentals as their periodic profit distribution. The lease rentals represented profit to the investors. The principal investment would only be redeemed upon maturity of the *ijārah* agreement.[68]

In addition, the current 5-year $1.5 billion *ṣukūk al-ijārah* (leasing *ṣukūk*) issued by Malaysian state oil company, Petroliam Nasional Bhd (Petronas), marks a new period of *ṣukūk* (Islamic securities) issuance in the country. The Petronas Emas $1.5 billion *ṣukūk* together with the 4 billion ringgit *ṣukūk al-mushārakah* issued by Cagamas in 2010 are listed on Bursa Malaysia, the local stock exchange, for the first time, as well as on the Labuan International Financial Exchange (LFX) and the Luxembourg Stock Exchange.[69]

6- Conclusion

The writer concludes that there is an overlap between debt and sale based structure of the *ṣukūk*. The relationship of the buyer and seller is created as a result of the contract of sale by deferred payment. Likewise, a debt obligation is created before the issuer can issue bonds to the investors. This obligation takes place in the second transaction between the issuer and the investor when the former buys back the assets from the latter at a profit margin and on deferred payment basis. On the other hand, the *ijārah* based structure indicates ownership in the assets that generate income and normally owned by the SPV. Unlike equity bonds, a steady Islamic income stream is required to back the issuance of the bonds in ABS.

Equity bonds are based on the concept of *mushārakah* and *muḍārabah*. The equity-based structure of the *ṣukūk* represent common ownership and entitles the holders shares in a specific project. In contrast with debt-based structure, no indebtedness is created in equity bond market. The issuer will simply issue bonds to raise funds. In order to attract and inspire the confidence of the investors, there are some positive factors behind the issuance of the bonds. For instance, in Jordanian *muqāraḍah* bonds, the government of Jordan guarantees the settlement of the nominal value of the bond, which provides support to the investor.

As the principles of Islamic finance emphasises ethical investment, green bonds are environment-friendly and thus green *ṣukūk* fall within the ambit of the objectives of *Sharīʿah*. Recognising the need for green *Ṣukūk*, the SC of Malaysia issued SRI framework to facilitate the SRI financing and investment initiatives. The SRI *ṣukūk* framework is an extension of the existing *ṣukūk* framework and therefore, all the other requirements in the Guidelines on *Ṣukūk* continue to apply. This initiative has put Malaysia at par with the rest of the world in the field of Islamic finance.

Lastly the introduction of equity based *ṣukūk* i.e., (*mushārakah* and *muḍārabah ṣukūk*) and *ijārah ṣukūk* in the Malaysian secondary market indicates a move from debt based *ṣukūk* to equity and *ijārah ṣukūk*. This trend will bridge the existing gap between Malaysia and the Middle East and thus facilitate the flow of investment from Middle East to Malaysia. The writer recommends that, despite this initiative, the *Sharīʿah* scholars need to revisit the controversial debt based instruments so that a coordinated and harmonised approach can be achieved in the near future.

Notes

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1. Nathif J. Adam and Abdulkader Thomas, *Islamic Bonds, Your Guide to Issuing, Structuring and Investing in Sukūk*, London, Euromoney Books, 2004 at 42.
2. Securities Commission, *Guidelines on Islamic Securities*, Kuala Lumpur, 2004 as mentioned in *Islamic Financial System: Principles and Operations*, Kuala Lumpur: ISRA, 2012 at 390.
3. Islamic Financial System: Principles and Operations, KL, ISRA, 2012 at 389.
4. http://www.sc.com.my/wcontent/uploads/eng/html/bondmkt/MalaysianDebtSecuritiesSukuk_2009.pdf (accessed on 30/06/2015).
5. http://www.sc.com.my/post_archive/sc-introduces-sustainable-and-responsible-investment-sukuk-framework (accessed on 10/07/2015).
6. Khazanah bonds are issued by Khazanah Nasional Berhad under the principle of *murābaḥah*. The Khazanah bonds have the benefit of a guarantee by the Government of Malaysia whereby the Government of Malaysia guarantees payment of face value of the outstanding bonds or if any of the bonds become due and payable before their maturity date, the fair value of such bonds. The secondary market trading of this bond is based on the principle *bayʿal dayn*. See http://www.midf.com.my/our-product-a-services/midf-amanah-investment-bank-berhad/khazanah-bond (accessed on 4/06/2015). Please note that the two words bonds and *ṣukūk* are used synonymously.
7. See <http://iimm.bnm.gov.my> (accessed on 4 June 2015).
8. Securities Commission Malaysia, *The Islamic Securities* (*Ṣukūk*) *Market*, Petaling Jaya Selangor, Lexis Nexis, 2009), at 47.
9. <http://iimm.bnm.gov.my> (accessed on 6/12/2010).
10. Wehr, Hans, *A Dictionary of Modern written Arabic*, Cowan, J. Milton (ed.), Bayrūt, Library Du Liban, 1980, at 305.
11. <http://www.sc.com.my/eng/html/bondmkt/Guidelines-Islamic_PDF.pdf>.
12. In Arabic this reads as: "*māl hukmī fi al dhimmah*"; See Al Kāsānī, *Badaiʿ al-Sanaiʿ*, Qāhirah, Maṭbaʿah al-Jamālīyah, 1910, V, at 148, Please also see Engku Rabiah, Securitization in Islamic Contract, paper presented at Colloquium on Islamic Bonds, jointly organized by the Securities Commission of Malaysia and International Islamic University Malaysia; Kuala Lumpur, 24th June 2004.
13. Rabiah, Securitization in Islamic Contract, at 34.
14. It is said that there is *ijmāʿ* (a general consensus) on the prohibition of *bayʿ al-Kalī' bi al-Kalī'*, whether the debt is sold to the debtor or to the third party. See Wahbah al Zuḥaylī, "Financial Transactions in Islamic Jurisprudence", Bayrūt, Dār al-Fikr, vol. I, 2007, at 79. However, this claim is rebutted by some other

jurists. Please see Kamali, *Islamic Commercial Law: An Analysis of Futures and Options*, Petaling Jaya, Ilmiah Publisher, 2002, at 127-128.

15. Al-Kāsānī, *Badā'iʿ al-Sanā'iʿ*, Meṣir, Dār al-Maʿrifah, 1326H, V, at 148.
16. Mansūr ibn Yūnus al-Bahūtī, *Kashāf al-Qanā'an Matn al-Iqnā'*, Bayrūt, Dār al-Fikr, 1982, III, at 294 in Sano Koutoub Moustapha, *The Sale of Debt as Implemented by the Islamic Financial Institutions in Malaysia*, Kuala Lumpur, Research Centre IIUM, 2001, at 46.
17. Confirmed debt is the debt where the sale of the commodity has taken place. For instance, the sale of the commodity in *murābaḥah* is a confirm debt. In the case of non-confirm debt, the transaction is not yet complete such as the cost of labour before completion. Please see Sano Koutoub Moustapha, *The Sale of Debt as Implemented by the Islamic Financial Institutions in Malaysia*, Kuala Lumpur, Research Centre IIUM, 2001, at 46.
18. Capital of *salam* refers to the cost of a commodity, which is paid in advance but the commodity is delivered later in the future. This is an exception from the general rule of Islamic commercial law which requires that commodity should be present at the time of the contract. This was allowed keeping in view the need of the people.
19. Sano Koutoub Moustapha, *The Sale of Debt as Implemented by the Islamic Financial Institutions in Malaysia*, Kuala Lumpur, Research Centre IIUM, 2001, at 49.
20. Securities Commission Resolutions, at 16-19. For a detailed discussion on the reasons for the decision, see the paper written by Suhaimi Mohd Yusuf, entitled, "*Bayʿ al-dayn*: Keputusan Majlis Penasihat Syariah Suruhanjaya Sekuriti", presented at Muzakarah *Bayʿ al-dayn* organized by Bank Negara Malaysia, 4 July 2002, Kuala Lumpur, at 14-19.
21. Resolution of *Sharīʿah* Advisory Council, Bank Negara Malaysia, 2006 at 14.
22. Resolution of *Sharīʿah* Advisory Council, Securities Commission of Malaysia, 2007 at 20; also Saiful Azhar Rosly and Azizi Che Seman, Juristic Viewpoints on *Bayʿal-ʿĪnah* in Malaysia: A Survey, *IIUM Journal of Economics and Management* 11, no.1 (2003), at 87-88.
23. Mohammad Hashim Kamali, Debt, Debt Securities and deferred Sales: An Islamic Legal Analysis, paper presented to the Colloquium on Islamic Private Debt Securities, Jointly organised by the International Islamic University Malaysia and the Securities Commission, Kuala Lumpur, 24 June, 2004.
24. Engku Rabiah Adawiah Engku Ali, *Bayʿ al-ʿĪnah and Tawarruq: Mechanism and Solutions*, Muzakarah Cendekiawan Syariah Nusantara, *Bayʿal-ʿīnah Dan Tawarruq: Isu-Isu Dan Penyelesaiannya dalam Konteks Kewangan Islam*, Organized by Bank Negara Malaysia, 28-29 Jun 2006. For instance, see Al-Zuḥaylī, Financial Transactions in Islamic Jurisprudence, Bayrūt, Dār al-Fikr, Translated by Maḥmoud A. El-Gamal, 2007.
25. For details see Wahbah al-Zuḥaylī, *al-Muʿamalāt al-Maliyyah al-Muʿaṣirah*, Bayrūt, Dār al-Fikr al-Muʿasir, n.d., at 45. See also Al-Zuḥaylī, *Financial Transactions in Islamic Jurisprudence*, Bayrūt, Dār al-Fikr, Translated by Maḥmoud A. El-Gamal, 2007, vol.1 at 114-115;
26. For instance Government Investment Issue (GII). It is issued by the government of Malaysia to finance the country's development programme. It is basically

an Islamic bond structured on the concept of *bayʿal-ʿīnah* and can be traded in the secondary market. In this transaction, the government undertakes to sell an asset on cash basis at a discount and buys it back at a higher price on the basis of credit. A debt is created here which is securitised through the issuance of GII.

27. Hasan Ahmad, Fiqh methodology for the Creation of the Benchmark Bonds in Islam, *Seminar on Islamic Bonds*, Kuala Lumpur, 1998.
28. Abdur Rashid Hussain, "Malaysia's Khazanah Benchmark Bonds," *Islāmic Banker*, April 1998, at 9-11.
29. <http://iimm.bnm.gov.my/index.php?ch=1&pg=42> (accessed on 15/02/2010).
30. Saiful Azhar Rosly and Mahmood M. Sanusi, *The application of Bayʿal-ʿĪnah and bayʿ al-Dayn in Malaysians Islamic Bonds: An Islamic Analysis*, International Journal of Islamic Financial Services Vol. I, no.2, Oct-Dec 1999.
31. <http://iimm.bnm.gov.my/index.php?ch=1&pg=42> (accessed on 15/02/2010).
32. Securities Commission Malaysia, *The Islamic Securities (Ṣukūk) Market*, Petaling Jaya Selangor, Lexis Nexis, 2009, at 75.
33. It is appropriate to differentiate between asset backed and asset based *ṣukūk*. Asset backed *ṣukūk* are similar to asset backed securities with the presence of a necessary element of securitisation. The originator who wants to raise funds sells the income generating asset to a special purpose vehicle (SPV) under a legal true sale. Consequently, the investors (*ṣukūk* holders) enjoy bankruptcy remoteness and the creditors of the originator cannot take back the asset from the investors if the originator is facing bankruptcy. The payment to the investors depends upon the actual performance of the underlying asset. On the other hand, in asset based *ṣukūk*, the asset is present for the purpose to fulfill *Sharīʿah* requirement rather than a source of profit and capital payments. The credit risk assessment is directed towards the entity with the obligation to redeem the *ṣukūk*. Normally, this will be the issuer. However, in some cases it may fall on the originator. For details see *Islamic Financial System: Principles and Operations*, KL, ISRA, 2012 at 400-401.
34. Securities Commission, *Guidelines on the Offering of Asset-Backed Securities*, Kuala Lumpur, 2004, at 1.
35. Securities Commission, *Resolutions of the Securities Commission Sharīʿah Advisory Council*, Kuala Lumpur, 2002, at 47.
36. Securities Commission Malaysia, *The Islamic Securities (Ṣukūk) Market*, Petaling Jaya Selangor, Lexis Nexis, 2009, at 87.
37. The SPV was only the investment agent of the investors.
38. Securities Commission of Malaysia, *The Islamic Securities (Ṣukūk) Market*, at 91.
39. The *sharīʿah* issues on this matter have been discussed in the preceding pages.
40. Securities Commission Malaysia, *The Islamic Securities (Ṣukūk) Market*, Petaling Jaya Selangor, Lexis Nexis, 2009, at 95.
41. There must be an asset and this asset must generate cash flow. With regard to genuine sale criteria, there should be an independence of the SPV with no recourse to the originator. This is to ensure adequate bankruptcy remoteness. Furthermore, the asset must not be based on solely monetary debts and receivables. The asset can be solely tangible asset (*ijārah* asset) linked with rental income for the purpose of cash flow generation. Or the asset can be the hybrid between tangible

assets and debts (with a ratio of at least 30:70; previously 51:49). Some other assets can also be used such as usufruct/services that generate cash flow.

42. The *sharīʿah* issues on this matter have been discussed in the preceding pages.
43. Walid Khayrullah, "*Al-Muqāraḍah* Bonds as the Basis of Profit Sharing", *Islamic Economic Studies*, vol.1, no.2, June 1994, at 80.
44. Ibid.
45. Saiful Azhar Rosly and Mahmood M. Sanusi, "Financial Instruments for Project Financing in Malaysia and Arab Countries: A Comparative Analysis", at 11.
46. Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance, Religion, Risk and Return*, The Hague, Kluwer Law International, 1998, at 191.
47. Please see Stuart R. Veale (editor), Stocks, Bonds, Options, Futures, Investment and their Markets, *New York Institute of Finance*, at 113-115.
48. Muhammad al-Bashir Muhammad al-Amine, The Islamic Bonds Market: Possibilities and Challenges, *International Journal of Islamic Financial Services*, Vol. III, No.1, July-Sep 2001, at 8.
49. Guarantee (*kafalah*) can be divided into two different types such as *kafalah bi al- mal* and *kafalah bi al al-nafs*. *Kafalah bi al- mal* means a guarantee to return an asset to its owner, while *kafalah bi al al-nafs* means a guarantee to bring someone to a specific authority such as before a court of law. For details see Al-Zuḥaylī, *Financial Transactions in Islamic Jurisprudence*, Vol. 2 at 5-13.
50. Ibid at 9.
51. The writer is of the opinion that government is the executive head of the country which carries executive responsibility of the whole country. The Ministry of Endowment is an entity of the Government which looks after the affairs of the Endowment. It has full financial independence and in this way can fulfill its financial obligations. However, it may not be considered by others a genuine transaction as the government and the Ministry of Endowment may be perceived as the same entity and not different and third parties.
52. Islamic Fiqh Academy Resolution No. (5) d 4/08/88 on *Sanadāt al-Muqāraḍah*, Majallah *Majma al-Fiqh al-Islāmī*, No. 4, Vol. III, at 1821-2165.
53. Ibid. 2164.
54. As mentioned in Muhammad al-Bashir Muhammad al-Amine, at 9.
55. Abdul Rahman Yousri Ahmad, "Islamic Securities in Muslim Countries Stock Markets and an assessment of the need for Islamic Secondary Market," *Islamic Economic Studies*, vol.3, no.1 December 1995, at 7-9.
56. Aḥmad Zarqā, *Sharḥ al-Qawaʿid al-Fiqhīyyah*, Bayrūt, Dār al-Gharb al-Islāmī, 1983, at 361.
57. Abdul Rahman Yousri Ahmad, "Islamic Securities in Muslim Countries Stock Markets and an Assessment of the Need for Islamic Secondary Market," *Islamic Economic Studies*, Vol. 3, No.1 December 1995, at 7-9.
58. Islamic Fiqh Academy Resolution no. (5) d 4/08/88 on *Sanadāt al-Muqāraḍah*, Majallah *Majma al-Fiqh al-Islāmī*, No.4, Vol. III, at 1821-2165.
59. Securities Commission Malaysia, *The Islamic Securities (Ṣukūk) Market*, at 73-74.
60. *Islamic Banker*, Issue 61, February 2001, at 28.
61. Securities Commission Malaysia, *The Islamic Securities (Ṣukūk) Market*, at 78-79.

62. Ibid at 81- 82.
63. Lee Irvine, Michael P Griffy and Alice Cowman, Green Sukuk: The race to be first, Special Report, *Islamic Finance News*, 5th Nov 2014 at 28-30.
64. http://www.sc.com.my/post_archive/sc-introduces-sustainable-and-responsible-investment-sukuk-framework (accessed on 10/07/2015).
65. Lee Irvine, Michael P Griffy and Alice Cowman, Green Sukuk: The race to be first, Special Report, at 29.
66. http://www.thestar.com.my/Business/Business-News/2014/09/03/Green-Sukuk (accessed on 11/7/2015).
67. Ihsan Sukuk Bhd http://www.sukuk.com/sukuk-new-profile/ihsan-sukuk-bhd (accessed on 10/07/2015).
68. Securities Commission Malaysia, *The Islamic Securities (Ṣukūk) Market*, at 66.
69. <www.zawya.com/middle-east/sidZAWYA20090824034601.htm> (accessed on 15/08/10).

TOWARDS THE FORMULATION OF A PEDAGOGICAL FRAMEWORK FOR ISLAMIC SCHOOLS IN AUSTRALIA

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Abstract: During the last 30 years 'Islamic' or Muslim schools have sprung up in Europe, North America and Australia. Reasons for the establishment of these schools generally pertain to Islamic faith and quality of education. Parents desire their children to be positive participants in, and contributors to, society while at the same time maintaining their faith. However, a number of researchers question the effectiveness of Islamic schools in achieving these goals. Driessen and Merry (2006) and Walford (2002) note that matters of Islamic faith are mainly confined to formalities expressed as rules and codes and Qur'an recitation. Moes (2006) and Shamma (1999) express concern that formalisation of religious education leads to negative consequences. Often, these schools devote their energies to the 'what' and 'why' of Islam without the 'how'. Memon (2007) proposes that to achieve the intents and purposes of Islamic education in a western context, teachers need to be guided by the pedagogical principles of the Islamic tradition in a fertile synthesis with the pedagogical principles of contemporary educational thought. Such a pedagogical framework would enable a curriculum to be embedded that is both faithful to Islamic principles and relevant to contemporary society. While there is some limited international research in this area, there is a dearth of research in the Australian context. This paper critically surveys and evaluates the existing research material and proposes a Prophetic Pedagogical Framework that may be used in a fertile synthesis with the Productive Pedagogies framework underpinning the Queensland public education system. It is contended that an Islamic extension of the Productive Pedagogies framework would have considerable value for the on-going quality of teaching in Australian Islamic schools.

Introduction

Muslims are no strangers to Australia; Northern Australia is marked on the maps of the Arab geographers of the 9th and 10th centuries of the Common Era (Cleland 2001). From the 17th century to 1907 the Macassans, from southern Sulawesi in Indonesia, were regular traders with the Aboriginal Yolngu people of Arnhem Land while in the east during the early days of the colony Muslims arrived both as free settlers and convicts. However, there are no records of the existence of mosques until after the arrival of the 'Afghan' cameleers in 1860. The oldest mosque still fully utilised was founded in Adelaide in 1895.

Different Muslim ethnic groups have migrated since that time but it was not until the late 1960s and 70s that significant numbers of Muslims migrated to Australia (Cleland 2001).

Since the 1970s Muslims have migrated from over seventy countries (Wise and Ali 2008:14) and although the representation in the popular media is of a uniform and homogenous group they come from a range of theological traditions and encompass different cultural, sectarian, linguistic, and ethnic values (Wise and Ali 2008:11). A large number of these migrants come from countries which are in themselves culturally and religiously diverse. Like other migrants they come for a multitude of reasons including economic advantages, educational opportunities, family reunion and escape from political oppression (Wise and Ali 2008:14). Muslims have followed the tendency of other migrant groups in settling close to each other. However given the importance of family and the mosque in Islam, subsequent generations have continued this tendency (Wise and Ali 2008:14-15). With the advent of larger communities from the 1960s and 70s the construction of more mosques became both an imperative and a possibility. These mosques were not only used for prayer gatherings but as centres for children's' religious education particularly Qur'an recitation. As the numbers of Muslim students grew, sentiment developed within the community that a quality religious experience could more readily be achieved by the establishment of full time Islamic schools. By 1983 the first of these schools had been established in Sydney, Melbourne and Perth. In the following thirty-two years more than thirty Islamic primary, secondary and k-12 schools have been established across Australia.

During the same period a similar growth in Islamic schools has been experienced in other migrant communities across North America and Europe. Given that it is the 'Islamic' that is the rationale for the differentiation of these schools from public and other faith based schools it is pertinent to examine the nature of this differentiation.

Islamic Schools: The International Experience

Driessen and Merry (2006) reviewed studies of Netherland's Islamic schools undertaken between 1989 and 2002. The empirical studies Driessen and Merry reviewed included those performed by the Dutch Inspectorate of Education (DIE), the National Security Centre (NSS) and two undertaken by university researchers, Shadid and Van Koningsveld (1992), and Driessen and Bezemer (1999). Driessen and Merry (2006) found, that after taking into consideration the different perspectives and intent of each of these studies, students in Dutch Islamic schools do no more poorly than students at schools with a comparable

socio-ethnic background. However matters of Islamic faith are generally confined to lessons in Qur'an recitation and formalities expressed as rules and codes imposed by the board on staff and students.

Islamic schools in Britain seem to perform better academically than their Dutch counterparts. In a comparison of all schools, both religious and non-religious, Islamic schools were among the most successful in terms of value-added scores and raw exam results in 2007 (TES website). The three Islamic primary schools measured were joint top in key English tests but lowest in contextual value-added (CVA) scores, which factor in student background and prior attainment, suggesting that students should have achieved better results (Marley 2008).

As a majority of British Islamic schools suffer from a shortage of funds, they consequently lack many of the facilities available in state schools (Meer 2007:61). It is therefore understandable that Muslim schools in Britain would seek to become voluntary aided schools and feel the need to highlight academic achievements. This continues to leave Islamic faith, as Walford (2002) found, confined in the main to formalities and the introduction of Islamic and Qur'anic studies as subjects merely appended to a standard public education curriculum.

Despite the dramatic increase of Islamic schools in North America over the last few years, ongoing financial pressures prevent many schools from fulfilling the claims of excellence initially promised (Merry and Driessen 2005:424). However, academic excellence is high on the agenda and the overwhelming majority of Islamic schools eagerly seek outside assistance from other non-Islamic schools and enthusiastically embrace accountability both at local and state levels (Merry and Driessen 2005:427).

This prioritisation of academic excellence results in Islamic faith requirements being addressed merely by the addition of decontextualized courses in Arabic, Qur'an memorisation and Islamic studies. This creates a situation where at best the classes produce factually knowledgeable students uncommitted to Islam and at worst students who turn away from Islam (Moes 2006:11)

The Australian Experience

In 2006, 20% of Muslim students attended independent schools, a significant rise from the 9% in 1996 (Buckingham 2010). The vast majority of these students attended Islamic schools. Clyne (2000) conducted parental interviews to identify the reasons why Muslim parents send their children to Islamic schools. She found the more important reasons were that the Islamic school curriculum reflects Islamic values; there is strong discipline; a Muslim environment; the

teachers understand about Islam; Qur'anic studies are taught; and that children will learn correct behaviour (Clyne 2000:199-200).

While there are currently no comprehensive studies in Australia that evaluate the extent to which Islamic schools' fulfil parental expectations; the observations of Sanjakdar (2005) at two Melbourne schools are informative. She found that despite the claims of delivering a holistic Islamic education it was difficult to find evidence of Islamic teaching principles and beliefs as the theoretical model for curriculum planning and practice (Sanjakdar 2005:2). Staff were concerned that the drive for academic success had made the college forget its religious obligations and commitment to parents. Islam had become restricted to a few periods of Qur'anic and Islamic studies per week. This restricted class time and the fragmented approach of Islamic education in the core curriculum made it difficult for students to view Islam as a long life activity, extending beyond the limits of formal schooling (Sanjakdar 2001).

The work of Sanjakdar (2001 & 2005) cannot be extrapolated to reflect all Islamic schools in Australia; however given the concordance with the experiences of Islamic schools in other western contexts it is reasonable to expect that it does at least reflect the situation of a significant number of other Islamic schools in Australia.

Watson and Chen (2008) undertook a study at an Islamic School in Sydney as part of, 'The Teacher Education for the Future Project'. The Project seeks to inform teacher education programs about the educational challenges and changes in society for the 21st century, to better inform the education of global citizens of the future. The project employs a survey to probe teachers' beliefs about the purpose of education and how best to prepare teachers for the future. Of the 41 teachers at the school, 26 responded to the survey, 19 female and 7 male. Of these respondents 73.7% of the females and 28.6% of the males identified as Australian. In response to questions about the purpose of education no teacher responded that preservation of culture is important. On inquiry as to why this option was not selected the women responded:

> Since the Cronulla riots we (Muslims) do not want to be seen as different ... We want to just melt into the background and disappear. We know this will not happen because we (a group of women) dress differently … But we still don't want to write that we want this difference. We feel ashamed. We shouldn't feel like this …We just want to be Australians like everyone else. We love our religion and we want to be Australians …

It is worthy of note that the women, while affirming their attachment to Islam and an Australian identity, do not see themselves as preservers of culture.

This awareness of a 'new world' to that of the parents is further elucidated in a female geography teacher's response concerning teacher education, "teacher education should produce teachers who are able to produce citizens who are independent, realistic thinkers and productively contribute to their welfare and that of society" (Watson and Chen 2008: 44).

Cultural Traditions and Islam

In their article discussing culturally appropriate cognitive therapy with Muslim clients, Hodge and Nadir (2008:33) note that in contrast to the individualism, rooted in European enlightenment, that is valued by Western counselling, Islam highlights the importance of community and as a consequence rather than looking inward to establish identity, Muslims tend to look outward, grounding their identity in religious teachings, culture and family. This importance of culture is noted by Wise and Ali (2008:11) who point out that Muslims in Australia practice their religion in accordance with the cultural traditions of their individual countries, and in some cases according to different ethnic traditions within these national cultural traditions. The Islamic cultural traditions of these countries have developed over time as Murad (1997:6) notes:

> The traditional Muslim world is a rainbow, an extraordinary patchwork of different cultures, all united by a common adherence to the doctrinal and moral patterns set down in Revelation. Put differently, Revelation supplies parameters (*hudud*) rather than a complete blueprint for the details of cultural life.

The interaction between Islam and local traditions from the beginning of Islam has always been dynamic and therefore it is natural that with time Australian born Muslims will develop their own distinct Australian Islamic cultural traditions. A process Watson and Chen (2008) reveal is already underway. This highlights the significance of Moes's comment, that if students feel religion is being used insincerely as a tool to ensure cultural conformity with an 'old world' standard, they will be more likely to rebel (Moes 2006:10). Children born in Australia are part of Australian society and therefore attempts by parents to protect children from the influences of society by placing them in Islamic schools can easily be interpreted by their children as a culture gap rather than a religious need. In some cases, expectations of conformity from parents have led to an outward compliance but inward rebellion against Islam (Moes 2006:9).

Given the issues raised above it is understandable why some critics of Islamic schools have concerns in regards to the ability of Islamic schools to

prepare children to live in a multicultural society, and to reflect critically upon their inherited beliefs and cultural norms (Merry and Driessen 2005:428).

A Possible Way Forward

The Qur'an and hadith are the original sources for the three different terms generally used to denote the concept of education in various Islamic Arab countries today. Each of these terms emphasise different aspects of the development of the whole person represented by the physical, intellectual, moral and spiritual dimensions (Boyle 2004:15). The first term *ta'lim* refers to instruction and learning about things, which develops reason and trains the mind, as stated in the Qur'an 'And He [God] taught (*'allama*) Adam the names of all things' (2:31), and the saying of the Prophet 'the best of you are those who learnt (*ta'allama*) the Qur'an and taught it (*'allama*) (An-Nawawi hadith 1000: 303). The second term *tarbiyah* refers to the development of human personality and the nurturing and rearing of a child (Qur'an 17:24), and the third term *ta'dib* refers to the training of the mind and soul in terms of behaviour and ethical conduct. It encompasses the recognition and acknowledgement of one's right and proper place and the self-discipline to enact one's role in accordance with that place (Attas 1980:22).

The term, *tarbiyah*, is used by Tauhidi (2001) to name his vision for Islamic education in North America: the Tarbiyah Project. This he envisages as a holistic and integrated approach that aims to nurture the character and inner spirit of the child to enable self-discovery, wholeness and social consciousness. To achieve this, he proposes that Islamic spirituality be woven throughout the curriculum and into the daily learning experience of the student. However, Attas (1980:28-33) points out that the use of the term *tarbiyah* to denote education is a modern construct, and does not lend itself to a concept of Islamic education and its essential elements of knowledge, intelligence and virtue. For earlier generations, the term *tarbiyah* was not intended to denote education or the education process, but signified the cherishing that parents bestow on their children. Attas (1980:24-27) argues that education is in fact *ta'dib* because the earlier Muslims combined *'ilm* (knowledge) with *'amal* (concomitant action). *Adab* is what joins the *'ilm* to *'amal* by the recognition and acknowledgement of the right and proper place for the willing enactment of one's role.

However, the opinion of Bin Omar is that an accurate definition encompasses all three aspects and is concerned with developing the essence of the human being (the soul-spirit, heart, self, and intellect) (Boyle 2004:15). Memon and Ahmed (2006:16-18) encompass these aspects in the term Adamic Education, coined by Abdul Hakim Murad (2001) (aka T. J. Winter).

This view is based on the movement of Adam from heaven to earth, a movement they argue is a spiritual ascent rather than a fall because he moved from a state of ignorance to a state of knowledge, and therefore through education Adam was raised to be the vice-gerent of God on earth. The vice-gerent has correct *adab* in that their behaviour is appropriate and fitting for the occasion and has been performed in due proportion in a conscious state of being, as if seeing God. Education is thus not a forward movement to things unknown but a search for knowledge to return to a state of *fitrah* (natural state of purity). Therefore education is not just transmission of knowledge but human transformation.

Memon (2007:3) sees immense value in the definitions discussed above but argues that limiting a definition to one or the other of the aspects does not give justice to the expansiveness of the Islamic teaching tradition. Although he does not explicitly follow Bin Omar in his synthesis of all three aspects to define Islamic education, they are all embedded in his discussion.

Memon (2007) argues that for Islamic schools to raise standards in Muslim students' preparation for the challenges of life in Western and contemporary society, curriculum and assessment need to be embedded in an authentic Islamic pedagogy. Muslims in Western and contemporary society face life experiences that are ostensibly different from previous generations. Memon (2007:2) points out historically Islamic schools in the west have erroneously assumed that Muslim teachers —by virtue of being Muslim— know what it means to educate Islamically, and as a result Islamic schools have focused any spare energy on the area of curriculum development. He therefore argues for a shift in effort from revisiting curriculum initiatives to teacher training initiatives. This, he argues, will enable improvements in standards.

Memon also argues that the 'Islamic' character/nature of an Islamic school should not be dependent on curriculum only, but must essentially be linked to an appropriate pedagogy. Hence, for the purposes of Islamic schools in Western contexts it is proposed that a "fertile synthesis" between the pedagogical principles of the Islamic tradition and that of contemporary educational thought be formulated in order to achieve the intended aims of Islamic schooling (Murad as cited in Memon 2007:12).

Productive Pedagogies

For Islamic schools in Australia, it is contended that a synthesis between Productive Pedagogies and Prophetic pedagogy would allow the achievement of the intended aims and objectives of Islamic schooling. The Queensland School Reform Longitudinal Study (QSRLS) is one of largest classroom based

research projects ever undertaken in Australia. The study was commissioned by Education Queensland (EQ), and commenced in 1997 with the submission of the final report in 2001. The QSRLS observational data led to the four dimensions of the Productive Pedagogies framework, which has been taken up widely in Australia and internationally as both a research tool and a metalanguage for critical teacher reflection (Mills et al 2009). Productive Pedagogies was adopted by Education Queensland in 2001. Another similar framework based on the QSRLS data is The Quality Teaching Model, which was adopted by the NSW Department of Education and Training in 2006.

The twenty elements of the framework are grouped in four dimensions: Intellectual Quality, Connectedness, Supportive Classroom Environment and Recognition of Difference.

The Productive Pedagogies framework has been chosen in preference to the Quality Teaching Model for use in a 'fertile synthesis' with prophetic pedagogy for the following reasons.

- Its wide use within Australia and internationally as a research tool and metalanguage.
- Group identity and citizenship are not included in the Quality Teaching Model but are potentially significant in the construction of pedagogy for Islamic Schools
- The twenty elements of the Productive Pedagogies Framework are basically the twenty classroom practices that formed a lens for the structured observations undertaken in the QSRLS research.
- The QSRLS (1997-2001) is currently being revisited in a recently commenced six-year study, the Queensland Longitudinal Study of Teaching and Learning.

Methodology for identifying Pedagogical Principles of the Islamic tradition

Islam is a complete way of life. It's moral, spiritual, legal, financial, educational and ethical guidance is derived through Islam's primary revealed sources: the Quran and Sunnah. The Quran deals with specific and general themes such as monotheism (*tawhid*), morals and ethics, the hereafter, the stories of past nations, and the cosmos. The Sunnah is defined as the sayings, actions and tacit approvals of Prophet Muhammad, and it expands on the themes of the Quran and is a practical manifestation of the ideal Islamic life.

As Du Pasquier (1992) points out; "in Islam everything belongs to God and every aspect of human and social life is sanctified through the tradition proceeding from the revelation; the Prophet is the exemplification of that

tradition, " His example gives the believers the possibility to fully realise their human condition while maintaining spiritual orientation" (Du Pasquier 1992: 48). This is expressed in the following verses of the Qur'an; "For you in the messenger of Allah [God] is an excellent example" (Qur'an 33:21), and "For this we have sent a messenger to you from amongst you reciting to you Our signs, purifying you, teaching you the Book and wisdom and teaching you what you previously did not know" (Qur'an 2:151).

The Sunnah has been preserved throughout the annals of Islam in collections known as the Hadith. A scientific approach was developed by classical Islamic scholars to filter out the authentic hadith from other less reliable narrations. The Hadith have been classified and collected in numerous compilations, however two of these, *Sahih Bukhari* and *Sahih Muslim* are the most well-known compilations in which all the hadith are accepted by the majority of traditional Islamic scholars as rigorously authenticated.

To identify the main elements of the pedagogical principles of the Islamic tradition as exemplified by the teaching of the Prophet it is necessary to examine the Hadith. For the purposes of this research the compilation of *Sahih Muslim* was preferred due to its more integrated structure and accessibility for non-specialist hadith scholars (Ali 2003:104). To minimise the potential of bias in hadith selection and a resultant skewing of results it was decided to use a Glaserian grounded theory approach of systematic coding and analysis by constant comparison of hadith from *Sahih Muslim* starting from the beginning of the compilation. Glaser's approach was selected given its more purely inductive nature and flexibility (Urquhart 2001). The method involves theoretical sampling and analysing by constant comparison. This continues until the point of saturation — the point in sampling when the categories, their properties and dimensions, as well as the links between the categories, are well established and the beginning of an emergent theory and a core variable is evident (Holloway 2008: 112-114).

However, it should be noted that in coding the hadith identification of a single core variable from the outset was not intended, but rather a number of core variables that would equate with pedagogical principals from the life of the Prophet Muhammad. These core variables were labelled in the analysis as core categories in order to avoid confusion with the core variable of emergent theory. When the analysis was tabulated the core categories were renamed Elements. Table 1 gives examples of coded hadith that were included in categories that were later linked together in the Element (core category) Differentiation.

Table 1. An example of an Element (core category) and some included codes

ELEMENT	EXAMPLES OF HADITH USED IN CODING
Differentiation Addresses according to the ability of the listener	**Hadith 6:** It is reported from Abu Hurairah that a Bedouin came to the messenger of Allah (may Allah grant him blessings and peace) and said: O Messenger of Allah guide me to a deed that if I do it I will enter paradise. He said, Worship Allah and do not associate anything with Him, establish the obligatory prayer, pay the *Zakat* (tax on the rich paid to the poor, needy, orphans etc.) and observe the fast of Ramadan. He said: By Him in Whose hand is my life, I will never add anything to it nor will I do less than it. When he turned to leave, the Prophet (may Allah grant him blessings and peace) said: Whoever is pleased to see a man from the dwellers of paradise should look at him.
Non-verbal strategies	**Hadith 46:** It is narrated that Abu Masud said; The Prophet of Allah (may Allah grant him blessings and peace) pointed in the direction of Yemen and said, Indeed *Iman* (faith) is here….
Teaches using himself and others as examples	**Hadith 99:** it is narrated from Abu Hurairah that the Messenger of Allah (may Allah grant him blessings and peace) passed by a pile of food; he put his hand into the pile and his fingers became wet. He said; O food vendor, what is this! He said; It has been affected by rain O Messenger of Allah. He said; Wouldn't it have been better to put it on top of the food so that the people could see it? Whoever cheats is not from us. **Hadith 2:** It is narrated from Abu Hurairah that the Messenger of Allah (may Allah grant him blessings and peace) in public with the people. A man came to him … He said; O Messenger of Allah, when is the Hour? He said, the one who is asked is no more knowledgeable than the questioner but I will inform you about its signs. (models politeness and completeness of reply)

Core categories that were identified after the initial one hundred and seventy-one hadith were systematically coded and analysed through constant comparison. These core categories made up the elements of the draft Prophetic Pedagogical Framework. The specific understanding and meanings of the core category and category names are teased out in the features of the various Elements of the draft Prophetic Pedagogical Framework at Table 2. The descriptions in italics represent categories included in the core categories (elements).

The element 'Memorisation as a key' has been included in addition to the core categories because of the central nature of oral transmission to Islamic religious education from the very inception of Islam up until the present day (Hardaker and Sabki 2010 & Boyle 2004).

Table 2 The Elements and their included codes and features

A PROPHETIC PEDAGOGICAL FRAMEWORK					
ELEMENTS	**FEATURES**				
BUILDING RELATIONSHIPS					
Respect of others Humility Individual not shamed	All classroom members feel comfortable to take risks because there are no put downs	Classroom input is presented without ostentation while counter arguments and discussions are conducted calmly addressing the issues and not the individual	All classroom members feel they may contribute if they wish to do so	A person's silence or deference to another's knowledge is respected	If a lack of respect is displayed by an individual he or she immediately acknowledges it and apologises where appropriate
Patient	Students are given time to consider their responses	Students are given time to self-correct	Contributors are not interrupted. Each waits their turn	Opportunity for understanding is given to those who are slow to grasp a point or concept	Classroom members are not angry with or sarcastic towards a person who makes a mistake
Just to both/all parties i.e. In accordance with evidence without questioning intent Good expectation and interpretation of others behaviour	Clear and consistent consequences for inappropriate behaviour for all classroom members	The inappropriateness of a behaviour is addressed and solutions sought without condemnation of the individual	A teacher who notices an instance of inappropriate behaviour does not immediately jump to conclusions	All parties involved in an incident are given fair and equal opportunity to explain their perspective	A student is not labelled or stereotyped for any reason. All students are and feel accepted

Relates to peoples environment and experience Concern for the welfare of the individual	Classroom members value others' life experiences	Classroom members value others' perspectives	Classroom members feel their circumstances are understood and given proper consideration	Classroom members listen to each other's concerns	Practical solutions are sought for classroom issues through class discussion
RELEVANCE					
Relates to peoples' environment and experience Relevant material for listeners Use of stories and examples of others Responsive to circumstances Careful use of own and others question	Examples are used that readily facilitate investigation and understanding of difficult concepts.	The structure of the stories facilitates understanding even if some aspects are outside the direct experience of the listeners	The stories of previous peoples used to illustrate relevant points for the listeners. This permits sensitive issues to be dealt with more explicitly	Flexible presentation whereby changed circumstances are utilised to give a more relevant learning experience	Questions and answers are used as teaching aids to focus and emphasise relevant points

A PROPHETIC PEDAGOGICAL FRAMEWORK					
ELEMENTS	**FEATURES**				
DEEP KNOWLEDGE **What and Why**					
Direct and indirect indications to deeper knowledge Brief but encompassing information Readily accepts suggestions	The reasons for studying topics and the information within them is coherent	Lessons are coherent and facilitate students' access to deep knowledge of the different aspects of a topic	Students develop a deep knowledge of a topic's links with other topics and its place within the broader body of knowledge	Students' constructive suggestions are encouraged and readily accepted	Students learn to extrapolate logical corollaries and conclusions from a wide body of knowledge
DEEP UNDERSTANDING **How**					
Direct and indirect indications to deeper understanding Broadens/deepens understanding	Lessons are coherent and facilitate students' access to a deep understanding of the spiritual significance of all aspects of a topic	Students develop a deep understanding of a topic's spiritual links with other topics	Students learn to extrapolate practical implications of the topic's spiritual significance	Students learn to be conscious thinkers able to rigorously examine their own intentions	Students' spiritual development is manifest in their understanding and implementation of their responsibilities as members of their community, Australian society and humanity

DIFFERENTIATION					
Scaffolds Addresses according to the ability of the listener Non-verbal strategies Teaches by examples	The lesson progresses in logical graduated steps	Lesson presented in a manner that all students are able to access aspects of the knowledge according to their ability	The information in the lesson is presented in different ways taking into consideration the different learning styles of students	Teacher uses examples appropriate for the students that may be abstract, concrete, verbal, visual or performed	Teacher is able to change the teaching style within and between lessons according to the needs of the students
Unambiguous/clear information and instruction Clear indication of standards Teaches strategies Gives reasons for direction	Information and particularly instructions are clearly unambiguous and coherent for all students	Required standards are clearly conveyed to all students	Students when directed clearly understand the reasons for the direction	Teaching strategies utilised allow all students to benefit from and contribute to the lesson	The teaching strategies maximise student learning

A PROPHETIC PEDAGOGICAL FRAMEWORK					
ELEMENTS	**FEATURES**				
ENGAGEMENT					
Strategies to aid retention Varied techniques for emphasis Explanation of negative consequences to discourage Draws attention from outset Builds interest and attention Maintains focus and attention on the matter being taught	The teacher uses various techniques to aid retention and emphasis e.g. word repetition, rhyme, contrasts, practical demonstration etc	Draws the attention from the outset e.g., by rhetorical questions and raising curiosity by mentioning strange things beyond the reality of the listeners	Maintains interest e.g. through stories, deliberately incomplete information that begs clarification, silence and questioning	Positive emphasis is the norm but negative consequences of certain actions are occasionally given to show the enormity of particular behaviours	Maintains focus on the objectives of the lesson despite disruptions and distractions
AUTHENTICITY OF KNOWLEDGE					
Link to source (authenticity-oral tradition)	The origins of the knowledge are recognised	Recognition is given of who and how the knowledge has been transmitted	The source and transmission of the knowledge is validated		

LANGUAGE PERCISION					
Mastery of language	Careful choice of words to give precise meaning	Choice of words permits a consistent depth of meaning	Words are not chosen to merely embellish the conversation i.e. for ostentation	Words and structures chosen are accessible	Words and structures are regarded by language speakers as representing eloquence
Metalanguage	New concepts given clear terminology	Words used for specific terminology with ongoing common usage are clearly defined	Terms used consistently	Different nuances of terms consistent	Different levels of meaning for terms introduced logically
MEMORISATION AS A KEY					
	Students learn the basic meaning of what is memorised	Students learn any additional information necessary to better understand what has been memorised	Students learn the links between what has been memorised and other topics	Students use what has been memorised and the links to topics as a tool to organise and access more extensive knowledge	Students use what has been memorised as a tool to store and recall important spiritual lessons

The features are the characteristics of the elements. Other Hadith to exemplify these characteristics have been taken from *Sahih Muslim* and other compilations of the hadith literature. A few examples of this are included at Table 3.

Table 3 Hadith that demonstrate features of an Element

ELEMENT	FEATURE	EXAMPLES FROM HADITH
	Lesson presented in a manner that all students are able to access aspects of the knowledge according to their ability	Imam Ahmad narrated from Abdullah bin ‘Amr bin Al-‘Aas that he said; we were with the Prophet of Allah (may Allah grant him blessings and peace) when a young man came and said; O Messenger of Allah may I kiss (my wife) when I’m fasting? He said; No. An old man came and said; may I kiss (my wife) when I’m fasting? He said; Yes. We looked at each other so he (may Allah grant him blessings and peace) said; I know why you looked at each other; the old man can control himself.
	Teacher uses examples appropriate for the students that may be abstract, concrete, verbal, visual or performed.	It is narrated from Abdullah bin Masud that the Prophet (may Allah grant him blessings and peace) drew a rectangle with a line passing through the rectangle lengthwise and smaller lines from the side of the rectangle perpendicular to the main line ... Bukhari: The book of Riqaq; The chapter of expectations

The work to formulate a Pedagogical Framework for Islamic schools from a synthesis of the proposed Prophetic Pedagogy and Productive Pedagogies is almost complete. Nevertheless it is clear from preliminary considerations that despite areas of difference there are sufficient similarities for the construction of a viable synthesis.

A very brief discussion follows to illustrate how a possible synthesis between some elements of the proposed Prophetic Pedagogy and dimensions of the Productive Pedagogies framework may be achieved. The Productive Pedagogies dimension that has been chosen for this illustration is Intellectual Quality. The elements of this dimension are **Higher-order thinking**, **Deep knowledge**, **Deep understanding**, **Substantive conversation, Knowledge as problematic** and **Metalanguage**. The definitions of these elements have been extracted from the Productive Pedagogies classroom reflection manual available from the Queensland Department of Education, Training and Employment website.

i. Higher-order thinking:

Higher order thinking involves students in the manipulation of information and ideas to synthesise, generalise, explain and hypothesise to arrive at a conclusion or interpretation. This element for those working in the Islamic sciences is just as if not more important than for those working in the material and social sciences. An Islamic scholar will constantly be required to synthesise complex material from a diverse number of fields before deciding an appropriate and authentic course of action in any given context. This is particularly so for scholars in the modern era and hence this element clearly has a place in a pedagogical framework for an Islamic school

However in addition memorisation was regarded in early Islamic education as an important tool in the facilitation of higher order thinking. It was not merely used for rote learning but intended as tool to aid later understanding of Islamic sciences and as means to synthesise, organise and access the vast amount of knowledge required by scholar to absorb before reaching decisions about essential matters in religious law (Hardaker and Sabki 2010 & Boyle 2004). The inclusion of Memorisation as a key, within a concept of higher order thinking, in a pedagogical framework for Islamic schools would facilitate the redirection of memorisation that is currently undertaken from that of rote learning to its true place within an Islamic curriculum.

ii. Deep knowledge

Deep knowledge involves the establishment of relatively complex connections

to the central concepts of a topic or discipline. On examination of the features outlined in this element of the Prophetic Pedagogical framework it is clear that there is a close fit between both frameworks. This element is essential for a student in an Islamic school so that they can not only connect across the common topics and disciplines of an Australian school education but between these topics and disciplines and their Islamic education.

iii. Deep understanding

A deep understanding is achieved when a student understands the complex relationships between the central concepts of a topic or discipline in a relatively systematic, integrated or holistic way. They can then produce new knowledge by discovering relationships, solving problems, constructing explanations and drawing conclusions. The emphasis of the esoteric rather than the exoteric in the proposed Prophetic pedagogy element Deep understanding is not at odds with Productive pedagogies but rather adds a deeper dimension for Muslim students. This emphasis lies at the core of an Islamic understanding not only of the holistic nature of Islamic knowledge but of all knowledge and the importance, interconnectedness and integrated nature of all thought and action.

iv. Substantive conversation

Through substantive conversation between teacher and students the understanding of subject matter is created or negotiated. This should include discussion about language, grammar, technical vocabulary and text structures and how these impact on, and are impacted by, different discourses and ideologies. The proposed Prophetic Pedagogy element Language Precision encompasses the mastery of language. It lies at the core of the Productive Pedagogies element. Substantive conversation as it develops through substantive, logical and precise conversation, analysis and synthesis of the ideas, reasoning and conclusions of bodies of knowledge. As such Language Precision may be regarded as an important area within the Substantive conversation element of Productive Pedagogies,

v. Knowledge as problematic

The Productive Pedagogies element Knowledge as problematic involves the critical examination of texts, ideas and knowledge and although not explicitly part of the proposed Prophetic pedagogy should be included in a synthesis. It is essential for students who are a minority in a society of many cultures. It assists them to better understand the subtleties of the influences to which they and others are exposed. Students in an Islamic school need to gain an

understanding of how knowledge is constructed, how conflicting forms of knowledge are presented and how this impacts on the individual and society in general.

vi. Metalanguage

Metalanguage instruction incorporates frequent discussion about talk and writing, about how written and spoken texts work, about specific technical vocabulary and words, text structures and specific discourses. In the time of the Prophet people were highly orally literate and understood the nuances of language. It was important that the Prophet carefully explained the differences in terminology and understanding that Islam brought to the use of language. How more important for the teacher in an Islamic school to give great importance to metalanguage in a time when influence and manipulation through oral, written and visual genres has gained prominence as a tool for the spread of diverse ideologies and perspectives from around the world.

Conclusion

The elements and features identified above of the Prophet's pedagogy are not necessarily exhaustive. They are not exactly the same as those identified in the QSRLS however they have significant areas of overlap. The recognition of this overlap should give teachers in Islamic schools the basis upon which to evaluate and use where applicable the various pedagogical frameworks that are based upon current research. Although the finalisation of the construction of a Pedagogical Framework for Islamic schools is currently underway the achievement of such a framework is in reality only a first step and is not intended as a panacea or a model to be mechanically learnt and implemented. It is rather a tool, that gives all educators in an Islamic school both of "religious and secular" subjects a common metalanguage and framework for discussion of quality teaching based on Prophetic tradition and contemporary Australian educational thought. It is therefore recommended that:

- Each Islamic school undertake a review of current pedagogical practices across all curriculum areas.
- Conversations about pedagogy are initiated in Islamic schools across all curriculum areas both "religious and secular".
- A consistent pedagogy is developed across all curriculum areas of the Islamic school.
- Training and Development funding be used to assist teachers in the development of their pedagogical practices.

- Untrained practitioners in Islamic schools, particularly those in the area of the Islamic Sciences, are funded to under go teacher training.

Notes

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WHY THE CRUSADES FAILED? NARRATING THE EPISODE AFTER THE FALL OF JERUSALEM

Muhammad Yaseen Gada *

Abstract: The fall of Jerusalem to the Muslims in 1187 CE[1] stood as a severe psychological jolt on the Christian West as they lost after an 88-year-long hegemony over Jerusalem. The subsequent preaching for Crusades invoked the Holy Land but each time the outcome turned to disappointment. The Fourth Crusade resulted in the sack of Constantinople, an act that Christians bemoaned as the crusaders became killers of their fellow Christians. The increasing schism between Byzantium and the Latin-West was coupled with the unity and expansion of the Muslims in the East to ultimately end crusader rule in the Levant with the fall of Acre in 1291. Notwithstanding, the crusading ideology persists today and is often echoed in Muslim as well as non-Muslim voices. The present paper re-tells the story with new insights based on contemporary scholarship on the Crusades following the fall of Jerusalem to Muslim forces. It focuses mainly on the military history and narrates about the 'how', 'what', and 'why' from the Third through to the Ninth Crusade. It also attempts to show that the Crusades were more than just confrontations since considerable cooperation and cultural exchange developed between the protagonists from the reign of Salah al-Dīn, particularly after the Third Crusade. The paper envisions that the current East-West dissent may be alleviated if scholars and policy makers on both sides attempt to find concrete examples of positive cooperation instead of highlighting instances of conflict from their historical perspectives.
Key words: Acre, Constantinople, Christian, Crusade, Jerusalem, Muslim, Pope, Salah al-Dīn

Introduction

Among all the Crusades, the Third Crusade stands as the most crucial and decisive as it, for the first time, invoked and garnered the support of the elites and kings of Europe. While Europe mourned their defeat in the Second Crusade, the crusader states were left with its bitter legacy. The people of Damascus now deeply distrusted the Christians. Momentum had shifted from the crusaders to the Muslims.[2] From his rise to power in 1146 until his death in 1174, Nūr al-Dīn Zangī, worked hard to found a Muslim state extending from Mosul to encompass all of Syria, Egypt, and Yemen. Calling for Jihād, he challenged the power of the Franks and is rightly considered the precursor of Ṣalaḥ al-Dīn Ayyūbī, who defeated the Franks. The great crusader cities capitulated one by one to the Muslims: Acre on July 10, 1187, Ascalon on September 4, and finally, the Muslim army besieged Jerusalem and on Friday, 2nd October 1187, Ṣalaḥ al-Dīn captured Jerusalem, thus ending almost one-century of Frankish rule over Jerusalem.[3]

The sad news of Jerusalem's fall reached Europe. For the papacy, in particular, it was a major blow as it had serious repercussions for the pope, abbots, bishops, and barons:

i. It was not merely that Jerusalem had fallen; it unveiled to the Muslims the secret plans of the papacy and the European kingdoms to control Europe's political and economic landscape. The plans were revealed when their books and correspondence fell into Muslim hands after Jerusalem's fall.
ii. Among the crusaders, only 20 percent were able to return home; the rest died from wounds or were killed in the fighting.[4] The property they left in Europe was handled by local bishops and churches and many were desperate to gain its ownership.
iii. Besides the papacy, many knights and lords who had established small kingdoms in and outside of Europe had gathered much wealth—donations, mortgaged land and church-entrusted property. News of this growing affluence spread throughout the Europe. Fabricated visions, dreams, miracles of papacy and their legates, and the epic stories of valour and courageous fighting of the knights had raised the Crusaders' image as saints. Swords had it seemed achieved much, and much yet remained for it to win: Aleppo, Damascus, Alexandria, and the fertile Nile land of Egypt. To resurrect the enterprise, a plot was rigged that Pope Urban III had died of grief over loss of the Holy City. This however, contradicts the facts as historian Archer wrote, "Urban died on October 20, 1187, before the fall of Jerusalem could have been known in Europe".[5]

Preaching of the Third Crusade (1187-92)

Unfound though, the news was received in the papal court with profound emotions; cardinals laid aside their luxury, and pledged themselves to 'take the cross' (recapture Jerusalem) and began to preach for another Crusade.

Pope Gregory VII initiated a new Crusade in 1187 by issuing *Audita tremendi*—a crusading bull, imposing a seven-year truce throughout Europe so that rulers could concentrate on the Crusades. Moreover, Gregory lamented the loss of the True Cross,[6] alleged the execution of Christian inhabitants, and claimed that God's anger at the sins of man could be assuaged by an act of penance, namely, the recovery of Christ's patrimony - Jerusalem. Conrad of Montferrat had landed at Tyre in August 1187 just as Ṣalaḥ al-Dīn's army was sweeping through the Latin States in the aftermath of his great victory at the Battle of Hittin - the decisive battle on 4 July 1187 that showed the superior strength and organisation of his armies. It was Conrad's force that proved crucial in the survival of the Frankish East. Conrad had sent a banner that depicted atrocities committed by Ṣalaḥ al-Dīn's men to be displayed at preaching meetings in the

West. In many ways, the Third Crusade marked the height of the crusading movement—led by kings and the highest elites of the West: Emperor Frederick Barbarossa of Germany, King Richard I of England and King Philip II Augustus of France. The ultimate goal of the Third Crusade was plainly the recapture of Jerusalem.[7] In England, a general tax called "Saladin (Ṣalaḥ al-Dīn) Tithe" was imposed to raise funds for the Crusade.[8]

The Germans of the Third Crusade

Frederic Barbarossa, the Emperor of Germany, was the first to mobilise his army from Germany on May 11, 1189. He was accompanied by his son, Duke Frederick of Swabia, and the massive crusading army, undoubtedly one of the largest yet to leave Europe.[9] Frederick however, had many problems on his expedition as soon as he entered Byzantine territory. Isaac II, the Byzantine Emperor, had entered a truce with Ṣalaḥ al-Dīn, and he did not help the progress of Frederick's army.[10] When Frederick and his army suffered severely from hunger, thirst and ambushes, he warned Isaac of dire consequences if he would not provide them free passage across the Bosporus. Finally, after negotiations, Isaac agreed on condition that Frederick would facilitate surrender of the captured city of Adrianople in Thrace to Isaac II. In April 1190, the Germans entered Turkish lands. As a crusading veteran, Emperor Frederick defeated the Turkish forces of Kilij Arslān II. However, on June 10, 1190, Frederick Barbarossa drowned in the River Salef near Antioch while taking a bath. The Duke of Swabia took charge of the army, but without a powerful figure, the will of the crusading army evaporated. Most sailed home; only a few continued their march to the Levant.[11]

The English and French of the Third Crusade

King Richard of England and King Philip of France made slow progress on their journey to the East. At a meeting in July 1190, they agreed to share equally the spoils of the conquests and then marched southwards to the coast of France. Unlike Barbarossa, they decided to travel east by sea.

Philip led his army to Genoa. Richard marched to Marseilles. The two kings joined their fleets at Messina in Sicily where they spent winter. Richard attacked the city but Philip refused to take part resulting in frosty relations between the two kings.

On March 30, 1191, Philip and his fleet left Sicily for Acre and arrived on April 20. Richard's fleet set sail for Acre on 10 April but as they passed Cyprus, a storm blew up and scattered his fleet. Then on landing and being poorly treated by the inhabitants while his fiancée was also trapped on her ship, Richard attacked and seized Cyprus.[12] He gained much wealth and provisions from Cyprus for the march to the East. After invading Cyprus, Richard departed and joined his ally

Philip Augustus at the siege of Acre on June 8, 1191. "For joy at his coming", says Bahā al-Dīn, "the Franks broke forth into public rejoicing, and lit mighty fires in their camps all night long. And seeing that the King of England was old in war and wise in council."[13]

After four days of the first ever pitched battle between Richard's and Ṣalaḥ al-Dīn's armies, on 12 June the Turkish garrison surrendered to the Franks. It was agreed that in return for the lives of the Muslim garrison, Ṣalaḥ al-Dīn would return the True Cross, release Christian prisoners, and provide 200,000 dinars. However, when Richard saw that Ṣalaḥ al-Dīn delayed in carrying out the treaty terms he broke his word - Richard's army gathered the more than three thousand Muslim prisoners along with their women and children in chains and slaughtered them in cold blood.[14] In this manner Richard "revealed the secret thought that he was nurturing, and put it into effect even after he had received the money and the (Frankish) prisoners".[15] Archer legitimises Richards's brutality on the lame excuse that he could not accompany so many prisoners along with him as he was about to leave Acre for Jerusalem.[16] One could ask however whether Richard the lion heart's (as he was famously known) treatment of Muslims here accorded with Christian teachings?

By the end of the month, Philip had returned to France and Richard took command of the entire Crusade and decided to march south to Jaffa along the sea coast as Ṣalaḥ al-Dīn controlled the whole countryside. Richard displayed excellent military skills when he ordered the weak to march along the shores, the infantry and cavalry farther inland, and the archers, crossbowmen and spearmen positioned on the outside of the column. Marching in the hot summer and harassed by Muslim forces, the crusaders reached just north of Arsūf where Ṣalaḥ al-Dīn had already reached to confront Richard. On September 7, Ṣalaḥ al-Dīn's forces engaged the Franks in battle but Richard playing brilliantly defeated the Turkish forces and headed on to Jaffa. Ṣalaḥ al-Dīn however, destroyed the city's fortification and withdrew his forces to Ascalon. Richard captured Jaffa on 10 September and started rebuilding the Jaffa walls. Richard probably wanted to secure Ascalon as a priority, but the bulk of his army wished to press on to Jerusalem. Meanwhile, Richard initiated negotiations and proffered a truce.[17] Ṣalaḥ al-Dīn dismantled Ascalon too because he knew the intentions of Richard who first wanted to consolidate and hold a strong port that could provision their planned onslaught on Jerusalem.

Although, Richard favoured garrisoning Ascalon and rebuilding its defence, the crusading majority remained steadfast in wishing to march to Jerusalem. In January 1192, Richard's army reached Bayt Nuba, just twelve miles from Jerusalem, but bad weather and the city's strong defensive walls compelled them to retreat back to Ascalon lest it fall to Ṣalaḥ al-Dīn.

Meanwhile, as events in the West were pressing upon Richard, the endless disunity in the army was another problem. The native barons favoured and demanded Conrad's election as king. Richard acquiesced and compensated Guy of Lusignan (d. 1194), the son of Hugh VIII of Lusignan, by making him ruler of Cyprus. However, the situation worsened when Conrad was assassinated; some suspected Richards' involvement but he made Henry of Champagne to succeed as the new king thus dampening the factional divisions.[18]

On 27 July 1192, Ṣalaḥ al-Dīn marched and tried to recapture Jaffa. After a fierce battle, Richards's troops found safety in Jaffa. Sensing difficulty to achieve anything worthwhile in Ṣalaḥ al-Dīn's lands, Richard tried hard to reach a truce with him, but failed.

For Richard, conquering Jerusalem would not solve the problem of the Holy Land. He thought that even if it had been liberated in isolation, it would soon be retaken by the Muslims when the Crusaders returned home. Instead, he urged his fellow crusaders to consider an attack on Egypt. Many crusaders were disgusted with Richard's diversion of motive from Jerusalem. The failure of the two attacks on Jerusalem doomed the old concept of a pell-mell attack on Jerusalem.[19] Therefore, Richard resumed negotiations with Ṣalaḥ al-Dīn following his bitter conclusion that while Ṣalaḥ al-Dīn remained Sultān of Egypt, the Christians could never take and hold Jerusalem.[20]

Finally, on 2 September 1192, a formal three-year peace agreement was agreed between the Christians and Muslims. It was agreed that the Christians would hold the coast as far south as Jaffa, but Ascalon was surrendered to the Muslims. Ṣalaḥ al-Dīn agreed to keep the road open to Jerusalem for Christian pilgrims. On October 9, 1192, Richard sailed home to curb his ambitious brother, Count John. The third Crusade was thus ended.[21]

One of the oft-ignored aspects of the Crusades should be highlighted: the cultural, economical and knowledge exchanges between Muslims and the Franks. The Franks were one of the main actors in the Levant with whom the Muslims had trade and commercial links despite the 'official' state of war. This trade would get boosted whenever peace treaties were enacted, particularly after the famous truce agreement between Richard I and Ṣalaḥ al-Dīn. Diplomatic relations would often foster civilian contacts. This did not mean that such contacts were always genteel, "but it does mean that Frankish-Muslim relations were far richer than the strictly military narrative would allow."[22] The commercial interaction implies cultural interaction, visible in the form of language. Many commercial terms of Arabic origin entered into various Romance languages: words for "custom" like *douane* and *aduana* all trace their roots from the Arabic *diwān*; and the words *cheque* from *sakk* (a letter of credit), and *tariff* from *ta'rif* (a notification).[23]

Similarly, there was considerable transmission of learning from Muslims to the Franks. Scientific and religious books were translated from Arabic into Latin and these formed the base for later significant developments in European intellectual culture. Muslims in turn also learned some tactics of war technology from the Franks.[24]

Consequences of the Third Crusade

- The Third Crusade only preserved a remnant of crusader-occupied Levant along the Mediterranean coast.
- The Muslim position became much stronger, holding cities and fortresses, which had previously been held by the old Christian kingdom.
- It was manifested that the Crusader leaders although vowed to recapture Jerusalem, implicitly wanted to establish their own kingdoms and amass riches in the East.
- Hostility between the Greeks and the Latins reached a climax as was manifested during the Fourth Crusade.
- The crusading spirit in Christian Europe was shattered; the West mobilised subsequent Crusades but aimed primarily not for the Levant.
- Trade and cultural exchanges were also fostered between the Franks and Muslims.

Fourth Crusade (1202-04)

When news of Ṣalaḥ al-Dīn's death and the division of the empire among his three sons reached Europe, the then Pope Innocent III (1198-1216) began preparations for a new Crusade. On 15 August 1198, he issued a crusading bull, but he was not able to convince and recruit any kings - even Richard and Philip refused to take the Cross again - as political conditions in Europe were not auspicious for this Crusade.[25]

King Richard was killed after being hit by a crossbow in 1199, and his successor was too preoccupied fighting Philip Augustus of France. The powerful and wealthy Count Baldwin of Flanders was also at loggerheads with his French suzerain. Germany was gripped in civil war. Sicily was struggling to maintain rule. Genoa and Pisa, two of the great maritime powers were also at war. Further, there was increasing fear of death and captivity amongst the Europeans since most of them had experienced losses from the previous Crusades.[26]

The hard work of two men saved the call of the Fourth Crusade from being unheard - Fulk of Neuilly and Cardinal-legate Peter Capuano. With their efforts, the call was finally answered by three French lords: Count Thibaut of Champagne,

his cousin, Count Louis of Blois, and Count Baldwin of Flanders. Among other prominent figures who later joined were Geoffrey and Stephen of Perche and Renaud of Montmirail, cousins of Thibaut.[27]

As before, the crusaders' lack of discipline, structural organisation, and proper command remained critical weaknesses.[28] Those who took the cross were incited by many purely personal motives: "it had become part of a family tradition to go on a Crusade. For some the shame of the failure of the third Crusade needed to be erased. For many it had been the forceful preaching of Fulk of Neuilly that had inspired them. Others felt the need to respond to their lord's decision to go on a Crusade".[29] Steven Runciman aptly remarked, "Many of these barons were moved less by piety than a wish to acquire new lands."[30]

After crusader leaders assembled in 1200, they decided that the best way to regain the Holy Land was by invading Egypt, the chief centre of Muslim power in the eastern Mediterranean. It was also agreed to go by sea to but this plan required a huge naval convoy. For this, the Counts of Flanders, Champagne, and Blois appointed six plenipotentiaries to make arrangements for a sizeable fleet "in all the ports of the sea, in whatever place they might go".[31] Finally, a treaty was made with Venice.

With the treaty, there would be a bargain between the crusaders and the Republic of Venice. The fleet would be ready to sail on June 29, 1202, which seemed heaven-sent for Pope Innocent III. However, the crusaders proved not conscientious in upholding their part of the bargain. As the proposed time for departure approached, the crusaders were trapped in grave difficulties because on June 29, 2012, only a small fraction of crusaders had arrived in Venice and they could not pay the bargained money to the Venetians. The doge of Venice, Enrico Dandolo (1192-1205), could not however, renounce payment for the fleet.[32]

Diversion to Zara

Both Doge Dandolo and the crusader leaders were equally desperate. Finally in October 1202, Dandolo suggested a compromise. He drove a hard bargain in suggesting that the interest on the debt be remitted if the crusader army would help Venice to reconquer the Adriatic port of Zara from the Hungarians. Although, the deal further exacerbated the crusaders' move since King Emeric of Hungary had himself taken the Crusader's cross in 1200, they had no option but to fight against their fellow Christians.

The conquest of Zara was quickly achieved but it caused great division among the crusaders and many deplored this attack.

Diversion to Constantinople

On January 1, 1203, envoys that were sent from Alexius Angelus arrived in Zara.[33] The young prince had written and begged the crusader leaders at Venice that if they helped to reinstate him on the Byzantine throne, the crusaders would receive lavish support for their sail to Egypt. Pope Innocent III initially had refused to entertain any support for Alexius, but fearing the dissolution of the crusaders' force, later allowed them to attack their fellow Christians in Constantinople.

In July 1203, the crusaders arrived in Constantinople. To their disappointment, they were awestruck, as John France the military historian wrote, that there was no welcome for Prince Alexius, but also little enthusiasm for their ruler, Alexius III. Factional divisions made it difficult to mount a determined resistance and the crusaders attacked with much success penetrating the Golden Horn.[34] Alexius III fled while Isaac and the young Alexius IV were restored to power. However, Alexius IV found it increasingly difficult to find the money to pay the remainder of his debt to the crusaders as per his commitment. Fulfilling his lavish promises to the crusaders provoked bitter resistance amongst the Constantinople population and finally on 27 January 1204, the leader of the anti-foreign faction in Constantinople, Mourtzouphlus, seized power and was crowned as Alexius V.

The crusaders were angered by what they saw as Greek treachery since Mourtzouphlus neglected to fulfill Alexius IV's promise. On 13 April 1204, they launched a full-assault and captured the city; Mourtzouphlus fled and a three-day sack ensued. The sack on Constantinople was more than just a mere plunder. Crusaders ruthlessly violated Byzantium's holy sanctuaries, destroying, defiling, or stealing all that they could lay hands on. The leaders of the Crusade grabbed spoils to the value of 400,000 silver marks. Moreover, crusaders slaughtered many of the inhabitants and raped women of all ages. One account stated that "so much booty had never been gained in any city since the creation of the world"; and "it was the greatest haul since the time of Alexander the Great".[35]

Innocent III hailed the news of the conquest of Constantinople as a miraculous vindication of the papal claims to supremacy over the Byzantine Church.[36] On May 16, Baldwin of Flanders was elected as the first Latin Emperor of Constantinople. Thereafter, Byzantine was divided between the Latin Emperor, the Venetians and other leaders. What led to the defeat of Constantinople was the outcome of political disarray, the bad image of Byzantium in the Latin-west due to its ideology and foreign policy, and its wealth.[37]

Nevertheless, Many Latins and Greeks bemoaned and harangued the sack of Constantinople, and expressed their shame:

> For they who are supposed to serve Christ rather than themselves, who should have used their swords against the infidel, have bathed those

> swords in the blood of Christians. They have not spared religion, nor age, nor sex, and have committed adultery and fornication in public, exposing matrons and even nuns to the filthiness of their troops.[38]

Nicetas Choniates, a Byzantine senator, eyewitness of the event, in contrasting the sack of Constantinople with the fall of Jerusalem to Ṣalaḥ al-Dīn, concluded that "Byzantine would have fared better had it been conquered by the Muslims"[39] who always provided security of non-combatants and let them live, adopt, and practice their own faith. The same expression of thoughts we can nuance when Muslims conquered Spain in the 8th century.

Outcome of the Fourth Crusade

- The Fourth Crusade resulted in a bitter sense of antagonism between the orthodox Greeks and catholic Latin's that lives on today.
- It betrayed its goal of capturing the Holy Land and instead attacked fellow Christians, first against the Latin city of Zara and secondly against Constantinople, the Byzantine capital, and the biggest, wealthiest and most cultured city in Christendom.
- It provided a free hand to crusaders who had personal motives to secure abundant riches.
- It made the Greeks appreciate the Muslim code of conduct of war.
- It again reflected the crusaders' lack of organisation and discipline essential for any successful campaign.

Fifth Crusade (1217-21)

Disappointed by the Fourth Crusade's failure, Pope Innocent III set in train major reforms that culminated in the holding of the Fourth Lateral Council in 1215 to deal with Church reforms and the new planned Crusade. In addition, he widened the scope of crusading by launching the Albigensian Crusade against the heretics of southern France in 1204.[40]

Innocent III, though, died before the muster-date of 1 June 1217 set for the launch of the Fifth Crusade. Nevertheless, Andrew II of Hungary and Leopold VI of Austria were the first to lead the Crusade and arrived at Acre. They stayed without any outcome. With the arrival of a large force of crusaders from Germany in April 1218, a decision was taken to attack Damietta in the Nile delta as a preliminary to a full-scale assault on Egypt.

In May, they laid siege and camped out on the west bank of the Nile. In autumn, 1218, they succeeded in taking a strategic tower. Al-Kāmil, the Sultān and ruler of Egypt, laid a blockade of the Nile and in this way arrested the crusaders'

further advance. With the continued presence of the crusaders near Damietta, al-Kāmil sent requests to his brothers' al-Ashraf in Syria and al-Mu'azzam in Mesopotamia; the latter responded to the call. Meanwhile, in March 1219, al-Kāmil offered a deal to restore Jerusalem to Christian hands if the crusaders left Damietta. However, Pelagius, the Cardinal legate, rejected the offer. This opened a rift in the crusading leadership. Damietta fell in November 1219 to the crusaders and the control carried on until 1221, when they were caught and forced to surrender before al-Kāmil. Further quarrels broke out between Pelagius and King John (d. 1237)[41] of Acre. The ensuing dilemma over what to do created confusion amongst the crusaders.[42]

The Italians on their part wanted to conquer Egypt to gain control over Alexandria; they had no interest in capturing Jerusalem and thus persuaded the reluctant John to lead the crusaders to attack Cairo on July 17, 1221.

Meanwhile, as Syrian aid for al-Kāmil had arrived by this time the Muslim army was greatly strengthened. The situation worsened for the crusaders as the Nile floods isolated them in the delta and they were forced to purchase their retreat by surrendering Damietta[43] on September 8, 1221. Al-Kāmil took control of Damietta triumphantly. The Fifth Crusade was a disastrous defeat. Pelagius was blamed by many historians for his opposition to al-Kāmil's offer. Moreover, it has been asserted that this Crusade killed more crusaders than did all the previous Crusades combined.

Sixth Crusade (1227-29)

With the terrible defeat in the Fifth Crusade Frederick II, the Roman Emperor and ruler of southern Italy, was held responsible as he had failed to fulfill his vow taken at his coronation in 1215. The Emperor was supposed to have joined the Fifth Crusade but he delayed. Finally, Pope Gregory IX threatened him with excommunication if he did not fulfill his vow soon. Consequently, by 15 August 1227, he had assembled a sizeable crusading army and set sail to the East but soon fell ill and returned to Italy. On delaying his departure again, Pope Gregory IX excommunicated him. Nevertheless, the emperor finally set out for the East in June 1228.[44]

While in Italy, Frederick II received envoys from al-Kāmil who asked him to come to Acre and promised to give him many cities in Palestine if Frederick would attack[45] his brother al-Mu'aẓẓam, ruler of Damascus. Frederick accepted the offer and arrived in Acre on September 7, 1228; however, after his arrival, al-Mu'aẓẓam suddenly died.[46]

Moreover, the changing scenario did not inspire Frederick to fight; after all, he was not positioned to seek a victory since his army was small. Consequently,

he committed to diplomatic rather than military actions in his relations with al-Kāmil.[47] In November 1228, Frederick marched down the coast to Jaffa. Fearing the consequences of Frederick's expedition and politically weakened within the Ayyūbid confederacy, al-Kāmil conducted negotiations with Frederick and finally on February 18, 1229, a ten-year truce was concluded under which Jerusalem was restored to the Franks. The Muslims held on to the al-Aqṣa compound and did not permit the city to be fortified.

On 17 March 1229, Frederick staged an imperial crown-wearing ceremony in the Holy Sepulcher but it was a joyless event as the Hospitallers and Templers boycotted the ceremony. Further, Pope Gregory IX was furious, Frederick stood excommunicated - for making peace rather than for pursuing a military victory. This caused a bitter division and civil wars among the crusaders in Jerusalem that lasted twenty years. Frederick's problems further deteriorated when the Pope called for a war to be waged against him in his Lands in Italy, which continued until his death in 1250. Frederick left the East in June 1229, "pelted with offal by the local populace as he made his way to the port of Acre". Although Frederick appointed his lieutenant, the kingdom was split between the imperialists and their opponents led by John of Ibelins (1179-1236)[48] — the lord of Beirut (1200/1205–1236).

The last severe clout to Frederick's fragile kingdom was meted as soon as his truce expired in 1239. The following four years completely wiped out all vestiges of Frederick II's power with the Muslim recapture of Jerusalem by a united Ayyūbid Empire[49] in 1244. This compelled the crusaders to retreat to a confined strip of ports along the Mediterranean coast.[50] John France complimented Frederick for he "had done what kings had earlier threatened to do; used the crusade as an instrument of prestige for political ends."[51] The Emperor's supporters however, soon lost all that had been gained by Frederick.

Seventh Crusade (1248-54) and Eight Crusade (1267)

Although the fall of Jerusalem made no significant impression in Europe, it did provoke the preaching of a new Crusade. Louis IX of France had taken the cross in December 1244 intending to recapture Jerusalem, but he himself fell ill thus abandoning the expedition until 1248.[52] Later, Louis prepared one of the most organised and well-funded Crusades Christian Europe had ever launched. He set sail for Egypt in August 1248 and arrived at Cyprus in September staying until May 1249.

After thorough preparations, the crusaders set sail to the Egyptian city of Damietta, which was taken easily on 6 June without combat. Louis halted further advance partly because he was awaiting more troops and also because of the

rising Nile water level that made movement through the delta impossible. When reinforcements arrived in October, there was disagreement over what to do next. Finally, in late autumn 1249, they decided to move towards Cairo and after a few days reached the opposite side of the river, in Mansurah. By this time, news of Sultān al-Ṣālih's death reached there.

However, Fakhr al-Dīn ibn al-Shaykh,[53] Egyptian commander-in-chief of al-Ṣālih, supported by the dead Sultān's wife, Shajar al-dur, rallied the troops resulting in the entrapment of the crusaders. Calamities exacerbated as Louis and his army were severely struck by disease on the one hand, while Muslim attacks gathered pace as they used their ships to cut the river link with Damietta. On 5 April 1250, Louis ordered a retreat; by then his helpless outnumbered army was forced to surrender. Louis himself was taken prisoner.[54] Louis was later ransomed for a huge sum and the freedom of Damietta. He spent until 1254 in Acre before returning to the West.

After Louis' departure from the East, the Christian holding fell into a state of anarchy. In the West, monarchical states were on the rise. In France and England, monarchs could command loyalty of their barons. Between 1192 and 1254 saw significant changes in the crusading movement. On the Muslim side, Mamlūks (Turks slave men) were replacing the Ayyūbids from Syria to Egypt; Jaffa, Caesarea and Antioch fell to the Muslims one by one.[55]

Following his return to France, Louis IX felt himself responsible for the failure of the Seventh Crusade and longed to redeem himself by another successful expedition. In March 1267, Louis prepared for a new Crusade, but this time people in Europe showed little enthusiasm. On July 2, 1270, Louis embarked for Tunis[56] where, he had been told, the Emir was ready to convert to Christianity and join the expedition to help win back the Holy Places. However, as for the previous Crusades this was also a dismal failure. On landing in Tunis, Louis learned that the information about the Emir was false. In Tunis the crusaders' conditions deteriorated: disease and unhealthy sanitation cost the lives of many crusaders. Louis also died on 25 August 1270 while still encamped in Tunis. With his death the crusader army abandoned the cause and returned to Europe.

Ninth Crusade (1271-2)

The betrayal and failure of the Crusades were reflected by the events on the Franks' return to the West. The Crusader spirit was waning and no significant response was expected for further expeditions. The final Crusade was Prince Edward's march with his English crusaders to the Holy Land. On May 9, 1271, he landed at Acre where he found the crusaders' Kingdom was breathing its last breath. He conducted small raids but accomplished nothing more than a ten-year

truce in 1272 between the crusaders at Acre and the Mamlūk Baybars.[57] Edward then returned to England.

Meanwhile, severe divisions developed among the crusaders at Tyre and Acre. Death of the Baybar sultān in 1277 gave them little relief. In 1280, Qawālūn, the emir of Syria took over the control of Egypt. Tripoli fell to Qawālūn in 1289, and after his death, his son al-Ashraf Khalīl marched against Acre. The news of the fall of Tripoli shocked the West.

Acre sent urgent appeals for help; although Italy sent new crusaders it was unmatched to the Muslim army. Nevertheless, the new crusaders killed peaceful unarmed Muslim merchants who used to enter and trade in Acre.[58] Outraged, the Muslim troops marched on 6 April 1291 to Acre—the last city held by the crusaders. Muslims laid siege for a month and finally Acre fell to the Muslims. The last remaining crusader possessions in Palestine easily fell into Mamlūk hands. The Muslim victory is summed up by the Arab historian Abū al-Fidā:

> With these conquests the whole of Palestine was now in Muslim hands, a result that no one would have dared to hope for or to desire. Thus, the whole of Syria and the coastal zones were purified of the Franks, who had once been on the point of conquering Egypt and subduing Damascus and other cities. Praise be to God![59]

In this way the Crusader states founded by the First Crusade almost two centuries earlier were completely wiped away.[60] The papacy tried hard to galvanise further efforts to march again to restore the lost Lands, but the papal authority over people had dropped to its lowest ebb. Monarchy was replacing papal authority; kings and lords were more interested in expanding their commercial enterprises; for them the Crusades were now irrelevant. Nevertheless in fits and starts small Crusade expeditions were launched to the East. However, on the rise of the Ottoman Turks, who replaced the Mamlūks, their successful campaigns to the West drastically changed the notion of the crusading movement. The crusaders were on the defensive by the time Constantinople was conquered by the Ottomans in 1453. Thus, crusading had become a matter of simple survival.[61]

Nevertheless, in modern times, particularly after the 9/11 event the crusading theme is again reverberating in academic, political, and public spheres; a good number of books have appeared on the Crusades covering, among other aspects, the impact that the Crusades have had on perceptions about the current conflicts prevalent in the MENA (Middle East and North Africa) region. Equally important was the call by George W. Bush (b. 1946) for a new 'Crusade' with the so-called 'war on terror', which provided a strong impetus for his Muslim opponents to respond in the same manner; for in the recent past, some Muslim leader(s)/figure(s) — 'Uthāmā bin Lādin and Saddām Ḥusayn—compared their

own stands with the medieval military leader and defender of Islam, Ṣalaḥ al-Dīn. From the continuous intervention of the US and its allies in the affairs of the Middle East, it seems difficult, but not impossible to forget that perceptions continue to influence Muslim minds against the Christian world and vice versa.

One can feel relieved from the recent initiatives taken by Muslim and Christian scholars in the first decade of the 21th century. November 4, 2008 was an historic day; it marked a new chapter in the long and multifaceted relationship between Islam and Christianity. For the first time in the history of Muslim-Christian relations, a delegation of twenty-nine Catholic cardinals, bishops and scholars met with twenty-nine leading Muslim authorities and scholars who represented some of the most established figures in the Sunni and Shi'ite worlds. After two days of deliberations and discussions, a fifteen-point final declaration was issued that included an appeal to safeguard religious minorities and a call for Muslims and Christians to work collectively in promoting peace globally. The declaration read, "We profess that Catholics and Muslims are called to be instruments of love and harmony among believers, and for humanity as a whole, renouncing any oppression, aggressive violence and terrorism, especially that committed in the name of religion, and upholding the principle of justice for all."[62]

This historic milestone in Muslim-Christian exchanges had earlier begun on October 13, 2007, with release of the document entitled "A Common Word Between Us and You", described as "An Open Letter and Call from Muslim Religious Leaders" addressed to leaders of all the Christian churches of the world. The document was signed by 138 leading Muslim scholars and intellectuals from all sections of the Islamic world, Sunni and Shi'a, including the Grand Muftis of Egypt, Syria, Jordan, Oman, Bosnia, Russia, Chad and Istanbul. More signatures added from prominent Muslims after its original publication. Moreover, with more than 460 Islamic organisations and associations endorsing it, and there are now over 500 signatories to "A Christian Response" in addition to dozens of additional Christian responses. It has become, in a short time, the world's leading initiative in interfaith dialogue and has led to numerous responses, conferences, theses and awards. The most public early response was a letter initially signed by over 300 Christian leaders and scholars entitled "Loving God and Neighbor Together: A Christian Response to A Common Word Between Us and You" that was organised by the Yale Center for Faith & Culture and the Yale Divinity School and published in the New York Times on November 17, 2007.[63]

Conclusion

The crusading movement involved most of Europe, encompassing every sphere of life—the ecclesiastical and religious, politics, the economy, and society.

Dissent between the clergy and the kings widened after 30 years of Pope Urban II's proclamation of the First Crusade. The prevalent crises such as succession conflicts weakened the medieval authorities. Monarchy was replacing the papacy. Even the Crusade language was exploited, and was directed against fellow Christians.

The emotional and physical force of the defeat at the battle of Hittin served as a real impetus for the swelling of crusades which followed: the Third Crusade, 1187–92, the Fourth Crusade in 1202–04, which resulted in the sack of Constantinople, the Fifth Crusade 1217–21, the Crusade of Frederick II, 1127-29, the Crusades of St Louis, 1249–50 and 1270, and the Crusade of Edward I of England. There were also minor expeditions and popular manifestations of the desire to liberate Jerusalem such as the 1212 'Children's Crusade'. There were far more Crusades in the thirteenth century and these were sent to various places such as the 1204 Albigensian Crusade. Nevertheless, the special regard of Christians for Jerusalem continued as the Crusades were embarked upon again and again despite the failures. The last stronghold of the crusaders, Acre fell in 1291, bringing the movement that had enthralled Europe to an end.

The Crusades had also great repercussions in engendering the expansion and strengthening of the Muslim world. Constantinople, the capital of the Christian (Greek Orthodox) Byzantine Empire, fell to the Muslims and was renamed Istanbul. They also helped to foster trade, cultural and knowledge exchanges between the two sides. That said, however, the Crusade rhetoric is again reverberating in the works of many modern scholars. This is perhaps due to the belief that history repeats itself: the modern conflict and western interference resulting in warfare particularly in the MENA region are often considered as 'neo-Crusades' in continuation and manifestation of the medieval Crusader tradition.

Therefore, following from this study it is recommended that what is urgently needed in the contemporary conflict-ridden world is that:

- scholars of both sides—Muslims and non-Muslims alike - should endeavor, as encouraged by Umej Bhatia (b. 1970),[64] Singapore's first resident ambassador to the United Arab Emirates, to identify and develop effective means of practical and functional cooperation to isolate, expose and debunk extremism in all its forms.
- It is also incumbent upon the historians and opinion makers of both Muslim and Christian worlds to find "In the clash over historical perspectives ... concrete examples of positive cooperation instead of merely highlighting instances of conflict".[65] In this regard, the initiatives such as "A Common Word Between Us and You" need to be further strengthened in order to

expurgate the current Crusader ideology nurturing the current Christian-Muslim or East-West conflicts.

Notes

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1. Used here to mean years After Christ (A.C.).
2. Thomas F. Madden, *The Concise History of the Crusades* (third edition) (UK: Rowman and Littlefield, 2014), p.61.
3. Francesco Gabrieli, *Arab Historians of the Crusades* (Routledge Revivals), trans. E.J. Costello, (New York: Routledge, 2010), p.85.
4. For more insights on the loss and fear of the crusaders see Jonathan Phillips, *The Fourth Crusade and the Sack of Constantinople* (London: Pimlico, 2005), pp. 14-1.
5. T. A. Archer and C. L. Kingsford, *The Crusades: The Story of the Latin Kingdom of Jerusalem* (London: T. Fisher Unwin, 1919), p. 306.
6. This refers to Jerusalem where relics of the cross on which Jesus (Peace be upon him) was purportedly crucified were still extant.
7. Jonathan Phillips, *The Crusades, 1095–1197* (London: Pearson Education, 2002), pp. 138-40.
8. Madden, pp.77-9.
9. Ibid.
10. Cf., Jonathan Harris, *Byzantium and the Crusades* (2nd edition) (London: Bloomsbury, 2014), pp. 138-40; wherein it is argued that “no such alliance existed in a formal sense”.
11. Archer, pp. 309-12; Madden, pp. 79-80.
12. This was the first time that a crusading army had seized territory directly from the Byzantines and then retained it.
13. Archer, p. 318.
14. Ibid; Madden. p. 85.
15. Gabrieli, p. 132.
16. Archer, p. 331.
17. Madden, p. 87.
18. Ibid., p. 88.
19. John France, *The Crusades and the Expansion of Catholic Christendom*, 1000-1714 (New York and London: Routledge, 2005), pp. 155,172.
20. Madden, p. 55.
21. John, pp. 154-5.
22. Paul M. Cobb, *The Race for Paradise* (UK: Oxford University Press, 2014), p. 170.
23. Ibid, pp. 172-3.
24. Niall Christie, *Muslims and Crusades: Christianity's Wars in the Middle East, 1095-1382, From the Islamic Sources* (London and New York: Routledge, 2014),

pp. 65-7, 73-6.
25. Donald E. Queller and Thomas F. Madden, *The Fourth Crusade: The Conquest of Constantinople 1201-1204* (Philadelphia: University of Pennsylvania Press, 1977), p. 1.
26. Jonathan, pp. 138-140.
27. France, p. 177.`
28. Jonathan Riley-Smith (ed.), *The Oxford History of the Crusades* (New York: Oxford University Press, 1999), p.64; see also France, ibid.
29. Michael Angold, *The Fourth Crusade: Event and Contest* (Harlow; New York: Longman, 2003), pp. 81-2, quoted in Myoung-Woon Cha, "The Crusades, Their Influence and Their Relevance for Today" (PhD thesis, University of Pretoria, Pretoria, 2006), p. 31.
30. Steven Runciman, *A History of the Crusades*, 3 vols. (Cambridge: Cambridge University Press, 1953), vol. 3, p. 93.
31. Queller, pp. 6-7.
32. Madden, pp. 96-7.
33. He was the nephew of Alexius III (1195-1203), who had escaped to the west. His father, Emperor Isaac Angelus (1185-1195), had been deposed and blinded by his own brother, Alexius III in 1195.
34. France, p. 180.
35. Harris, p. 174; see also David Nicolle, *The Fourth Crusade 1202–04: The Betrayal of Byzantium* (Osprey Publishing, 2011), pp. 5-16.
36. Michael Angold, *The Byzantine Empire 1025-1204: A Political History* (London; New York: Longman, 1984), p. 284, quoted in Myoung-Woon, p. 26; see also France, ibid.
37. Harris, p. 159.
38. Queller, p. 198.
39. Madden, p. 113.
40. France, p. 160.
41. He was the King of Jerusalem (1210–1212) as consort to Maria of Montferrat ("la Marquise"), queen of Jerusalem, and subsequently regent (1212–1225) for their daughter, Isabella II. In 1208, he was chosen to marry the heiress to that realm, Maria of Montferrat. He had military prowess, a family with a crusading pedigree, and the support of Philip II of France, Pope Innocent III, and his fellow Champenois lords, together with a kinsman already prominent in the East (Walter of Montbéliard) to recommend him. On 13 September 1210, John reached Acre with 300 knights. He married Maria on the following day, and they were crowned in Tyre on 3 October 1210.
42. Madden, pp. 141-145; Christopher Tyerman, *England and the Crusades, 1095-1588* (Chicago: The University of Chicago Press, 1996), p. 97.
43. France, p. 183.
44. Riley-Smith, p. 133; see also, Madden, p. 148.
45. Soon after the Fifth Crusade, we are told that three Ayyūbid brothers fell out among themselves.
46. M. Setton (ed.), *A History of the Crusades*, 6 vols., Marshall W. Baldwin (ed.), "The First Hundred Years" (Philadelphia: University of Pennsylvania Press, 1955), vol. 2, p. 151.

47. Ibid., p. 152.
48. Riley-Smith, pp. 134-35; Setton, p. 461; France, p. 189; see also Peter W. Edbury, "John of Beirut", in *The Crusades: An Encyclopedia*, Alan V. Murray, ed. (California, Colorado and England: ABC-CLIO, 2006), vol. 1, p. 690.
49. The death of al-Kāmil in 1238 initiated a power struggle in the Ayyūbid house whose chief protagonists were al-Ṣālih Ismā'īl of Damascus (1239–45) and the ambitious al-Ṣālih Ayyūb (1240–49) who seized Egypt during the crusade. When war broke out between Damascus and Egypt the kingdom favoured Damascus with whom the kingdom formed an alliance. However, al-Ṣālih Ayyūb of Egypt found a useful ally in the Khwarezmian horde. When crusaders launched an attack Khwarezmians broke through the army of Damascus on the left and surrounded the Franks who were assaulting the Egyptian infantry. The result was a massacre. Al-Ṣālih Ayyūb went on to conquer Damascus and most of the kingdom. For this, see for example John France, *op. cit*., pp.190-192.
50. Madden, pp. 156-57.
51. Ibid.
52. Setton, pp. 489,493.
53. The right heir Turan Shāh was far away then in Syria.
54. Setton, p. 502; see also France, p. 196.
55. Madden, p. 168.
56. Setton, p. 512. It has been argued that behind Tunis was the political motive of Charles of Anjou who had trouble with Tunisia from the beginning of his reign in Sicily and, thus he persuaded Louis on the pretext of the Emir's would be conversion.
57. Setton, p. 518.
58. Norman Hously, *The Later Crusades 1274-1580: From Lyons to Alcazar* (New York: Oxford University Press, 1992), p. 16.
59. Gabrieli, p. 207.
60. Madden, pp. 174-15.
61. Ibid., p. 180.
62. Dr Joseph Lumbard, "The Uncommonality of 'A Common Word'", in *A Common Word between Us and You*, 5-Year Anniversary Edition (Amman: The Royal Aal Al-Bayt Institute for Islamic Thought, 2013), pp. 11-2.
63. Ibid., p. 13; Paul S. Fiddes, "The Root of Religious Freedom: Interpreting Some Muslim and Christian Sacred Texts", *Oxford Journal of Law and Religion* (2012), pp. 1–16, doi:10.1093/ojlr/rwr016, p. 2.
64. Author of *Forgetting Osama bin Munqidh, Remembering Osama bin Laden: The Crusades in Modern Muslim Memory* (2008).
65. S. J. Allen and Emilie Amy, eds., *The Crusades: A Reader*, second edition (Toronto, Canada: University of Toronto Press, 2014), p. 425.

ADVANCING WELL-BEING WITH INTEREST-FREE FINANCE

Abdul Karim Abdullah *

Abstract: This paper argues that utilising risk sharing in preference to interest-based financing would bring a broad range of economic benefits to both individuals and society. The main reason is that equity financing, whether in its conventional or Islamic form, allocates resources *more efficiently* than loan financing. To show this, the paper compares equity markets with credit markets with a view to *efficiency*. The prime reason why equity markets allocate resources better than credit markets is that profit as an incentive for driving economic activity is far better suited for allocating resources efficiently than interest. The paper concludes with a number of policy recommendations.

1. Benefits of guidance

Islam teaches that compliance with revealed guidance brings success while defiance brings failure. History confirms the truth of this principle. The prohibition of interest (usury) is one of the major prohibitions in the Qur'an. Yet interest has been legalised in a number of nations.[1]

The social acceptance of usury enabled the entrenchment of a different culture, radically unlike what preceded it. Over the course of history, the practice of usury has brought untold misery. Poverty, inequality, indebtedness, and even debtors' prisons testify to the harsh consequences of usury. Few practices have caused and continue to cause as much harm.

It is no doubt on account of the misery and hardship it causes for countless persons that usury (interest) is prohibited in the Qur'an. For the realisation of justice is one of the main objectives of the Shariah. However, the practice of usury threatens other objectives of the Shariah as well, such as the protection of wealth.

The harm caused by interest-based lending manifests itself not only in the pervasive indebtedness of individuals, companies and entire nations.[2] It also manifests itself in the suffering caused to millions by the need to pay interest.[3]

Large and in some cases growing levels of debt are not sustainable over the longer term.[4] Indebtedness of nations such as Greece is only one manifestation of the global debt crisis.[5] Lending at interest favours the wealthy at the expense of the poor, whether individuals or nations.[6]

Financing expenditure by means of interest-based loans imposes burdens on people and society in different ways. High levels of consumer indebtedness

caused by excessive spending and the risk of getting mired in a debt trap are only some of the consequences of borrowing.[7] However, interest-based financing also has a number of adverse macroeconomic effects.

The use of interest-based financing adds to unemployment, worsens inflation, and increases the gap between the rich and poor. In all these ways, the use of interest-based financing causes *injustice*.[8] Financial instability, business cycles, as well as reduced economic growth over the longer term are also attributable to the use of interest-based financing.[9]

By contrast, interest-free methods of financing expenditure such as risk sharing prevent harm and bring benefits. Thus, it is necessary to take steps to supplant lending at interest by other forms of financing, in particular risk sharing.

The conventional view, however, is that interest-based financing in fact helps society. It does this by channelling surplus funds (savings) to investors (in the form of loans) and by rationing funds to the most efficient or profitable businesses.

However, surplus funds can also be channelled into investment by means of interest-free, participatory contracts. Moreover, the most *efficient* businesses are not necessarily always the same as the most *profitable* ones.

In the sales of consumer products, interest-free financing can be implemented by encouraging manufacturers to sell their products directly to customers, on an instalment (credit) basis, without the costly "intermediation" by financial institutions. However, in order to prevent opening the proverbial "back door to *riba*," the credit price of the products would have to be the same as the cash price.[10]

Implementing direct selling on an industry-wide basis would require amending the law to enable manufacturers to provide *interest-free financing*. A small administrative charge, set by the government, could be added to the cash price of the item in order to compensate sellers for any extra expenses they might incur from administering sales on an instalment (credit) basis.[11]

The acceptance of interest as a morally and legally acceptable incentive for rewarding investment was facilitated by adopting the view that interest is little different from profit as a driver of commercial activity and therefore equally suitable as an incentive for an efficient allocation of resources.

2. Interest and profit

A closer look at interest and profit shows that important differences exist between these two incentives for engaging surplus capital in economic activity. These differences have profound effects on how resources are allocated in the economy, as well as on how the fruits of economic activity are distributed within society. In the case of profits, the effects are *positive*. In the case of interest, they are *harmful*.[12]

The major difference between interest and profit is that while the amount of profit earned by investors is closely linked to the performance of a business enterprise, interest income is not tied in any way to the performance of a business being financed with loans.

On the contrary, all interest payments are determined in advance, and moreover must be legally guaranteed by the borrowers. This means that lenders, unlike investors, have no incentive to channel resources into projects that offer returns higher than what it takes to repay all loans with interest.

Determining the amount of interest owing to lenders independently of any profits earned is made possible by the fact that the amount of interest paid to lenders depends on the amount of the loan made by lenders to entrepreneurs, and on the percentage of interest charged on the loan, rather than on the amount of profit earned by entrepreneurs.

In other words, in loan financing interest is calculated as *a percentage of the total amount loaned*, which is *known in advance*, while in equity financing profits are calculated as *a proportion of total profits earned*, which are *not known in advance*. It is for this reason that profits can never be determined in advance. They can only be *projected*.

Moreover, borrowers are legally obliged to guarantee both the interest and the principal amount of the loan to lenders. By contrast, entrepreneurs are obliged to guarantee neither profits nor the capital invested. The reason is that unlike lenders, investors are obliged to take *risk*.

The need to take risk provides investors with a strong incentive to exercise due diligence before investing in any project. Exercising due diligence in turn helps to allocate resources more efficiently, as only viable projects will attract funding.

The use of interest-based lending has contributed to the financial crises, with each crisis being greater than its predecessor. The cost of each upheaval, in the form of "bailing out" financial institutions, has been rising at an exponential rate. How long can the process of reflating economies with injections of liquidity continue?[13] How long is re-financing debt with more debt "sustainable"?[14]

Because of its harmful effects, eliminating interest from economic transactions can bring significant benefits. These benefits would enhance social *welfare* and ensure higher efficiency with which resources are allocated among alternative uses.[15]

Financing without interest is possible. Globally, approximately one third of financing takes place on the basis of risk sharing. Equity financing has been around for centuries, even if its proportion out of total financing has declined, especially beginning the latter half of the twentieth century.

3. Need for a better paradigm

Theories, models or analytical frameworks are used to study problems and recommend policy responses to them, whether in the public sector or in business. For a theoretical model to be reliable, it needs to have a solid foundation.

This foundation typically takes the form of underlying assumptions about how a given system works and what can be expected from it. Such models can be found in the sciences, both social and natural.

Thus, a theory can only be as reliable as the underlying assumptions on which it rests. If any of its fundamental assumptions turn out to be questionable, the theory can hardly be expected to provide a reliable basis for analysing and responding to problems as and when they arise. For a flawed model can only provide flawed results.

Thus, a flawed model or methodology needs to be *mended*. That which distorts the operation of the model needs to be removed so that the analytical framework may once again provide reliable results to its users.[16]

The main reason for the inability of conventional economic theory to generate credible responses to the major economic problems confronting mankind is that the model that has been and continues to be used for the purpose of analysis contains precisely such a flaw (*anomaly*).

This flaw is the assumption that interest as an incentive for productive activity and allocating resources efficiently is no different from profit. A closer look at interest, however, shows that this is far from the case.

One consequence of this analytical *faux pas* is not only misunderstanding in economic theory, but also inefficiency in the way resources are allocated. Thus, the assumption that interest is no different from profit needs to be looked at, as there is evidence that it is causing significant problems both in theory and in practice. As the challenge is as much theoretical as it is practical, economic theory itself will need to be restructured first to bring it in line with reality.

Despite glaring "realities on the ground," however, economic theory remains unaware of the adverse effects of interest and continues to maintain, despite evidence to the contrary, that interest-based financing allocates resources *efficiently*.

4. Rationing of capital theory

The claim that interest-based lending helps to allocate resources efficiently is based on the "rationing of capital" theory.[17] According to this view, interest-based lending helps allocate resources (capital) efficiently because it provides funds only to enterprises that can afford to pay the asking rates of interest.

In other words, only companies that earn profits large enough to repay loans with interest in the agreed upon time period become eligible for loan financing. To put it differently, interest-based financing excludes from access to loan capital all companies whose expected profit rates fall short of the rates required to repay both principal and interest over the term of the loan.

It is not enough for businesses to earn rates of profit on borrowed capital that exceed the lending rates. They need to earn profits that will enable them to repay the principal during the amortisation period.

Thus a business that borrows $ 100, 000.00 over a ten-year period at 8% interest rate needs to earn approximately 14.5% profit rate on the money borrowed if it is to repay the entire loan over a ten-year period with a total of 120 repayments. Yet the average return on equity in developed nations is approximately 13%, which is below the level of profits required used in our example.

Another problem with the "rationing of capital" theory is that it identifies *profitability* with *efficiency*. As is well known, the most profitable companies are not necessarily also the most efficient. Every monopoly is highly profitable yet by no means efficient. Monopolies gain higher profits by raising prices and reducing output. They are able to do this because they face no competition.

Conversely, slim profits do not necessarily indicate inefficiency. Every small or medium sized business that operates in a highly competitive environment is likely to have small profits, precisely because it operates in a highly competitive environment. Under the logic of the "rationing of capital" theory, monopolies (*de facto* the least efficient businesses) are the first to qualify to borrow capital, while the most efficient businesses, the SMEs, are the last, if they qualify at all.

In addition, borrowers need to post acceptable collateral, which few small and medium sized businesses can provide. This is another reason why small and medium enterprises, to say nothing of start up businesses, are often excluded from loan financing. Yet the SMEs provide most of the jobs in the modern economy.[18] In this way, the results of withholding capital from SMEs include reduced investment and higher unemployment.

5. Equity and loan financing

Investment can be financed by means of investment for profit (risk sharing) or by means of loans (borrowing at interest). The first is interest-free and *permitted*; the latter uses interest to reward providers of capital and is therefore *proscribed*.[19]

Equity and loan financing affect businesses (at the microeconomic level) as well as entire economic systems (at the macroeconomic level) in different ways. In the case of equity financing these effects are *positive*; in the case of loan financing, they are *adverse*.[20]

Parties that provide capital to businesses in the equity (share) markets are *investors*. Parties that offer capital in the credit markets are *lenders*. Investors and lenders participate in economic activity in significantly different ways.

The investor is an active participant that takes risk and therefore responsibility for his decisions. The lender by contrast is a passive supplier of capital, who takes little or no risk, and therefore no responsibility for the relative success or failure of the enterprises he helps to finance. In the case of investors, the objectives of entrepreneurs and financiers coincide; in the case of lenders, they diverge.

Common shares are asset-backed securities. The nominal price of a share is equal to the net worth of a company (total assets – total liabilities) divided by the total number of shares. The value of a share does not include any liabilities in the form of debt, as these are excluded from the calculation of the net worth of the company when debts are subtracted from the assets of the company.[21]

As a rule, financing by means of shares or participatory sukuk is conducive to an efficient allocation of resources. "Efficiency" here refers to the allocation of resources over the longer term in ways that meet society's needs without causing lingering shortages and surpluses.

Financing by borrowing at interest, by contrast, is far from efficient in this way. On the contrary, financing using interest-based loans *reduces* the efficiency with which resources are allocated. This is evident from the shortages and surpluses caused by financing investment using collateralised interest-based lending.

At the business level, equity financing has significant advantages over loan financing. First, it does not require entrepreneurs to go into debt. Second, equity financing requires providers of capital (investors) to share risks with the entrepreneurs. This shields entrepreneurs from having to shoulder all the risks of a business enterprise.

The risk of losses provides investors with an incentive to exercise due diligence, something that cannot always be taken for granted in collateralised lending. Exercising due diligence increases the efficiency of the allocation of resources, as projects with poor prospects are unlikely to attract funding.

Only credible business proposals will be able to attract funding. This helps to prevent waste and thus to increase efficiency in the use of resources. Moreover, because it requires capital providers to share the risks of business enterprise with entrepreneurs, equity financing is also more *just* than lending at interest.

Financing on the basis of risk sharing also brings significant benefits at the macroeconomic level. These include higher levels of employment resulting from an increase in investment; reduced cyclical instability due to lower financing using money "created" by financial institutions, and reduced inflation caused by lower prices.[22] Thus, for the purpose of public policy, it is advisable to promote

risk sharing as the choice means of financing, while at the same time phasing out financing expenditure by borrowing at interest.

6. Markets and efficiency

A market is an institution for buying and selling. There are as many markets as there are products, services or resources. They include producer, consumer and capital markets. Governments provide public goods and services, such as public transportation, education, welfare and medical care.

Markets facilitate the trading of goods, services and resources. Resource markets comprise human, natural and financial markets. The latter comprise equity and credit markets. Assets (company shares) are traded in the stock markets, while liabilities (loans) are traded in the bond markets. Equity markets comprise share (stock) and Islamic sukuk markets.

Efficiency is an attribute of workers, businesses or entire economies. Efficiency means *productivity*. Thus, a *productive* worker is an *efficient* worker. Similarly, a productive business is an *efficient* business. A productive economic system is an *efficient* system. Efficiency understood as “productivity” can be thought of as the “narrow” or technical meaning of efficiency.

The term efficiency, however, is used in one *other* sense in economics. The term efficiency is also used to refer to the way resources are allocated in a given economic system. If resources are allocated without generating any lasting *shortages of surpluses*, they are said to be allocated *efficiently*. If resources are allocated in ways that cause either shortages or surpluses, they are said to be allocated *inefficiently*.

In other words, a shortage or a surplus indicates *inefficiency*. It indicates inefficiency in the sense that either too few or too many resources are allocated to the production of a given product. This meaning of efficiency can be thought of as the “broad” meaning of efficiency.

In finance, however, the term “efficiency” has come to be understood differently from the way it has “traditionally” been understood in business or economics. In finance, efficiency signifies neither *productivity* nor the way resources are allocated. Rather, efficiency has come to be seen as an *attribute of markets*.

However, in so far as *markets do not produce anything*, characterising markets as “efficient” or lacking in efficiency seems rather odd. A market is an *institution*. It is not a factor of production.[23] Markets facilitate the exchange of goods, services, and resources. Thus, one may well ask, what is the basis of describing markets as “efficient” in the discourse of finance?[24]

Nevertheless, while markets can hardly be viewed as “efficient” in the narrow sense of the term, one could perhaps argue that markets are “efficient” – or at

least *contribute* to efficiency – in the *broad* sense of the term. In other words, one could still argue that markets are efficient in the sense that they allocate resources where they are needed most, without causing lasting shortages or surpluses.

However, in finance, markets are not seen as "efficient" in this sense either. Rather, in finance, markets are seen as "efficient" because they *indicate the prices of securities (stocks and bonds) accurately*.

This understanding of "efficiency" represents a significant departure from the way this term is understood in economics. Perhaps one could say that it indicates a shift of perspective *from that of an economist to that of a trader*.

The characterisation of financial markets as "efficient" in this way is unusual not only because markets are "traditionally" not seen in terms of "efficiency." It is also unusual because markets are generally viewed in terms of the relative *freedom* that may or may not prevail in a given market.

"Market freedom" means in particular freedom from government intervention. The freedom of enterprise (participating in business activity) enables markets or rather the market system as a whole to channel resources to where they are most in demand, and do so without causing any persistent shortages or surpluses. Markets do this better when they are *free* than when they are *regulated*. In this sense, "free" markets may be said to *contribute* to an efficient allocation of resources, in the "broad" sense of the term.

Markets channel resources to where they are most in demand. They do this by indicating, by means of the price mechanism, where higher profits may be earned. In other words, other factors being constant, changes in prices signal changes in profitability. Rising prices indicate rising profits while falling prices indicate declining profits.

The claim that markets are "efficient" is likely to give the impression that *all* markets – including credit markets – are *efficient*. Moreover, it is likely to give the impression that markets are efficient not only in the sense in which this term is used in finance but also in the sense in which it is used in economics.

On the contrary, evidence shows that unlike real sector markets, credit markets are efficient neither in the sense in which this term is used in finance nor even in the sense in which this term is used in economics.

In other words, *credit markets neither determine process accurately nor allocate resources efficiently*. The view that markets are efficient was first given prominence by Eugene Fama in the so-called efficient market hypothesis (EMH).

7. Efficient market hypothesis (EMH)

The view that "markets are efficient" is known as the "efficient market hypothesis" (EMH). It was espoused by Eugene Fama in the 1960s.[25] He derived

his hypothesis from a study of share markets, and later extended it to the bond (credit) markets.

According to Fama, markets are efficient because they indicate prices of financial securities, stocks and bonds, accurately. The reason why markets indicate prices *accurately* is that, over the longer term, markets take into account all available *information*. This means that there can be no substantial difference between the price of a security and its "real" value over the longer term.

The view that markets are "efficient" emerged at a time known as "financialisation."[26] Financialisation was part of a larger trend, *market liberalisation*. This trend itself has been part of a larger movement towards *liberalism*, the ideology that views individual "freedom" as the single most important characteristic of a well-governed system.[27]

Liberalisation of commercial activity was undertaken in the conviction that markets were capable of regulating themselves. In general, it was expected that deregulation would increase both productivity and growth. It was believed that freer markets would enable a more efficient allocation of resources.

Thus, the often-repeated mantra that "markets are efficient" could also be seen as a plea to keep markets "free," free in particular from government regulation. Less regulation would make it possible for traders to take greater risks, and thereby gain potentially higher returns.

It appears that the argument that markets should be left to "regulate themselves" found favour among the regulatory authorities. Later events, however, would throw a different light on the experiment with the wholesale deregulation of financial markets that took place in the years leading up to the most recent (2007) financial crisis.[28]

The first consequence of deregulation was an increase in *speculation*. One perception that fuelled the rise of speculation was the perception – alleged or real – that higher returns could be earned in the financial sector than in the real sector.

Accordingly, resources in the capital markets shifted from financing productive activity in the real sector (share) markets to supporting speculative activity in the *credit* markets.

While benefiting some companies – financial institutions in particular – deregulation had an adverse impact on economic activity by impairing overall efficiency in the allocation of resources. This was evident in the build up of indebtedness and threats to the stability of the financial system as a whole.[29]

A significant amount of resources was diverted from the real sector, where production takes place, to the financial sector, where speculation is the dominant activity. This "transformation" was facilitated by changes in the law. The changes invariably favoured the banking sector over the real sector.[30]

As a consequence of financialisation, the proportion of loans compared to

equity financing in the capital structure of corporations increased dramatically. In the developed world, approximately two thirds of corporate financing takes place by means of *loans*.

The transformation of the economy from *production* to *speculation* resulted in the migration of capital from the real sector to the financial. The difference between a businessman and a speculator is that while a businessperson is willing to invest over the longer term, the speculator seeks short-term gains.

Deregulation encouraged a dramatic increase in lending, speculating on changes in interest rates by means of interest rate swaps, and betting on the possibility of loan defaults by means of credit default swaps. These developments increased levels of debt, heightened risks, and threatened systemic stability.

In the absence of market or regulatory failure, and over the longer term, share markets are efficient both in the sense in which this term is used in finance, as well as in the sense in which it is used in economics. They both determine prices *accurately* and allocate resources *efficiently* in the broad sense of the term, without causing long-term surpluses or shortages.

Evidence shows that, unlike share markets, credit markets are efficient neither in the sense in which this term is used in economics, nor in the sense in which this term is used in finance. In other words, *credit markets neither allocate resources efficiently, nor determine prices accurately.*

Evidence of inefficiency of the credit markets in the sense in which this term is used in finance, of determining prices accurately, was provided by the dramatic collapse of the prices of securities, in particular collateralised debt obligations or CDOs.

The inefficiency of the credit markets, in the sense in which this term is used in economics, has been confirmed by the surplus of houses financed by means of subprime mortgages. These mortgages were sold to institutions such as pension funds and insurance companies in the form of collateralised debt obligations (CDOs).[31]

In the US, after being repossessed by financial institutions due to defaults by house buyers, these surplus properties were subsequently demolished due to dilapidation.[32] Similarly, overinvestment also took place in the property market in Dubai, using similar, debt-like instruments of financing.

The inefficiency caused by credit financing is due to the fact that rewards to capital providers (lenders) are not linked in any meaningful way to the profitability of the businesses financed with loans. Rewards to lenders (payments of interest or equivalent) are not determined as a proportion of the total profits earned but rather as a proportion of the total amount of capital provided (loaned). This gives the capital providers little incentive to allocate resources to the most profitable uses.

At the basic level the inefficiency of credit markets stems from the fact that lenders can obtain rewards without being required to make a *real* contribution to production. As long as any party is able to claim income without making a direct contribution to production, inefficiency will persist in one way or another.

8. Conclusions and Recommendations

It needs to be recognised that credit markets do not operate in the same way as equity or share markets. Activity in these markets is driven by different incentives, *interest* on the one hand, and *wages*, *rents* and *profit* on the other. Interest and profit in particular have radically different effects on how resources are allocated.

One incentive (profit) is conducive for ensuring that resources will be allocated efficiently. The other (interest) is not. Borrowers need to guarantee both principal and periodic payments to creditors. Entrepreneurs need to guarantee *neither*.

The amount of waste caused by interest-based lending can be ascertained by identifying the total amount of interest paid out to all lenders in a given year by all borrowers. In a typical developed country, the amount of interest paid as a component of national income ranges from 8 to 11% of total GDP.

It goes without saying that in any economic system where it would be illegal to gain interest income, and where income could only be earned in the form of wages, rents and profits, the real GDP could be expected to increase approximately by the amount of money currently paid out to lenders by borrowers, in other words by approximately 8 to 11% per annum.

To eliminate the inefficiencies spawned by financing investment by lending at interest, a different mode of financing needs to be utilised. A mode of financing needs to be implemented where rewards to the providers of capital depend directly on the performance of the productive assets they finance.

Suppliers and managers of capital share both risks and rewards. This is in keeping with the requirements of ethics. The transition from debt to equity financing can take place in stages. It can be facilitated by suitable legislative changes.

When risk sharing takes the place of lending at interest, major inefficiencies caused by interest-based financing should be overcome. In addition, one can expect reductions in the levels of debt, the freeing of government resources for spending on social services, higher employment, lower inflation, higher growth and greater systemic stability – *at the same time*.

The realisation of efficiency in the allocation of resources presupposes meeting a number of conditions. This includes the need to restructure the system of incentives. In particular, there is a need to implement a regulatory framework and a system of incentives that reward real investment (production

of wealth) rather than speculation (transfer of wealth) such as takes place in the trading of bonds in the debt markets.

This requires supplanting lending at interest with financing on the basis of risk sharing. Incentives need to be put in place to foster productive activity and to discourage unproductive speculation, in particular in the credit markets.

Thus it is the *problem of interest* that needs to be addressed first. Interest is an anomaly of sorts within the economic system. It was not always entrenched within the economic system to the same extent as it is in the modern economy.

Thus, what is required is a *paradigm shift*, from an economy that is driven by incentives that includes not only incentives in the form of wages, rents and profits but also interest, to an interest-free economy.[34]

- It is recommended that economic theory be restructured in a way that eliminates interest from the theoretical framework, as an incentive for rewarding participation on commercial activity.
- Courses in economics should incorporate modules that highlight differences between interest and profit and outline the effects each has on different aspects of economic activity.
- Economic analysis needs to highlight the differences between credit and real sector markets and the effects each have on the efficiency of the location of resources.
- It is recommended that suitable incentives, both legal and tax, be provided to spur the utilisation of risk sharing modes of financing.

Notes:

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1. This took place during the emergence of what has come to be known as European modernity. By modernity we mean primarily European modernity, or the major social, political and economic transformation that took place beginning with the Renaissance. Interest was legalised in England by Henry VIII in 1545, after he broke away from the Catholic Church a few years earlier.
2. Leigh, Daniel, Deniz Igan, John Simon, and Petia Topalova "Chapter 3: Dealing with household debt," IMF World Economic Outlook, April 2012, p. 16. Available

online at: <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/c3.pdf>

3. Interest is typically "compounded," which means borrowers effectively pay interest not only on the original amount borrowed, but also on any interest added to the original amount.
4. See Abdul Karim Abdullah "Debt and Economic Activity," ICR, Vol. 4, No. 3, July 2013.
5. The yield on Greek government bonds "reached almost 40% at the beginning of March 2012." Greenlaw David, James D. Hamilton, Peter Hooper, Frederic S. Mishkin, "Crunch Time: Fiscal Crises and the Role of Monetary Policy," paper written for the U.S. Monetary Policy Forum, New York City, 22 February 2013, p. 33. Available online at: <http://research.chicagobooth.edu/igm/usmpf/file.aspx>
6. Perkins, John *Confessions of an Economic Hitman*, Ebury Press, UK, 2006, p. 218.
7. Dent, Harry S. Jr. and Rodney Johnson *The Great Crash Ahead*, Free Press, New York, 2011, pp. 182–200.
8. See Abdul Karim Abdullah "Restoring the Ethical Basis of Finance" ICR, Vol. 5, No.1 January 2014.
9. See Abdul Karim Abdullah "Enhancing Cyclical Stability by Interest-free Banking" ICR, Vol. 5, No. 3, July 2014.
10. This is already taking place in some sectors, such as the furniture market, but needs to be extended to other sectors as well, for example housing. Some manufacturers of furniture, such as IKEA, already offer interest-free financing to households that are not able to pay in cash but can only afford to purchase furniture on an installment (credit) basis. No interest is added to the price of the furniture thus purchased on an installment basis.
11. See http://www.ikea.com/ms/en_SG/customer_service/ikea_services/interest_free/#.
12. As one observer noted, "interest on debt is one of the world's most powerful instruments for redistributing wealth from the poor to the rich." Anielski, Mark 2004: "Genuine Wealth and the Good Life," article originally written for the publication in the Summer 2004 edition of *YES! A Journal for Positive Futures* on the subject of "The Good Life," p. 2. Available online at: <http://www.anielski.com/old_site/Documents/Anielski%20Good%20Life.pdf>
13. See Abdul Karim Abdullah "Understanding the Causes of the Debt-Crisis: Interest-based lending," ICR, Vol. 3, Number 4, July 2012.
14. Brown, Ellen, Hodgson, *The Web of Debt*, Third Millennium Press, 2008, p. 368.
15. See Abdul Karim Abdullah "The Pitfalls of *Riba* or Interest-based Financing," ICR, Vol. 4, No. 1, Jan. 2013.
16. The process is similar to that described by Thomas Kuhn in his acclaimed work. See Kuhn, Thomas S. *The Structure of Scientific Revolutions*, 50th anniversary, Ian Hacking (Intro.) (4th ed.,) The University of Chicago Press, 2012.
17. See for example McConnell R. Campbell and Stanly L. Brue *Economics*, McGraw-Hill Inc., New York, 1996, pp. 485– <http://www.ikea.com/ms/en_SG/customer_service/ikea_services/interest_free/# 486>
18. "SMEs today account for more than 98 per cent of Europe's business and provide more than 67 per cent of jobs in the union which makes them the most

important drivers of European long-term economic growth and sustainable job creation. A recent study by the European central bank reported a deterioration in the availability of bank loans … for eurozone SMEs applying for a loan." De Backer, Philippe "SMEs crucial to Europe's economic and job stability," *The Parliament*, 27 September 2014, available online at: <https://www.theparliamentmagazine.eu/articles/opinion/smes-crucial-europe%E2%80%99s-economic-and-job-stability>
19. Qur'an, 2:275¬-280.
20. See Abdul Karim Abdullah "Economic Benefits of Risk Sharing," ICR, Vol. 5, No. 4, October 2014.
21. Thus there is no need to worry that when common shares are traded debt is also traded. All debt is automatically subtracted from the values of the share, as all liabilities are subtracted from the total assets of the company to determine the book value of the share.
22. Robert Skidelsky, in Skidelsky, Robert and Christian Westerlind Wigstrom, *The Economic Crisis and the State of Economics*, Palgrave Macmillan, 2010, p. 8.
23. For a novel treatment of markets, see McNally, David *Monsters of the Market*, Haymarket Books, Chicago, 2012.
24. One may note in passing that money, used for the purpose of making transactions in markets, is not a factor of production either, as money by itself does not produce anything. Thus, the payment of interest for the use of someone's money cannot be justified by the claim that the lender is entitled to be compensated for the use of his or her money by the borrower.
    Compensation for the use of money can, however, be justified if an additional condition is satisfied, which is that the capital provider takes *risk*. Taking a risk merits being compensated for the use of one's capital.
    Investors take risk when they invest in ordinary shares or asset-backed sukuk. By contrast, no risk to creditors is present in any agreement where borrowers are required to guarantee both the principal amount of the loan as well as the interest.
    One may additionally note that *time* is not a factor of production either. At best, time can be seen as a *condition* of production. It can be seen as a condition of production in the sense that all production takes place *over time*.
    The payment of interest cannot be justified by claiming that it is payment for time either. The reason is that time is neither a commodity nor a service that can be "traded" in a market. In any case, time is not the lender's to sell.
25. Fama, Eugene F. and French, Kenneth R. "Common Risk Factors in the Returns on Stocks and Bonds," *Journal of Financial Economics* Vol. 33 (1), pp. 3–56, 1993.
26. Foster, John Bellamy "The Financialization of Capitalism," *Monthly Review*, Issue 11 (April), Volume 58, 2007. Available online at: <http://monthlyreview.org/2007/04/01/the-financialization-of-capitalism>
27. While freedom is necessary to protect the dignity of the individual, freedom is not without limits. This is recognised by the fact that even the freest nations impose restrictions on freedom in various ways.
    Some restrictions thus need to be placed on freedom, if for no other reason than to prevent abuses. Life with dignity itself is hardly possible without differentiating acts that contribute to well-being from those that undermine it. The prohibition of interest is a case in point.

Seen in a broader context, the legalisation of interest was part of a liberal trend that swept Europe during the sixteenth and seventeenth centuries. It was also to a degree a result of a new confidence, perhaps not entirely warranted, in the power of human reason to legislate in the area of ethics, traditionally a preserve of religion.

The legalisation of interest was a part of a *moral revolution*, which took place in part by drifting away from revelation as a source of guidance. During this upheaval, individual autonomy became more prominent and the state was expected to protect it.

The liberation of modern man from the restraints "traditionally" imposed on human initiative by the need to conform to the requirements of religion was justified by appealing to the doctrine of human rights. However, it appears that in the haste to recognise and protect *human rights*, the need to maintain consciousness of *human obligations* appeared to have taken a back seat.

28. Rogoff, Kenneth S. & Carmen M. Reinhart *This Time Is Different*, Princeton University Press, 2009, p. 208.
29. See Roubini, Nouriel and Stephen Mihm *Crisis Economics*, Penguin Books, New York, 2010.
30. Financialisation is a global phenomenon. According to the World Bank, the global volume of financial transactions is approximately 15 to 20 times greater than what is required to finance world trade. Kennedy, Margrit, *Interest and Inflation Free Money*, Seva International, 1995, p. 10. Available online at: <http://userpage.fu-berlin.de/~roehrigw/kennedy/english/Interest-and-inflation-free-money.pdf>
31. Hammond, Jeremy R. *Ron Paul vs. Paul Krugman*, n.a. 2012, p. 48.
32. "Since 2007, banks have foreclosed around eight million homes. It is estimated that another eight to ten million homes will be foreclosed before the financial crisis is over." Currently there are 18.6 million unoccupied houses in the US. That is approximately 6 houses for each of the 3.5 million homeless persons. The National Economic and Social Rights Initiative, *The Mind Unleashed*, 2014. Available online at: <http://themindunleashed.org/2014/02/18600000-vacant-homes-united-states-enough-every-homeless-person-six.html>
33. See Abdul Karim Abdullah "Risk Sharing, Transfer and Management," ICR, Vo. 4, No. 2, Apr. 2013.
34. One may note in passing that in the discourse on sustainable development, little attention is being accorded to ensuring that financing of development itself will be sustainable.

    This is especially worrying in light of the fact that estimates show that anywhere from 3.5 to 5 trillion dollars per year will be required to finance development over the next fifteen years. The need to pay attention to the sustainability of finance shows up dramatically in the issue of indebtedness, especially by poorer nations. Let us hope that "development" will be sustainable not only in terms of the impact on the environment, but also from the financial point of view, in terms of the impact on the people that will, in the final analysis, have to pay for it.

VIEWPOINTS

Enhanced Life Expectancy during the Golden Age of Islamic Civilisation

*Daud AbdulFattah Batchelor**

People living in Muslim countries in 2013 had an average life expectancy at birth of just 67 years – four years lower than the global average of 71 years! Life expectancy is a statistical measure of the number of years an individual is expected to live. Global average life expectancy today is much greater than what is was in 1900 – then only 31 years. During the period of the medieval Islamic Caliphate, however, life expectancy at birth of the general population was relatively high, above 35 years, according to Conrad Lawrence (1995) in the book, *The Western Medical Tradition: 800 BC to AD 1800*. This is greater than longevity figures estimated for late medieval English aristocracy (30 years), and for populations in classical Greece (28 years) and classical Rome (20-30 years). Several studies even concluded that the life span of classical Muslim scholars as a professional group were between 69 and 75 years, much higher than the general population.[1] Overall, the figures indicate a *relatively* high level of well-being for Muslim citizens during the Caliphate period. These *average* general figures may however, appear quite low, but in reality many citizens then lived well into their 50s and 60s once they survived infancy. What reduced these historical longevity figures were high infant mortality rates that existed then. The rapid increase in average life expectancy over the past 100 years is largely due to greatly reduced infant mortalities resulting from improved nutrition, water and sanitation, and the eradication of many infectious diseases, partly through child vaccinations.

The relatively long life expectancies seen for the Islamic civilisation were a direct outcome of the interwoven values contained in Islamic teachings emphasising good health and hygiene. It is well-established in modern medicine that cleanliness is essential for good health. The Prophet (*Peace be upon him*) stressed that "*Cleanliness (tahara) is half of faith (iman)*".[2] This is certainly reflected in the Prophet's (Pbuh) practice and teaching of regularly bathing, cleaning teeth frequently using *miswak*, and wearing clean clothes. Jabir bin Abdullah (*may God be pleased with him*) stated that, "The Messenger of Allah (*Pbuh*) came to visit us, and saw a man who was wearing dirty clothes. He (*Pbuh*) said, "*Could this person not find anything with which to wash his clothes?*"[3] Another time Abu Hurayrah (*may God be pleased with him*) narrated

that the Messenger of Allah (*Pbuh*) said, "*It is the duty of every Muslim to take a bath (at least) once every seven days, and to wash his head and body*".[4] Not only these measures but additionally the essential requirements of a practising Muslim is to bathe (*ghusl*) to remove major impurity (*junabah*), such as after conjugal relations, and to ensure ritual purity before the five-time daily prayers by taking ablutions (*wudhu*). These practices ensured a high level of hygiene in Islamic civilization. Consequently, as an example, Ibn Sa'id commented that "The Andalusian Muslims were very particular about their cleanliness in their person, dress, and beds and the interior of their homes. The poorest man would spend his last dirham on buying soap for washing his clothes, rather than appear in the street with dirty clothes."[5]

Further, for Muslims, the value of life and the importance of saving lives are highly stressed in the Noble Qur'an:

> We ordained for the Children of Israel that if anyone slew a person – unless it be for murder or spreading mischief in the land – it would be as if he slew the whole people; and if anyone saved a life, it would be as if he saved the life of the whole people. (Q Al Maidah 5:32)

No doubt this verse has inspired Muslim physicians throughout the ages and engendered great advances in medical science by Muslim scholars. Further encouragement towards seeking good health is provided by a number of hadith including the following: Abu Hurayrah (RA) reported that the Prophet (*Pbuh*) said: "*The strong believer is better and more beloved of Allah than the weak believer, while there is good in both*."[6] It is clear in its usage by classical scholars such as by Ibn Taymiyyah that the connotation here includes that of physical strength. Further incitement for Islamic medical research to seek good health for the *ummah* were the Prophet's statements: "*Every illness has a cure, and when the proper cure is applied to the disease, it heals by Allah's Will*."[7] Medical knowledge grew rapidly in the Muslim world as illustrated by the extensive tomes written by such luminaries as al-Razi, and Ibn Sina known in the West as Avicenna. *Al-Qanun Fi'l-tib* (the Canon of Laws in Medicine) represents the most important work of Ibn Sina, and as William Osler described it, "the most famous medical textbook ever written".[8] Many medical advances claimed by western physicians actually derive from Muslim discoveries and practices, such as the explanation of pulmonary blood circulation, delayed splintage, and vaccinations, to mention a few.

Other Islamic values that are conducive towards longevity in society are seeking moderation in all things (*wasatiyyah*), seeking ease (*taysir*) rather than hardship, respecting and caring for parents in old age, maintaining family ties, taking exercise, and avoiding excessive food consumption, to name but a few.

The relatively high life expectancy of the Caliphate period is unsurprising when considering the essential attributes of Islamic governance and administration: Rule of law providing for justice and human security; emphasis on acquiring knowledge and the provision of educational institutions; provision of clean water and sanitation systems; and treatment and caring for the ill and the aged. Extending public education is directly correlated with improved health since educated people can better access and understand health messages. The early Caliphate had (with 4th century BC Athens) the highest literacy rates amongst pre-modern societies.[9] Cities in the medieval Muslim world greatly outstripped their European counterparts with their size and public facilities.

Water is critical to the life of a Muslim from the necessity for clean drinking water and for ritual ablutions, to water used in gardens as a symbolic attribute of Paradise, while many parts of the Muslim world lie in relatively dry regions not well-endowed with reliable supplies. Consequently the hydraulic engineer was a highly respected profession and demonstrated considerable expertise and ingenuity. Surface water was transported to cities via aqueducts and canals, while underground water was tapped using deep-bored wells and *qanats* (gradually sloping underground channels with vertical access shafts, transporting water from aquifers). Large mosques had ablution areas and often public lavatories. Not everyone had running water, but in many cities water was carried to public fountains, and every urban quarter had bathhouses with hot and cold water on tap.[10] In cities, water was stored in cisterns.

Some approaches of water supplies to Muslim cities include (1) the Umayyad capital of Cordoba in Spain[11] relied upon the re-furbishing of Roman aqueducts, but with elaborate new distribution systems; (2) Fustat, the first administrative capital in Egypt after the 641-642 Islamic conquest, lying just south of Cairo, used a series of aqueducts and in the finest of houses, water was supplied through pipes into fountains and basins, often with separate supplies for potable water and for washing and cooking.[12] (3) In Hama, central Syria, lifting devices tapped water from the Orontes River, which was fed through networks of underground ceramic pipes to cisterns, elegant fountains and a bathhouse.

Further, advanced sanitation systems are widely evidenced during the medieval Caliphate period. At Fustat, Egypt, even simple 2-3 room houses were each equipped with latrines sitting over cess-pits, while in high-rise multi-storey buildings, which existed then, latrines were placed on each floor with flues constructed within the walls. "In the most elaborate sanitation systems, flues from the domestic complexes were connected with underground canals, which ran into communal cesspits. Sanitation systems at Fustat suggest some forethought and subsequent management by municipal authorities, particularly in the placement of drainage channels and cesspits beyond the confines of private property".[13]

Other impressive sanitary infrastructure can be seen in 1) the former palace-city of Madinat al-Zahra, Cordoba, where it comprised 1,800 metres of subterranean channels that took water and waste from courtyards, latrines, bathhouses and roofs of buildings. These drainage routes must have been established prior to erection of the buildings.[14] 2) In the congregational mosque at Mayyarfariqin in northern Mesopotamia it was reported that "the ablution pool faces forty chambers, through each of which run two large channels, one of which is visible for use, while the other is concealed beneath the earth and is for carrying away refuse and for flushing the cisterns".[15]

Hospitals (*bimaristans*) became widespread. They appeared around the 9th century CE in Baghdad and spread quickly throughout the Muslim world. The Nuri hospital in 12th century Damascus, had druggists, barbers, orthopedists, oculists, and physicians. Ibn Jubayr, a 12th century traveler, observed one or more in most cities and declared that hospitals were one of "the finest proofs of the glory of Islam".[16] They provided a range of facilities from treatments to convalescence to retirement residences. They looked after all kinds of people because Muslims are honour-bound to provide care for the sick. Some hospitals were specialised such as for mental patients or for leprosy treatment. Services and medicines were generally provided free-of-charge from funds from charitable religious endowments (*waqf*) while operating expenditures were often paid for by the government. The advanced 9th century Ahmad ibn Tufal Hospital in Cairo contained a bathhouse each for men and women, a library, and a psychiatric wing. Patients were given ward clothes to wear and assigned beds. The 13th century Al-Mansuri hospital in Cairo with teaching facilities had separate male and female wards with running water provided throughout. The dispensary provided medicines for patients to take home. Its founding constitution read, "[The hospital's] duty is to give care to the ill, poor, men and women, until they recover. It is at the service of the powerful and the weak, the poor and the rich … without demand for any form of payment, but only for the sake of God, the Provider." Many hospitals doubled up as medical schools where generations of doctors – Muslim, Christian and Jewish – were trained. Here the great advances in Arabic medicine were made.[17] Students often accompanied physicians on their daily rounds, examining patients' histories and preparing their prescriptions. Surgeons used advanced surgical instruments, which can be seen in today's hospitals, as described by al-Zahrawi who transformed surgery into a specialist science. The Crusaders were inspired by the magnificent hospitals of Damascus and Cairo. The first European hospital was established by Louis IX in Paris after his return from the Crusades (1254-60).[18]

Surprisingly however, many of the countries today that have the world's lowest life expectancies are Muslim majority countries – Afghanistan (60 years);

Niger, Burkina Faso and Guinea (58 years); Mali (57 years); Nigeria (54 years); Somalia (53 years); Chad (50 years); and Sierra Leone (46 years; world's lowest life expectancy). At the same time these are countries that reflect high Islamicity levels in terms of praying five-times daily, paying zakat and fasting in Ramadan.[19] It would appear though that inculcation of the Islamic civilisational values that lead to longevity, as discussed in this paper, have been relatively neglected here.

It is now high time for Muslims and Muslim countries to re-emphasise Islamic values and teachings so as to change the mindsets of individuals, as well as to establish institutions and facilities that engender good health, vitality and spiritual well-being (*hayat al-tayyibah*) for all.

Notes

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1. Shatzmuller, Maya. *Labour in the Medieval Islamic World*, (Brill Publishers, 1994), p.66.
2. *Sahih Muslim* (1/203), Number 223.
3. *Sunan Abu Dawud*, Book 32, Number 4051.
4. *Al Bukhari*, Book 13, Number 21.
5. Syed Azizur Rahman, *The Story of Islamic Spain*, (New Delhi: Goodword Books, 2001), p. 593.
6. *Sahih Muslim*, Number 6774. Albani called it '*hasan*'.
7. *Al-Bukhari*, Book 71, Vol.7, Number 582.
8. William Osler, *The Evolution of Modern Medicine,* (Whitefish, Montana: Kessinger Publishing, 2004), p. 71.
9. Andrew J. Coulson, *Delivering Education*. (Stanford, California: Hoover Institution Press, c.2002), p. 117. http://www.hoover.org/sites/default/files/uploads/documents/0817928928_105.pdf. Accessed 22/07/2015.
10. Amira K. Bennison, *The Great Caliphs: The Golden Age of the 'Abbasid Empire*, (Yale University Press, 2009), p. 87.
11. Cordoba was one of the world's most advanced cities in the 10th century with paved streets and oil lamps lighting the streets after dark, amenities that London and Paris would only have 700 years later (Rageh Omar in the BBC's An Islamic History of Europe). Cordoba became a city of 500,000 population, five times larger than coeval Paris.

12. Marcus Milwright, *An Introduction to Islamic Archaeology,* (Edinburgh: Edinburgh University Press, 2010), p. 93.
13. Ibid.
14. Milwright, p. 92.
15. Bennison, p. 87.
16. Salim T. S. al-Hassani (Ed.), *1001 Inventions: The Enduring Legacy of Muslim Civilization*, 3rd Edn. (Washington, D.C.: National Geographic, 2012), p. 156.
17. Bennison, p. 90.
18. Muhammad Saud. *Islam and Evolution of Science* (Islamabad: Islamic Research Institute, International Islamic University, 1986).
19. Daud A. F. Batchelor, "A New Islamic Rating Index of Well-being for Muslim Countries", *Islam and Civilisational Renewal*, Vol. 4(2), 2013, pp. 188-214.

Shariah Offences and Fundamental Liberties in Malaysia

*Tengku Ahmad Hazri**

The debate about the scope of Syariah offences in Malaysia in reality impinges on the pertinent question of the limits to legislation by the state government.

Commentators have often noted that since Malaysia does not follow the doctrine of Parliamentary supremacy, the power of Parliament to enact laws is constrained by the Federal Constitution, which declares itself the "supreme law of the Federation".[1] If Parliament enacts laws contrary to the constitution, the judiciary is empowered and authorized to declare such legislation unconstitutional and hence null and void. Criminal law—such as the Penal Code—as the law that belongs under Federal List, is thus subjected to the same test, whereby if Parliament enacts laws that, among others violate fundamental liberties, then it follows that the court may declare the law unconstitutional. Such arrangement is only necessary for a democratic society.

When it comes to Islamic law, however, the case is different. Although the constitution assigns criminal law to the federal government, state government is authorized to legislate on selected matters involving Islamic law, among others to create "offences against the precepts of Islam". The actual scope of this power has been a point of contention, least of all in the very definition of "precepts of that religion [i.e. Islam]" as used in the constitutional text, but also because of the tenuous distinction between "offence" and "crime".[2] These two points have been at the very centre of debates on the proper right of Syariah courts to exercise their jurisdiction. Thus in several cases, the court conceded to the difficulty of distinguishing between "offence" and "crime". This was made explicit in the case of *Sulaiman Takrib v Kerajaan Negeri Terengganu*, whereby the presiding judge, Abdul Hamid Mohamad CJ remarked, "I admit that it is not easy to draw the dividing line between 'criminal law' and [Shariah offences]. Every offence has a punishment attached to it. In that sense, it is criminal law. However, if every offence is criminal law, then no offence may be created by the State Legislature".[3] But surely a line has to be drawn somewhere. The only available limit to the creation of Shariah offence appears to be the Syariah Offences (Criminal Jurisdiction) Act 1965, which restricts the sentencing power to three years imprisonment, five thousand ringgits of fine, or six strokes of whipping. Apart from this, there is no clear boundaries or limits to the *type* of offences that may be created, or what may and may not be criminalized.

The lack of clear guidelines in the constitution or federal law could have been resolved by the courts, yet the case law reveals a reluctance to do so in their part. In

Mamat bin Daud v Government of Malaysia, the Supreme Court—the apex court then, now the Federal Court—chose to leave the question unanswered.[4] Again in *Sulaiman Takrib*, the Federal Court explicitly refused to do so, describing any such attempt as serving more harm than good. The court nevertheless offered the barest guidelines, namely that, on the one hand, if the offence is against the precept of Islam, it is not deemed to be criminal law, and on the other, if similar provision is to be found in federal law, it is regarded as criminal law. Other than this, the court preferred the issue to be handled on a case by case basis. The issue becomes more complex in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara*, a trilogy that went through the High Court, the Court of Appeal and finally, the Federal Court. This case was the first opportunity for the court since the constitutional amendment inserting Article 121 (1A) to examine the scope of state government and Syariah courts with regards to Syariah offences. The court concluded that if an offence falls within the jurisdiction of both civil and Syariah courts, the accused may be prosecuted in either court. However, the court is silent on the role of state legislature itself.

This lack of clear guidelines also means that there is little limit to the scope of Syariah offence as may be legislated by state government. This is aggravated by a liberal interpretation adopted by the court in interpreting "the precepts of Islam". In *Sulaiman Takrib*, the very definition of this phrase was contested. To resolve this quandary, the opinions of three court experts were adduced: two favored a liberal approach, whereby "precepts" were wide enough to cover anything encompassing belief, law and ethics (*'aqidah*, *Shari'ah*, *akhlaq*), yet one minor view took a restrictive stance whereby "precepts" were confined to those fundamental points on which there is little disagreement among the jurists, albeit may encompass all three areas. The court adopted the liberal interpretation of the majority and consequently, was able to hold the impugned enactment provisions valid. These liberal interpretations have left state government unimpeded in its powers to create Syariah offences, giving it leeway towards vast territorial expansion. Only recently, the Federal Court upheld an enactment criminalizing the dissemination of Irshad Manji's *Allah, Liberty and Love* (or more specifically, its Malay translation, Allah, Kebebasan dan Cinta), on the ground that the book contains materials contrary to Islamic law. The court cited with approval *Sulaiman Takrib*, as was later followed by subsequent cases, such as *Fathul Bari Mat Jahya v Majlis Agama Islam Negeri Sembilan*.[5]

Now to recall from the federal structure, when Parliament enacts laws violating the constitution, the court may turn them down for want of constitutionality. Is the same arrangement replicated for Islamic law? Arguably no: the reason is that the courts have repeatedly insisted that constitutional interpretation is the province of the civil rather than Syariah courts.[6] The effect is that, in the Syariah courts

at least, constitutional protection of fundamental liberties is not available to the parties. If indeed, they wish to rely on it, a separate avenue has to be pursued, namely in the civil courts to challenge the constitutional validity of the enactment provision in question. However, this only happens at the judicial level, not the legislative level.

In fact, the very act of separating jurisdictions itself serves as a check on the limits to legislative competence of state government with regards to offences. By excluding criminal matters from the jurisdiction of state government, the constitution in effect forces the matter to be addressed at the platform where constitutional protection of fundamental liberties is available, namely, the civil courts. We submit, however, that this arrangement is not always desirable. While it may be argued that such an arrangement retains the supervisory role of the civil courts over the Syariah courts, in fact the 1988 amendment as encapsulated in the insertion of Article 121 (1A) envisaged an independent and parallel jurisdiction for the Syariah courts. Consequently, if indeed fundamental liberties of individuals need to be protected, this should occur even within the framework of state Islamic legal system. Toward this end, two options may be advanced.

The first possibility is to open the scope for Syariah courts towards constitutional interpretation—limited, however, to the extent necessary to resolve the issue in question. The Syariah court's power nevertheless will not be the same as that of the civil courts, in which lies the judicial function of the Federation. The Syariah courts will thus not be able to declare an enactment unconstitutional, or adopt a constitutional interpretation binding on the civil courts. Instead, they will be able to *apply* constitutional provisions *proportionate* to the case at hand.

The second possibility is to enact a 'micro' form of constitutional protection of liberties. Given the limited jurisdiction of state legislature, the latter may not be able to enact positive legislation protecting fundamental liberties per se. What it may nevertheless do, is to adopt negative rather than positive protection of rights, that is to say, to legislate on matters in which the Syariah courts are *not* allowed to encroach, meaning that liberties will be safeguarded, not by conferring direct rights (positive protection)—which it cannot do—but by *restraining* the state government from encroaching on fundamental liberties (negative protection).

Notes

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1. Article 4 (1); for discussion see, Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (Kuala Lumpur: The Other Press, 2003), chapter 4, 35-42; Tun Mohamed Suffian bin Hashim, *An Introduction to the Constitution of*

Malaysia (Second Edition) (Malaysia: Government Printer, 1976), 17-20.
2. Federal Constitution, Ninth Schedule, List II—State List includes the "creation and punishment of offences by persons professing the religion of Islam against *precepts of that religion*, except in regard to matters included in the Federal List". (emphasis added)
3. *Sulaiman Takrib v Kerajaan Negeri Terengganu* [2009] 2 CLJ 54.
4. *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, as cited by Abdul Hamid Mohamad CJ in *Sulaiman Takrib.*
5. *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor* [2015] 8 CLJ 621; *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Anor* [2012] 4 CLJ 717
6. *Latifah Mat Zin v Rosmawati Sharibun & Anor* [2007] 5 CLJ 253

The Use of Big Data and its Effects on the Right to Privacy: A *Sharīᶜah* Perspective

*Ahmad Badri Abdullah**

The use of big data systems is expanding faster than the rules or legal infrastructures that manage them. Everyday, transnational companies like Google process more than 24,000 terabytes of data and a few largest banks in the world manage more than 75 terabytes of internal corporate data. Facebook, the parallel world with 1.2 billion users at a time who send 10 billion messages, upload 350 million pictures and 250 million videos, is another hallmark of the rise of big data.

TechAmerica Foundation sees big data as characterised by three main factors: volume, velocity and variety. In other words, big data is the perpetual growing culmination of datasets derived from different sources to be analysed and mined in a manner which traditional database technologies are not capable of. It requires powerful computing facilities to filter massive amount of information so as to determine trends and behavioral patterns in the pursuit of making smarter and more accurate decisions.

To date, the use of big data is everywhere. This is evident as entertainment companies are creating television series based on their costumer's specific preferences, and data brokers collect employment information and sell them to debt collectors, financial institutions, and the like. With the ability to access unimaginable amount of data, business organisations may gain valuable insights with which their operations and earnings could be significantly improved. It is interesting to note the user of big data by a retailer such as *Target* is able to determine the time that its costumers get pregnant, by analysing their purchasing history and sending them online marketing materials early on to win business. A similar case applies to *Amazon* and *Netflix* who recommend products based upon the costumers' purchasing history. Furthermore, the use of big data is forecasted eventually to help in finding the cure for cancer and other chronic diseases. In sum, the societal benefit (*maṣlaḥah*) that is presented by the use of big data is indubitably enormous. Nonetheless, as big data becomes more widely utilised, the legal risks and ethical issues associates with it also become more of a concern.

Issues and risks regarding the use of big data are typically sidelined since organisations that resort to such practices merely focus on enhancing their business efficiency and profits. This in turn has resulted in the drowning out of the calls for risk oversight. Bernard Marr in his article suggests that the crux of the problem lies in the fact that most data collection and analysis is not done transparently since the extent to which data is analysed and mined is not disclosed. Given

that, the most significant legal challenge associated with big data is privacy. For instance, personal information may end up in the database of a data broker, being combined and disclosed in ways that do not comply with any privacy policy. If an e-commerce vendor informed a marketer that a person purchased a deep fryer, such information could find its way into a data broker's database. If the broker then sells access to the database to a health insurance company whose algorithm deems a person who likes deep fries as exposed to high risk, an initial innocuous data disclosure may end up serving as the basis for denying a person from accessing health care facilities and services. Furthermore, in most cases data subjects do not know what entities are collecting information about them, particularly by the data brokers. Data subjects do not have direct access to them and these brokers do not receive information directly from the data subjects. All this may expose data subjects to the risk of their personal information being misused by unknown parties.

An important requirement of privacy is that a person is able to keep certain information about himself concealed and inaccessible to others. Islam in this matter guarantees the sanctity of private life because it prohibits prying into people's personal affairs or disseminating personal information. The Qur'an admonishes against the act of prying into other's personal realms as well as any measures of disseminating such information:

> O you who have attained to faith! Avoid most guesswork [about one another] for, behold, some of [such] guesswork is [in itself] a sin; and do not spy upon one another, and neither allow yourselves to speak ill of one another behind your backs. Would any of you like to eat the flesh of his dead brother? Nay, you would loathe it! And be conscious of God. Verily, God is an acceptor of repentance, a dispenser of grace (Q, Al-Ḥujurāt, 49: 18).

> Indeed, those who like that immorality should be spread [or publicized] among those who have believed will have a painful punishment in this world and the Hereafter. And Allah knows and you do not know (Q, An-Nūr, 24: 12).

Kamali points out that the right to privacy in Islam not only refers to the sanctity of an individual's home but to all other aspects of privacy that range from personal correspondence, the confidentiality of one's private activities, personal conversation to financial affairs. Therefore, in the pursuit of protecting the sanctity of the private sphere, measures to protect the privacy of data subjects need to be given due consideration. The technique for mitigating privacy-related risk of big data is the de-identification or anonymisation of data sets.

Such technique strips away key information from data sets so as to prevent other parties from identifying to whom the data sets might refer. Nevertheless, if the de-identification process is not done properly, data that appeared anonymous could be re-identified and there have been several real-life events in which re-identification of data sets has occurred. However, David Nevetta suggests that with the abundance of data available and accessible with sophisticated algorithms that allow data-mining, true anonymisation is actually more difficult to achieve.

Personal autonomy is among the most important ethical requirements that are based on the idea that every individual owns the intrinsic right to make informed decisions. Islam acknowledges the concept of autonomy since God created man as his viceroy on earth and endowed them with honor. Therefore Islamic jurisprudence rules that no one is entitled to dispose of the right of a human being without his consent and permission. However, in the case of big data usage, data subjects often lack understanding of the interpretations, inferences, and deductions processes which are made and drawn from his combined data through the big data mining techniques and analysis, and therefore have little ability to provide consent.

Another alarming matter pertaining to the use of big data that triggers *Sharīʿah* issues is the 'predictive policing and punishment'. A growing number of places in the United States, ranging from Los Angeles, Richmond to Virginia are currently employing the use of big data analysis to select groups and individuals to subject to extra scrutiny simply due to an algorithm that suggests them as more likely to commit crime. Such systems seek to prevent crimes by predicting who might commit them. The fundamental setback of such a system is that it negates the foundational principle of justice in the *Sharīʿah* – the presumption of innocence – since it holds people responsible for what their prediction indicates they are likely to do. With such a system society might be safer, however only at the expense of the ability to make choices and being held responsible for them. Individuals in the system are denied their ability to make moral choices.

In summing up, we need to weigh cautiously the benefit (*maṣlaḥah*) and harm (*mafsadah*) implied by the use of big data. Of course big data offers numerous benefits. However, it could also turn out to be dehumanising due to the ways in which it is being utilised. The misuse of big data necessitates protection and preventive measures, be it in the form of laws or public policies. Nonetheless laws and policies are not quite sufficient to deal with such a complex subject. More importantly, the use of big data by Muslim entrepreneurs data brokers needs to be governed by Islamic ethical principles, which are underpinned by the higher objectives of *Sharīʿah*.

Notes

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Is Garnishee Proceeding Feasible on Islamic Banking Deposits and Investment Accounts in Malaysia?

*Apnizan Abdullah**

Introduction

It is common in loans or debts recovery action that once a creditor obtains a judgment from the court of law against his debtor, he will eventually proceed to enforce it. Fundamentally, there are several methods of enforcement of the judgment available to the judgment creditor, *inter alia* writ of execution which includes writ of seizure and sale, writ of possession and writ of delivery, judgment debtor summons, stop orders, appointment of receiver and committal. Another prevailing mode of the enforcement of judgment in the market is garnishee proceeding. Procedurally, a garnishee proceeding is initiated by a judgment creditor by way of applying to the court for an order to be issued on a person who is indebted to the judgment debtor (a garnishee) to satisfy the amount judgment sum or a sum of an order of payment issued by the court against the judgment debtor. The very reason why a garnishee proceeding can be brought against a garnishee is that there is a debtor-creditor relationship between the garnishee and the judgment debtor. This procedure is very typical in the conventional banking sector since the relation between the banks and their customers is a debtor-creditor relationship. In the conventional banking practice, every deposit placed by a customer in either current, saving or investment accounts at his bank is constituted as a loan to the bank. However, this is not the only relationship that occurs between a customer of an Islamic financial institution (IFI) and his bank. The nature of relationship between the two in Islamic deposits and investment accounts is dependent on the underlying contracts employed by them for instance, *qard* (loan) *wadiah* (trust), *wadiah yad dhamanah* (trust with liability), *mudharabah* (partnership), *wakalah* (agency) or *tawarruq* (sale). Since garnishee proceeding is only viable for a debt-based contract which establishes debtor-creditor relationship, is it now possible to apply it to all types of Islamic deposits and investment accounts placed at the IFIs?

What is garnishee proceeding?

Garnishee proceeding is common in Malaysia as one of the method of enforcement of judgment obtained from the court (Mei Pheng & Samen, 2006). It is also usual to execute a garnishee proceeding on bankers conventionally should the judgment debtor has placed certain amount of money in his account provided by his bank. Once it is served on the relevant bank, the court will order the bank to pay to the judgment creditor to satisfy the judgment amount owed by his customer judgment debtor since the bank is the debtor to its customers.

The procedure for the enforcement of judgment via a garnishee proceeding is laid down in Order 49 of the Rules of Court 2012. The mentioned Order 49 allows the judgment creditor who has obtained a judgment or an order for the payment of money by the judgment debtor to apply to the court for the payment of the judgment sum or the sum mentioned in the order for payment from a person who is indebted to the judgment debtor (a garnishee). The court may order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee or so much as it is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings. It is clearly mentioned in Rule 1(3) of the same Order 49 that the amount of debt due or accruing due includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured or any restriction as to the mode of withdrawal has been made or otherwise.

Islamic deposits and investment accounts under the purview of the Islamic Financial Services Act 2013

Since *riba* and interest are prohibited in Islam, IFIs all over the world have employed various types of underlying contracts for the products they offer on the deposit accounts. Undeniably, Islamic deposit and investment accounts are contracted based on the different *aqad* (underlying contracts) which eventually implicate distinguished features from a contract to one another. For instance, *Qard* is a contract of loan, hence the *Shariah* principles governing loan will be applicable to the contract. *Wadiah* contract on the other hand is based on trust, the principles of Islamic trust are applicable. If the account is contracted based on *Wadiah Yad Dhamanah*, the principle of *Qard* will apply on the account since it is a trust with liability contract as ruled by the Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) in its 6th special meeting dated 8 May 2008.

In Malaysia, the newly enacted Islamic Financial Services Act (IFSA) 2013 has paved a new way in defining Islamic deposit. The IFSA 2013 clearly demarcated 'Islamic deposit' and 'investment account'. Section 2 of IFSA 2013 defines 'Islamic deposit' as the money required, among others, to be paid

and accepted by the bank on terms that it will be repaid in full, whereas, the 'investment account' is the money that is required to be paid and accepted by the bank for the purposes of investment without any express or implied indication as to the obligation to repay the money in full (Abdul Rahman & Abdullah, 2015). This segregation of definitions was not found in the previous governing law, namely Islamic Banking Act (IBA) 1983 since investment account was made part of the definition of Islamic deposits as appeared in Section 2 of the repealed Act.

Based on the definitions made by IFSA 2013, Islamic deposit is now limited to the money deposited in the saving or current accounts which could only be based on the principle of *Qard*, *Wadiah* or *Wadiah Yad Dhamanah*. The investment account on the other hand appears to be limited solely to investment thereby implying the restricted application of *Shariah* underlying contracts to *Mudharabah*, *Musharakah*, *Tawarruq* and *Wakalah Bi Al-Istithmar* only. As far as the Islamic deposit is concerned, whether or not it is current or saving account, the only accounts that could be exposed to the garnishee proceeding are those based on *Qard* and *Wadiah Yad Dhamanah* since both underlying contracts establish debtor-creditor relationship. This position implies that any *Wadiah*-based account could not be made vulnerable to this proceeding since the nature of its contract is trust. Undoubtedly, the Islamic investment account may not be subjected to any garnishee proceeding since the debt obligation does not arise between the IFIs and their customers.

Indeed, the key factor in deciding whether the accounts maintained at an IFI may be garnished or not is whether the relationship between the IFI and its customer is a relationship of debtor and creditor or not (Abdul Rahman & Abdullah, 2015). This is a crucial point to see whether there is a debt due or accruing due by the IF to the customer or otherwise. In deciding so, it is pertinent to closely examine the nature of each of the *Shariah* contracts employed as the basis of the contracts made between the contracting parties.

Conclusion

Thus, it may be concluded that the garnishee proceeding is suitable for the execution of the judgment obtained by a judgment creditor against a conventional bank garnishee on all types of its deposit accounts but not necessarily so on the Islamic deposit accounts and its investment accounts placed at an IFI. This is because the conventional banking deposits placed by a customer at his conventional bank result in a debtor-creditor relationship. It is settled that under the Islamic law of transactions, the nature, rights and liability of the contracting parties of any *Shariah* contract are determined by the type of contract employed. Since a garnishee proceeding could only be brought against a debtor-creditor

based account, therefore it is only applicable to *Qard*-based and *Wadiah Yad Dhamanah*-based deposit account. The proceeding could not be possibly initiated on a *Wadiah*-based account any Islamic investment account since the debtor-creditor relationship does not exist in the contract involved. This position indeed restricts the application of garnishee proceeding on the Islamic banking accounts since it is only applicable to selected deposit accounts. Therefore, Islamic banking accounts would be perceived as less favourable by the judgment creditor compared to the conventional banking accounts. In other words the position suggests that in debt recovery action via garnishee proceeding, the judgment creditor has more options in garnishing conventional deposit account rather than Islamic deposits and investment accounts. This means that the judgment creditor must proceed with other types of recovery methods when he finds that the account of the judgment debtor with garnishee is not a debt-based account.

Notes

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3. Islamic Banking Act 1983

SIGNIFICANT EVENTS AND DEVELOPMENTS

The Islamic Declaration on Climate Change (Istanbul, 18 August 2015)

Daud AbdulFattah Batchelor

Islamic scholars provided a clarion call to the Muslim ummah to work together to take urgent measures to protect the earth's environment and restore its balance (*mizan*) in **The Islamic Declaration for Climate Change** promulgated in Istanbul on 18th August 2015. The Declaration called for a global mindset change to recognise the moral obligation of wealthy and oil-producing states to reduce their consumption and production patterns; and to realise that to chase after unlimited economic growth in a finite overloaded planet is not viable. It drew attention to evidence of the serious deterioration and corruption of many features of the global environment and that negotiations on addressing global climate change have been in deadlock since the 2005 Millenium Ecosystem Assessment was published.

The Islamic Declaration on Climate Change called for specific actions by the following groups:

The Conference of the Parties (COP) of the United Nations Framework on Climate Change Convention (UNFCCC) and the Meeting of the Parties (MOPs) to the Kyoto Protocol should: Agree to ensure that greenhouse gas emissions (GGEs) do not exceed a rise of 2 percent, and ideally do not reach a 1.5 percent increase in global temperature, as soon as possible, and ideally agree to set this binding target at the Paris Conference being held in December 2015.

Well-off nations and oil-producing states should: Lead the way in phasing out their GGEs by no later than 2050, and provide generous financial and technical support to the less well-off to achieve an early phase-out of their GGEs; reduce resources consumption; refocus their concerns from unethical profit from the environment, to that of preserving it and elevating the condition of the world's poor; and invest in the green economy.

People of all nations and their leaders should: Aim to phase out GGEs and to commit to 100% renewable energy as soon as possible; Realise that growth must be pursued wisely and in moderation, increasing the resilience of all, especially those most vulnerable to climate change impacts – countries, indigenous people, women and children - and help them in adaptation strategies; Establish a fresh model of well-being as an alternative to the current financial model which depletes resources, degrades the environment and deepens inequality.

Corporations, finance and the business sector should: Take responsibility for their profit-making activities by reducing their carbon footprint and other environmental impacts; Commit to a 100% renewable energy target, as early as possible, by divesting from the fossil fuel driven economy; and Change from the current business model to adopt a circular sustainable economy.

All groups should: Collaborate and cooperate in friendly competition in this endeavour; and the drafters of the Declaration welcomed the similar initiatives from a number of other world religions.

These are all praiseworthy goals and the Declaration deserves support from Muslim governments and all Muslims towards protecting planet earth and achieving a better future for our present and future generations. The Declaration ended with pertinent warnings from the Noble Qur'an to those who "strut arrogantly on the earth", and a hadith where the Prophet (*Peace be upon him*) reminded us of our duties as stewards to acquit ourselves well (as we are accountable for our actions).

Round Table Discussion: 'Islamic Perspectives on Sustainable Development' (IAIS Malaysia, 25 August 2015)

Ahmad Badri Abdullah

On 25 August 2015, IAIS Malaysia organised a round table discussion with an interesting topic entitled '*Islamic Perspectives on Sustainable Development*'. The panelists were Professor Mohammad Hashim Kamali (Founding CEO of IAIS Malaysia), Dr. Daud Abdul Fattah Batchelor (IAIS Malaysia), Dr. Chandra Muzaffar (President of International Movement for a Just World), Associate Professor Dr. Azilah Sarkhawi (International Islamic University Malaysia), Professor Gamini Herath (School Business of Monash University, Malaysia), and Mr. Ahmad Shaiful Alwi (on behalf of Dr. Adi Setia Md. Dom, IIUM). The objective of the discussion is to bring– focus the attention of leaders, stakeholders

and scholars on critical issues related to sustainable development from the regulatory, industry, NGO, and educational viewpoints.

Professor Kamali in his opening remark highlighted the fact that the underpinning principles of Islam such as the oneness of God (*tauhid*), the higher objectives of Shari'ah (*maqasid al-shari'ah*), vicegerency of humankind (*khilafah*), and moderation (*wasatiyyah*) showcase Islam's commitment towards sustainable development. Adding to this, Dr. Daud Batchelor enumerated the key principles of sustainable development from the Islamic perspective and values ranging from achieving balance (*mizan*), avoiding waste, avoiding pollution, protecting communal areas, building the earth (*imarat al-'ard*) to achieving the good life (*hayat tayyibah*). He asserted that these values could underpin the World Wildlife Fund (WWF) model of sustainable development.

In explicating sustainable development as a process in which society remain salient, peaceful, and harmonious, Dr. Muzaffar proposed three dimensions of social cohesion which need to be preserved encapsulating economic, political, and cultural social cohesions. Selfishness, greed, and deviation from the right path of religion he contended, are the determining factors which disrupted social cohesion in contemporary Muslim societies.

On the functional aspects, Dr. Sarkhawi delineated the Islamic concept of urban planning whereby religion and religiosity need to be the prerequisite of city planning and the hallmark of urban life. Moreover, in Islamic urban planning, there are several other elements which need to be duly considered encapsulating Shari'ah rulings, climate constraints, local building materials, and socio-economic situation. Professor Herath maintained that since there is a forecast that in 2025, more than 3 million people will suffer from water scarcity, pre-emptive measure need to be taken at present. Mr. Alwi presented on the topic of 'gift-economy', an economic concept which is underpinned by two foundations' premises, that natural and cultural resources in the world are abundant and that human material needs should be limited. He also presented on the pilot project of 'gift-economy' which has taken place in Cambodia to reform the farming industry of the locals therein. The presentation session was then followed by a lively question and answer session.

Round Table Discussion on the Future of Muslim Youth (IAIS Malaysia, 5 May 2015)

Tengku Ahmad Hazri

On 5 May 2015, IAIS Malaysia in collaboration with the Muslim Youth Movement of Malaysia (ABIM), Malaysian Youth Council (MBM) and the World Assembly

of Muslim Youth (WAMY) organized a Round Table Discussion on the Future of Muslim Youth.

The discussion explored some of the characteristics of contemporary youth and the challenges they face towards making a difference in society. One crucial observation about contemporary youth is, notwithstanding national, cultural and religious differences, youth across the globe appear to exhibit several common features that bind them together. Some of these, like their familiarity with social media and new communication technologies, relate significantly to transformation in the nature of education and work. Yet others suggest similar lifestyles and personal tastes or choices (even mundane ones, like their preference for cold drinks over hot beverages!), pointing to the possibility of contemporary youth playing pivotal roles towards bridging cultural divides.

More importantly however, is how youth are effectuating changes in the very nature of work and education – itself a manifestation of their personality traits. For instance, the entrepreneurial spirit of the young is driven, among others, by their enthusiasm for making a difference and the high value they place on their independence. It is not uncommon for the "Gen-Y" (and those following them like the "Millenials" as known in popular parlance) to enlist several portfolios concurrently, as founder of this and that company, director of another corporation, and president of another organisation. The motivation is hardly financial, although it was acknowledged that such startup companies typically wield handsome financial returns. Instead, the chief catalyst is the youth's appreciation for three things, namely, (1) *autonomy*, (2) *mastery* of a particular skill or knowledge, and (3) a sense of *purpose* in what they do. These are reflected in the way they perform their work or social activities; for example, they have the tendency to rewrite the rules (lending the impression of being rebellious) and redefine social norms, directing their work or activity towards what they independently judge to be better.

In learning, the approach taken is quite similar. Eschewing 'preachy' type of learning, youth prefer an approach to knowledge repackaged as 'knowledge sharing among peers'. That is to say, youth being typically opinionated, the teacher should take a laid back role and encourage self-learning on the part of students towards intellectual independence, intervening only when necessary such as when the student makes serious mistakes or exhibits major misunderstandings. Given the propensity towards action, the pursuit of knowledge has become result-oriented, and very often multidisciplinary.

As "digital natives", a major challenge facing youth, unlike their predecessors, is not how to retrieve information—for this is aplenty—but rather how to filter and discriminate the morass of information, to distill true knowledge from the mass of data and information—indeed, mere opinions—masquerading as knowledge.

BOOK REVIEW

Mohd Nizam Barom, Mohd Mahyudi Mohd Yusop, Mohamed Aslam Haneef and Mustafa Omar Mohammed (Eds.), *Islamic Economics Education in Southeast Asian Universities*

Centre for Islamic Economics (CIE)-IIUM, Malaysia and International Institute of Islamic Thought (IIIT), USA, 2013.Pp. XVI+302.
ISBN: 978-983-44600-1-3.

by Foyasal Khan, *International Islamic University Malaysia*

'Economics education' as a field within economics focuses on "the current state of, the economics curriculum, materials and pedagogical techniques used to teach economics at all educational levels" (Becker, 2001). Unfortunately, Islamic economics education (IEE) is a highly neglected field in contemporary Islamic economics. As such, this edited book is an important addition to this much needed area.

There are two forewords in the book underscoring the context, content and necessity of the book. In the first foreword, Emeritus Prof. Dr. AbdulHamid Ahmad AbuSulayman of IIIT condemns 'economics education' that graduates of top prestigious western universities received because of its inability to mitigate recurrent economic and financial crises. He urges to reform economics curriculum through the integration of revealed and human knowledge in order to produce graduates imbued with the provision of knowledge, skill and ethical values. In addition to discussion about the establishment of CIE in 2013 and its activities, Prof. Dr. Mohamed Aslam Haneef of CIE-IIUM, in his foreword, emphasises on the required programmes that contain knowledge /courses covering both modern disciplines and Islamic heritage for developing IEE.

The book, consists of 2 parts and 15 chapters. Mohd Nizam Barom and Mohd Mahyudi Mohd Yusop provide an introduction in chapter 1 while chapters 2 to 5 in Part I discuss the conceptual introduction to university curriculum reform integrating both Islamic heritage and modern knowledge/ disciplines. A good number of case studies and experiences of selected universities in Malaysia and Indonesia where Islamic economics programmes have been presented from chapters 6 to 14 in Part II. Finally, Mohamed Aslam Haneef and Mohd Nizam Barom discuss selected issues in IEE in chapter 15.

Though the first three chapters in Part I are not directly connected to IEE, they have significantly contributed towards enriching the book as the general philosophy of Islamic education, the process of Islamisation, and the integration

of modern and revealed knowledge to the body of the curriculum have been discussed. In his chapter entitled 'Islamization of Human Knowledge (IOHK)', Dr. Mohd Kamal Hassan highlights very lucidly various pertinent issues related to IOHK i.e. the importance and role of human knowledge in Islamic worldview; responsibilities of the true believers; unified and integrated knowledge in the Qur'anic paradigm; the concept of IOHK; and the case of IIUM as alternative model of Muslim higher education. Even though Hassan's chapter talks about the what and why of IOHK, he provides no concrete idea of how to Islamise human knowledge. In chapter 3, Dr. Rusnani Hashim examines the issues related to curriculum, namely the philosophy, content, and structure for higher institutions of learning that desire to translate the Islamic philosophy of education and the mission of IOK into reality. In her conclusion, she underscores the creativity and innovation of Muslim curriculum designers in bringing key players from society, the industry and the experts, and not to be rigid in making the curriculum. However, does not show any concrete strategy or outline of designing higher education curriculum. In chapter 4, Mustafa Omar Mohammed of IIUM-Malaysia proposes a framework for Integrated Islamic *Turath* Curriculum Index (IITC-Index) that can serve as a benchmark to measure the extent to which *turath* (traditions/heritage) has been integrated into the curriculum. Though it is an important initiative to develop a conceptual framework on IITC-Index, he, however, does not substantiate his framework with real data that could tell readers about the limitations and challenges of applying the index. To make these three chapters more relevant to IEE, the writers may either include a section in their chapters giving possible directions towards IEE or collaborate with other scholars of Islamic economics who could translate their ideas suitable for IEE.

In chapter 5 entitled 'Teaching of Economics at IIUM: the Challenges of Integration and Islamization' Mohamed Aslam Haneef reveals lack of qualified human capital as one of the major challenges that IIUM is facing in designing curriculum and in teaching undergraduate economics. This study should be expanded to understand the state of the art of the postgraduate curriculum as students are, at this level, more mature and ready to contribute to the body of knowledge of IEE.

In chapter 6, Mohamed Aslam Haneef and Ruzita Mohd. Amin carry out a comparative analysis between two programmes, the Bachelor of Shari'ah (Shari'ah and Economics), University of Malaya (UM) and the Bachelor of Economics, International Islamic University Malaysia (IIUM) to portray the overall picture of IEE in Malaysia. They conclude that adequate emphasis should be given to the content of the program, the methods and manner in which integration efforts are made, and the planning for manpower needs in the integration process in order to achieve a true integration of knowledge.

Chapter 7 to 13 share the experiences of seven universities and institutes in Indonesia with regard to Islamic economics teaching. These are: Sekolah Tinggi Ekonomi Islam (STEI) Tazkia; State Institute of Islamic Studies (IAIN), North Sumatra; Airlanga University, Surabaya; Universitas Muhammadiyah Yogyakarta; Institut Pertanian Bogor (IPB); Universitas Brawijaya; and University of Indonesia respectively. While STEI Tazkia, IPB, Universitas Brawijaya, and University of Indonesia offer Bachelor of Islamic Economics, IAIN offers Shari'ah Study Program on Banking, Accounting and Finance, and Management. It took a decade for Airlanga University to establish the Department of Islamic Economics in 2008. Universitas Muhammadiyah Yogyakarta runs an international program for Islamic economics and finance.

Chapter 14 exposes the *mu*ᶜ*amalat* curriculum of Universiti Sains Islam Malaysia (USIM) which offers Bachelor and Master program on *mu*ᶜ*amalat* administration. Students can also have specialization in *halal* products. In the final chapter 15, Haneef and Barom highlight some selected issues in IEE and provide suggestions to move forward. They found that qualified human resources is still a problem for institutions teaching Islamic economics. Apart from the lack of qualified human resources, dearth of sufficient materials on Islamic economics for both lecturers and students is another challenge that the institutions face. In order to solve this crisis, the authors emphasise on writing review articles and thematic selections. Finally, they propose to develop an *usul* for Islamic Economics which is only possible when the collective initiatives are taken into account.

The book has been written on the Southeast Asian context. But only two countries have been covered. It would have been much enriched if it provides the experiences of teaching Islamic economics in Brunei. A separate chapter could also be written on the state of teaching Islamic economics in Muslim minority countries such as Thailand and the Philippines. Having said this, the book is essential reading for anybody concerned with the issues of integration and Islamisation efforts in economics/knowledge. Hopefully the book will be welcomed by erudite scholars and inquisitive readers.

OBITUARY

Professor Dr. Wahbah M. Zuhaily (1932 - 2015)

Wahbah al-Zuhaily was born in 1932 in Deir-Atiyah province of Syria. His father, Mustafa al-Zuhaily, made his livelihood from personal businesses and farming. Wahbah did his primary education in the vicinity of Deir-Atiyah, and later moved to the capital and enrolled into the University of Damascus. He graduated from the faculty of Shari'ah at the University of Damascus in 1952, topping the graduates of that year. In 1956, he completed his studies in Al-Azhar University once again with the top grades at the university. He also studied law at Ain Shams University in Cairo, graduating in 1957. He received his Masters in Law from Cairo University in 1959, and his Ph.D in law with specialisation in Shari'ah in 1963.

His professional career began with teaching Islamic law at the University of Damascus in 1963. His sound knowledge and commitment to teaching and research gained him visiting professorships at the Muhammad bin Ali al-Sanusi University in Libya, the University of Benghazi, the United Arab Emirates University, the University of Khartoum, the Islamic University of Madinah and the Imam Muhammad bin Saud University in Riyadh among many other distinguished institutes of higher education.

He was held in high esteem as one of the prominent scholars of comparative Islamic jurisprudence in the contemporary era, having solid understanding of the major Sunni and the Shi'i schools of Islamic law. His *Al-Fiqh al-Islami wa Adillatuhu* (Islamic Jurisprudence and its Proofs) – a compendium of the jurisprudence of the major schools of Islamic law – is a highly acclaimed encyclopedic work on Islamic jurisprudence. Among his earlier works, his Ph.D. dissertation entitled *Aathar al-Harb fi al-Fiqh al-Islami*: *Dirasah Muqaranah Bayna al-Madhahib al-Thamaniyah wal-Qanun al-Dauli al-'Aam* (The Effects of War in Islamic Jurisprudence: A Comparative Study of the Eight Schools of Islamic Jurisprudence and International Law) also resonates such a claim.

Professor Zuhaily held membership of several prestigious international bodies of prominent Islamic scholars, including the Royal Aal al-Bayt Institute for Islamic Thought in Amman, Jordan, the Islamic Fiqh Academy in Jeddah, Majlis al-Ifta in Syria, and Islamic Fiqh Councils in USA and India. Besides, he headed the Shari'ah Supervisory Boards of several Islamic banks and financial institutions in Bahrain, Saudi Arabia and the UK.

Sheikh Zuhaily wrote extensively on Islamic law, hadith studies, Islamic history, Qur'anic exegesis, and Islamic studies. His numerous books would be

no less than a hundred and sixty in titles, comprising voluminous compendia to simple primers.

His *Tafsir al-Munir* was awarded the 'Best Research Work in the Islamic World in 1995' for its comprehensive yet simple approach to the explanations and elucidating commentaries. In 2008, he was awarded the 'Islamic Personality of the Year' by the government of Malaysia, in conjunction with the celebration of Hijri New Year. He was also enlisted among the top 500 most influential Muslims in 2014.

This great mind from Syria has been truly successful in reflecting through his works and life the resemblance of towering Syrian scholars like that of Ibn Qayyim, al-Nawawi, Ibn Kathir and Sa'eed Ramadhan al-Buti among many others. Having left this temporal world on the 8th of August 2015, Saturday, in Damascus, he has left an indelible legacy of scholarship and service to Islam. May Allah the Almighty shower him with His blessings and the best of abodes in the Hereafter! *Ameen*!!

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Islam and Civilisational Renewal (ICR) invites scholarly contributions of articles, reviews, or viewpoints which offer pragmatic approaches and concrete policy guidelines for Malaysia, the OIC countries, civic non-governmental organisations, and the private corporate sector. The principal research focus of IAIS is to advance civilisational renewal through informed research and interdisciplinary reflection with a policy orientation for the wellbeing of Muslim communities, as well as reaching out to non-Muslims by dialogue over mutual needs and concerns.

Our enquiry and recommendations seek to be realistic and practical, yet simultaneously rooted in Islam's intellectual and spiritual resources, Muslim political and social thought, inter-faith exchanges, inter-civilisational studies, and global challenges of modernity.

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- minorities and culture-specific studies
- ethical, religious or faith-based issues posed by modernity
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