PERSPECTIVES

MANY PEOPLE BELIEVE THAT ANYTHING SHARI'A-COMPLIANT IS AUTOMATICALLY ETHICAL AS WELL. THEREFORE, THERE IS NO NEED FOR A SEPARATE EMPHASIS ON ETHICS IN ACTIVITIES AND TRANSACTIONS THAT ARE AIMED TO BE SHARI'A-COMPLIANT. WHAT IS YOUR VIEW AND WHAT ARE ITS IMPLICATIONS FOR THE PRACTICE OF ISLAMIC BANKING AND FINANCE?

The intrinsic quality of being human is our ability and freedom to think and make decisions. In every situation, we are faced with a moral dilemma. The only thing that prevents us from falling is our choice to do otherwise. Ethics explore this concept and demands responsibility.

As much as ethics are needed in one's personal life, they are needed more in organisations and the corporate world.

"We need timeless principles to steer by in running our organisations and building our personal careers. We need high standards - the ethics of excellence." Price Pritchett, American Businessman and Author

Shari'a, in the general term is understood as a set of legal rules. In its broader sense, it is permeated with a deeper sense of moral purpose. It governs all aspects of human life and presents unchanging beliefs and principles in accordance with the will of Allah.

"Shari'a in its literal sense means, the path to water. It refers to the religious guidelines, derived from the Qur'an, the words and deeds of the Prophet Muhammad (PBUH), and scholarly interpretations thereof.

This brings us to an important discussion. Many people believe that anything Shari'a-compliant is automatically ethical as well. Therefore, there is no need for a separate emphasis on ethics in activities and transactions that are aimed to be Shari'a-compliant.

We asked experts their views on this important question and what are its implications for the practice of Islamic banking and finance?

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A debate regularly emerges on the issue of ethics and Shari'a compliance. Start-ups grapple with the issue and wonder whether to use both or either of them. Some argue that Shari'a compliance does not necessarily mean being ethical. This brief article shall endeavour to explain how Shari'a is inherently value-laden and that Shari'a compliance incorporates ethical considerations. It shall further highlight how Shari'a compliance can relate to different dimensions.

THE MEANING OF SHARI'A

To understand the essence of this debate, it is necessary to understand what Shari'a means. Linguistically, Shari'a means the path to a source of water. Technically, it is the system given by God to mankind, comprising of belief, practice and character. Hence, the word Shari'a encompasses all aspects of Islam: faith, actions and character.

Shari'a is a spectrum of value judgements such as hurma (unlawful), makru (disliked), mubah (permissible) and fard (obligatory). These values stem from the moral framework and worldview of Shari'a. They are assigned to actions depending if they are right, wrong or an imperative in light of the revealed guidance.

DIMENSIONS OF SHARI'A COMPLIANCE

There are two dimensions for ethics when discussing Shari'a compliance. First is the text, and second is a specific circumstance or context.

1. Text: the transaction flows and contracts

Usually, when Shari'a scholars review transactional structures and contracts, what we can call 'text', for Islamic financial institutions it is generally in the absence of a context. The transactions are reviewed in the light of Shari'a principles as they have been presented in writing. If the structure is deemed Shari'a-compliant at this level, it necessarily means that the structure meets the Shari'a criteria for it to be morally right and ethical. Scholars use halal (lawful) and sahi (valid) to state that the transaction incorporates all ethical considerations that Shari'a demands. These terms are value-laden statements. Shari'a would not consider something to be halal if it is intrinsically wrong or morally problematic. Likewise, something cannot be sahi if it violates Shari'a judgements and values. The opposite of sahi is batil (void), which means there is something severely wrong with the core contractual elements making it unethical.

From an Islamic law perspective, Shari'a considers this structure to be fair in relation to the two transacting parties and their immediate rights and obligations. Hence, when an unfair term is in the contract, it results in the contract being corrupt (fasid), in other words, unethical. When Shari'a-compliant is used in the Islamic finance industry, it generally addresses the transaction and the contract, in this meaning. Contractual *agreements* practiced in the pre-Islamic times such as mulamasa[1] (sale by mutual touch) and munabadha[2] (sale by throws) are examples of unethical and impermissible contractual forms. These were prohibited by the Prophet Muhammad (peace be upon him). Such contracts failed to meet the Shari'a criteria of how a contract ought to be conducted and how transactions should morally be performed, and therefore were considered unethical from a contractual dimension.

2. The Context

Another dimension, which Shari'a also considers, is the context. Sometimes the unethical nature of a context necessitates a ruling or fatwa to understand the issue's permissibility, resulting in contextual and conditional fatwas. For example, a product structure might meet all ethical considerations of Islamic law making it sahi. However, the extrinsic nature of the product structure violates macro and extrinsic ethical considerations making it haram (unlawful), makru (highly reprehensible) and khilaful 'awla (not preferred). Such a violation would not mean that the structure is intrinsically invalid or problematic, rather in the given circumstances and in light of wider considerations, an overall negative value shall be assigned to it, anchored in the Islamic legal maxim, "preventing harm is given priority to gaining benefits[3]." Similarly, there may be a context in which a structure is assigned a positive value such as mustahab (preferred), sunnah and wajib (necessary).

CASE STUDIES

The above principles can be understood by the following case studies:

1. Transacting at the time of Jumu'a (Friday Prayer)

It is not permitted for a person upon whom Jumu'a prayer is obligatory to engage in trading at the expense of missing Jumu'a[4]. This is impermissible even if the transaction intrinsically meets all Shari'a principles and was ethical at a micro, contractual level. Since this transaction is preventing a person from fulfilling his duty to God - which is unethical and morally wrong in Islam - a negative value is assigned to this context. Hence, even though the contract was executed correctly, the wider unethical implication overpowers.

2. Talaqqi al-Jalab (Intercepting Delivery of Goods to the Market)

It is prohibited to intercept delivery of goods designated for the market[5]. Before the advent of Islam, it was a common practice in early Arabia, to stop a merchandise caravan before it reached the market and buy the entire stock and later sell it at a higher price in the city. This practice would only be disliked (makru) and discouraged if it is economically harmful. In contrast, if it is beneficial, then such a practice is not disliked[6]. Shari'a has a contextual ruling and deems it unethical and morally wrong when harm is perceived.

3. Making an Offer after Two Parties have Agreed in Principle

The Prophet (peace be upon him) has prohibited making a purchase offer on a deal agreed upon between the two parties in principle[7]. Making an offer is independently lawful and ethical when made according to the Shari'a principles, however, it becomes unethical in this context due to the wider consideration of harming the other party.

CONCLUSION

Shari'a compliance is always inclusive of ethical considerations but understanding the dimensions and context is essential to arrive at the right decision. The Islamic finance industry generally uses the term 'Shari'a compliant' to express the ethical nature of the contract and product structure. It is the responsibility of the Islamic financial institutions to put the matter before the Shari'a Supervisory Board to assess the proximity or remoteness of the transaction to the perceived ethical/unethical context, and thereafter issue the corresponding Fatwa.

"IT IS NOT PERMITTED FOR A PERSON TO ENGAGE IN TRADING AT THE EXPENSE OF MISSING JUMU'A. THIS IS IMPERMISSIBLE EVEN IF THE TRANSACTION INTRINSICALLY MEETS ALL SHARI'A PRINCIPLES. HENCE, EVEN THOUGH THE CONTRACT WAS EXECUTED CORRECTLY, THE WIDER UNETHICAL IMPLICATION OVERPOWERS."

1. A sale by touching the subject matter or its carton without knowing its detail.
2. An exchange of garments by throwing the garments without inspecting what is bought.
3. Dar' al-mafasaid 'awla min Jalb al-Manafi'.
4. Hashiyah Ibn Abidin
5. Sahih Muslim
6. Umdat al-Ri'ayah 'ala Sharh al-Wiqayah
7. Sahih Muslim