

İslami Finans Endüstrisinde Yaratıcı Şer'i Uygunluğun Analizi

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How does Islamic finance ensure its “Islamicity”? Do Shariah compliance processes inadvertently distance Islamic finance from Islam itself? Is Islamic finance, in fact, truly Islamic? A new and thought-provoking book, which tackles these and similar questions, offers a critical exploration of one of the most debated topics in the field: Sharia compliance.

Ahmad A. Alkhamees, who holds a degree in theology and is pursuing doctoral studies in law, has introduced the concept of “creative shariah compliance” to the literature with this book. Written with a critical perspective on the Islamic finance industry, the book examines Shariah compliance processes. The book consists of seven chapters, each addressing a key dimension of Islamic finance. It begins with an overview of the concept and foundations of Sharia (Chapter 1), then delves into the long-standing debate between form and substance (Chapter 2). Chapter 3 int-

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roduces the concept of creative Shariah compliance and employs tawarruq, one of the most controversial instruments in Islamic finance, as a detailed case study. It then discusses the standardization of fatwas to reduce creative Shariah compliance (Chapter 4) and examines Shariah governance practices in greater detail, revealing their impact on Shariah compliance (Chapter 5). Finally, it concludes by proposing public mechanisms, such as Central Advisory Boards (Chapter 6), and private mechanisms, including Shariah rating agencies, Shariah indices, international standards, and auditing firms regarding Shariah (Chapter 7), to rectify creative Shariah compliance processes.

Sheikh Saleh Kamel, who has held senior management positions at several international Islamic banks, expressed concern in an interview that many Islamic banking products and services are not genuinely Islamic (DDCAP, 2020). Similarly, Justice Taqi Usmani, Chairman of the AAOIFI Shariah Board, stated that approximately 85% of sukuk traded in the market imitate conventional bonds and are inconsistent with Islamic principles due to issues such as deficiencies in the transfer of ownership, fixed returns, and the guarantee of repayment (Alam, Hassan, & Haque, 2013). Given such concerns about the authenticity of existing Islamic finance products, the manner in which shariah compliance processes are conducted and fatwas are issued becomes critically important. In this context, the author defends the original and authentic foundations of Islamic finance while sharply criticizing the so-called “Islamized” products currently dominating the market. He introduces the concept of Creative Shariah Compliance, referring to the practice of formally adhering to Shariah requirements while disregarding its underlying objectives (maqasid al-Shariah). In other words, such products are formally compliant with Islam but fail to embody its essence. Throughout the book, the author argues that creative Shariah compliance products and services undermine the spirit and objectives of Shariah, ultimately pushing Islamic finance closer to its conventional counterparts.

Discussions concerning the relationship between form and substance are a recurring theme in Islamic finance (Ahmed, 2011; Asutay, 2012; El-Gamal, 2006; Yenice & Bektaş, 2022). At present, the vast majority of jurisdictions practicing Islamic finance operate within legal and regulatory frameworks that are not fully aligned with Islamic principles. Simultaneously, capitalism—and more specifically, financial capitalism—remains the dominant economic paradigm in these countries. In this context, Islamic finance seeks to offer an alternative within systems dominated by capitalism, yet practitioners encounter significant challenges when competing with conventional financial institutions. The most pressing challenge,

as the author argues, lies in the loss of the essence (ruh) of Islam or the Shariah, resulting in practices that achieve only superficial compliance.

The author addresses the concept of *hiyal* (hila), recognized in fiqh as a legal device, and critiques its use as a tool for achieving so-called “creative” shariah compliance. In this critique, he begins by defining *hiyal* within the context of fiqh, tracing its origins, evolution, and treatment across different schools of Islamic thought. While the literature distinguishes between permissible and prohibited *hiyal*, the author emphasizes that even permissible forms are intended for use only in exceptional circumstances. He contends that the systematic and institutionalized use of deceptive mechanisms by financial institutions undermines their legitimacy. If such practices persist, he warns, Islamic financial products will become indistinguishable from conventional ones in the eyes of the public. To illustrate this, the author examines the case of *tawarruq*. He highlights that the difference between *tawarruq*, as discussed in classical fiqh, and its modern application in Islamic banking lies in the “creative” process used to determine Shariah compliance. As a result, modern *tawarruq* has become debt-based, akin to conventional lending, and leads to capital outflows, since the commodities involved (such as platinum and other metals) are sourced from the London Metal Exchange. This process ultimately generates excessive profits for Islamic banks and, as the author concludes, demonstrates that such transactions do not genuinely conform to the principles of Shariah.

So, how can creative Shariah compliance be reduced within the Islamic finance industry? The author undertakes a thorough examination of several proposed solutions to this problem, consistently positioning himself against the phenomenon of creative shariah compliance.

First, he argues that inconsistencies in fatwas must be minimized. Achieving this requires the establishment of institutions dedicated to promoting the standardization of fatwas. However, the author notes that existing discussions on how such standardization might be implemented globally within the Islamic finance sector remain relatively underdeveloped. The challenges posed by divergent schools of thought, varying interpretations of Shariah, and the political as well as ideological differences among countries have not been sufficiently addressed in the literature.

In Chapter 4, the author emphasizes the importance of transparency -particularly, clearly identifying which school of law (madhhab) and which legal opinions underlie a given fatwa- rather than simply labeling products as Shariah-compliant.

This approach, he argues, would significantly enhance trust and credibility within the market, as transparent disclosure of the reasoning and procedures behind fatwas strengthens institutional legitimacy. Finally, the author notes that issues of transparency are particularly prevalent in Türkiye, underscoring the need for greater openness and accountability in the country's Islamic finance sector.

What is the impact of committees responsible for making Shariah decisions and reviewing compliance -commonly referred to as Shariah Supervisory Boards (SSBs) or Shariah Advisory Committees- on the practice of Islamic finance? The author explores this question in considerable depth in Chapter Five, which provides a detailed analysis of the literature on Shariah governance.

Functional Ambiguity: The precise role of Shariah Supervisory Boards (SSBs) remains unclear in many Islamic financial institutions. Are they responsible for issuing fatwas, conducting Shariah compliance reviews, providing education, or performing all these functions? This ambiguity undermines both operational efficiency and accountability.

Lack of Legal Status: In most jurisdictions, these boards lack a formal legal standing. The absence of supportive legal infrastructure often prevents the effective institutionalization and enforcement of their decisions.

Accountability Deficit: A primary concern lies in the lack of mechanisms to hold SSBs accountable for erroneous rulings—such as declaring a non-Islamic product to be Islamic. Across most jurisdictions, boards exhibit significant shortcomings in terms of accountability and oversight.

Transparency Issues: Questions persist regarding whether all activities of Islamic financial institutions are genuinely Shariah-compliant. For example, some institutions accumulate substantial funds in penalty pools -revenues derived from non-compliant activities- which are rarely disclosed to the public. Such opacity undermines confidence in Shariah governance.

Lack of Independence: The independence of SSBs from the management of Islamic financial institutions is essential for credible Shariah oversight. However, empirical studies consistently demonstrate that management influences these boards, compromising the objectivity of their decisions.

Conflict of Interest: Research on SSB membership reveals that a small group of prominent scholars holds positions on multiple boards simultaneously. The ten most influential scholars are estimated to sit on roughly 40% of all boards globally.

This concentration of authority creates risks of groupthink, conflicts of interest, and diminished diversity of scholarly opinion.

Lack of Competence: Appointments to SSBs are often made based on accessibility or institutional loyalty rather than scholarly competence. In many cases, selection is influenced by narrow considerations—such as a candidate’s alignment with the institution’s interests or their general support for the Islamic finance ecosystem—rather than demonstrated expertise in *fiqh al-mu‘amalāt* (Islamic commercial jurisprudence)

Creative Shariah compliance distances Islamic finance from its core values and the true spirit of the Shariah. To address this issue, the author proposes both public and private mechanisms.

On the public side, he recommends establishing Central Shariah Advisory Boards to standardize fatwas and reduce inconsistencies, citing Sudan and Malaysia as examples of proactive governance models. On the private side, he suggests creating Shariah rating agencies, Shariah indices, and independent audit firms, as well as developing international standards, introducing whistleblowing mechanisms, and incorporating legally binding Shariah clauses into company contracts. Together, these measures aim to strengthen Shariah governance, enhance accountability and transparency, and minimize creative Shariah compliance within the Islamic finance industry. However, the author argues that these proposed solutions are insufficient to fully address the identified problems and raises a more fundamental question: whether the current financial system truly provides an appropriate environment for offering Sharia-compliant products. The “Islamization” of financial products and services within a framework shaped by capitalist paradigms often results in the mere imitation of conventional instruments. This process, in turn, fosters creative Shariah compliance but structurally similar Sharia-compliant products. Such a question is rarely raised within the field of Islamic finance. Although the author offers a valuable analysis of the current situation, he does not tackle the crucial issue of how Islamic finance can be effectively integrated into the existing financial system. While this is beyond the scope of his study, he suggests it as a direction for future research.

In conclusion, the Zamzam Tower, which was financed through sukuk and is located directly opposite the Ka‘bah, exemplifies creative Shariah compliance (Şencal & Asutay, 2021). It is Islamic in form, as scholars have approved the permissibility of the issued sukuk. However, one may question whether this project is, in essence, truly compliant with the spirit of Islam.

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