



**THE MAQASID-BASED APPROACH OF GRADUAL
REFORM
for Shariah Decision-Making in The Development of
Islamic Financial System
In Malaysia**

**DR MUHAMMAD NAJIB BIN ABDULLAH
DEPUTY DEAN
FACULTY SYARIAH AND LAW, UNIVERSITI SAINS
ISLAM MALAYSIA**



THE MEANING AND CONCEPT OF GRADUAL REFORM

the gradual reform
is a composite of
the words "reform"
and "gradualism"

"reform"
is the essence of Shariah itself

Gradualism" is a wise approach used since the
beginning of laws, considering the needs of
people. It helps Muslims achieve their goals in a
way that aligns with Shariah and its objectives."

The importance of the concept for strategic development of Islamic Finance



- an important principle and a practical dimension to apply Sharia rulings on the lived reality and facing all the problems
- improving the applications of Sharia in various fields

The most important area is the field of financial transactions and contemporary Islamic banking due to many challenges and various obstacles without spreading and expanding in their matter.



**Need A Meticulous Mind To
Understand And Application
In Combination of Gradual
Reform Concept..**

WHY?



**THE MERE
UNDERSTANDING OF
THE EXISTENCE OF
"GRADUALISM" IN
SHARIA WITHOUT BEING
ACCOMPANIED BY THE
"REFORM APPROACH"
AND ITS CONTROLS
WILL:**

affect the effectiveness of the implementation of Sharia itself.

lead to procrastination in the application of Sharia and disable it

**It leads to a lack of plans and clear steps for future changes, including
timelines and stages.**

**Making reforms too quickly, without considering a gradual approach, is
risky because it might not take into account how ready the community is
to accept Sharia rules**

more likely not to get respond and fail to apply,

**the immediate full application does not achieve the
desired goal, and make people offend the Sharia and its
provisions.**

The position of gradual reform in the General Maqasid-based theory

- That gradual reform in the objective of Shariah in it's legislation, are divided into three sections:

Maqasid al-Khitab al-Sharie

scientific method for understanding the objective of Shariah by studying legal texts and derive shariah legislation (methodology). It involves using jurisprudence (fiqh) and its rules (Usul Fiqh) to understand and apply Shariah laws."

Maqasid al-ahkam al-shariyyah

it is the wisdoms and interests that the shariah rulings is legislated to achieve. The Scholars who study Maqasid al-Sharia explain these benefits of those purposes. It was discussed by the fundamentalists while dealing with the subject of reasoning (al-illah)

Maqasid Al-Shari' Fi Manhaj al-Tasyri')

The purposes of the Lawgiver in the legislative approach, (the researcher sees where it related to the subject of gradual reform)

this is because -
the purposes of Sharia in the approach to legislation are based on the principle of tolerance and facilitation, and approach towards the limits and aspects considered in Sharia.

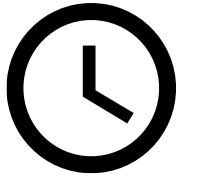
Understanding this principle is important to balance the benefits and potential harms of rulings, both in theory and practice.



the gradual reform is very important element of *ijtihad*, especially in the *third* and *fourth* sections of the gradation.

GRADUALISM IN THE LEGISLATION OF RULINGS as in the legislation of alcohol, and this type of gradation is no longer needed because it is completely contradictory to the completion of shariah.

if we stick to the gradualism in legislation, it is as if we have said that some provisions have been abrogated, and the time of abrogation is over.



GRADUAL TO AMENDMENT AND REFORM THE PREVAILING PROVISIONS,

- this related to the application the provisions on the lived reality, which related to the changing recent jurisprudential issues
- Scholars (mujtahids) are responsible for explaining and occasionally updating these rules
 - for the purpose of reforming due to certain condition of the verification of the causes / it's absence
 - to bring the interests and ward off harm from the recent condition.

GRADUAL REFORM IN VIEW OF THE FOUR SECTIONS OF THE GRADATION FOR SHARIA RULINGS AND LEGISLATION.

GRADUALISM IN EXPLAINING THE ISLAMIC RULINGS IN THEIR FULL LEGISLATIVE FORM, as in the guidance of the Prophet (to Muadh bin Jabal by preaching the peoples by explaining the command of Islam in gradual form.

GRADUALISM IN THE IMPLEMENTATION THE RULINGS, IN WHICH THE LEGISLATIVE PICTURE IS KNOWN AND COMPLETE

- but it is silent about its enforcement for a legitimate reason
- seeks to achieve the requirements of this provision as a gradual
- noting the ability of the muslim to carry out the shariah obligation by dropping them, or reducing them and introducing rukhsah in some cases.

AMONG THE CAUSE OF IMPLEMENTING GRADUAL CONCEPT

- Attia Fayyad (2016) wrote a research discussing on graduation issues, he discussed on the prevention the gradation of the legislation, despite the permissibility of using gradualism in the explanation of the ruling, the application and the implementation of it, with mentioning some of the governing rules.
- In order to gradually implement the Sharia, among the reason that can be accepted are:

1

Inability to enforce and sustain with the proposed rulings.

2

In the case of the ability to implement the rulings, but with the predominance of the failure impact because of the rushed and leave the gradient aspect.

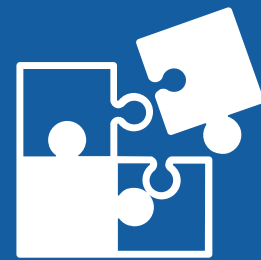
3

Having the ability, and with the confirmation of less of harm and slim chances of failure to implement the rulings, but the problem is on the will of the rulers and the holder of power with their policy to be kind to people and prepare them for the rulings.

- These three things argument are valid reason to be justified for the need of gradualism
- These are possible reasons for the claim of gradualism
- They have already been valid to say gradualism in certain cases

But these validity is not intended to say that gradation is permissible legally without regard to balance between the reasons and impediments in the specific cases

RULING TO ACCEPTING PRODUCTS WITH PROBLEMATIC LEGITIMACY, FROM THE DIMENSION OF GRADUAL REFORM



- Some of the products of financial transactions will be facing in the initial stages to some issues related to Sharia



- in the dimension of gradual reform, relying on the ruling that it is **PERMISSIBLE TO TAKE ILLEGAL OR FORBIDDEN THINGS** and the like is based on taking into account the fundamental rules such as istihsan , masalih mursalah and fiqh al-muwazanah.

There are several arguments relied upon by those who took the permissibility, including:

The fundamental rule about necessity

(الضرورات تبيح المحظورات) (الضرورة تقدر بقدرها)

- Necessity in this rule means the special circumstances that oblige a person to resort to certain prohibited acts in order to preserve legitimate basic necessities.
- On the pretext of necessity, prohibited acts are legally permissible on the license. However, this “rukhsah” based on necessity has implications for it.

FIRST

Necessity may CHANGE THE PROHIBITED PROVISION TO PERMISSIBLE

- every act has become permissible in Sharia
- the perpetrator does not entail the right to punishment

SECOND

a person in extreme circumstances may be allowed to do what he is forbidden, but the ORIGINAL RULING ON THIS ISSUE HAS NOT CHANGED.

- the rule of the act remains prohibited and has not changed, even if the Sharia tolerates its violation because of these circumstances

THIRD

No permissible act should exceed its limits of necessity.

In other words, a NECESSITY THAT CAN GO BEYOND THE PROHIBITION MUST BE GIVEN WEIGHT

The maxims :

إذا ضاق الأمر اتسع وإذا اتسع ضاق

from the words of Imam al-Shafi'i al-Muttalib (may Allah have mercy on him)

the meaning of this rule:

If there is hardship in a matter, it is permitted and expanded, and if the hardship disappears, the matter returns to what it was.

If a person or group encounters casual hardship, and the matter becomes narrow, or an exceptional circumstance arises for them, the original provision of ordinary cases becomes burdensome for them until it makes them narrow from application,

in that case,

shariah relieves them and expands on them as long as that necessity exists, and if the necessity disappears, the judgment returns to its origin.

The issue of to subsidize the sin “I’anah ala al-ma’siah”

ولكن قد يجوز الإعانة على المعصية لا لكونها معصية، بل لكونها وسيلة إلى تحصيل المصلحة الراجحة، وكذلك إذا حصل بالإعانة مصلحة تربو على مصلحة تفويت المفسدة. كما تبذل الأموال في فدى الأسرى الأحرار المسلمين من أيدي الكفرة والفجرة

“ However, it may be permissible to subsidize the sin (i'anah ala ma'siah) not because it is a sin (maksiah), but because it is a means of obtaining the preponderant interest, as well as if the aid obtains a maslahah that contribute to eliminate the harm (mafsadah), – Izzuddin Abd As-Salam, in Qawaid ul-ahkam fi Masalih al-Anam.

HISTORICAL APPLICATION OF THE RULES IN MALAYSIAN ECONOMIC EXPERIENCE

- The application of this rule in the introduction of forbidden things in the case of gradual reform in the provisions of transactions, that despite the clarity on the sanctity of usury in Islam, we find that the fatwa of the Commission in the National Council of Islamic Affairs in Malaysia in 1970 issued a ruling to dissolve usurious interest from conventional banks.

- The text of the advisory opinion reads:
"The interest of loans from banks in order to raise the level of trade and industry of the Islamic Ummah is permissible for necessity."

- In 1971, the advisory opinion continued and affirmed that this trick of interest also includes the benefits of deposits, whether for entities or individuals.

-The reason for this was also the necessity and distress of Muslims.

-The text of the advisory opinion reads:

"Riba-based interest from deposits made by Islamic or commercial institutions or bodies whose members are composed of Muslims in any of the banks is halal due to the distress and embarrassment that the Muslim economy suffers from at this time"

- This fatwa, which resolves usurious benefits on the idea of necessity, has sparked disagreement among Muslims and is not widely accepted by scholars. It is contrary to what was held by the Second Islamic Research Conference on Banking Transactions in 1965, in Cairo, which ruled that all types of loans is forbidden usury, and that it is not permitted by need or necessity.

The necessity is definite, as in the hadith, that the morning and the ghabouq come and you will not find anything to eat.

- This fatwa from the Commission is explained by the necessity and difficult conditions faced by Muslims at the time. However, such controversial fatwas are likely to be questioned by individuals, society, scholars, and researchers.

Our position is to trust the members of the Fatwa Board and Committee are the scholars of the Ummah who know about halal and haram matters and the details of their provisions in Sharia, and they have extreme argument with their deep consideration to develop fatwa decisions for the issue.

- We need to understand the difficult conditions Muslims faced at the time when the Commission decided to allow usurious interest in banks due to necessity and taking into account the conditions of distress of Muslims in the country, because if the reason is known, the wonder will prevail.

- The study confirmed that Muslims in Malaysia in 1970 were poorer compared to Buddhists and Indians.

The monthly income of a Malay household that year was 179 ringgit while the average was 387 ringgit and 310 ringgit for Indians. It is worse when 85% of Malaysia's poor are Muslims, and in villages this figure is 90%. Most villagers even earn a monthly income of around 15 ringgit.

. Tough economic conditions led to the spread of Sharia violations in the field of economy among poor farmers in Malacca, with 83% in debt to non-Muslim lenders by 1976. Unfortunately, many of those who borrowed usurious shops owned by Chinese non-Muslims. At that time, there were no Islamic banks or financial institutions to support Muslims

- Muslims in Malaysia faced hardship and growing social and economic gaps between Malays and non-Muslims. This tension led to violence in May 1969, a year before the fatwa was issued, with Malaysians burning Chinese shops and vandalized homes, resulting in around 187 deaths

- When this fatwa decided that the interest of riba-based banks set by institutions or bodies whose members are composed of Muslims is halal, it means those economic institutions by the new policy. Knowing that Islamic banks, Islamic finance institutions and fixed Islamic products did not exist in those days, as all financial institutions at that time dealt with usurious transactions. It is difficult for the Commission to issue fatwas that reverse this reform movement in these particular circumstances.

The Commission indicated that taking the ruling to allow usurious benefits due to the danger of the Muslim economy at this time, and that the ruling prohibiting it will lead to the loss of the rights of Muslims and their guardianship due to the weakness of their economy

PARAMETERS AND GUIDANCE TO THE APPLICATION OF GRADUAL REFORM IN SHARIAH DECISION MAKING FOR ISLAMIC STRATEGIC ECONOMIC AND FINANCIAL DEVELOPMENT

- The researcher believes that it is necessary to adhere to the specific controls that must be followed, so as to avoid caveats, and to ensure the safety of the objective of the hukum and the validity of its use.
- Therefore, the use of gradual reform shall be in accordance with the moderate approach that takes into account all the scientific and methodological foundations that achieve the legitimate purpose and the public interest without excess or negligence. These controls are summarized as follows:

1

The principle of adoption "gradual reform" is a way to achieve peremptory interests and not illusory interests.

It is known to those engaged in the science of purposes that the proper course of weighting is that if there is a conflict between peremptory interests and illusory interests, peremptory is given over delusional.

Fatwa bodies should not issue rulings on the basis of illusory expectations

ما ثبت باليقين لا يرتفع إلا باليقين

-what is proven with certainty does not rise except with certainty-

2

The principle of "gradual reform" should not be taken as a trick (hilah) without the intention to implementat the provisions of Sharia, as achieving the supreme sovereignty of Sharia must be the goal in issuing a decision of the rulings in which this principle is observed, i.e. gradual reform, because the legitimate purpose is inevitable, which is to preserve the religion of God Almighty.

So, It is not allowed to disrupt God's commands whether it is due to ignorance or improving the belief of reason, or following the passion under the pretext of relying on the principle itself.

3

Using the principle of 'progressive reform' shouldn't overshadow the rule that public interest takes precedence over private interest.

This means that if public and private interests conflict, the public interest should come first. Sometimes, public interest can justify exceptions to certain rules.

For example, Izz al-Din Ibn Abd al-Salam noted that renting land for an indefinite amount was allowed due to public interest, even though such leases are usually not permitted. This is because public interests can override private concerns.

4

The government, scholars, and experts must first assess the necessity or need before making specific decision on the principle of "gradual reform", then balancing between bringing interests and eliminations of harms, and warding off harms is ahead of bringing interests.

The principle of "progressive reform" should not lead to greater corruption or worse. It is necessary to observe the consequences of actions, so it is hoped that the choice of a particular provision immediately or its postponement will lead to its proper application in the future, thus achieving greater interests.

For example, it is assumed that the most appropriate investigation in the reform of any of the laws governing a country should be achieved. Also, if holding on to determination leads to what is more corrupted, then determination must be abandoned.

The understanding of this matter is essentially complicated, not applied in the best application except by experienced jurist.

Ibn Taymiyyah in his beautiful words has stated:

"The origin is that these duties are performed in the best way. Whenever it is possible to establish it from a ruler who did not need two, and when it is not to be done except for a number of people and without authority, it is erected if there is no corruption in its establishment that exceeds its loss, then it is a matter of enjoining virtue and preventing vice, and if there is more corruption among the rulers or the parish than its loss, no corruption should be paid with more corruption than it."

6

the adoption of the principle of "gradual reform" must be in a specific decision of the resolution and within the development of a reform action plan that outlines the objectives, stages, and timing."

MAQASED-BASED METHODOLOGY SHARIAH DECISION MAKING IN ISLAMIC ECONOMIC:

Fahm al-mas'alah –
understand the issue

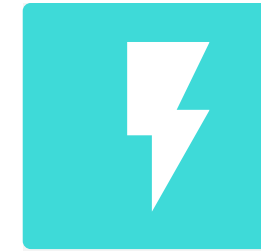
Fahm al-waqi' –
understand the reality

Fahm al-nusus –
understand the Shariah
texts & evidence

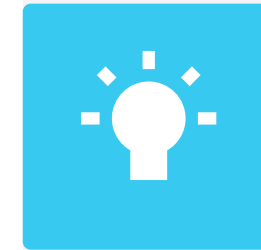
Fahm al-maqasid –
understand the objectives
of Shariah & persons

Fahm al-maalat –
understand the impacts

Some practical application of Gradual Refrom in Islamic Financial System in Malaysia



The Issue of Bai al-Innah



The Issue of Bai al-Tawarruq



The Issue of tolerance ratio in
Shariah Screening In Islamic
Capital Market.



The Issue of Shared Services is
Takaful Institution.



1) GRADUAL REFORM ON THE ISSUE OF BAI AL-INAH

At the beginning, as mentioned in (Mish 5), (M1), (Kh3) in the researcher's interview,

- Malaysia allowed bai al-Inah because there were no other suitable Sharia-compliant options to address the lack of liquidity
- Malaysia decided that bai al-Inah is allowed for Islamic institutions and market products.

Bai al-Inah was seen as a suitable financing method during the transition from traditional to Sharia-based banking.

- This trend is in the interests of Malaysia.

One of the banks using this method is Bank Islam Malaysia, one of the country's first Islamic banks.

- (C3) believes that decisions on the sample are made based on economic policy of the state interests not from a purely jurisprudential view. In 1983, when Bank Islam Malaysia was established, it was in fact that the introduction of equity partnerships was made on a Mudharabah and Musharaka basis.

Following advice from the Central Bank of Malaysia, which warned that this could lead to the problem of high non-performing financing (NPF) for the bank, and therefore the bank would fail



The Shariah Issue In Inah

- There are real problems in the Bai Inah, in that the procedures followed in the sample reflect a clear picture of the circumvention of usurious financing, and to obtain cash, which leads to the denial of the reality of the purposes of the judgment.


- The person who buys a commodity from the bank at a deferred price, and then sells it to him for less than its price immediately or vice versa, did not mean the fact of sale, but rather the loan with interest.

This transaction is considered a circumvention of usury, which is the same reason in the prohibition of selling the sample according to the public of jurists.



SAC GRADUAL REFORM APPROACH FOR INAH

- **The National Sharia Advisory Council (SAC) did not cancel the INAH deal, but introduced reforms to make the deal real, because the first deal in the Inah at (M2) should not be related to the second deal. But the current practical applications in the Malaysian industry do not meet the conditions stipulated by the Shafi'is, so it is understood from this that what is being implemented by the (SAC) is for the purpose of reforming the correct treatment methods in the sample in the way that this transaction should be.**
- **With these reforms, most Malaysian banks had difficulty implementing the real sample in their system, and most banks switched to Tawarruq as an alternative.**



2) GRADUAL REFROM APPLICATION IN BAI AL-TAWARRUQ

The concept of selling tawarruq in the terminology of jurists:

The purchase of a commodity by a person (the Mustawaruq) at a deferred price in order to sell it for cash at a lower price - often to someone other than the one from whom it was bought - with the intention of obtaining cash.

This type is the original in Tawarruq, and it is permissible in Sharia, provided that it meets the conditions of sale prescribed by Sharia.

The authorizers inferred the verse in the permissibility of working with tawarruq as part of the trade transaction to obtain cash, whether or not this intention is known by all the parties to the contract.

The Tawarruq transaction is also due to an urgent need to do so, or the common practice of some parties or institutions.

- **On the contrary, some Islamic economists have determined the illegality of "organized and reverse tawarruq" as one of the financing products for Islamic banks.**
- **Based on the poor applications of Islamic banks as well as conventional banks that offer products that comply with Sharia, and that its applications in banks were not accurate, and were marred by some suspicions, which prompted scholars to unanimously prohibit it.**



THE NEED OF IFI TO USE TAWARRUQ AND IT DISCOURSE

- In terms of industry practicality, tawarruq is easier to use for banks at (3). -(M2), (M4) believes that some banks have proactively addressed problems with Tawarruq products by implementing contracts taking into account their compatibility with Islamic law as much as possible. This attempt by some banks to reduce problems related to Tawarruq, especially in tricks.

- According to MS4, some Islamic banks in Malaysia have a regulated institution in their practices, which is under the control of the review of Sharia scholars. This institution supervises all practice related to the commodity in order to ensure that it is disciplined to the standards set in this regard.

But this process is subject to the will of banks, as there are banks that take tawarruq in general and loose, and some are more accurate and detailed.

- (MS) 1) argues that despite some reforms to structured Tawarruq, the basic status of this deal is still highly disputed among jurists, while (Mas3) (Mas4) suggests that Tawarruq should not be made as an open door and an easy way to solve all the problems of the Islamic deal, because if Tawarruq reaches a certain level, it no longer reflects real economic growth, and its framework does not exceed only financial growth.

THE ISSUE OF TOLERANCE ISLAMIC REAL ESTATE INVESTMENT TRUSTS (REITS)

IN ISLAMIC CAPITAL MARKET.



Real Estate Investment Trust (REIT)

[ˈrē(-ə)l i-ˈstāt \ in-ˈves(t)-mənt ˈtrəst]

A company that owns, operates, or finances income-generating real estate.

Regulatory framework

Guidelines on Listed/Unlisted REITs

Revised requirements for Islamic REITs

- **Initial listing/establishment:**

1. Acceptance of new tenancy and renewal of existing tenancy
2. Acquisition of real estate post listing
3. Non-compliance with the less than the 5% threshold

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Conversion to an Islamic REITs:

1. Upon conversion
2. Acceptance of new tenancy and renewal of existing tenancy
3. Acquisition of real estate post listing
4. Non-compliance with the less than the 20% or 5% threshold.

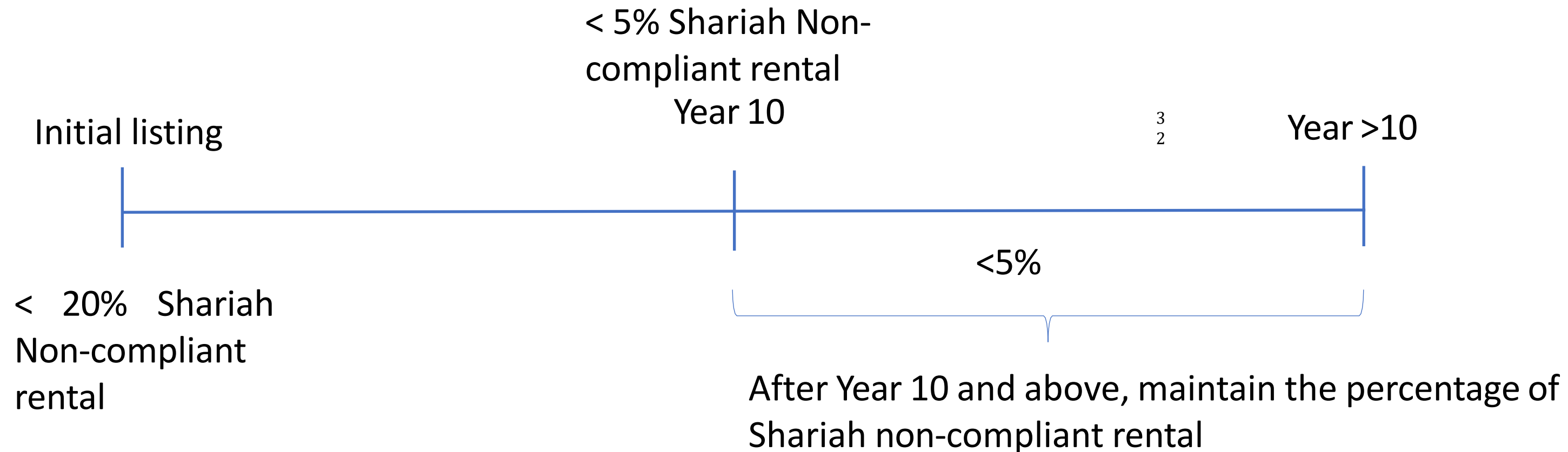
Guidelines on Listed/Unlisted REITs

Initial listing / establishment

The Islamic REITs may:

- I. Accept new tenants and renew tenancy agreements of existing tenants whose activities are shariah-compliant; and
- II. Acquire new real estate post listing / establishment

Provided that:-



Guidelines on Listed/Unlisted REITs

Initial listing / establishment

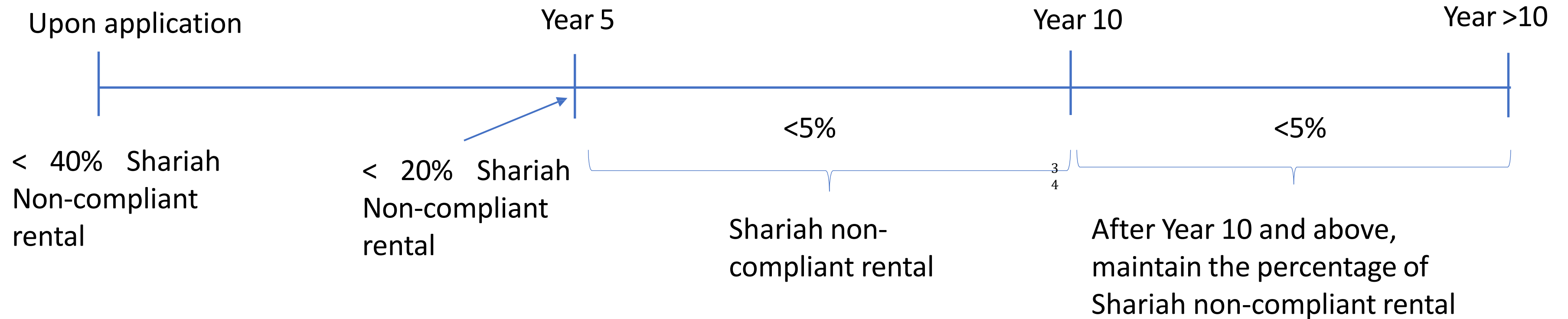
Non-compliance with <5% Threshold

- If an Islamic REIT fails to reduce the percentage, the excess amount of the Shariah non-compliant rental must be channeled to baitulmal or charitable bodies as advised by the Shariah adviser
- The excess amount must be channeled within 1 year from the end of each financial year for as long as the Islamic REIT is unable to reduce its Shariah non-compliant rental to less than the 5% Threshold

Guidelines on Listed/Unlisted REITs

Conversion to an Islamic REITs

A listed conventional REIT may convert to Islamic REIT provided that:-



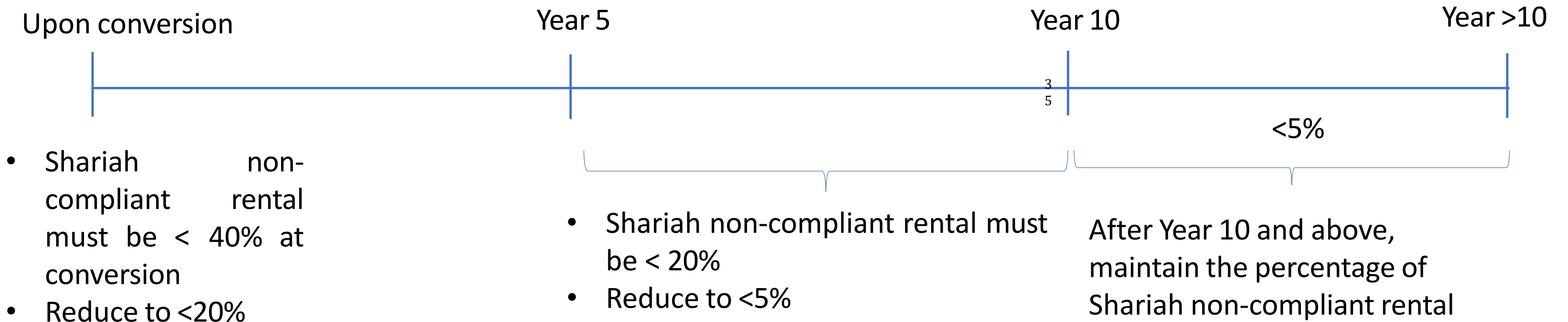
Guidelines on Listed/Unlisted REITs

Conversion to an Islamic REITs

The Islamic REIT may;

- a) Accept new tenants and renew tenancy agreements of existing tenants whose activities are Shariah non-compliant; and
- b) Acquire new real estate post conversion

Provided that:-



Guidelines on Listed/Unlisted REITs

Conversion to an Islamic REITs

Non-compliance with <20% or <5% Thresholds

- If an Islamic REIT fails to reduce the relevant percentage, the excess amount of the Shariah non-compliant rental must be channeled to baitulmal or charitable bodies as advised by the Shariah adviser
- The excess amount must be channeled within 1 year from the end of each financial year for as long as the Islamic REIT is unable to reduce its Shariah non-compliant rental to less than the 20% Threshold or the 5% Threshold, whichever applicable.